

13<sup>th</sup> Annual Elder Law Institute  
2010-6035  
**July 27, 2010 – Session #8**  
**11:00 – 12:00**

Supplemental Handout:

## **Third Party and Self-Settled Non-Payback Special Needs Trusts**

---

**Professor Lawrence A. Frolik**  
University of Pittsburgh School of Law  
Pittsburgh

**Kathleen D. Hendrickson**  
Achieva Family Trust  
Pittsburgh

**Third Party and Self-Settled  
Non-Payback  
Special Needs Trusts**

**Lawrence A. Frolik  
& Kathleen D. Hendrickson**

July 2010

---

---

---

---

---

---

---

---

**GOVERNMENT BENEFITS  
The "Big Four"**

---

---

---

---

---

---

---

---

- 1) Social Security Disability Income (SSDI),
- 2) Supplemental Security Income (SSI),
- 3) Medicare, and
- 4) Medicaid (aka Medical Assistance, MA).

---

---

---

---

---

---

---

---

A. SOCIAL SECURITY  
DISABILITY INCOME (SSDI):

Monthly benefits paid to individuals with physical, intellectual or mental disability that prevents gainful employment.

---

---

---

---

---

---

---

Eligible for SSDI by participating in Social Security or being the dependent of a Social Security insured worker - even as an adult.

**Not based on need – no asset test.**

---

---

---

---

---

---

---

Insured worker must have at least 40 quarters of qualified coverage for Social Security (\$1,120 in 2010). Benefit amount based on earnings of insured worker.

---

---

---

---

---

---

---

Disability *for an adult*= incapable of any substantial gainful activity. Disability must be expected to last for at least 12 months or end in death.

---

---

---

---

---

---

---

Disability for a child (under age 18) is physical or mental impairment; results in marked and severe functional limitations; lasts for at least 12 months.

---

---

---

---

---

---

---

Eligible child is –

- a dependent of the insured worker
- unmarried, **and**
- under age 18, age 18 or older with a disability that began before age 22, or if age 18 or older and a full-time student.

---

---

---

---

---

---

---

SUPPLEMENTAL  
SECURITY INCOME (SSI)

Federal welfare program. Pennsylvania, supplements the monthly federal SSI benefit but reduced it this year.

---

---

---

---

---

---

---

---

The 2010 federal SSI benefit –

\$674 individual  
\$1,011 couple.

---

---

---

---

---

---

---

---

Those eligible -  
individuals who are aged, blind or  
disabled and who meet strict  
income and asset tests.

---

---

---

---

---

---

---

---

Children under age 18 who have proven medical condition and “marked and severe” functional limitations.  
(Same as SSDI)

---

---

---

---

---

---

---

SSI has asset limits

\$2,000 (\$3,000 for a couple)  
of countable resources

Any other income may reduce SSI benefit amount.

---

---

---

---

---

---

---

Receipt of even \$1 per month makes the recipient eligible for Medicaid (Medical Assistance).

---

---

---

---

---

---

---

MEDICARE

Federal health insurance for the elderly and disabled.

Disabled individuals on SSDI for two years are eligible at any age.

No asset and no income eligibility tests.

---

---

---

---

---

---

---

MEDICAID (MEDICAL ASSISTANCE, MA)

Jointly financed federal and state program for low income individuals. Eligibility varies from state to state.

---

---

---

---

---

---

---

SSI receipt creates eligibility for MA.

Others can do medical “spend down” to become eligible e.g., nursing home residents.

---

---

---

---

---

---

---

Disabled children in Pennsylvania under 21 are eligible for Medicaid without regard to parents' income or assets.

---

---

---

---

---

---

---

Medicaid is gatekeeper for Home and Community Based Waiver Programs – often the most valuable services for individuals with disabilities.

---

---

---

---

---

---

---

**ADVANTAGES OF A TRUST FOR AN INDIVIDUAL WITH A DISABILITY**

---

---

---

---

---

---

---

Provide support for life while maintaining eligibility for SSI and Medicaid.

---

---

---

---

---

---

---

Assets held by trust are not considered assets of that person and so don't cause ineligibility for government benefits.

---

---

---

---

---

---

---

Statutorily approved trusts for persons with a disability. Assets do not "count" when calculating eligibility.

---

---

---

---

---

---

---

- Pooled Trusts
- Self-Settled Payback Trusts
- Third Party Common Law Trusts

---

---

---

---

---

---

---

POOLED TRUSTS

“OBRA Trusts” or “C” Trusts,  
42 U.S.C. § 1396p(d)(4)(C).  
Also approved per 55 Pa. Code  
§ 178.7(f)(2).

---

---

---

---

---

---

---

Pennsylvania Act 42 of 2005  
(challenged by Lewis v. Richman, CA  
No. 06-3963 (U.S.D.C.E.D. Pa) (cross  
motions for summary judgment  
pending)

---

---

---

---

---

---

---

Requirements:

- For individual with a disability
- Operated by a nonprofit association,
- Funds pooled for investment but accounted for separately for each beneficiary

---

---

---

---

---

---

---

- Must be established by parent, grandparent, legal guardian, court or by the individual, and
- At beneficiary's death, remaining funds not retained by the trust subject to payback to state for Medicaid benefits paid.

---

---

---

---

---

---

---

Advantages

- Can be funded with assets owned by the individual with a disability.
- Protects assets from spend down.
- Investment efficiencies.
- Shared costs lowers expenses.
- Nonprofit association as trustee provides continuity.

---

---

---

---

---

---

---

Disadvantage

- Remainder must stay in trust or subject to payback.

---

---

---

---

---

---

---

SELF-SETTLED PAYBACK TRUST  
(DPW calls Special Needs Trusts)

---

---

---

---

---

---

---

- Must be established by parent, grandparent, legal guardian or court

---

---

---

---

---

---

---

- Individual can't establish – issue if individual adult, but has no living parent or grandparent

---

---

---

---

---

---

---

Funded by beneficiary, for his or her benefit but distributions are solely at discretion of trustee.

Not considered a resource.  
42 U.S.C. § 1396p(d)(4)(A).

---

---

---

---

---

---

---

At death of beneficiary, the trust must payback to the state MA benefits.  
Remainder distributed per trust terms.

---

---

---

---

---

---

---

Nonprofit association that manages pooled trust can be the trustee of a Special Needs Trust.

---

---

---

---

---

---

---

---

**COMMON LAW TRUSTS**  
Established & funded by third parties.  
Known as Supplemental Needs Trusts or Non-payback Special Needs Trusts.

---

---

---

---

---

---

---

---

**PENNSYLVANIA SUPREME COURT CASES**  
**COMMON LAW TRUSTS**

---

---

---

---

---

---

---

---

1. Lang v. DPW, 515 Pa. 428, 528 A.2d 1335 (1987).
2. Commonwealth Bank and Trust v. DPW, 528 Pa. 482, 598 A.2d 1279 (1991).
3. Snyder v. DPW, 528 Pa. 491, 598 A.2d 1283 (1991).

---

---

---

---

---

---

---

4. Estate of Rosenberg v. DPW, 545 Pa. 27, 679 A.2d 767 (1996).
5. Shaak v. DPW, 747 A.2d 883 (2000).

---

---

---

---

---

---

---

Trustee has complete discretion to distribute income and principal to beneficiary to supplement rather than supplant government benefits.

Upheld by Penna. case law.

---

---

---

---

---

---

---

Is “sprinkle provision” required?  
- after Snyder and Commonwealth Bank?

---

---

---

---

---

---

---

No payback to state for MA benefits.

---

---

---

---

---

---

---

Whenever goal is to financially assist person with a disability –  
Consider a trust.

---

---

---

---

---

---

---

**SPECIAL ISSUES**

- Beneficiary of self-settled trust is over age 64
- Use of annuities to fund trust
- SSA position on court “establishing” trust

---

---

---

---

---

---

---

**CURRENT DEVELOPMENTS**

- New-Early termination of self-settled trust – POMS SI 01120.199
- ABLE Act – Achieving a Better Life Experience Act  
H.R. 1205/S.493

---

---

---

---

---

---

---