

## SPECIAL NEEDS TRUSTS

Presentation- Pennsylvania Bar  
Institute- 09/12/2018  
Janet Colliton, Esq., CELA  
Colliton Elder Law Associates, PC  
West Chester, PA 19382  
610-436-6674

---

---

---

---

---

---

---

---

### The Public Welfare Programs – SSI/Medicaid – An Overview

- Purpose – Title indicates welfare but **primary benefit is health care/health insurance under Medicaid**
- In Pennsylvania eligibility for SSI automatically qualifies applicant for Medicaid for potential substantial medical benefits
- Maximum SSI cash benefit for individual 2018 (FBR) is \$750/month federal and \$22.10 PA SSP
- The Special Needs Trust is intended to allow a fund for supplemental needs to improve quality of life while allowing the beneficiary to receive government benefits.

---

---

---

---

---

---

---

---

### Who Is the Client/ Who Are the Beneficiaries

- You need to know something about the client and about the potential beneficiary or beneficiaries to make a judgment call whether Special Needs Trust is appropriate.
- The first question often to ask is “is the beneficiary now or is the beneficiary expected to be on (a) Supplemental Security Income (SSI), a “means tested” (welfare) program or (b) Social Security Disability (SSD), a program based primarily on work history either of the potential beneficiary or of someone under whom he claims (e.g. Disabled Adult Child).”

---

---

---

---

---

---

---

---

### The Beneficiary – SSI or SSD and Why It Matters

- If the beneficiary is or will be on SSI it is more likely a Special Needs Trust will be appropriate
- If the beneficiary is on Social Security Disability, because of higher income and no limitation on assets, SSD clients are less likely to need a Special Needs Trust
- A beneficiary on SSI is severely limited in income and assets which is why Special Needs Trust is needed

---

---

---

---

---

---

---

---

### The SSI Track v. The SSD Track

#### SSI Track

- SSI Track (“Means Tested”)
- Leads to Medicaid



#### SSD Track

- SSD Track – Applicant’s or other work history (eg DAC)
- Leads to Medicare (wait 2 years for most applicants)



---

---

---

---

---

---

---

---

### SSI and SSD Disability Requirements

#### Supplemental Security Income

- Disabled, blind or aged (65 or older)
- Medically determinable physical or mental impairment that prevents them from performing any substantial gainful activity, for a continuous period that has lasted or is expected to last for no less than 12 months or results in death.

#### Social Security Disability

- Disabled, blind (converts to Social Security retirement at age 65)
- Medically determinable physical or mental impairment that prevents them from performing any substantial gainful activity, for a continuous period that has lasted or is expected to last for no less than 12 months or results in death.

---

---

---

---

---

---

---

---

### SSI and SSDI Asset and Income Limitations

<p><b>Supplemental Security Income</b></p> <ul style="list-style-type: none"> <li>• Income – Maximum countable income generally maximum of \$750/month (2018- federal benefit rate - FBR) plus \$22.10 PA for individual</li> <li>• Assets - \$2,000 total for individual. \$3,000 for married couple.</li> <li>• *Note: There are countable and noncountable assets and income.</li> </ul>	<p><b>Social Security Disability</b></p> <ul style="list-style-type: none"> <li>• Income - Unlimited but cannot be received from “substantial gainful activity”</li> <li>• Substantial gainful activity – income from employment of \$1,180 (disabled) \$1,970 (blind)/month</li> <li>• Assets – Unlimited. Can be received from inheritance, investments or other sources but work limitation.</li> </ul>
---	--

---

---

---

---

---

---

---

---

### Deeming - SSI

- Under some circumstances, income and/or assets of another can be considered in running the calculations for SSI benefits.
- There are four types of situations where income and resources are deemed: from a spouse ineligible to receive SSI to an eligible individual; from a parent to a child under age 18; from a “sponsor” to an alien; from an “essential person” to an eligible qualified individual.

---

---

---

---

---

---

---

---

### Deeming – Effect on Children

- Because of the deeming rules, many children will not qualify for SSI until they are 18 since parents’ assets (\$over \$2,000 if child lives with one parent, over \$3,000 if child lives with both parents) would place them over the SSI limits. At age 18 they may qualify on their own lower income and assets.
- Note: At age 18 they might still not qualify for SSI if, for instance they could claim on a parent’s Social Security if parent is claiming Social Security but then child could potentially receive Social Security as Disabled Adult Child (DAC).
- Social Security Administration gives highest benefit to which a person is entitled.

---

---

---

---

---

---

---

---

### In Kind Support and Maintenance

- In-kind support and maintenance is either food or shelter that is given to someone or that they receive because someone else pays for it.
- It is significant because it can reduce, up to one-third, although not eliminate the amount paid for SSI.
- Examples of in-kind support and maintenance include food and shelter. Detailed examples are included in the text.

---

---

---

---

---

---

---

---

### Transfer Penalties and Miscellaneous Re. Medicaid

- SSI, like Medicaid, has transfer penalties if an SSI recipient transfers assets without fair consideration.
- The period is 36 months lookback.
- While SSI recipients are automatically qualified for Medicaid in Pennsylvania, there are Medicaid programs in PA where the recipients are not receiving SSI – such as various Medicaid waiver programs and most Medicaid in nursing homes.

---

---

---

---

---

---

---

---

### The Public Welfare Programs – SSI/Medicaid – An Overview

- Questions –
- The End

---

---

---

---

---

---

---

---

### Trusts and Their Impact on SSI

- What Is a Trust – A legal arrangement regulated by State law (and, as to SSI, federal law) in which one party, the Trustee, holds property usually for the benefit of another
- A Trust may be established for the benefit of an SSI recipient.
- Whether such a Trust will disqualify the recipient for SSI or other government benefits whether in whole or in part depends on federal (and in some cases state) law.
- Also a federal resource known as the POMS (Program Operations Manual) has persuasive effect.

---

---

---

---

---

---

---

---

### Self-Settled Trusts – Section 1917(d)(4)(A)

- One exception to the availability of a Self-Settled Trust is contained at Section 1917(d)(4)(A) of the Social Security Act.
- Also known as a “payback” trust, it has specific and rigid requirements to be established properly.
- It may be established by the disabled person himself/herself, by his/her parent, grandparent, guardian or the court.
- Any balance remaining in the trust must be paid back to government.

---

---

---

---

---

---

---

---

### General Rule – Self Settled Trusts

- Section 1613(e)(1) of the Social Security Act provides as a general principle that trusts established by the applicant will be considered a “countable resource” for purposes of SSI eligibility if the trust is revocable or if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual’s spouse).

---

---

---

---

---

---

---

---

### Revocable Trusts

- As to revocable trusts established with assets of the SSI recipient, the entire corpus of the trust is considered available.
- Revocable trusts keep the same Social Security number as the grantor.
- Revocable trusts are, therefore, not helpful in planning for SSI eligibility and are not Supplemental/Special Needs Trusts.

---

---

---

---

---

---

---

---

### Support Trusts

- Some trusts are referenced as support trusts and typically contain the language they are intended for the health, education, maintenance and support of an individual.
- These 3<sup>rd</sup> party trusts, which may be established either as standalone trusts or by Will (testamentary trust) are also generally not helpful in Special Needs/Supplemental Needs planning.
- They are treated as available assets.

---

---

---

---

---

---

---

---

### Irrevocable Trusts – Common Law Third Party

- Purely discretionary trusts where the absolute discretion rests with the Trustee and are irrevocable are a common means to preserve a Special Needs Trust to be used for a beneficiary's needs without losing SSI.
- Assets may not be distributed to the beneficiary directly.
- Before establishing this type of trust, be sure to establish the goals of the Testator and also, importantly whether the beneficiary is an appropriate candidate for a Special Needs Trust (see discussion in SSI whether party is SSI or SSD, as one example).

---

---

---

---

---

---

---

---