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DISTRIBUTIONS FROM SELF-SETTLED SPECIAL NEEDS TRUSTS

By Thomas D. Begley, Jr., Esquire

Distributions from self-settled special needs trusts are usually subject to more severe restrictions than distributions from third party special needs trusts. Many State Medicaid Agencies have regulations or internal policies governing how these distributions can be made. Under federal law, distributions from a self-settled special needs trust must be for the benefit of such individual. In a CMS letter, distributions from the trust must be “solely for the disabled individual’s benefit.” Some states interpret this slightly differently. In New Jersey, distributions must be “for the sole benefit of.” In New York, distributions must be for the “primary benefit of.”

If distributions from a trust must be solely for the disabled individual’s benefit and certain distributions actually benefit other parties, then the other parties must pay a pro rata share.

Generally, distributions from a self-settled special needs trust may not be made to discharge a legal obligation of support of a parent. Many states, such as New Jersey, by regulation prohibit the use of trust funds to discharge a legal obligation of support unless the parents are unable to satisfy the legal obligation of support from their own funds.

Examples of Permissible Trust Distributions/SSI Recipients

Examples of permissible trust distributions from a trust established for the benefit of an SSI recipient are:

- Home purchase, with rent paid by occupants;
- Home improvements, repairs, and maintenance by outside source;
- Tools to perform home improvements, repairs, and maintenance by homeowner;
- Installation of burglar alarm or monitoring/response system in home;
- School tuition, books, and supplies;
- Health and life insurance premiums;
- Entertainment purposes, including books and magazines; trips to movies, plays, museums, and sporting events; audio/video equipment; or hobby supplies;
- Purchase and maintenance of car, or bus passes;
- Household goods and other items of personal property of reasonable value;
- Clothing;
- Payment for items such as cleaning supplies and paper products;
- Telephone expenses;
- Dental care, physical therapy, massages, support services, and other medical costs not covered by any benefit programs;
- Home care services not covered by another program;
- Durable medical equipment, such as wheelchairs; or
- Gifts of limited amounts to family members (under certain circumstances, for example gifts can be made from

a third party special needs trust if specifically authorized in the document, i.e., gifts for birthdays and holidays).

If a beneficiary can pay his/her pro rata share of household expenses, then a one-third reduction of the SSI grant can be avoided.

ISM

If a trustee provides in-kind support and maintenance that is food or shelter, then SSI benefits may be reduced. Depending on the household in which the individual resides, the benefit may either be reduced by the actual value or the presumed maximum value. A beneficiary can always show that the actual value is less than the presumed market value. If the actual value exceeds the presumed market value, then the benefit is only reduced by the presumed market value.

While such distributions may have the negative consequence of reducing the trust beneficiary's SSI payment, there is nothing in the federal statute to preclude the use of trust funds for food or shelter.

Examples of ISM

Examples of trust distributions that will reduce SSI benefit are:

- Shelter-related expenses which are specifically defined in the SSI program (mortgage payments, real property taxes, heating and cooling bills, electricity, water, sewage, garbage collection); and
- Groceries or meals.

General Rules

Under the distribution rules for special needs trusts, trustees should not make certain payments, including cash to the beneficiary, cash to family members of the beneficiary under 18 years of age, and, distributions to third parties. Also, trustees should try to avoid payment of: mortgage, rent, real estate taxes, homeowner's insurance, utilities, garbage removal, and food. On the other hand, they should always pay income taxes, trustee fees, attorney fees, administrative costs, and all regularly recurring expenses. Finally, it is important to for them to retain public benefits counsel and a care manager.

Distributions must be made in such a manner that they are not considered to be income to the beneficiary for public benefits purposes. In a leading case, an Oklahoma court determined that the trust in question was an exempt resource; however, distributions might be characterized as income, if they were used for food and shelter.

The court required the trustee to disclose the character and amount of each disbursement so that the state of Oklahoma could determine whether it is income within the Oklahoma Medicaid eligibility regulations.

42 U.S.C. §1396p(d)(4)(A).

2 CMS Letter to All State Medicaid Directors, Subject: Treating Disability Trusts Under Transfers of Assets, Trusts, Estate Recovery and Third Party Liability Rules (June 5, 1996).

3 NJAC 10:71-4.11(g).

4 New York State Department of Social Services, Transmittal 96 Adm-8 iv A 7 b ii.

5 POMS S.I. 0835.300.

6 CMS Letter from Thomas E. Hamilton, Director, Disabled and Elderly Health Programs Group, dated July 5, 2001, to Janet L. Lowder.

7 POMS S.I. 00835.020.B.36 and 00835.465.D.1; 20 C.F.R. §416-1130b.

8 Trust Co. of Okla. v. State ex rel. Dep't of Human Servs., 890 P.2d 1342 (Okla. 1995).

9 Trust Co. of Okla. v. State ex rel. Dep't of Human Servs., 890 P.2d 1342 (Okla. 1995).

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