

# Memo to Trustees of OBRA '93 Supplemental Needs Trusts

*By Theresa M. Varnet, Esq.*

This memo is intended to help you properly administer an OBRA '93 or a Supplemental Needs Trust for its beneficiary. We recommend you keep this memo for future reference. The purpose of the OBRA '93 Trust or a Supplemental Needs Trust is to allow the disabled beneficiary to benefit from the funds in the trust without losing his or her eligibility for government benefits including, but not limited to: SSI, SSDI, and Medicaid coverage.

As trustee you will be responsible for investment of the funds, accounting to the beneficiary (and possibly others such as your state's department of public aid or the Social Security Administration (SSA)), and making proper expenditures or distributions for the benefit of the disabled beneficiary.

It is important you properly administer the trust so that naive distributions from the trust do not disqualify the beneficiary from the benefits he or she requires. Before you open any accounts in the trust's name, you must first apply for a tax identification number by filling out the Internal Revenue Service (IRS) form SS-4. If a trust is currently revocable, it should be amended and made irrevocable before filing for the tax identification number and before funding begins. Filing for a tax identification number and/or funding a revocable trust could create several problems. First, the government will consider the assets held in a revocable trust to be part of the settlor's estate when he or she dies. This means that upon the settlor's death, everything in the supplemental needs trust is included in the settlor's estate for tax purposes. The assets could also be subject to any judgments in any lawsuits against the estate. Second, it is generally the case that to meet the asset eligibility requirements for Medicaid and SSI, a supplemental needs trust must be irrevocable.

## **TAX IDENTIFICATION NUMBER**

After making sure that the trust is irrevocable, you should then either telephone in, fax, or mail a copy of the completed SS-4 form to the IRS which will provide you with the tax identification number to be associated with the trust. This tax identification number is used in lieu of an individual social security number when opening accounts or filing income tax returns for the trust. It is critical that you use the tax identification number rather

than the beneficiary's social security number or the trustee's social security number. This will insure that no trust assets will ever be considered to be that of the beneficiary's, thus leaving him or her eligible for government benefits.

It is important to emphasize again that you should not begin funding the trust until you have a tax identification number for the trust. As stated above, premature funding could lead to unintended tax consequences for the settlor(s) of the trust. Once the trust is funded, you will be required to file any applicable federal or state income tax returns for the trust. You must be able to account for all income earned and all distributions made from the trust. If the trust owes taxes, you may pay this tax out of the trust.

## **MIXING MONEY**

It is important that you never use the beneficiary's social security number when opening trust accounts and that you not commingle the beneficiary's earnings, savings or government benefits (such as his or her SSI or SSDI check) with trust money. In the event you also become the representative payee for the beneficiary's social security check, be sure to keep this money in a separate account from the trust money. Mixing the beneficiary's money with third party funded trust money could result in a state claim for reimbursement from the trust for the beneficiary's basic care and support. If the trust is an OBRA '93 trust, you can transfer excess benefits that you are not able to spend down into the OBRA '93 trust. Please note that this is a major difference from the third party funded supplemental needs trust in which you must never commingle the beneficiary's assets with trust assets. It is important for you to remember that the beneficiary is only entitled to own a maximum of \$2,000 in cash assets or assets which can be converted to cash such as stocks, bonds, certificates of deposit, etc. (In a few states the limit is even lower. For example, Missouri and Indiana only allow a person \$999.99 in cash assets.)

## **GOVERNMENT BENEFITS**

You may need to consult with professionals who are familiar with current eligibility requirements for the type of government benefits that the beneficiary is receiving. You must then make

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sure that the distributions from the trust estate do not disqualify the beneficiary from continued receipt of benefits. For example, if the beneficiary is receiving welfare type benefits such as SSI, Medicaid or food stamps, you will not want to disburse funds from the trust directly to the beneficiary. The reason for this is that these programs limit the amount of discretionary unearned income the beneficiary is entitled to have. In most cases, a person is limited to only \$20 per month in unearned income. Unearned income includes money from gifts, dividends, or distributions from a trust. If you give the beneficiary \$100 a month in spending money, he or she may lose \$80 worth of government benefits. For this reason, it is best to purchase goods and services for the benefit of the beneficiary rather than to disburse cash directly to him or her. For example, instead of giving the beneficiary \$25 for a haircut, you should send his barber or her hairdresser a check (from the trust) directly. It is important that you balance the need to keep the beneficiary as independent and self sufficient as possible with the need to preserve his or her eligibility for government benefits. You may want to identify those personal services that the beneficiary needs but the government will not provide and make arrangements with service providers to send you a bill for such services. By way of illustration, you can pay for services such as phone service, housekeeping, lawn work, laundry services, recreation and leisure time activities, high tech electronic equipment which may make it possible for the beneficiary to live independently, a companion, an advocate if needed, private health insurance premiums and for a higher level of dental or medical care than is available through Medicaid or Medicare.

## **PERSONAL PROPERTY**

Because most states limit the amount and value of personal property, it is often recommended that expensive items such as a television, VCR, stereo, computers, etc. be purchased in the name of the trust. The beneficiary can enjoy the beneficial use of these items but will not actually own them in his or her name. That way, if the state lowers the amount a person is permitted to own in personal property and still qualify for government benefits, the earlier purchase of some of these goods will not disqualify him or her from future benefits. One exception to the trust retaining ownership of personal property is if you purchase a car on behalf of the beneficiary. If the beneficiary is able to drive and if you feel it is in his or her best interest to own a car, you can purchase a car with trust funds. You can also pay all of the maintenance and insurance costs associated with owning a car. However, it is not recommended that the trust retain an ownership interest in the car, in order to protect the trust from being sued in the event the beneficiary is involved in an accident. Ownership of a car should not affect the beneficiary's eligibility for even welfare type benefits. A car (of reasonable value) is considered an exempt asset in most states if a car is needed for the beneficiary's transportation.

## **INVESTING**

Generally, you can invest the assets in the trust in any reasonably prudent manner. Unless there are specific restrictions drafted within the beneficiary's trust, you can invest the trust assets in any number of investments such as real estate, stock market investments, bonds, treasury notes, etc. However, you should avoid making any risky investments that could result in the loss of the trust assets. Obviously, the goal should be to maximize the amount of income earned while providing sufficient funds to draw on during the year. It is often important that the trustee receive advice from a professional financial planner in regard to investments and certainly in regard to distributions from the trust. You will want to ask the financial planner if s/he is familiar with the eligibility requirements for welfare and sliding scale fee benefits so that the planner does not recommend investments which will result in the beneficiary losing eligibility for any of the services he or she is presently receiving. For example, if the planner recommends an annuity which will provide the beneficiary with a monthly stream of income, the state, and not the beneficiary, will benefit from the annuity income because the state will require that the beneficiary use this money first for his or her basic care before the state will provide benefits. A direct stream of income to the beneficiary will result in a dollar for dollar loss of government benefits and will not provide him or her with funds to purchase supplemental goods and services.

## **WHO SHOULD HAVE ACCESS**

A social worker may ask to see the trust document and may have a right to review it. If the social worker is required to determine the beneficiary's continued eligibility for government benefits, he or she will need to see the trust in order to make this determination. Failure to produce the trust, when a copy is requested for deeming purposes by a government agency, could result in the termination of the beneficiary's benefits. While you do not want to indiscriminately show a copy of the trust to anyone who asks to see it, there are some individuals who legitimately need to see the trust in order to keep the beneficiary's funding in place. Ask the social worker why he or she wants to see the trust. Depending on the answer, you may or may not want to provide a copy. When in doubt, this is an issue you should discuss with your attorney. Keep in mind that the fees a financial planner, an accountant or your attorney charges you for their advice can be paid from the trust assets. Fees for advice in administering the trust are considered supplemental services and payment of the fees will not result in a decrease in government benefits. We recommend that you consult with us, as necessary, regarding any of the above issues to head off potential problems when administering the trust.

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## WE HAVE ANSWERS

To learn how we can assist, contact our Special Needs Practice Group Leader Frederick M. Misilo, Jr. at 508.459.8059 or [fmisilo@fletchertilton.com](mailto:fmisilo@fletchertilton.com).



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