

SOCIAL SECURITY AND WASHINGTON MEDICAID RULES FOR SPECIAL NEEDS TRUSTS

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I. EFFECT OF TRUSTS ON PUBLIC BENEFIT ELIGIBILITY

The existence and administration of a trust can affect whether the trust beneficiary is eligible for certain public benefit programs and the amount of benefits to which the beneficiary is entitled. The most significant programs that are affected by trusts are Supplemental Security Income (SSI), which provides a cash grant to low-income disabled and elderly persons, and Medicaid, which provides health care coverage to low-income persons.

Generally, whatever part of a trust estate the beneficiary can independently access and use will be treated as an available resource of the beneficiary. If a beneficiary has available resources in excess of \$2,000 as of the first day of a month, the beneficiary will be ineligible for SSI and Medicaid for that month. Further, cash distributions from an irrevocable trust to the beneficiary are treated as income in the month of receipt and a resource if held in the following month. Income usually reduces the benefits available from SSI and Medicaid on a dollar for dollar basis.

The term “Special Needs Trust” is not defined in law or regulation, but means a trust that is not treated as an available resource of the beneficiary for purposes of eligibility for SSI and Medicaid. Distributions from Special Needs Trusts are usually made in a manner that will not be treated as income of the beneficiary by SSI or Medicaid.

The first question in determining whether a trust is a Special Needs Trust is whether the trust is a “first party” trust (often referred to as a “self-settled” trust) or a third party trust. Self-settled trusts are trusts that hold assets that were previously owned by the beneficiary or for which the beneficiary was entitled. Self-settled trusts will be treated as a Special Needs Trust only if they meet one of two criteria established by Congress in 1993. The first criteria is for a trust created by a parent, grandparent, guardian or court (or, after December 13, 2016, the beneficiary) that requires a Medicaid payback on the death of the beneficiary, commonly called a “D4A” trust because it is authorized by 42 U.S.C. 1396p(d)(4)(A). The second criteria is for a “Pooled Asset Trust” established by a nonprofit organization that requires that Medicaid be paid back or the trust assets to be held for other trust beneficiaries upon the death of the primary beneficiary, commonly called a “D4C” trust. 42 U.S.C. 1396p(d)(4)(C).

Third party trusts are trusts that hold assets contributed by persons other than the beneficiary. Third party trusts will be treated as a Special Needs Trust if the beneficiary has no independent right to access and use the trust assets or income.

All Special Needs Trusts generally avoid distributing cash to the beneficiary because cash distributions will be treated as income to the beneficiary. Instead, Special Needs Trusts usually directly purchase goods and services which benefit the beneficiary because most “in-kind” distributions are not treated as income.

For many years, the State of Washington Medicaid program included all of its regulatory provisions relating to all manner of trusts into one section of the Washington Administrative Code, codified at WAC 182-516-0100. In an effort to provide more comprehensible guidance on the treatment of trusts, the Washington Health Care Authority, which administers the Medicaid

program in this state, adopted a new regulatory scheme for trusts on March 2, 2018. Under this framework, the regulation of trusts has now been broken down into nine separate sections.

For the SSI program, the Social Security Administration promulgates a manual called the “Program Operations Manual System” or “POMS” detailing how eligibility for and benefits from the SSI program are determined. The POMS sections relating to Special Needs Trusts are set forth at SI 01120.199 - .204. A major revision of the POMS trust provisions was adopted on April 30, 2018.

The materials that follow discuss the current state regulations, and also reference the related POMS provisions. Important changes relating to the administration of special needs trusts are addressed in the POMS provisions discussed in the last five sections below.

II. ROADMAP OF STATE REGULATIONS

Here is the structure of the Washington Medicaid regulations relating to trusts:

- A. Definitions: WAC 182-516-0001
- B. General Rules Applicable to All Trusts: WAC 182-516-0105
- C. Overview of Self-Settled Trusts: WAC 182-516-0110
- D. Revocable Self-Settled Trusts: WAC 182-516-0115
- E. Irrevocable, Exempt “D4A” Trusts: WAC 182-516-0120
- F. Irrevocable, Exempt “D4C” Trusts: WAC 182-516-0125
- G. Irrevocable, Nonexempt Self-Settled Trusts: WA 182-516-0130
- H. Third Party Trusts: WAC 182-516-0140
- I. Trusts with first party and third party assets: WAC 182-516-0145

III. TRUST PRINCIPAL AVAILABLE IF BENEFICIARY IS TRUSTEE OR IN CONTROL

Under the state regulations, if the beneficiary is the **trustee** of ANY trust (revocable or irrevocable, first party or third party) for the benefit of the beneficiary, the assets in the trust will be deemed available to the beneficiary for all eligibility and benefit level determinations. WAC 182-516-0105(4)(a). POMS SI 01120.200(D)(1)(b)(3).

Similarly, all trust assets will be deemed available if the beneficiary has authority under the terms of the trust to direct the use of the trust assets for the beneficiary’s support and maintenance. WAC 182-516-0105(4)(b). POMS SI 01120.200(D)(1)(a).

If language in the trust makes a formerly available trust unavailable (a “trigger”), the beneficiary is treated as having made an uncompensated transfer at the moment the trust became unavailable. WAC 182-516-0105(5)(c). POMS SI 01120.200(E)(2)(b) & 01120.201(E)(1)(a). The uncompensated transfer will result in a period of Medicaid ineligibility for Medicaid Long-Term Care coverage under WAC 182-513-1363, and a period of SSI ineligibility under POMS SI 01150.100.

IV. REVOCABLE SELF-SETTLED TRUSTS

If the beneficiary of a trust can change the terms of the trust (except for technical changes to comply with changes in trust law) or can acquire or reacquire any assets held by the trust, the trust will be treated as **revocable** by the beneficiary. WAC 182-516-0001. POMS SI 01120(D)(1)(a).

A revocable trust is “**self-settled**” if:

- A. The **assets** in the trust are from the beneficiary or beneficiary’s spouse, **and**
- B. The trust was not established by Will, **and**
- C. The trust was **established** by the beneficiary, or the beneficiary’s spouse, or a person (including a court) with legal authority to act in place or on behalf of the beneficiary, or a person (including a court) acting at the direction or upon the request of the beneficiary. WAC 182-516-0115(3).

Assets in a revocable, self-settled trust are treated as if directly owned by the beneficiary. WAC 182-516-0115(4). But, such assets will not adversely affect eligibility, if they are “exempt” under Chapter 182-512 WAC, with the notable exception of a home. A home held in a revocable trust will **not** be treated as an exempt resource for purposes of determining eligibility for **long-term care** services. WAC 182-516-0115(4)(a). However, the SSI rules allow a home in a revocable, self-settled trust to be treated as an exempt resource. POMS SI 01120.200(F)(1).

For Medicaid, all distributions from revocable, self-settled trusts for the benefit of the beneficiary are treated as unearned income to the beneficiary. WAC 182-516-0115(5). While this is inconsistent with the usual principles of income for SSI and Medicaid, it is arguably required by the federal Medicaid trust statute. 42 U.S.C. 1396p(d)(3)(A)(ii). For SSI, distributions from revocable, self-settled trusts are **not** treated as income to the beneficiary. POMS SI 01120.200(E)(2)(a).

All distributions from revocable, self-settled trusts for the benefit of anyone other than the beneficiary are treated as uncompensated asset transfers, WAC 182-516-0115(6), and thus will cause the imposition of a period of ineligibility for Medicaid long-term care coverage under WAC 182-513-1363. This is consistent with the SSI treatment of such distributions. POMS SI 01120.200(E)(2)(b).

V. DETERMINING SELF-SETTLED VS. THIRD PARTY TRUST STATUS

A trust is deemed to be self-settled if it contains assets originally owned by the beneficiary. WAC 182-516-0001. POMS SI 01120.201(B)(8).

Importantly, a trust is **also** treated as self-settled if it contains assets that would have been owned by the beneficiary if they had not been diverted to the trust by the beneficiary, a court, a someone acting on the beneficiary’s behalf. WAC 182-516-0001. This rule creates a different outcome

than a prior Washington Court of Appeals case: *In Re Riddell*, 157 P.3d 888 (2007). The POMS provisions on this issue are consistent with the current state regulation. POMS SI 01120.201(B)(1).

For trusts established after August 1, 2003, a trust is also treated as self-settled if it contains assets originally owned by the beneficiary's **spouse** or would have been owned by the beneficiary's spouse if they had not be diverted to the trust by the beneficiary's spouse, a court or someone acting on behalf of the beneficiary's spouse. WAC 182-516-0130(2). POMS SI 01120.201(B)(1) also treats assets owned by the beneficiary's spouse the same as assets owned by the beneficiary.

VI. SELF SETTLED IRREVOCABLE TRUSTS: COUNTABLE AND EXEMPT

A. Countable Self Settled, Irrevocable Trusts.

Most irrevocable, self-settled trusts will either be treated as an available resource of the beneficiary or as an uncompensated asset transfer by the beneficiary.

If an irrevocable, self-settled trust can provide any benefit to the beneficiary, any part of the trust from which that benefit may be provided is treated as a countable resource owned by the beneficiary. WAC 182-516-0130(6)(a). POMS SI 01120.201(D)(2)(a). In addition, for Medicaid, any actual distribution for the benefit of the beneficiary from such a trust will be treated as unearned income of the beneficiary. WAC 182-516-0130(6)(a)(i). For SSI, distributions to the beneficiary from this kind of trust are **not** treated as income. POMS SI 01120.201(I)(2)(a). And, for both SSI and Medicaid, any actual distribution for the benefit of someone other than the beneficiary will be treated as an uncompensated asset transfer by the beneficiary. WAC 182-516-0130(6)(a)(ii). POMS SI 01120.201(E)(1).

If an irrevocable, self-settled trust can make no distribution for the benefit of the beneficiary, the funding of the trust constitutes an uncompensated asset transfer by the beneficiary. WAC 182-516-0130(6)(b). POMS SI 01120.201(E)(1).

B. Exempt Self Settled, Irrevocable Trusts.

The state Medicaid exemption for "D4A" trusts is set forth in a separate regulatory section: WAC 182-516-0120. The beneficiary of such a trust must be disabled under the Social Security Act definition and must be under 65 years old. The trust must be irrevocable and be established for the sole benefit of the disabled beneficiary. The trust must be established by a parent, grandparent, guardian or court; however for trusts established after December 12, 2016, the beneficiary can directly establish this kind of trust. Finally, for such trusts established after August 1, 2003, Medicaid must be reimbursed for expenditures on behalf of the beneficiary when the beneficiary dies, the trust terminates or the beneficiary's disability ends. (Trusts established after August 11, 1993 and before August 1, 2003 only had reimburse Medicaid when the beneficiary died.)

The SSI provisions relating to “D4A” trusts are set forth in SI 01120.203(B) & (C). The beneficiary must be under 65, SI 01120.203(B)(2), and must be disabled as of the date the trust is established, SI 01120.203(B)(4). Effective December 13, 2016, the trust may be established by the beneficiary, a parent of the beneficiary, a grandparent of the beneficiary, a legal guardian of the beneficiary, or a court. SI 01120.203(C)(2). A beneficiary acting as Trustor, or an agent of the beneficiary acting pursuant to the beneficiary’s power of attorney, may establish the trust. SI 01120.203(C)(2)(a). A parent or grandparent establishing a D4A trust should execute and then first initially fund the trust with “seed” money before the beneficiary’s funds are added. SI 01120.203(C)(2)(b). For a court to establish the trust, the court must enter an order requiring the establishment of the trust before the trust is executed. SI 01120.203(B)(8).

There is no Medicaid or SSI transfer penalty for transfers by the beneficiary to a D4A trust before the beneficiary attains age 65, and the trust remains exempt after the beneficiary attains age 65. WAC 182-513-1363. POMS SI 01150.121(A)(3).

The exemption for “D4C” pooled trusts is set forth at WAC 182-516-0125 and POMS SI 01120.203(D). This requires a “master trust” established and managed by a nonprofit organization. Each beneficiary must be disabled under the Social Security Act definition. Each beneficiary has a separate account governed by the master trust which must be established by the beneficiary, the beneficiary’s parent, grandparent or legal guardian, or by a court. The beneficiary’s account must be managed for the sole benefit of the beneficiary. When the beneficiary dies, the trust account terminates, or the beneficiary’s disability ends, either Medicaid must be reimbursed **or** the remainder of the trust account may be held by the trustee for the benefit of other disabled beneficiaries of the trust.

Although there is no age limit for persons establishing a D4C trust, a transfer into a D4C trust account after the trust account beneficiary attains age 65 is subject to the Medicaid and SSI transfer penalties. WAC 182-513-1363; WAC 182-513-0125(5); POMS SI 01120.203(D)(1). (In many other states, transfers to a D4C trust after the beneficiary is 65 do not result in a transfer penalty.)

VIII. TREATMENT OF THIRD PARTY TRUSTS AND “MIXED” TRUSTS

For an irrevocable, third party trust, the trust is not an available resource if the beneficiary has no power to access or control trust assets or distributions. WAC 182-516-0140(6). POMS SI 01120.200(D)(1)(a). If the trust mandates that the trustee make distributions as necessary for the “health, education, maintenance and support” of the beneficiary, the trust assets will be deemed available to the beneficiary because the beneficiary can compel a distribution for support.

A testamentary trust created by a Will is treated as a third party trust. Such a trust must “be in the Will” and the estate must be the grantor. WAC 182-516-0140(3). POMS SI 01120.200(B)(15). So, assets in a testamentary special needs trust will not be deemed an available resource of the trust beneficiary unless the beneficiary is the trustee or otherwise has power of access and control trust assets and distributions. Note that a testamentary trust is the **only** way that a special needs trust for a surviving spouse can be accomplished.

Where a trust holds assets contributed by both the beneficiary and by a third party, the assets contributed by the beneficiary are treated under the self-settled trust rules and the assets contributed by the third party are treated under the third party rules. WAC 182-516-0145. POMS SI 01120.201(C)(2)(c).

IX. SSI TRUST REVIEW PROCESS

In the past, the SSI program would on occasion review a previously disclosed trust, find it wanting in some regard, and immediately terminate SSI coverage and impose an overpayment for years of previously received SSI. Now, the POMS provides that, beginning on April 27, 2018, if a trust was previously reviewed and accepted by SSI, immediate termination of benefits will not occur. Instead, the beneficiary is to receive a notice detailing the non-complying provisions of the trust and given a 90 day period to amend the trust to bring it into compliance. POMS SI 01120.200(K)(2).

In another reform, local SSA office employees are now directed to refer all a trust resource determinations to trust experts located in SSA regional offices. POMS SI 01120.200(L).

Finally, SSA has implemented a process to make advance determinations concerning the validity of “D4C” pooled asset trusts. Once a “precedent” has been established for a particular pooled trust, the pooled trust will be accepted unless it has subsequently been amended or the SSA trust policy has changed. POMS SI 01120.202(C).

X. SSI ASSIGNMENT OF INCOME REQUIREMENTS

For income that is assignable, SSI permits “irrevocable” assignments to a special needs trust of that income. After such an assignment, the income is no longer treated as the income of the trust beneficiary. POMS SI 01120.201(J)(1)(d). The POMS revisions provide that if a court order effectuates the assignment, e.g. of alimony or child support, the assignment is deemed to be irrevocable. POMS SI 01120.201(J)(1)(d). Medicaid generally disregards attempted assignments and continues to treat the assigned income as belonging to the beneficiary unless an asset which generates the income is also transferred. WAC 182-513-1330(7).

Most government benefits, including SSA and VA benefits, are not assignable by law and will always be deemed income of the beneficiary. POMS SI 01120.201(J)(1)(c). A notable exception is for U.S. Military Survivor Benefit Plan benefits which by federal law can be assigned to a special needs trust for a disabled child. POMS SI 01120.201(J)(1)(e).

XI. EFFECT OF TRUST DISBURSEMENTS

Generally, special needs trusts make “in-kind” disbursements, by directly paying vendors of goods or services, rather than make cash disbursements to the beneficiary because the latter would be treated as income by SSI and Medicaid and thereby reduce benefits. Because it is typically not feasible for trustees to accompany beneficiaries on shopping trips, it is important to find ways for trustees to make goods and services available from afar. While making online

purchases that are shipped to the beneficiary is often effective, there are a variety of situations where this does not work. The recent POMS revisions discuss various alternatives in detail.

If the beneficiary of a special needs trust has a credit card that is not connected in any way to trust income or principal, a trustee can make payments toward the credit card debt. Such payments are not treated as income by either SSI or Medicaid, but will be treated as in-kind support and maintenance by SSI if the credit card was used to purchase food (e.g. a restaurant bill) or to pay for shelter expenses like rent or utilities. POMS SI 01120.201(I)(1)(d).

Administrator-managed prepaid credit cards, like True Link cards, are not counted as a resource of the beneficiary as long as the account to which the card is linked is owned by the trustee of the special needs trust. Use of the card will be treated as income only if the card is used to access cash, something that is usually not allowed by True Link administrators. If the card is used to purchase food or pay for shelter expenses, those will be treated as in-kind support and maintenance by SSI, but will not be treated as income by Medicaid. If the card is used for non-food, non-shelter acquisitions such as clothing, the acquisition will not affect either SSI or Medicaid eligibility and benefits. POMS SI 01120.201(I)(1)(e).

Gift cards and gift certificates that can be used to purchase food or pay shelter expenses are treated by SSI as income in the month of receipt. Gift cards and gift certificates that cannot be used for food or shelter will also be treated as income in the month of receipt unless the card or certificate has a legally enforceable prohibition against selling the card or certificate for cash. POMS SI 01120.201(I)(1)(f).

A trust can reimburse a third party for expenditures made for the benefit of the trust beneficiary, or pay off the credit card bill of the third party for such expenditures. If the expenditures were for food or shelter, they will be treated as in-kind support and maintenance for the beneficiary by SSI. Otherwise, the expenditures will have no effect on SSI or Medicaid eligibility and benefits. POMS SI 01120.201(I)(1)(g).

XII. LIBERLIZATION OF “SOLE BENEFIT” STANDARD BY SSI

Historically, SSI very narrowly interpreted the requirement that a special needs trust under either “D4A” or “D4C” be for the “sole benefit” of the beneficiary. Most notably, SSI consistently took the position that payment to a family member to provide care to the trust beneficiary, paying for a family member to accompany the beneficiary on a trip, or paying a family member to visit an institutionalized beneficiary violated the “sole benefit” requirement. Happily, the April, 2018 POMS SNT revisions substantially changed the SSI positions on these issues.

Now, SSI says that items purchased by a trust, including a home or vehicle or household items, need not be for the “exclusive” benefit of the beneficiary; rather, they simply need to be for the “primary benefit” of the beneficiary. So, other people can live in a house purchased by the trust for the beneficiary or watch the TV purchased by the trust for the beneficiary. POMS SI 01120.201(F)(3)(a).

Trust payments to family members who provide caregiving services for the beneficiary are now clearly permissible, and medical training, certification or tax records of the caregiver are no longer required. POMS SI 01120.201(F)(3)(a). Further it is recognized that paying for “companionship” services to enable visits outside the home or for the beneficiary to live safely in the home are also permitted. POMS SI 01120.201(F)(3)(a).

For the first time, SSI now permits a special needs trust to pay for the travel expenses of family members or caregivers that are necessary to enable the trust beneficiary to visit places outside the home. And it is recognized that multiple persons may be required for this. So, both parents may be compensated for a trip to a vacation destination, although the same is not true for siblings of the beneficiary. POMS SI 01120.201(F)(3)(b).

Finally, SSI permits the trust to compensate others to visit beneficiaries residing in care facilities to assure that appropriate care and services are being provided to the beneficiary. POMS SI 01120.201(F)(3)(c).

XIII. RELATIONSHIP OF ABLE ACCOUNTS TO SPECIAL NEEDS TRUSTS

On December 19, 2014, the “Achieving a Better Life Experience” (ABLE) program was enacted as part of the federal Internal Revenue Code. 26 U.S.C. §529A. While accounts established under the ABLE program are not trusts, they offer an important tool to trustees of Special Needs Trusts.

ABLE accounts can be established by disabled persons whose disability began before reaching age 26. A total of up to \$16,000 per year can be deposited into an ABLE account from any source including the disabled beneficiary of the account or a special needs trust for the benefit of the disabled beneficiary of the account. (An additional \$12,000 of income earned by the account holder can also be contributed.) Contributions to, and most distributions from, ABLE accounts are not treated as income by SSI or Medicaid, and the balances in ABLE accounts are not treated as resource for purposes of determining SSI or Medicaid eligibility. (SSI will count amounts in excess of \$100,000 in an ABLE account as a countable resource.)

ABLE accounts are administered by individual states, and a disabled person can choose to place his or her account in any state that has established an ABLE program and accepts out of state participants (although a disabled person cannot have more than one ABLE account). Interest, dividends and capital gains derived from ABLE account investments are not subject to federal income tax. But, when the Beneficiary dies, Medicaid is entitled to be paid back for Medicaid expenditures made on behalf of the ABLE account beneficiary.

Information on the Washington state ABLE program can be found here: <https://www.washingtonstateable.com>.

The detailed rules relating to the SSI income and resource exclusions applicable to ABLE accounts are set forth in POMS SI 01130.740.

Notably, SSI has expressly authorized transfers by a special needs trust to an ABLE account established by the beneficiary of the special needs trust. POMS SI 01120.201I(1)(c) & (h).

For a trustee of a special needs trust, ABLE accounts offer significant advantages:

1. Distributions of cash, such as an allowance, from an ABLE are not treated by SSI and Medicaid as income to the beneficiary. Distributions of cash from a special needs trust to the beneficiary are treated as income and will reduce benefits available from SSI and Medicaid.
2. An ABLE account enables a beneficiary or representative to have direct access to funds for acquiring needed household and personal items. Whereas the trustee of a special needs trust must directly purchase such items from a vendor to avoid the transaction being treated as income to the beneficiary.
3. Very significantly, distributions from an ABLE account for food or shelter are not treated by SSI as “in-kind support and maintenance.” Similar distributions from a special needs trust are treated as “in-kind support and maintenance” and cause a reduction in the SSI cash benefit by up to one-third.

XIV. DESIGNATING A SNT AS RETIREMENT ACCOUNT BENEFICIARY

Most third-party Special Needs Trusts will qualify as a “Disabled and Chronically Ill Beneficiary” (DCIB) Trust under the Secure Act relating to the calculation of required minimum distributions from retirement accounts. IRC §401(a)(9)(H)(iv). For DCIB trusts, the required minimum distributions to the SNT during the life of the disabled beneficiary will be calculated based on the life expectancy of that beneficiary. However, note that a retirement plan may require distributions under the 10 year rule under certain circumstances if the employee dies before their Required Beginning Date. Prop. Reg. §1.401(a)(9)-3(c)(5)(ii), (iii).

Under the applicable provisions, a SNT will qualify for the preferential treatment (as an “applicable multi-beneficiary trust”) as long as the trust solely benefits the disabled beneficiary during the beneficiary’s life, and the residual beneficiary are all individuals. IRC §401(a)(9)(H)(v).