People With Disabilities, Age 65 and Over, Can Establish a Self-Settled Pooled Special Needs Trust That Protects Their Medicaid Benefits

By Thomas E. Beltran

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Persons with disabilities, receiving cash or other assets – for example, successful litigants in personal injury actions – must take care to shelter the cash or assets received when they are also recipients of needs-tested public benefits such as Supplemental Security Income (SSI) and Medicaid (known as "Medi-Cal" in California). This is due to a rule, typical of many programs, limiting assets for public benefits recipients to no more than $2,000, exclusive of certain exempt assets such as a car or residence. For a number of reasons, a litigant with disabilities will often elect to shelter the funds in a special needs trust.[1] The successful litigant, establishing a special needs trust with their own assets, would be both the grantor (or settlor) and the beneficiary. The resulting special needs trust is referred to as a "first party," "self-settled," or "(d)(4)(A)" special needs trust.

There are two factors which limit access to this resource[2] shelter. First, the person with disabilities must meet the strict Social Security test of disability, and second, the person must be under the age of 65. Therefore, an elderly person residing in a Medi-Cal funded nursing home, who recovers in an action for nursing home abuse for example, would ironically, upon receipt of the award, lose their Medi-Cal funding because their assets would exceed the resource limits, and an individual special needs trust would be unavailable due to age. Except for a narrow range of non-penalized transfers, that person would then need to spend-down the assets to below the $2,000 asset limit, before Medicaid long-term care would resume. A remedy, and the subject of this article, is a self-settled (or First Party) pooled special needs trust.

The federal authority governing the establishment of first-party special needs trusts is found at § 1917(d)(4)(A) of the Social Security Act (the "Act"), known as the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), codified at 42 U.S.C. 1396p(a)–(e). As will be discussed more thoroughly below, post OBRA '93, an individual disposing of resources to become eligible for Medicaid benefits may be penalized, depending upon how the disposition of assets is characterized. If it is characterized as a transfer, because less than the value of the thing transferred was received in return, i.e., a "below-market-transfer," it will be penalized under 42 U.S.C. 1396p(c), subject to the exemptions found at 42 U.S.C. § 1396p(c)(2)(B)(i) through (iv). By contrast, if the assets are used to establish a trust, it will be penalized under 42 U.S.C. § 1396p(d), subject to the exemptions of 42 U.S.C. § 1396p(d)(4).[3]

The Two Types of First-Party Special Needs Trust: Pooled and Individual

Within the class of first-party trusts that can be established under OBRA '93, there are two subclasses available in California – individual trusts, established under the authority of § 1917 (d)(4)(A) of the Social Security Act (42 U.S.C. § 1396p(d)(4)(A)),[4] and pooled trusts, similar to an attorney's client trust account, established pursuant to § 1917 (d)(4)(C) of the Act (42 U.S.C. § 1396p(d)(4)(C)).[5] Individual first-party trusts, most likely numbering in the thousands in California, are far more common than pooled trusts, of which there are approximately six.[6]

With the exception of two very significant distinctions concerning trust establishment and a third, relating to termination, individual and pooled special needs trust are otherwise similar, and accomplish the same purpose, to shelter assets that otherwise exceed the public benefits resource limits, allowing future use by the person with a disability to meet their unmet need.

In establishing a (d)(4)(A) trust, the public benefits recipient cannot establish

the trust themselves. It must instead be established by a "parent, grandparent, legal guardian of the individual, or a court." (42 U.S.C. § 1396p(d)(4)(A).) By contrast, a (d)(4)(C) trust can be established by the public benefits recipient themselves, in addition to those persons/entities. (42 U.S.C. § 1396p(d)(4)(C)(iii).) Even more significant however, is the absolute bar to establishment of a (d)(4)(A) trust by a person over the age of 65. By contrast, the statutory language of section (d)(4)(C) contains no such restriction. Finally, upon termination, the remaining assets in a (d)(4)(A) trust, up to the amount equal to the total medical assistance paid by the state plan, is returned to the state. The remaining assets in a (d)(4)(C) trust can be retained by the non-profit entity, with the state recovering the remainder, if any, up to the amount equal to the total medical assistance paid by the state plan.

The Federal Medicaid Agency's Interpretation Incorrectly Infers an Age Limit from the Statute

The Centers for Medicare & Medicaid Services ("CMS"), the agency that oversees the Medicaid and Medicare programs, released a Massachusetts State Agency Regional Bulletin, dated May 12 2008,[7] generally agreeing with the construction presented herein, stating "a pooled trust may be established for beneficiaries of any age." This statement is significant, in that some commentators have suggested either that Congress mistakenly omitted the reference to age in section (d)(4)(C), or an alternative interpretation, that under the SSI program, an individual, upon reaching age 65, is no longer considered to be disabled because disability benefits terminate, and the individual then becomes eligible for old age benefits.[8] The bulletin goes on to advise that "only trusts established for a disabled individual age 64 or younger are exempt from application of the transfer of assets penalty provisions (see §1917(c)(2)(B)(iv) of the Act)." In other words, the position taken in the bulletin is that the establishment of a (d)(4)(C) trust by a person over the age of 65 will not be penalized unless that person seeks long-term care.

Fortunately, the Bulletin is not controlling law; even regulations, promulgated in accordance with the Administrative Procedures Act, are not given deference when they are inconsistent with Congressional intent and "arbitrary, capricious, or manifestly contrary to the statute." (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, (1984) 467 U.S. 837, 844; 104 S.Ct. 2778, 81 L.Ed.2d 694.) Even if the bulletin had the force of a regulation, the position taken by CMS conflicts with the plain language of the statute. Unlike regulations however, the CMS interpretation as stated in the Bulletin has not undergone the rigors of the Administrative Procedures Act, and would not be subject to the deference accorded regulations:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference. (*Christensen v. Harris County* (2000) 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621.)

The opinion presented in the CMS bulletin[9] rests upon the erroneous assumption that when a person establishes a trust with the funds, they give up ownership of those funds, such that the establishment of a first-party special needs trust can be penalized as a "transfer for less than fair market value." This assumption fails to take into account the internal construction of the statute, as well as the basic Social Security Act principal that a grantor of a first party trust, upon funding the trust, retains equitable ownership of the trust assets.

A Transfer of Assets Only Occurs When an Individual Transfers Funds to Someone Other Than Him or Herself, Implicating Subsection (c)

The general rule of Subsection (c), is that "if an institutionalized individual or the spouse of such an individual ... disposes of assets for less than fair market value," the individual will be ineligible for Medicaid funded long-term care. (42 U.S.C. § 1396p(c)(1)(A).) There are four exceptions to the general rule, which are found at 42 U.S.C. § 1396p(c)(2)(B)(i) through (iv), where a transfer of assets will not be penalized. The bulletin cites to the last exception, for support of its interpretation:

> An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that ... the assets ... (iv) were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)].

It is this exemption that both CMS and some commentators regard as proving that a person must be under the age of 65 to shelter their assets in a pooled special needs trust, and be eligible for long-term care Medicaid without a penalty. As will be shown, in the context of subsections (c) and (d), this exemption can only concern a person establishing a trust, any type of trust including a trust described in (d)(4), for someone *other* than themselves. If the four exemptions did not concern transfers to another, they would not be *exemptions* to the transfer of assets penalties of subsection (c).

Assets Placed in Self-Settled Special Needs Trusts for the Benefit of the Settlor Continue to Be the Settlor's Assets, by Virtue of the Settlor's Retention of Equitable Ownership

The general rule concerning irrevocable trusts, which are governed by subsection (d), is found at 42 U.S.C. §§ 1396p(d)(3)(B)(i) and (ii). That rule, subject to exceptions found in subsection (d)(4), is that assets placed in a self-settled trust continue to be assets countable or attributable to the individual by virtue of their equitable ownership. As long as the assets are used (or could be used) for the benefit of the grantor/beneficiary, they continue to have an equitable interest in the assets.

This is what distinguishes a transfer of assets (Subsection (c) described above), from the establishment of a trust (Subsection (d)).

The principal of equitable ownership is demonstrated under Social Security law,

in the context of determining in-kind support. If an SSI recipient resides in a home without paying rent, the rental value is considered in-kind income, which reduces the monthly cash payment. But Social Security Administration's Program Operations Manual System (POMS) states that if the SSI recipient resides rent-free in a home owned by their special needs trust, they are deemed to be the owner, on the basis of their equitable ownership, and no in-kind support is attributed to their rent-free use of the home.[10]

It is clear from the foregoing discussion that there is no subsection (c) transfer penalty for placing assets into a self-settled trust, unless assets from the trust are then transferred for "any other purpose" than the benefit of "the individual," or the assets cannot be distributed for the benefit of the individual "under any circumstances." Therefore, it is incorrect to apply the subsection (c) limitation for a transfer of assets to a trust, including a trust established under subsection (d)(4), when the trust is self-settled, and the trust assets can be expended, but only for the benefit of the beneficiary.

Since an Individual Who Establishes a Trust with Their Own Assets for Their Own Benefit Retains Beneficial Ownership (There is No Subsection (c) Transfer of Assets), Subsection (d) Applies

When an individual establishes a special needs trust with their own assets, and the trust is for their own benefit, the transaction is *not* a transfer for purposes of long-term Medicaid (which is governed by Subsection (c)), but an entirely different transaction; it is the establishment of a trust, which is governed by Subsection (d). *See*, 42 U.S.C. 1396p(d)(1). This is because the settlor/beneficiary is not divested of ownership, which is required for the transaction to be a transfer, but instead retains equitable ownership of the trust assets. Therefore, the exemption to a transfer of assets discussed above, 42 U.S.C. § 1396p(c)(2)(B)(iv), would not apply to a self-settled (d)(4) trust, because a transfer of asset for purposes of subsection (c) has not occurred.

Therefore, the statement in the Bulletin then, that "[w]hen a person places funds in a trust, the person gives up ownership of those funds ... [s]ince the individual generally does not receive anything of comparable value in return," is incorrect except in a very specific context. That specific context occurs in Subsection (d), where the individual places his or her assets into a trust for his or her own benefit, and then such assets are distributed in a manner that does not benefit the individual/beneficiary, or, under the terms of the trust cannot be distributed under any circumstances for the benefit of the grantor/beneficiary. (42 U.S.C. § 1396p(d)(3)(B)(i)(II)&(ii).)[11] In that case, the transaction is partially recharacterized as a below-market transfer, which is then penalized under Subsection (c). (*Id.*) Such a recharacterization of the portion that cannot be spent on the self-settled trust beneficiary, is consistent with the construction advanced herein, providing a clear demonstration of the difference between establishing a trust, in accordance with Subsection (d) and a transfer of assets under Subsection (c).

Since the Establishment of a Self-settled Trust Is Not a Transfer of Assets, the Exemptions Found in (d)(4) Are Not Exemptions to the Transfer Rules, but to the Countable Resource Rules

As Subsection (d) clearly shows, when an individual self-settles a special needs trust, they are penalized for excess resources, because they retained equitable or beneficial ownership of the assets. The exemptions found in Subsection (d)(4) are remedies not for transfers, but for continued eligibility notwithstanding the excess resources. But when the assets of a self-settled special needs trust can either be spent on someone other than the Settlor, or, cannot be distributed at all, both the transfer penalties of Subsection (c), and the trust establishment penalties of Subsection (d) apply. The differences between the application of Subsections (c) and (d) are illustrated by the following three fact patterns.

First, where an individual transfers their assets to another person, outright or in trust, where the individual cannot benefit from them, i.e., no equitable ownership over the assets is retained, the transaction is a transfer of assets which falls within the scope of subsection (c). The exemptions from the subsection (c) transfer of asset penalties allow the outright transfer of assets to or for the benefit of the transferor's spouse, or transfers in trust to a child under the age of 21 or disabled, or to anyone under the age of 65 who is disabled, without a penalty.

The second fact pattern is where an individual places their assets into a self-settled trust, where all the assets can be used for their benefit, i.e., equitable ownership over all the assets is retained; this transaction falls within the scope of subsection (d). Trusts established under (d)(4)(A) and (d)(4)(C), containing assets in which the individual retained equitable ownership, are exempt from the excess resource penalties. The transfer penalties do not apply because the establishment of a trust, where equitable ownership is retained, is not considered a transfer of assets for purposes of 42 U.S.C. 1396p. (See, 42 U.S.C. 1396p(d)(1).)

Finally, where an individual places their assets into a self-settled trust, but only some of the assets can be used for their benefit, and the balance of the assets either cannot be used at all, or can be used for some other person, i.e., equitable ownership is retained over only some of the assets; part of this transaction is a transfer of assets, falling within the scope of subsection (c), and part is the establishment of a trust, falling within the scope of subsection (d).[12] Both of the exemptions described above apply to their respective portions of the trust.

Conclusion

As can be seen, the construction advanced by the CMS, in its regional bulletin, is erroneous because it fails to take into account the difference between the establishment of a trust with one's own assets, which is governed by subsection (d), and a transfer of assets, which is governed by subsection (c). This confusion results in the misapplication of a transfer of assets exemption, 42 U.S.C. § 1396p(c)(2)(B)(iv), to the case of a self-settled trust established under subsection (d)(4)(C). From this misapplication of the exemption, CMS then infers an age limit applicable to self-settled pooled trusts.

As 42 U.S.C. § 1396p(d)(1) expressly states, the rules governing a self-settled

special needs trust are found in subsection (d), not (c). Since the transfer of assets rules do not apply to the establishment of a trust, the exemption described in 42 U.S.C. § 1396p(c)(2)(B)(iv) cannot apply. Since the subsection (c)(2)(B)(iv) exemption does not apply to (d)(4)(C) pooled trusts, neither does that exemption's age limitation. An age limit simply cannot be read into the pooled trust provisions.

Elders (in non-209(b) states)[13] with disabilities, then, can place their assets in a self-settled pooled special needs trust without the imposition of the Medicaid transfer penalties. While the statutory construction is clear, practitioners should take certain precautions:

First, obtain court approval for the establishment of the self-settled trust for a person aged 65 or over. Although one of the benefits of a pooled special needs trust is that the public benefits recipient can establish the trust directly, court establishment provides a forum where any objections, or questions about construction raised by the Department of Health Care Services, can be resolved, before what will be an irrevocable trust is established.

Second, although California's Department of Health Care Services has unofficially stated that it will not penalize the establishment of a pooled trust by a person over the age of 65, for purposes of long-term care, it would be a good idea, in giving notice to the Department of Health Care Services, to put a synopsis of the argument in the attorney-drafted notice. One benefit of assuring that the Department is well aware of the transaction and the basis therefore, is to assure that collateral or administrative estoppel attaches. Although the statute of limitations is tolled when a first-party trust is established, you can limit the issues that could be litigated.

Third, care should be taken when the pooled trust is established for a person aged 65 and over who receives or is anticipated to again receive SSI, because this is still uncharted territory. The Foster Care Independence Act of 1999, H.R. 3443 amended 42 U.S.C. 1382b, which is now quite similar to 42 U.S.C. § 1396p, however, the distinction between a transfer of assets and establishment of a trust under the SSI rules is not quite a clear as in the Medicaid statute.[14] There are other differences complicating the construction, that would warrant a lengthy discussion such as presented here for the Medicaid rules. Notice should be given to the Social Security Administration at the earliest opportunity to allow resolution. In fact, it may be wise to begin working on the SSI issue as soon as it is probable that a pooled trust will be needed. This is because it is unclear what position the Administration, which is solely federal, will take. The Social Security Administration's Procedures and Operations Manual System (POMS) states that a transfer of assets into a pooled special needs trust by a person over the age of 65 "may result in a transfer penalty." (POMS SI 01120.203B.2.a.) Therefore, you must exercise care in properly setting up the SSI case. When the evidence is that the elderly grantor cannot reasonably live in a setting that is less restrictive than a nursing home, such notice may not be necessary, because SSI would go into suspense, and after 12 months, terminate.[15] ■

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1 Self-settled special needs trusts, established after 1993, are creations of federal law, allowing a public benefits recipient to retain assets, that otherwise would make him or her ineligible for public benefits, in an irrevocable discretionary spend-thrift trust. Prior to 1993, such trusts were (and still are) governed by 42 U.S.C. 1396a(k). See, *Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001). In the context of litigation, California procedures for establishment of a first-party special needs trust are found at Probate Code §§ 3600 et seq.

2 In public benefits parlance, the term "resource" refers to assets. Income, in the form of cash or property, remaining in the month or months after receipt is then characterized as either an exempt or non-exempt resource. Even non-exempt assets, when placed in a special needs trust, become essentially exempt, because they are not considered in the resource calculation.

3 For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this title (42 USCS §§ 1396 et seq.), subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual. (42 U.S.C. 1396p(d)(1).)

4 The statutory definition of an individual special needs trust is as follows:

"A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3) [42 USCS § 1382c(a)(3)]) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 USCS § 1396 et seq.]."

5 The definition of a pooled special needs trust is "[a] trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] that meets the following conditions:

"(i) The trust is established and managed by a non-profit association.

"(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

"(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

"(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title [42 USCS §§ 1396 et seq.]."

6 See Section 12.16, page 579, *Special Needs Trusts: Planning, Drafting, and Administration* (Cal CEB 2008). One of the pooled trusts listed in this section, the PLAN of California Master Pooled Trust, was drafted by the author, who serves as general counsel to the pooled trust.

7 The text of the bulletin is as follows:

"The purpose of this bulletin is to clarify Medicaid policy with respect to the application of the transfer of assets penalty provisions on pooled trusts established by individuals age 65 and older.

"A pooled trust established by an individual age 65 and older is not exempt from the transfer of assets provisions. A pooled trust is a trust that can be established for a disabled individual under the authority of §1917(d)(4)(C) of the Social Security Act (the Act). A trust that meets the requirements of this section of the statute is exempt from being treated under the normal Medicaid trust rules in §1917(d) of the Act. A pooled trust is run by a non-profit organization. The trust (or more accurately, a sub-account within the trust) is established for each individual beneficiary. All the beneficiary sub-accounts are pooled for investment and management purposes. Upon the death of the disabled individual, the balance remaining in the account is paid back to the State Medicaid agency in an amount equal to the medical assistance paid on behalf of the beneficiary. The statute also

allows the trust to retain some portion of the balance remaining after the death of the beneficiary.

"Although a pooled trust may be established for beneficiaries of any age, funds placed in a pooled trust established for an individual age 65 or older may be subject to penalty as a transfer of assets for less than fair market value. When a person places funds in a trust, the person gives up ownership of those funds. Since the individual generally does not receive anything of comparable value in return, placing funds in a trust is usually a transfer for less than fair market value. The statute does provide an exception to imposing a transfer penalty for funds that are placed in a trust established for a disabled individual. However, only trusts established for a disabled individual age 64 or younger are exempt from application of the transfer of assets penalty provisions (see § 1917(c)(2)(B)(iv) of the Act)."

[8] This second alternative ignores the fact that there is no requirement that one actually receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) in order to establish a first-party special needs trust, only that one has a disability described in the Social Security statute. As long as the disability for which the now-elderly person was made eligible for SSI or SSDI continues, there should be no question that they have a qualifying disability.

[9] In a telephone conversation Mr. Tieng, of the Centers for Medicare & Medicaid Services on October 23, 2008, advised the author that he regarded the Bulletin as the Services' national opinion, not limited to the Boston Area.

[10] The POMS section states that "A trust is a right of property established by a trustor or grantor. One party (trustee) holds legal title to trust property which he or she manages for the benefit of another (beneficiary). The beneficiary does not have legal title but does have an equitable ownership interest." (SI 01110.515C.2.) Equitable ownership is sufficient to rebut a question of In-Kind Support. Equitable ownership under a trust is included in the term "principal form of ownership." (SI 00835.110)

[11] "(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

"(I) to or for the benefit of the individual, shall be considered income of the individual, and

"(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

"(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date."

[12] An annuity is similar to the situation in 42 U.S.C. § 1396p(d)(3)(B)(i)(II)&(ii) to the extent that funds used to purchase an annuity can be considered a transfer of assets for purposes of subsection (c), or falling within the scope of a trust for purposes of subsection (d). The statute states that "[t]he term 'trust' includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies." (42 U.S.C. § 1396p(d)(6).)

[13] A Section 209(b) state is one that limited Medicaid coverage to those individuals who would have been eligible under the state's Medicaid plan in effect on January 1, 1972. Section 209(b) of the Social Security Act is codified at 42 U.S.C. Section 1396a(f). All other states, including California, are referred to as "SSI" states.

[14] In spite of the differences between the Medicaid and SSI statutes, the underlying rational is the same, that a transfer to a trust is not penalized, as long as the resources, now held in trust, continue to be a "resource available to the individual" under the SSI trust rules. (42 U.S.C. § 1382b(c)(1)(B)(i).) Like Medicaid, a disposal of resources occurs to the extent that resources in a self-settled trust are distributed in a manner that does not benefit the individual/beneficiary, or, under the terms of the trust cannot be distributed under any circumstances for the benefit of the grantor/beneficiary. (42 U.S.C. § 1382b(c)(1)(B)(ii)(I)&(II) *cf.* 42 U.S.C. § 1396p(d)(3)(B)(i)(II)&(ii).) The four exceptions to the SSI disposal of resources rule are identical to the four exceptions to the Medicaid transfer of assets rule. (42 U.S.C. § 1396p(c)(2)(B)(i)-(iv).) The SSI exemptions are found at 42 U.S.C. § 1382b(c)(1)(C)(ii)(I) through (IV).

[14] When an SSI recipient transfers to a Medicaid-funded facility, the SSI monthly cash payment goes into suspense, and Medicaid pays the full cost of the placement, along with a small stipend of $35.00, paid to the recipient, for personal and incidental needs.

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