

Section D

Special Needs Trusts: Maintaining Medicaid Eligibility When Receiving Settlements

Abigail Hillers

Bradshaw Fowler Proctor & Fairgrave

801 Grand Avenue

Des Moines, IA

hillers.abigail@bradshawlaw.com



The following information, in printed and electronic form, can ONLY be used by the individual specifically registered with IAJ to attend IAJ's Claimants & Plaintiffs Trial Lawyer Conference or an individual member of IAJ, and SHALL NOT be disseminated, either orally or in writing, to any other individual or entity without the express written permission of IAJ.

**A Discussion on the Use of,
and Alternatives to Special Needs
Trusts in Iowa**

**For the Iowa Association for Justice
Iowa Trial Lawyers Conference
February 13, 2020**

**Presented by
Abigail M. Hillers
Bradshaw Fowler Proctor and Fairgrave, PC
Des Moines, Iowa**

OVERVIEW

In this outline, I will discuss the use planning for the elderly and disabled, especially as it pertains to maintaining government eligibility.

I. FINANCIAL NEED — BASIC ELIGIBILITY

In order to plan for a person with disabilities it is critical that the program(s) under which the person is receiving benefits are confirmed as the eligibility standards vary. This outline will not go into any great detail in identifying the different programs, but will refer to some basic eligibility standards and a process to analyze planning alternatives. It is important that you determine in which programs your client is enrolled. Appendix A provides a sample “Release” that once submitted to DHS will enable you to speak to DHS in order to confirm your client’s Medicaid enrollment.

Resource Eligibility

Some, but not all governmental programs base eligibility on financial need. Two examples of such programs are social security supplemental income (SSI) and Medicaid (Title XIX). Both utilize the methodology of the social security administration to determine countable resources and noncountable resources. Generally, a home, household goods, an automobile, health equipment, and prepaid burial accounts do not count. A special needs trust as defined by federal and Iowa statutory law is a noncountable resource. 42 USC 1396 p(d)(4)(A) and Iowa Code 633C.2.

Other assets, such as cash, investments, life insurance, and other hard assets, "count". Under both SSI and XIX, a person may have only \$2,000 in countable resources in order to satisfy resource eligibility (for most programs).

Income eligibility

Both SSDI, SSI and XIX, are financial needs based programs and have income eligibility limits, which are adjusted annually to reflect changes in the cost of living. If a person is eligible for SSDI and SSI, he or she is eligible to receive XIX benefits. If his income is greater than the SSI limit, but less than the XIX limit, he may still be eligible for XIX benefits. In 2020, the SSDI income limit is \$1,170, the SSI income limit is \$735 per month, and the XIX limit is three times this figure, or \$2,349 for nursing home/institutional care/Waiver/HCBS. The Iowa Health and Wellness program has an eligibility income cap of roughly \$1,293 per month.

The following planning worksheet may be used to help analyze the alternatives when financial need based programs are involved. This worksheet is a generalization of eligibility as there are many different programs and different eligibility requirements.

Planning worksheet

Income	Resources	Noncountable Resources
Pension, earned income	Cash, investments, retirement plans, structured settlement payments, etc	Home, household goods, health equipment, auto, and prepaid burial accounts
Social security		
SSI Eligibility \$735	SSI Eligibility \$2,000	Special Needs trusts
XIX Eligibility \$2,349	XIX Eligibility \$2,000	Medicaid qualified annuity

*

II. NON-COUNTABLE RESOURCES

Often one of the planning objectives is to attempt to use countable resources to purchase, or fund noncountable resources, including the possible creation, or funding, of a special needs trust.

Trusts.

The Special Needs Trust is a statutory creation. It was created by 1993 federal legislation, known as OBRA 1993. It was one of three trusts specifically authorized by Congress which pertain to Medicaid eligibility. The citation for the federal legislation is 42 USC 1396p(d)(4)(A), which provides:

A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) 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 subchapter.

Subsequent to the OBRA 1993 legislation, the Social Security Administration adopted identical language for a Special Needs Trust. The Social Security operating manual elaborates slightly and provides:

"The statutory exceptions from the Medicaid trusts provision effective October 1, 1993, may affect the eligibility of certain SSI beneficiaries for Medicaid. Those exceptions are applicable to:

- Trusts established for the benefit of a disabled individual under age 65 containing assets of the 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 the individual up to an amount equal to the total medical assistance paid on behalf of the individual."

SI 01730.048 *Medicaid Trusts*, available at <http://policy.ssa.gov/poms.nsf/lnx/0501730048>.

Iowa has adopted the trusts created by Congress as part of OBRA 1993. The language for the Iowa Special Needs Trust is found at Iowa Code Chapter 633C.1(7) "*Medical assistance special needs trust*" means a trust or similar legal instrument or device that meets the criteria of 42 U.S.C. § 1396p(d)(4)(A) or (C)."

Disposition of the trust income and resources is also explicitly addressed at Section 633C.2 and 633C.3 of the Iowa Code. Any expenditures over one thousand dollars (\$1,000.00) must be approved by a court.

Iowa law allows distributions from a Special Needs Trust only to cover those needs that would not exist but for the beneficiary's disability. This specifically excludes expenditures for ordinary needs, such as ordinary support and maintenance, education, and entertainment, that would exist regardless of disability. 633C.1(8). Any distributions made paying for basic needs, such as food, utilities, and rent, may be considered income to the beneficiary and may jeopardize his or her eligibility.

Allowable distributions, if related to the beneficiary's disability, from a Special Needs Trust include the following:

- Payments directly to providers of services for sole benefit of the beneficiary (such as medical equipment, supplies, or services not covered by Medicaid, and reasonable compensation of care providers, including family members, where appropriate); household services (including cable TV, internet, telephone, security alarm, yard service and maintenance, housekeepers); professional services (including attorneys, accountants, care managers, life care planners, benefits advocates, special education advocates, and investment advisors); personal care services (including dry cleaning, laundry, hairstylists, massage therapists, acupuncturists, personal attendants; counseling, and therapists).
- Quality of life expenditures such as appropriate academic or recreational courses or classes; and educational needs and supplies, and over the counter medications.
- Transportation costs including taxi or private driver, public transportation, or mileage reimbursement for medical, rehabilitation, educational or similar purposes.
- Reasonable compensation of Trustee, and allied professionals advising the Trustee such as investment manager, attorney, or accountant. Fees for the trustee must be approved by a judge.

To qualify to establish this trust, a person must be under 65 years of age, be disabled, and the trust must be established for the individual's benefit, by the beneficiary, a parent, grandparent, legal guardian, or a court. 441 IAC 75.24(3)(a).

It must be noted that the Special Needs Trust concerns self-settled trusts. Trusts established by a fiduciary or a court on behalf of an incapacitated individual have routinely been treated by the DHS as self-settled.

Further regulatory authority exists under the Iowa Administrative Code at 441 IAC 75.24 which explains treatment of trusts established after August 10, 1993.

As noted above, currently the income limit for eligibility for Title XIX is \$2,349 per month. For resources, a person may only own \$2,000 in countable resources and be eligible. To determine the amount of countable resources, one must first identify all of the noncountable resources and remove them from

consideration. Noncountable resources include a home and the land adjacent or contiguous to it, household goods and furnishings, one automobile, health equipment, prepaid and burial funds. 441 IAC 75.5(3)c.

If a person is the grantor of a revocable trust, the assets are counted for eligibility purposes. 441 IAC 75.24(2). For nonrevocable trusts, the amount distributed to the beneficiary will be considered available. 441 IAC 75.24(2)(b). In addition, if the trust was established within the five (5) year look back period, all of the corpus will be considered available. Iowa Code Section 249A.3(13). IAC 75.24(2).

As a result of these rules, persons often seek the establishment of a trust which will allow her, or him, to preserve the trust assets while also allowing her, or him to maintain eligibility for government benefits. The OBRA 1993 trusts mentioned above satisfy this goal. In addition, trusts established by third parties, or testamentary trusts (trusts established under a decedent's will) are not required to be as narrowly drawn as the OBRA 1993 trusts. IAC 75.24(1)(b). Please remember that any distribution from any trust may be considered countable for income or resource purposes and that the trust should be drafted with this concern in mind.

In addition to the Special Needs Trust described above, OBRA also created a special trust called a Pooled Trust. 42 U.S.C. p(d)(4)(C), Iowa Code § 633C.1(7). There is a key distinction between a Pooled Trust from a regular Special Needs Trust. In a pooled trust, at the death of the life beneficiary, the funds in the beneficiary's sub-account may be retained by the trust. If the funds are retained by the trust, the trust may use it for the benefit of other beneficiaries of this Pooled Trust, to provide benefits for indigent disabled persons, either by adding them as beneficiaries of the trust, or making a direct payment for such indigent person by paying for equipment, medication or other services.

Iowa has a Medicaid Trust Program. Under this program, all requests pertaining to these trusts must be submitted to the Medicaid Trust Program for review. Previously these requests would be submitted to the Iowa Department of Human Services and the Iowa Attorney General's office. This change should provide for better tracking of these trusts on behalf of the state as the Medicaid Trust Program and the Estate Recovery Program in Iowa. All trusts, after execution, must be provided to your client's caseworker or local county DHS office.

Discretionary Support Trust:

The Iowa Court of Appeals has ruled that the provisions of a testamentary trust which included discretion in the trustee to pay for the care, support, maintenance, and education of a disabled beneficiary was a support trust which could be reached in satisfaction of an enforceable claim for necessary services rendered to the beneficiary. Strojek v. Hardin County (Iowa Court of Appeals 1999) 602 NW 2d 566, 568.

The Strojek case returned to the Iowa Court of Appeals in February of 2002 to determine if payments for "vocational services" were within the discretion of the trustee as part of the beneficiary's basic needs. The Court of Appeals concluded that the trust was broader than "basic needs" as it directed the trustee, in its discretion, to provide for "*proper care, support, maintenance and education.*" The court concluded that vocational, residential and maintenance were part of proper care, support, maintenance and education of the beneficiary. As a result, the reasonable cost for vocational services, (in this instance \$34 per day for 200 days per year) were to be included as part of the beneficiary's basic care and counted for purposes of determining eligibility. Strojek v. Hardin County (Not reported in NW 2d, 2002 WL 180377 (Iowa App 2002)).

In the 2004 legislative session, the Iowa Trust Code was amended to specifically address this issue and state that in the construction of trust language that the language of the trust which is discretionary should prevail over any other interpretation of the language. Iowa Code Section 633A.4702.

In December of 2004, the Iowa Supreme Court handed down a decision in a case by the name of In the Matter of George G. Barkema (690 N.W.2d 50). This case also involved a discretionary support trust. The issue was whether the State of Iowa, under the estate recovery statute had a right to seek recovery from the trust for benefits paid by the trust, following the death of the life beneficiary of the trust. The court found, that under the language of the trust in question, Lois, the life beneficiary had the right to expect at least a minimum level of support, within the reasonable discretion of the trustee. Since she could expect, or had a right to expect such support, the Iowa Supreme Court found that her creditors could expect similar support and under the terms of this trust had the right to pursue recovery.

In March of 2009, the Iowa Supreme Court further elaborated on discretionary trusts in the Matter of the Estate of Eleanor Gist, 763 N.W.2d 561. In the Gist case, the court examined the terms of a trust to determine whether the trust would be available pursuant to the decision entered in Barkema above. The court, after careful examination of the trust, determined that it was a "discretionary" trust

with the standards, and to the extent that the standards were enforceable, there was an interest in trust which was subject to the estate recovery.

The recent Iowa Court of Appeals decision in recent case of Kinsel (February 10, 2010), 2010 WL 446551 confirmed the rule of Barkema and Gist that the beneficiary of a discretionary trust had an "interest in trust" subject to an estate recovery claim under Iowa Code Section 249A.5.

Also it is worthy of note that there was a recent case in the 10th Circuit concerning special needs trusts and whether or not it might be treated as a resource which counts in determining eligibility. In that case, there was a special needs trust which appeared to be properly drafted but the problem occurred with the administration of the trust. As it turned out, the trust was administered in a fashion that allowed expenditures and made expenditures for routine things such as home furnishings, home maintenance and life insurance on a parent of the beneficiary. Since these were not special needs, it was determined that the trust had not been administered "for the sole benefit" of the disabled individual and therefore would be considered a countable resources for purposes of eligibility. Hobbs v. Zenderman, 2009 WL 2750707 (C.App. 10 N.M. 3). The Hobbs case points out how important it is not only for the trust to be properly drafted but properly administered.

Iowa Code Chapter 634A Supplemental Needs Trust:

This chapter of the Iowa Code allows for the establishment of a trust for a disabled person to provide for the person's supplemental needs. It is intended as a discretionary trust. It allows for payments for basic living expenses such as food, shelter and clothing, with the proviso that such expenditures shall only be used to supplement government benefit programs. 634A.2. A trustee must be very careful in administering such a trust. If distributions are made for basic needs, the DHS will consider the assets as available, which could result in an individual being over resources or income and losing governmental benefits.

Non-Trust Alternatives.

In light of the foregoing rules and regulations, it is typically recommended that the parties consider non trust alternatives.

Acquisition of Non-Countable Resources

A primary alternative is using the funds to purchase noncountable resources for the individual. Under federal rules for SSI and Title XIX, there is a broad list of resources which are considered noncountable. These include a home, and land which is adjacent or contiguous to it, an automobile, household goods and furnishings, property reasonably related to self support of the applicant, health aids, and prepaid burial funds.

Under federal and state law, a tactic which is available is the annuitization of one's resources. For persons working in the Medicaid field, annuitization means taking otherwise liquid countable assets such as cash or investments and using them to purchase an annuity. In order to satisfy Medicaid regulations, the annuity must be nonrevocable and nonassignable, no change in beneficiary can be made and the monthly payments must be fixed. In addition, if the spouse the annuitant is a Medicaid beneficiary, the annuity contract must name the spouse as the residual beneficiary. For any amounts remaining in the annuity, the State of Iowa will pursue an estate recovery claim, if either spouse was a Medicaid recipient. If all these criteria are met, the annuity will not "count" as a resource but the income stream from the annuity will be considered. 441 IAC 75.23(9)

Given the complexity of the rules governing trusts and the potentially restrictive nature of many of these trusts, use of the funds to purchase noncountable resources should be carefully considered.

Guardianship and Conservatorships

One of the non-trust alternatives that should be considered would be the use of a conservatorship and guardianship. While these tools do not assist in government eligibility, they are well-defined and court-supervised which are characteristics that many of our clients will appreciate using. The length of my presentation does not allow us to go into a detailed consideration, but please consult Chapter 633 of the Iowa Code pertaining to guardianships and conservatorships as well.

Powers of Attorney

Another possibility of the parties do not wish to have court involvement of a guardianship or conservatorship would be to seriously consider health care and financial power of attorney documents if the principal has the capacity to execute them. Statutory authority for powers of attorney appears in 633.705 and 633.706 and health care powers of attorney in Chapter 144B.

ABLE Accounts

ABLE accounts were created under 26 U.S. Code §529A. Achieving a Better Life Experience, or ABLE accounts were created in 2014. In 2020 the annual contribution limit is \$15,000.

To be eligible to establish an ABLE account you must meet the following criteria:

- Diagnosed with a disability before the age of 26;
- Eligible for SSI or SSDI
- Experience blindness
- Have similar severe disability with a written diagnosis from a licensed physician.

Information about Iowa ABLE program can be found at iable.gov.

Prepaid Funeral Plan

Prepaid burial contracts are a non-countable resource if the contract is irrevocable and has no accessible cash value, or liquidation of the contract would create a “significant hardship” to the application or member. DHS will request an itemized list of funeral costs along with a copy of the policy. Current Iowa law will not allow for the purchase of a funeral plan with special needs trust assets. Therefore, this purchase will need to be made prior to the funding of any special needs trust.

IV. OTHER CONSIDERATIONS:

Estate Recovery

Under Iowa Code § 249A.5, there is an estate recovery provision which directs that the state is required to make an attempt to recover any assets which remain in the name of the beneficiary at the time of his or her death if in fact the beneficiary has received medical assistance under the Medicaid program during his or her lifetime.

Virtually any asset owned by the Medicaid recipient at the time of death is subject to the estate recovery claim. Following are some examples.

Life estates: In Estate of Laughead, 696 NW 312 (Iowa 2005), the Court held that the value of the life estate owned by the decedent immediately before death was included in the estate for purposes of estate recovery.

Jointly held property. In Estate of Serovy, 711 NW2nd 290 (Iowa 2006), jointly held property of the decedent Medicaid recipient is subject to estate recovery. And in the Estate of Kirk 591 NW 2nd 630 (Iowa 1999), the Court held that the jointly held interest owned by the Medicaid recipient immediately prior to death was subject to estate recovery and could not be disclaimed.

Interests in trusts. As noted above in the Barkema case, estate recovery may be made to the extent of the interest of the decedent in trust. The subsequent cases of **Gist and Kinsler** referred to above confirmed this proposition.

This means that while the assets may not count for purposes of determining eligibility, the assets do count for purposes of estate recovery. It is important to note this because there is no guarantee that this is a bilateral treatment of the assets. That issue is raised in the Gist case mentioned previously in the outline, and the court dismissed it without much discussion.

Summary

When a you know that your client will be receiving funds from a settlement, or verdict, it is critical that you verify what government benefits he or she receives. From a planning perspective, although many planning tools are available, it is critical that the client, and in many cases the family, identify their goals and objectives.

Once identified, the role of the attorney is to evaluate the alternatives available and to assist in selecting the option which is best suited to meet the goals of the client.

Caveat: This outline is provided for general discussion purposes only. Consult with an attorney to determine how to best develop and implement your own plan. Original materials prepared by Gregory L. Kenyon, as edited by Abigail M. Hillers.

Appendix A

**RELEASE AND AUTHORIZATION to the
IOWA DEPARTMENT OF HUMAN SERVICES**

I, _____ of _____, Iowa, have retained
_____, of the law firm of _____ to assist me.

I authorize the Iowa Department of Human Services to communicate with
_____ or other members of his firm, or his/her staff in any manner for the purpose of
processing an application or maintaining eligibility for Medicaid, or any questions concerning
Medicaid eligibility, services or benefits for _____ whose date
of birth is _____ and social security number is _____. I authorize
_____ or other members of his/her firm, or his staff to represent me, without further
action on my part, in any and all matters concerning the Iowa Department of Human Services
and Medicaid.

Copies of this release shall have the same effect and power as originals.

Signed this _____ day of _____, 20__.

NAME