



## You are a Trustee of a Special Needs Trust: What Do You Do Now?

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This article assumes the beneficiary of your trust receives Supplemental Security Income (SSI) and Medicaid. It reviews the SSI rules so you can understand if, when, whether and how to make distributions from the trust in order to continue your beneficiary's eligibility for those benefits. It is divided into three parts:

I. The first section provides an overview of SSI and related public benefits programs, your duties as Trustee, and suggests how to prepare an agenda for the Trustee to decide on distributions;

II. The second section describes the rules about distributions: how and when to make payments from the trust; and

III. The third section reminds you of the reporting rules for SSI and Medicaid benefits and suggests ways to protect benefits by promptly responding to any adverse notices. It also reminds you of the importance of staying current with new developments in this area.

This article is intended only to provide basic and general information on trust distributions from supplemental needs trusts. It should not be relied upon before a careful examination is made of the beneficiary's status and the SSI rules and regulations in effect. You should always consult with a qualified attorney if you are unsure of how to make proper distributions.

### I. Overview of SSI & Related Public Benefits

The federal Social Security Administration (SSA) operates the Supplemental Security Income (SSI) program. In Michigan, the Department of Human Services (DHS) administers the Medicaid program pursuant to an agreement with the federal government. DHS county offices administer the Medicaid program locally. In Michigan, like many (but not all) states, an individual who is eligible for SSI benefits

is automatically eligible for Medicaid benefits.

Under current federal law, SSI is intended to pay for the beneficiary's "support." This usually means for things like food and shelter. An SSI eligible beneficiary receives a monthly cash payment for support because the beneficiary is aged, blind, or disabled and because his or her assets and income are low enough to meet a "means test."

Once this test is met, an individual is considered "categorically needy." This is why a Michigan SSI recipient is automatically entitled to receive Medicaid benefits. If the recipient receives too much income or has assets that are too great, he or she is likely to lose SSI eligibility -- and the automatic Medicaid coverage along with it. In many instances, the loss of Medicaid coverage can be a more serious problem than the loss of SSI benefits, particularly if alternative medical insurance is not readily available.

### ***A. Trustee Duties***

The terms of your trust give you substantial discretion over the trust funds. In exercising that discretionary authority, you as trustee must administer the trust for the beneficiary to supplement any benefits he or she receives from the SSI and Medicaid programs, or anywhere else.

Being appointed and serving as a Trustee is a very serious undertaking. Every Trustee is held to a high standard of performance, considerably higher than the performance acceptable for one's own affairs. One who holds property for another is considered a fiduciary. Every Trustee is a fiduciary and every Trustee has certain duties which must be strictly respected. Those duties include:

1. Duty to carry out the terms of the trust agreement.
2. Duty of loyalty to the beneficiary.
3. Duty to act and invest prudently.
4. Duty to not delegate Trustee responsibility.
5. Duty to maintain book and records and keep the beneficiaries reasonably informed of the trust administration.

Perhaps the most significant duty of a Trustee is that of undivided loyalty to the beneficiary. The Trustee must administer the trust solely in the best interests of the beneficiary and exclude from consideration his or her own advantage and the welfare of any other person. Because the Trustee is in a position of such intimacy with the beneficiary and has such control over their property, a Trustee is held to a higher standard than would prevail in an ordinary business transaction.

It is important to understand that if you do not carry out the Trustee duties with diligence, you can be personally responsible to the beneficiary and have to pay back any damages that result from your actions.

Assuring that public benefits are maintained can be tricky because it requires that you know and respect the rather complicated eligibility rules. If you don't satisfy these rules, you can cause the beneficiary to lose some or all of his or her public benefits, and then you are not carrying out the terms of the trust, which is duty #1. This memorandum explains how these basic rules apply to you so that you can

better carry out the purpose of the trust and perform your duties as Trustee properly. That way, you will be able to avoid the loss of needed benefits and any reason to remove you as Trustee.

Please note that if you are also the beneficiary's Conservator or Payee, you have additional legal obligations as a result of those other roles. You **MUST** keep these roles and the FUNDS SEPARATE. The trust funds and benefits payments cannot be commingled or mixed together. For example, if you have been designated as the Representative Payee for the beneficiary and receive his or her SSI check, you must not commingle the SSI funds with the assets that are part of the trust -- and both must be kept totally separate from your own assets.

### ***B. Trustee Agenda***

To help you make decisions about purchasing goods or services for the beneficiary, you should start with the "wish list" you had in mind when the trust was initially established. You should also ask the beneficiary and those who know him or her well to tell you what he or she wants, especially items he or she does not have now and would be beneficial. This "wish list" is the starting point for developing an agenda.

Then, working with the beneficiary and keeping in mind the rules described below, you should decide which items, if any, you want to pay for out of the income and principal in the trust. You should also consider obtaining information from the beneficiary's school records or life care plan, if one has been developed. Another helpful source is the annual evaluation which may be requested, but not required in the trust agreement itself.

For example, if we assume your beneficiary is Jason, the trust agreement may provide:

#### Annual Evaluation.

The Trustee or an agent is requested (but not required) to arrange for an annual evaluation of Jason addressed to the following topics:

1. His physical condition, rehabilitation and training programs.
2. Recreational leisure time and social needs and appropriateness of existing program services.
3. Laws and administrative practices relating to various governmental financial assistance and private contractual benefit programs, since unless Jason has a reasonable chance of earning sufficient income to support himself, it is essential that these benefits be secured.
4. Legal rights, treatment in accord with his needs, payment of a fair wage for work performed, the right to vote and to marry.

The annual evaluation should be based on individual contacts with Jason, his social worker (if any), his family and other individuals who are in regular contact with him, including his service providers. Information in the evaluation shall be shared with any Guardian who is or may be appointed for Jason.

Since the Trustee is encouraged to employ professionals to assist in the administration of the trust, you should consider hiring a care manager or other

qualified person to prepare an annual assessment of the beneficiary's needs to be reviewed by the Trustee. The report should include both assessment of the beneficiary's current needs and recommendations for maximizing his or her quality of life.

## **II. Administering the Trust**

This section describes the rules about distributions: how and when to make payments from the trust. To do this properly, you need to have some knowledge of the SSI rules on assets and income. Then, using these rules and the results of the assessment, you can see how and when to make payments from the trust that will maximize the quality of your beneficiary's life and also maintain eligibility.

### **A. SSI Guidelines—Trusts**

The SSA Program Circular advises employees at the local offices that "Trusts are often used to set aside and protect property and funds for the security and maintenance of a person."

The SSA rules have always provided that trust principal would not be considered a resource to an individual who has no power to revoke the trust and use the principal for his or her own support or maintenance. The Program Operations Manual (also called POMS) notes: "Revocability of a trust depends on the terms of the trust agreement and/or on state law. If a trust is irrevocable, the trust principal is not anyone's resource."

Your trust is or should be irrevocable. This determination is usually made by the caseworker in the Social Security Administration office who reviews the trust.

Next, you need to know about the different rules SSI has for "income" and "resources." Even if a trust is irrevocable and not considered as a resource, disbursements from the trust can be considered as income. So, you want to have some understanding of the "income" and "resource" rules because they can make a big difference in the beneficiary's eligibility and benefit levels.

### **B. SSI Guidelines—Assets**

#### *(1) Countable Resources*

Generally, a countable resource is any asset counted by SSI rules to determine eligibility. Thus, a resource is often called a "countable asset." It could be tangible, like a second car, or it could be intangible, like a savings account. A SSI recipient is allowed to have only \$2,000 or less in resources. If resources exceed \$2,000 during any calendar month, even by a few cents, the beneficiary's SSI benefits may be terminated because of excess resources.

#### *(2) Excluded Resources*

The beneficiary is allowed to have certain exempt assets. These exempt assets are not counted in determining eligibility, and the beneficiary's ownership of them will not jeopardize his or her SSI benefits. Therefore, you may freely purchase exempt

assets for the beneficiary and give them to the beneficiary (except food and shelter, as explained below). You should definitely *not* give the beneficiary the money to purchase exempt assets himself or herself. Payments of money are always considered income. Examples of assets which are specifically exempt under SSI regulations:

- A home, including adjacent land, if the beneficiary lives in it or intends to return to it.
- Household goods (furniture, furnishings, household equipment, household supplies), and personal effects (toiletries, items of personal care and education, clothing, and jewelry).
- One motor vehicle.
- Life insurance with cash surrender value, if its face value is less than \$1,500, and all term life insurance.
- A burial plot, or other burial space, worth any amount.
- A revocable burial fund, worth up to \$1,500.

Additionally, there are a number of common and useful items which are not specifically mentioned as exempt in the SSI regulations, but are not counted because they are included among "personal effects" or are services. These include:

- Recreational equipment, games, and crafts,
- Books and magazines,
- Telephone, answering machine,
- Television, radio, and cable service
- Musical instruments and stereo,
- Travel and education,
- Recreation and entertainment,
- Some home maintenance, such as gardening.

### ***C. SSI Guidelines—Income***

As you already know, even if the trust principal is not a resource, disbursements from the trust may be considered "income," depending on the nature of the disbursements. Income that is received during the month is considered income throughout the calendar month of receipt, even if it is deposited in a bank account. If it is still in the account, it becomes a resource in the next month, and is then subject to resource rules.

The SSI income rules can be rather complicated, but you should know that distributions you decide to make from the trust will be considered in one of these three categories:

#### ***(1) Direct Income to the Beneficiary***

Any cash or money you give to the beneficiary will immediately be considered as direct income to the beneficiary, and will reduce his or her SSI benefits on a dollar-for-dollar basis. As a result, you should avoid making cash payments to the beneficiary, since there will be no advantage from doing so. In fact, if your actions reduce the beneficiary's SSI benefits to zero, then both the beneficiary's SSI and Medicaid benefits will be jeopardized, because the Medicaid benefits are derived from SSI eligibility. In addition, SSI rules say that if you give the beneficiary anything that

is equivalent to or convertible to cash or (for example: postage stamps, or a winning lottery ticket), it will be also counted as direct income.

### *(2) Not Income*

These are distributions made by the Trustee to a third party (someone other than the beneficiary) which result in the beneficiary receiving items that are not food, clothing or shelter. Examples of distributions that are not income for SSI purposes are payments made to a provider of medical or social services for care rendered to the beneficiary. Furthermore, bills you pay for the beneficiary to receive services are not income to the beneficiary. However, if the beneficiary receives any asset as a result of your paying the bill, the value he or she receives is counted under the "in-kind income" rules discussed next.

### *(3) In-Kind Income*

In general, in-kind income exists when you give the beneficiary something other than money. In most cases, it is safe to provide such income to the beneficiary. The reason is that the value of any non-cash item (other than food or shelter) is not counted as income if the item will become an exempt asset when it is retained into the following month. This type of distribution is allowable in-kind income.

As a result, you may give the beneficiary most of the exempt assets mentioned above (such as books, furniture, or recreational equipment). For example, if you give the beneficiary a television, it will not be counted as income. The reason is that it would be an exempt household item if retained into the following month.

There are three ways that you can distribute allowable in-kind income.

1. The safest way is to distribute these services or goods directly to the beneficiary personally. In other words, you can buy the television and deliver it to the beneficiary.
2. Alternatively, you also may make a direct payment to a provider (such as an appliance store), who then in turn provides the goods or services to the beneficiary.
3. Third, you can give the beneficiary the right to obtain the goods and services (e.g., a voucher). This last method may be risky, however, if he or she can convert the voucher into cash, as it would be considered a cash equivalent, like a winning lottery ticket. When you give the beneficiary any right to receive services or goods it should always be non-transferable and non-refundable.

One safe way to use the voucher approach is to buy the voucher with a credit card you hold as trustee. Then, any refund would be credited to the trust rather than to the beneficiary. As a result, the beneficiary can show that he or she cannot refund the item to obtain cash.

Of course, you may also pay for the beneficiary to receive services such as telephone, alternative health massage therapy, or a non-refundable airplane ticket.

None of these will be counted against the beneficiary's SSI benefits, because there is no way to convert them into cash.

#### *(4) In-Kind Support or Maintenance (ISM)*

If the beneficiary receives food or shelter as a result of payments by the Trustee to other persons, then the beneficiary will have income in the form of in-kind support and maintenance (ISM). This is why the Trustee is directed to exercise his or her discretion under the trust agreement to make distributions which will supplement (i.e. additional or extra items) and not provide for the beneficiary's basic needs.

In many cases, however, the Trustee also has authority to make decisions which are in the best interest of the beneficiary. That may require examining carefully how the rules regarding in-kind support and maintenance will be applied. Problems can arise when in-kind income consists of food or shelter or other goods and services that the Social Security Administration regards as "support." The beneficiary's SSI benefits will be reduced or eliminated if he or she receives ISM.

The theory is that since SSI benefits are specifically intended to pay for a person's food and shelter, if that person receives those goods or services from another source, then less SSI benefits are needed. As a result, if you pay the beneficiary's rent, grocery bills, or meals (for example, a restaurant meal) for the beneficiary, you would be providing ISM to the beneficiary. In theory, you are then also reducing his or her need for SSI benefits.

There are sometimes rather fine distinctions between allowable in-kind income and countable ISM. For example, you can pay for some travel arrangements but not others -- for example, plane tickets charged to the trust credit card, but not a hotel room, because that is shelter. You can pay for some entertainment expenses but not others -- for example, a movie pass but not a restaurant meal, because that is food.

Note also that you can pay for certain medications and alternative health treatments if they are not covered by Medicaid or other benefit programs. When the trust or beneficiary purchases a home, ISM can arise in each month when the trust pays the beneficiary's mortgage payments, property taxes, insurance required by the mortgage lender, or utilities (garbage, water, gas, and electricity).

If you do give ISM to the beneficiary, his or her SSI benefits will be reduced as well, but not on a dollar-for-dollar basis, like with cash. There are two different formulas that Social Security uses to reduce the SSI benefits for a person who receives ISM. Which formula depends on the household and living arrangements of the SSI recipient. Determining which rule and how it applies can be complicated and quite detailed, like income or estate tax planning. So, if you have concerns or questions about the impact of ISM distributions from your trust on your beneficiary, you should seek the assistance of a qualified attorney.

NOTE: The SSA rules regarding conservatorships (or guardianships, as they are called in some states) take a completely different approach. Those rules consider funds in a conservatorship as available for an individual's support and maintenance. It is therefore important to administer the trust properly and consider the

consequences of placing assets in a conservatorship for the beneficiary.

#### ***D. Record-Keeping***

In order to be sure that your distributions fall into the desired category, you must maintain very accurate records. The records are most accurate if done timely, for example, on a monthly basis, with an annual review in preparation for the accounting and filing income tax returns. These records will be needed if Social Security or the Department of Human Services wants verification of the expenditures you have made.

The director of the United States Centers for Medicare & Medicaid Services, charged by Congress to implement the Medicaid programs, has advised all State Medicaid Directors on how to treat Medicaid payback trusts. That memo indicated that States have the right to "monitor distributions from the trusts to be sure the funds are used for the benefit of the disabled person." Such a demand for verification of trust disbursements is therefore likely, and you should expect it. You must also be responsive to requests for information from DHS regarding the trust and expenditures from the trust.

### **III. Reporting Requirements**

#### ***A. SSI Guidelines***

The SSI program requires periodic reports for all SSI recipients. These reports must be completed for eligibility to continue. The Representative Payee (you or the beneficiary, if you are acting for him/her) must report the existence of your Supplemental Needs Trust to SSA, and provide a copy of it if requested. In addition, you or the beneficiary must report all of the following:

A change in: the beneficiary's address, or employment status, in his or her living arrangements (for example, relocating, adding or losing a roommate), a change in his or her income (including the receipt of any direct or ISM from you), a change in any (countable) resources, new eligibility for other public benefits, or a change in health insurance coverage, medical improvements (if, for example, the beneficiary improves so much that he or she no longer is considered disabled), a change in the beneficiary's marital status, admission to or discharge from any health facility or public facility, such as a hospital or nursing home, or any trip outside the U.S.

The report may be brief, but it should be in writing to the Social Security Administration, and it should include the beneficiary's name and Social Security number, your name, and a description of the event that triggered the report and the date it happened. The report is due within 10 days after the end of the month in which the event occurred. Keep a copy of all reports filed with the SSA.

Should you fail to make a required report in a timely fashion, the SSI program is entitled to reimbursement for all SSI benefits incorrectly paid to the beneficiary. In addition, for each report that is filed late SSI is entitled to assess a penalty of up to \$100, depending on how late the report is.

You may be in doubt sometimes about what to report. As a practical matter it is

safer to report and explain a distribution to the beneficiary currently than to be discovered later by SSI's Income and Eligibility Verification System (IEVS). At that point, the explanation then will have to be made to a skeptical investigations unit.

### ***B. Protecting Benefits—Appeal from Adverse Actions***

In administering the trust, you must pay attention to any notice regarding change of benefits and keep reasonably informed of new developments. If SSI or Medicaid notifies you or the beneficiary that it intends to reduce or eliminate the beneficiary's benefits, you should appeal in writing, *within 10 days*. If you act quickly, the SSI and Medicaid benefits will continue and not be suspended during the appeal. Although you are allowed up to 60 days to appeal an SSI decision, and 90 days to appeal a Medicaid decision, asking for an appeal after 10 days have passed will result in the loss of the SSI and Medicaid benefits while you await the results of the appeal.

You must also stay informed about changes in the beneficiary's benefits in order to make intelligent decisions as trustee of the trust. Failure to learn about a change in benefits can have catastrophic results. Although SSI is a federal program run by the Social Security Administration, the federal contribution is only a portion. Make sure the SSI and Medicaid programs have your address, in addition to the beneficiary's address, and request that you receive copies of all communications affecting the beneficiary's benefits. Be sure to keep copies of all correspondence from each benefit agency. This will help in determining the applicable rules on eligibility, reporting, and appeals.

**Note:** Much of this material is taken from a presentation by Mary Schmitt-Smith to the National Academy of Elder Law Attorneys. It is intended as a very general guideline only to help individuals who have been named trustee of a supplemental needs trust understand what their responsibilities are. This article is not a substitute for qualified legal advice. SSI and Medicaid laws and regulations and interpretations of them change regularly, and vary from state to state. This article therefore should not be relied on as an authoritative statement of the law on the administration of supplemental needs trusts.