Attorney Sharon L. Pope
DILLMAN & POPE, ATTORNEYS AT LAW
1160 SILAS DEANE HWY.
WETHERSFIELD, CT. 06109
860-563-4070; SPOPE@CTSENIORLAW.COM

OBRA '93 MEDICAID TRUSTS FOR PERSONS WITH disABILITIES

Background information; the way it used to be.....

The Laws: Federal and State

I. Federal Law: **Self-funded Trusts vs. Third party trusts (or other people's money)**

A. Past provision: the History *

1. Medicaid Qualifying Trusts, the earlier statute, 42 U.S.C.§1396a (k), declared certain inter-vivos (established during your lifetime, not thru your will)) trusts established by an applicant or the applicant's spouse to be "Medicaid Qualifying Trusts". These trusts typically gave trustees discretion as to whether or not payments could be made to the Grantor or spouse, in order to preserve trust assets for the remaindermen, usually other family members.

2. Congress had a strong dislike of these trusts and tried to eliminate this Medicaid planning tool by deeming available to the beneficiary the maximum amount that a trustee *could* distribute from such a trust.

***my thanks to Attorney Deb Tedford for an earlier article on the history.**

B. The Standard Rule.

For non-testamentary inter-vivos trusts, (trusts established "other than by Will"), if there are **any** circumstances under which payment *could* be made to or on behalf of an individual, that portion of the trust that could be paid out shall be treated as "available" to the individual.

1. **Exception:** Prior to OBRA 1993, inter-vivos "income-only" trusts established by an individual outside the look-back period.

2. **Exclusions** that do not necessarily preclude Medicaid eligibility:
   a. Testamentary trusts,§1396p(d)(2)(A); presumably these are considered third party trusts since the applicant did not establish the trust.

b. Inter-vivos trusts established by third persons with their own funds or funds of anyone other than the applicant. These are "Other People's Money" Trusts sometimes called, "Stand-Alone trusts".

c. Three other special kinds of inter-vivos, irrevocable trusts delineated by the statute itself. These are now called O.B.R.A. '93 trusts or payback trusts.

Current Provision. As part of O.B.R.A. 1993, Congress again looked at this issue and repealed 42 U.S.C. §1396a(k), replacing it with 42 U.S.C. §1396p(d). The act applies to trusts funded with the applicant's or applicant's spouse's money, not other people's money.

The way it is now....

Under OBRA "93 each of these types of trusts are designed to be established as a means of protecting the beneficiary's assets/entitlements. **The corpus of these trusts are deemed non-countable or unavailable to the beneficiary of the trust for Medicaid purposes and for some other programs, such as SSI.**

II OBRA '93 Types of trusts, "Special or Supplemental Needs", **(A),(B), and (C).**

A. Even though, OBRA '93 legislation made it far more difficult to utilize certain types of trusts, Congress, in recognition of the particularly difficult circumstances of many disabled individuals, made the following exceptions for disabled parties under 42 U.S.C. §1396p(d)(4):

1. Trusts established for disabled persons under the age of sixty-five (65) 42 U.S.C.§1396p(d)(4)**(A),**
2. Income assignment trusts, sometimes referred to as "Miller Trusts" 42 U.S.C. §1396p(d)(4)**(B),**
3. Trusts established for disabled persons of any age with a non-profit association as trustee. 42 U.S.C. §1396(d)(4)**(C).**

B. Under OBRA '93 each of these types of trusts are designed to be established as a means of protecting the beneficiary's assets and entitlements.

C. Under 42 U.S.C.§1396p(d)(4)**(A)**, Congress provided that trusts for a disabled individual may be implemented subject to the following requirements:

1. The trust must contain assets of the disabled individual, i.e. self-funded, typically from a personal injury settlement, or inheritance, or divorce.
2. The individual must be considered disabled according to criteria under

the Federal Supplemental Security Income ("SSI") program. If the individual does not have SSDI or SSI, consider using DSS's W-300 series to determine disability.

3. The trust must be established for the benefit of such individual by that individual's parent, grandparent, legal guardian, or a court.
4. The individual must be under the age of sixty-five(65) years.
5. Upon the death of the individual, the state shall have the right to recoup from the remaining assets of the trust an amount equal to the Medicaid benefits that it had paid on behalf of the disabled party during his or her lifetime.

D. Under 42 U.S.C. §1396p(d)(4)**(B)** Congress provided for "income only" trusts, referred to as Miller trusts named as a result of , Miller v. Ibarra , 746 F.Supp. 19 (D.Colo. 1990). These trusts are designed to shelter the excess income in "income cap" states so if a nursing home Medicaid applicant's income exceeds the income cap, the excess is placed in a Miller trust.

1. The excess income captured by these trusts must be repaid to the applicable state or states on the individual's death, up to the maximum equal to the total medical assistance paid.
2. Connecticut, a medically needy state, does not recognize Miller trusts, but does permit excess income to be diverted to a Type **A** trust (under age 65) or a Type **C** trust (65 years or better) in Federal Waiver home care cases.

E. Under 42 U.S.C. §1396p(d)(4)**(C)** Congress provided for a Pooled Fund Trust for disabled persons of **any age**. PLAN of Connecticut has such a pooled trust. (PLAN is the only non-profit in Connecticut to have such a pooled trust: www.PLANofCT.org 860-523-4951.)

1. The trust is established and managed by a non-profit association;
2. Separate account is maintained for each disabled beneficiary;
3. All accounts are pooled for purposes of investment and management.
4. Accounts are for the exclusive benefit of the disabled beneficiary;
5. Upon death of beneficiary, amounts remaining in account must be either retained by the Pooled Fund Trust for other disabled beneficiaries, or dedicated to repaying State for all medical assistance (Title XIX benefits) to the beneficiary, to the extent of trust funds available.

III. State Law: State of Connecticut's UPM- relevant sections re: **Transfers**.

There are transfers which are exempt from transfer rules and are not disqualifying events; here are two common examples:

1. An individual or his or her spouse may transfer his or her **home** without penalty to his or her:
   a. Spouse; or
   b. Child under age 21; or
   c. Child of any age if the child is considered to be blind or disabled under criteria for SSI eligibility; or
   d. Sibling, if the sibling:
      (1) has an equity interest in the home; and
      (2) was residing there for a period of at least one year before the date the individual is institutionalized; or
   e. Son or daughter, other than the one described in subparagraph b. and c, who:
      (1) was residing in the home for a period of at least two years immediately before the date the individual is institutionalized; and
      (2) provided care to the individual which avoided the need of institutionalizing him or her during those two years.

Connecticut Department of Social Services, Uniform Policy Manual, §3028.10

2. An individual or his or her spouse may transfer **any asset** without penalty to:

   a. His or her child who is considered to be blind or disabled under the criteria for SSI eligibility; or

   b. A trust, including a trust described at 4030.80 G, established for the sole benefit of his or her child who is considered to be blind or disabled under criteria for SSI eligibility. (This is a Special Needs Trusts, discussed later)

Connecticut Department of Social Services, Uniform Policy Manual, §3028.10.

IV. The application of Special Needs Trust law to the Medicaid waiver programs.

A Special Needs Trusts may be your solution. This section addresses how the PCA* and ABI** waiver programs (both home care programs for the disabled under 65) and the Special Needs Trusts can work together to stay at home. In addition this article will discuss special needs trusts for the 65 plus client.

How can these special needs trusts, hereinafter referred to as SNT's, help your client stay home if the individual is either over the income or the asset limits? This trust is a tremendous tool for the disabled individuals who want to live more independently and who qualify for one of the home care programs.

Under 65, but over income or assets for the PCA or ABI/TBI homecare waivers:

Over-income limit of $1,809 for 2006 ?

Case example:

Consider the 40 year-old woman with multiple sclerosis who has a minor son and a husband. She was gainfully employed for many years but is no longer able to work. She is now receiving home care through the Medicaid PCA-waiver program, after the couple spent down half of their assets; the husband now has $40,000 and his wife $1,600. She has been receiving $1,650.00 SSDI (Social Security Disability Insurance) monthly. Suddenly, she receives a letter stating her Social Security Disability payments will increase to $1,863.50, gross, a month due to an error in the original calculation. Now she is over-income for the home care program, yet she qualifies functionally and could not stay home without this assistance. She will have to go to a long-term care facility without the home health care in place. Her SSDI is inadequate to support private pay home health assistance. Her husband is gainfully employed, however his income barely covers their current expenses for shelter, food, utilities, etc. His income does not count toward her income cap.

Over-asset limit of $1,600 ?

Case example:

A serious accident occurs and the 30-year old divorced father suffers a traumatic brain injury in an accident while delivering goods for his company. After an initial stay in the hospital and a much longer stay in a long-term care facility, on Medicaid, he can finally leave the long term care facility and move into an apartment on the Medicaid, ABI-waiver program. (Acquired brain injury/traumatic brain injury)

Meanwhile, his conservator has compromised and settled a claim against his former employer under workers compensation. Now, he is over asset by $150,000. If he spends this on medical care, these settlement dollars may only last another 2-3 years.

However, a transfer of this asset is not a disqualifying event under the UPM, if these dollars are placed in a special needs trust with a payback provision. Therefore, he can stay on Medicaid and receive the assistance he requires to live independently. His SNT money can now be used for his supplemental needs.

More on who can establish this trust and who can serve as trustee.

Since Federal law requires a parent, grandparent, legal guardian or court to establish the special needs trust, problems arise where you have a capable individual, yet disabled under the terms of

the law, unless a pooled trust is utilized; a pooled trust allows the individual to establish the trust, unless the individual is already conserved, in which case the conservator should petition the probate court for permission.

If there is no parent or grandparent who can establish the trust, the Probate Court's assistance is required. In this case, a voluntary conservator of the estate must be requested. The voluntary conservator is often a spouse, but any trusted person can be appointed. Remember, no bond is required in voluntary conservatorships and no finding of incapacity is required.

In some cases, there are no family members or friends who are willing or available to serve as trustees and in this case, PLAN of Ct. may be a good choice. www.PLANofCT.org or 860-523-4951. PLAN provides a variety of trustee services in addition to the pooled trust and they are a non-profit organization. PLAN may be a good choice especially if one is planning for a minor disabled child and wants to insure services as well as establish a testamentary special needs trust so the child is cared for after the parent(s) are deceased. Another example is when the client is diagnosed with a mental illness in which case family or friends would rather not be in charge of the money because they would like to stay in the supportive roles as family members or friends. Clients should be counseled regarding the careful and thoughtful selection of a trustee.

V. Recovery for Past Aid and Assistance

A. Medicaid Recovery.

1. Trusts are often established in connection with settlements of personal injury actions or workers compensation settlements. However, under federal law, such trusts are not restricted to utilization in planning with personal injury actions, but have the potential, for instance, to be utilized in connection with various forms of planning, including inheritance, or divorce.

2. Generally speaking, 100% of the accident-related medical expenses are required to be repaid out of the net personal injury settlement of a **Medicaid recipient**. 42 U.S.C. §1396a(25)(B); C.G.S.§17b-265.

*This can be a substantial portion of the recovery and a disincentive to pursuing a recovery, however, Connecticut has an incentive statute which states that Connecticut's claim shall be a lien against the **net proceeds** (my emphasis) in the amount of assistance paid or fifty per cent, whichever is less, for repayment. C.G.S. §17b-94. Furthermore, a recent Supreme Court decision limited liens to only the medical portion of the award, thus the pain and suffering, loss of work, etc. can not be included in the State's reimbursement.* *See,* Arkansas Dept. of Health and Human Services v. Ahlborn.