Sheltering Resources & Income: Pooled Special Needs Trusts (and ABLE Accounts)

Jacquelyn E. Connell, Esquire
Director of Legal and Trust Administration Services
Achieva Family Trust

412-995-5000 x 452

jconnell@achieva.info

Agenda

Topics to Cover:

1. First-Party Pooled Trusts to Shelter Resources
2. First-Party Pooled Trusts to Shelter Income
3. Pooled Trusts v. Payback Trusts
4. ABLE Accounts + Pooled Trusts

Why Pooled Special Needs Trust? Needs-Based Government Benefits

- ***Supplemental Security Income (SSI)***
  - Needs-Based (Chronic Disability & Low-Income)
  - Cap of $794/month benefit for individual in 2021
  - Asset Limit - $2000
  - *Linked to Medicaid*
- ***Medicaid***
  - Needs Based (Disability and Low-Income)
  - Insurance - $2000 Asset Limit (Medical and Prescriptions/Medicare supplement)
  - Waiver Services/LTC - $8000 Asset Limit (Residential, attendant care, respite, day program, therapies)

42 U.S. Code § 1396p(d)(4)

(A) A trust containing the assets of an individual under age 65 who is disabled and which is established for the benefit of such individual by the individual, 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 subchapter (First Party Payback Special Needs Trust);

(B) A trust established in a State for the benefit of an individual if—(i)the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust) (Miller Trust) and (ii) amount in trust at death goes back to state Medicaid plan;

(C) A trust containing the assets of an individual who is disabled 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 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 subchapter.**

PSNT Mechanics: Who Can Settle?

Grantor/Settlor: ***the individual with the disability, a parent, grandparent, guardian, agent under POA, or the Court***

- **Does agent under POA have authority to establish a trust for the benefit of the principal/authority to take necessary steps to preserve benefits?**
- **POA document or guardianship papers required to show authority to open the PSNT**
- **Court order is last resort option where there is no available grantor**

PSNT Mechanics: Beneficiary and Trustee Requirements

Beneficiary Requirement: ***Must be disabled as defined by SSA and should be under the age of 65***

- PA courts and DHS have held that transfers into a PSNT by an individual with a disability age 65 or older are transfers for less than fair market value that can be penalized within the five-year look back period
- ABLE as an option?

Trustee: ***Must be administered by a non-profit***

- No co-trustees are permitted

PSNT Mechanics: Funding

Trust Corpus/Funding the Trust

- **Generally funded by the monies belonging to the individual beneficiary.**

  ***Examples**: settlements, direct inheritances, SSD back pay*
- **There is no limit to the amount that can be placed into a pooled trust.**
- **Third party money can be added to a pooled trust, but generally long- term planning for inheritances should be done through a third party trust**
- **Funds are pooled for investment purposes, but each account is administered individually.**
- **Typically, only small deposits are required to establish the account.**

PSNT Mechanics: Drafting/Setup

Drafting

- **Standard form documents allow accounts to be created quickly and cost-effectively**
- **Governed by master trust document, so no separate trust document is required**
- **Master Trust approved by DHS and SSA**
- **Pooled trusts are irrevocable**

PSNT Mechanics: Distributions

Distributions

- **Must be made for the sole benefit of the beneficiary**
- **SSI rules apply with regard to shelter costs**
- **When making distribution decisions, trustee will consider amount in Trust, an individual's benefits, and budget.**
- **Trustee has sole discretion.**

PSNT Mechanics: Remainder Funds

Remaining Funds

- **42 U.S.C. § 1396p(d)(4)(c) requires pooled trust funds to be paid back to Medical Assistance "to the extent that funds remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust."**

- **Under P.S. § 1414(b)(iii), PA attempted to limit nonprofits to retaining only 50% of remaining funds. In Lewis v. Alexander, 685 F.3d 325 (3rd Cir. 2012), the United States Court of Appeals for the Third Circuit held this limit to be invalid, and the federal law allowing 100% retention remains controlling.**

PSNT Mechanics: Remainder Funds

Remaining Funds

- **There are various ways that pooled trusts company can handle remainder funds**
- **To appeal to a broader client base, some trustees will pay back DHS and distribute remaining funds to family members, similar to a pay back trust, retaining nothing. Other trustees, have a hybrid approach that includes, pay back, retention, and money to family members. Others retain 100% of the funds.**
- **Attorneys should discuss the different trustee options with clients to determine which trust option and trustee is right for them based on the source of funds, goals, and the amount of money funding the trust.**

Charitable Residual Program

- In alignment with its non-profit mission, at AFT, money retained at the death of a pooled trust beneficiary is used for charitable grants for the benefit of children and adults with disabilities in the state of Pennsylvania.
- Grant applicants "join" the Pooled Trust in order to be eligible beneficiaries of the grant program, but need not have a trust account prior to the application.
- Funds have been distributed for items such as camps, medical equipment, home and vehicle adaptations and recreational activities that are not covered by other sources of funding.
- Since its inception, AFT has distributed more than $8 million in charitable grants.
- Applications are available online at: achievafamilytrust.org

Pooled Trust or Payback Trust?

Things To Consider:

- **How much money is funding the trust?**
- **How old is the beneficiary?**
- **What are the needs of the beneficiary?**
- **What benefits does the beneficiary receive?**
- **What is the intention for remainder funds?**

Pooled Trust or Payback Trust?

Pooled Trusts:

- Can be established by beneficiary, parent, grandparent, guardian, agent under POA, or court
- Protects an individual's eligibility for government benefits
- Standard form Joinder agreements governed by Master Trusts serve as trust document
- Trustee must be a non-profit corporation
- Trust funds must be used for sole benefit of the beneficiary
- Remainder funds may be retained, paid back to DHS with funds remaining to family, or hybrid of those

Payback Trusts:

- Can be established by beneficiary, parent, grandparent, guardian, agent under POA, or court
- Protects an individual's eligibility for government benefits
- Trust document must be drafted by an attorney and approved by DHS
- Can have an individual or corporate trustee, or both
- Trust funds must be used for sole benefit of the beneficiary
- Remainder funds must first pay back DHS and then can be directed to remainder beneficiaries

PSNT: Sheltering Income

Background

- Miller Trusts (named after the landmark case Miller v. Ibarra, 746 F. Supp. 19 (D. Colo. 1990)) or d(4)(B) trusts, are recognized in some states. These allow individuals who are over the monthly income limit for long-term care services paid by Medicaid (nursing services and Home and Community Based Waiver Services) to place their excess income into an irrevocable trust and, if properly set up, the income is disregarded for eligibility purposes by Medicaid.
- Miller Trusts *are not* recognized in Pennsylvania. PA is a medically-needy only state (MNO), where individuals must spend down their excess income on medical expenses to a set limit ($425.00 in 2021) before the individual will be eligible for long-term care services through Medicaid. This is not as much of an issue for individuals living in facilities where basic needs are covered, but problematic for individuals attempting to remain in the community.
- Spending down to the MNO limit does not leave sufficient income for the individual to live and spend for day-to-day needs such as shelter and food.

PSNT: Sheltering Income

Background

- **On a public policy basis, in 2019, PA Department of Human Services (DHS) began allowing individuals who are less than $500.00 over the monthly Home and Community Based Services (HCBS) income limit ($2,382.00 in 2021) to shelter their excess income in a pooled trust at AFT, regardless of their age.**
- **Transfers of $500.00 or less made monthly for less than fair market value have been historically disregarded by PA DHS in terms of an individual's eligibility for long term care services.**
- **This created an opportunity for people who are minimally over income to become eligible for HCBS and stay in their homes instead of having to go to a nursing facility.**
- **The individual must be otherwise eligible for services (meet medical assessment and asset requirements), and the income spend down option is one of last resort. Where income can be otherwise assigned or converted into an asset and spent down, the client must do so.**

PSNT: Sheltering Income

Spend Down Rules for CHC Waiver

- **Individuals over age 65 seeking to be approved for a Community Health Choices (CHC) Waiver must place their excess income into the trust on a monthly basis. The trust must then spend that excess income down monthly on unreimbursed medical expenses.**
- **Medical expenses can include co-pays, medications, over the counter medical supplies, incontinence products, medical equipment, paying family members for caregiving not covered by Waiver, etc.**
- **Individuals under age 65 seeking to be approved for CHC Waiver do not have to spend down on unreimbursed medical expenses. Contributions made to the pooled trust can be used on supplemental needs as described previously.**

PSNT: Sheltering Income

Spend Down Rules for LIFE Participants

- Individuals over age 65 seeking to be approved for participation in the LIFE program must also place their excess income into the trust monthly, but the spend down process differs. DHS contends that there are no unreimbursed medical expenses for LIFE participants, and therefore argues the client cannot properly spend down the money on a monthly basis.
- At the outset of the program, the only spend down option that DHS would accept was private paying for a month of LIFE services, either directly to the LIFE program, or reimbursing a family member for paying for a month.
- This was a lot to ask of family, as well as the LIFE program, and ultimately DHS was not comfortable with this as an option either.
- DHS counsel worked with its policy department to come up with a solution for the LIFE participants.

PSNT: Sheltering Income

Spend Down Rules for LIFE Participants

- **LIFE participants now must spend down their monthly excess income placed in the trust as "prepayments prior to death" to DHS – Third Party Liability division.**
- **Prepayments prior to death have always been a method of spending down funds for people trying to qualify for long term care services paid through Medicaid.**
- **Individuals under age 65 seeking to be approved for the LIFE program do not have to spend down on unreimbursed medical expenses. Contributions made to the pooled trust can be used on supplemental needs as described previously.**

PSNT: Sheltering Income

Trust Documents

- Standard form Joinder and Joinder Addendum must be completed to join the pooled trust (see previous discussion regarding Joinder).
- The Addendum sets out the excess income amount, and also that the money must be forwarded to the Trust and spent down monthly on unreimbursed medical expenses (Note discussion of spend down for LIFE).
    - Addendum not required for people under 65, but one needs to be completed when the client reaches age 65, if still enrolled in the Trust.
- The same class of people can establish the trust, including the beneficiary either individually or by and through an agent under POA or a legal guardian.
- Proof of income must be forwarded with the Trust documents.

PSNT: Sheltering Income

Trust Funding

- **The documents are forwarded to AFT for review and execution.**
- **The client must also forward one month of excess income to open and fund the Trust. This is a DHS requirement, which effectively starts the income sheltering process.**
- **The initial amount required to fund the trust is $150.00 ($100.00 opening balance and $50.00 annual fee).**
- **Note that AFT has reduced its minimum to open a trust for these accounts to $100.00, and also charges a minimal fee.**

PSNT: Sheltering Income

Approval

- Trustee forwards trust documents and proof of account to DHS Legal Counsel for review. DHS Counsel is only accepting trust documents from AFT at this time to ensure the trust has been properly open and funded before review.
- DHS Counsel reviews the documents and will make a recommendation to the local County Assistance Office (CAO) regarding approval.
- The CAO makes the decision, DHS Counsel just advises.
- If approved, the CAO will generate a new PA-162 showing the individual is eligible for HCBS, as well as the date of eligibility.

PSNT: Sheltering Income

Trust Administration

- **Trust staff works directly with the beneficiary or family member on assuring the monthly income is sent to the trust monthly in a timely fashion**
- **Trust staff also assists the family with paperwork and documentation needed to spend down the excess income monthly on unreimbursed medical expenses.**
- **DHS requests trust accounting annually as part of the renewal process.**

ABLE Accounts

Background

- The ABLE Act was signed into law by President Obama on December 19, 2014.
- Created a new provision under Section 529 of the IRS Code establishing ABLE accounts, which allow individuals with a disability to save for qualified disability related expenses, much like a traditional 529 plan allows for saving for education-related expenses.
- The Pennsylvania ABLE Savings Program is administered by the PA Treasury Department:

PAAble.gov or 855-529-2253

ABLE Accounts

The Basics

- **Beneficiary is the account owner, but authorized signers can be added to the account.**
- **Beneficiary must be disabled, and the onset of that disability must have been before age 26.**
- **Contributions are limited to $15,000 per year from all sources.**
- **SSI recipients can save up to $100,000 without SSI being affected.**
- **Remainder funds can be transferred to a disabled sibling or beneficiary's estate.**

ABLE Accounts

Qualified Disability Expenses

Monies can be spent on Qualified Disability Expenses including:

- Education
- Housing***
- Transportation
- Employment training and support
- Assistive technology and personal support services
- Health, prevention, and wellness
- Financial management, administrative services, legal fees
- Basic living expenses***
- Funeral and burial expenses

****** NOTE: SSA will not deem payments out of an ABLE account as ISM. An account owner can pay for shelter costs out of the ABLE account without getting an SSI reduction, unlike with SNTs. ****

ABLE Accounts

What's New with ABLE?

- **Transfers from 529 College Savings Plans to 529a ABLE Accounts**
- **ABLE To Work allows an individual to save more than $15k per year - an additional amount up to the federal poverty limit ($12,880 for one person in 2021) - provided they are not participating in a work-sponsored pension program**
- **In 2020, the IRS clarified who can establish an ABLE account, and in what order, on behalf of the individual in the event the individual cannot, and the order now includes rep payees.**

QUESTIONS?

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