ESTATE PLANNING AFTER THE FACT: FIXING THE BROKEN PLAN[1]

BethAnn Boudah Chapman
Mary F. Mearig
Faulkner Banfield, P.C.
Juneau, Alaska

I. INTRODUCTION[2]

A. Issue

Wills and trusts may be written without considering the impact the inheritance or gift may have on a beneficiary's receipt of means-tested benefits.[3] The receipt of an inheritance or gift by a beneficiary receiving means-tested benefits can have severe consequences, including the loss of those benefits. This oversight could occur for several reasons. For example, the grantor[4] may have been unaware of the beneficiary's disabilities or receipt of public assistance, an irrevocable trust may have been established before the beneficiary was determined to need public assistance, or the grantor died without a will and the estate passed by the laws of intestacy directly to the person with disabilities. After the grantor's death (or during life if an irrevocable trust is established), the practitioner must consider how best to preserve the grantor's intent while minimizing the impact on the beneficiary's public assistance.

B. Options

Alaska and federal laws provide practitioners several options to achieve some, if not all, of the grantor's wishes, and yet protect the beneficiary's receipt of public

---

[1] **Disclaimer:** These materials are not intended to be construed as legal, accounting, or other professional advice from the authors. Due to the rapidly changing nature of the law, information contained in these publications may become outdated. An attorney using these materials must always research original sources of authority and update this information to ensure accuracy when dealing with a specific client's legal matters. In no event will the authors be liable for any direct, indirect, or consequential damage resulting from the use of these materials.

[2] **IRS Circular 230 Disclosure:** To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under federal, state or local tax law, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

[3] Means-tested benefits means any "Federal, state or local government program of benefits or assistance for the elderly, blind or disabled which has resource or income eligibility requirements, including, but not limited to Supplemental Security Income and Medicaid programs" and is used interchangeably in this outline with pubic assistance.

[4] "Grantor" will be used in this outline to describe the person making a gift or devise (through a will).

assistance when an inheritance or gift was not properly structured to preserve public assistance for the beneficiary.[5] These options include establishing a special needs trust, a pooled trust, and reforming or modifying the terms of a previously established trust.

C. Cautions

A practitioner seeking to protect an inheritance or gift must have a working knowledge of the programs from which the beneficiary receives benefits to determine what effect the inheritance or gift will have on the benefits, and what options might be available. These programs include, but are not limited to, Alaska Adult Public Assistance, Alaska Medicaid, Alaska Pioneers Home Payment Assistance, and social security income benefits ("SSI").[6] There may be other programs that need to be considered as well, such as Section 8 housing. This outline focuses on Alaska Medicaid and SSI benefits. In addition, the practitioner needs to consider the income, gift and estate tax effects when determining the best option to follow.[7]

II. ALASKA MEDICAID CONCEPTS GOVERNING INHERITANCES, GIFTS AND TRUSTS

Medicaid is a state and federally funded program that pays for some types of medical care, prescription drugs, nursing home care, and at home care for certain categories of individuals with disabilities or the elderly who meet certain financial eligibility criteria.[8] The program is funded partially by the State of Alaska and partially by the Federal government. The State must follow the federal law, but has the ability to deviate from the federal requirements with the consent of the federal government.[9] Currently, the rules regarding Alaska's Medicaid program are found in the Aged, Disabled and Long Term Care Medicaid Eligibility Manual ("Medicaid Manual"), and the Alaska Adult Public Assistance Manual ("APA Manual").[10] The Department of Health and Social Services proposed regulations on the use of trusts in Medicaid planning

---

[5] See Estate Planning for Disabled Family Members: Third Party Trust Planning (February 2007) by Peter Brautigam for planning ideas for gifts and inheritance. If properly implemented, the beneficiary will receive the benefit of the inheritance/gift, will continue to receive public assistance, and the grantor will have the ability to preserve the remaining assets for other beneficiaries.

[6] SSI benefits are provided to individuals who meet the definition of disability and income and resource limits established by federal law. Some individuals with disabilities receive social security disability benefits ("SSB") that are not conditioned on financial eligibility requirements. Most inheritance and gifts will not affect an individual's receipt of SSB benefits or the receipt of Medicare. Those programs are beyond the scope of this outline.

[7] Those considerations are beyond the scope of this outline.

[8] See Alaska Legal Services' Questions and Answers on Medicaid for Nursing Home Residents and the CHOICE Programs for a description of the eligibility requirements.

[9] The Deficit Reduction Act of 2006 substantially changed the rules governing Medicaid. None of those changes, however, affected the use of trusts to preserve an inheritance or gift for the use of the beneficiary.

[10] Current manuals can be found online at http://dpaweb.hss.state.ak.us.

in the posting on the State of Alaska Online Public Notice System, dated September 16, 2005, but as of this date it has not finalized the regulations.[11] Both manuals, as well as federal law, need to be consulted to determine the best option for preserving the beneficiary's inheritance and public assistance eligibility.

This section summarizes the current rules regarding inheritances, gifts, and trusts. In all cases, however, the Medicaid Manual and laws and policies must be consulted.

A. Inheritance

Under the Alaska Medicaid Program, an inheritance (defined as cash, a right to cash, or a noncash item received as the result of someone's death)[12] payable to the Medicaid Beneficiary will be considered either a resource or income to the beneficiary, and thus could affect the beneficiary's ability to receive Medicaid. The following rules apply:

1. The value and impact of inheritance is determined according to the criteria of the APA program.[13]

2. An inheritance is considered an available resource to the beneficiary the month after it is received, unless otherwise excluded. Noncash items are not counted as income when received, but they must be evaluated as a resource the month after they are received.[14]

3. An inheritance that is received in the form of cash, or any other liquid asset that can readily be converted to cash, is considered unearned income.[15]

4. An inheritance that is received in the form of real or personal property is considered in-kind support and maintenance, and is not counted as income.[16]

B. Gifts

Under the Alaska Medicaid program, gifts payable to the Medicaid Beneficiary are considered unearned income in the month received.[17]

1. A cash gift is cash that a person receives that is not a repayment for goods or services the person provided, and is not given because of a legal obligation on the giver's part. To be a gift, the cash must be given irrevocably (the giver intends to and

[11] Link is found on Attachment A.
[12] APA manual 431-2 H.
[13] Medicaid Manual 524
[14] APA Manual 431-2 H
[15] APA Manual 441-2 K
[16] APA Manual 441-2 K
[17] APA Manual 440-3 G

does relinquish all control). Donations and contributions may meet the definition of a gift.[18]

2. There are gifts that are excluded as resources or income under the APA, and practitioners will want to pay careful attention to available gift exemptions.[19]

C. Voluntary Action by Beneficiary to Avoid Receiving Inheritance or Gift

A Medicaid recipient who receives outright (not in trust) an inheritance or gift may seek to renounce the inheritance or gift so that it passes to another beneficiary, thereby preserving his Medicaid benefits and allowing the inheritance or gift to pass to another beneficiary. This action could be accomplished by executing a disclaimer or renunciation.[20] The Alaska Medicaid program will treat any voluntary act to refuse a gift or inheritance as a transfer for less than fair market value, which could result in a loss of benefits.[21]

CAUTION: THIS OPTION GENERALLY DOES NOT WORK FOR MEDICAID PURPOSES. NOT ONLY WILL THE BENEFICIARY NOT HAVE THE BENEFIT OF THE INHERITANCE OR GIFT, BUT HE WOULD LIKELY LOSE HIS MEDICAID BENEFITS FOR THE IMPOSED PENALTY PERIOD.[22]

D. Trusts Governed by Alaska Medicaid Rules

Trusts can be a valuable tool to preserve Medicaid benefits. Currently, the rules governing trusts and their impact on Medicaid eligibility are found in the Alaska Medicaid Manual. DHSS has proposed comprehensive new regulations outlining the requirements for trusts but have not yet adopted those regulations. Nonetheless, the proposed regulations are a useful guide for drafting certain types of trusts that are exempt from the Medicaid requirements.

The Medicaid rules governing trusts vary depending on the type of trust (revocable v. irrevocable), the distribution terms of the trust, and the source of the funds used to fund the trust. Trusts established with the assets of the Medicaid recipient are referred to as self-settled trusts or "First Party" trusts. Trusts established with the assets of a third party, whether by will or during life, are referred to as "Third-Party" trusts".

---

[18] APA Manual 441-2 I
[19] APA Manual 432 and 440
[20] A disclaimer is a document in which a beneficiary gives up the right to receive an inheritance or gift. If the disclaimer is qualified under state and federal law, it is not considered a transfer from the beneficiary for gift purposes. A disclaimer must meet the technical rules contained in AS 13.12.801 and IRC §2518.
[21] Medicaid Manual 554 A
[22] See Alaska Legal Services' Questions and Answers on Medicaid for Nursing Home Residents and the CHOICE Programs for a description of the penalty period.

1. Self-settled Trusts are trusts established with the assets that belong to the person with disabilities. For example, a personal injury settlement, an inheritance or gift received outright, or an unexpected payment. While the trust is described as "self-settled," the trust may be established by a person with the legal authority to manage the beneficiary's assets. A trust established by a spouse (except by will) is considered a self-settled trust.

2. A Revocable Trust is a trust over which the grantor retains the right to revoke the trust and receive the assets back. Revocable trusts are generally established to avoid probate and to provide a management vehicle for the beneficiary's assets.

- Medicaid considers all the assets in the revocable trust as the beneficiary's resources.[23]

- Any transfer of assets from the trust to another person is considered a transfer for less than fair market value that could result in a penalty period.[24]

3. An Irrevocable Trust is a trust that is established by the grantor for the benefit of a person (which can include the grantor) and the grantor has not retained the right to revoke or amend the trust.[25] An irrevocable trust established by a grantor (or his spouse, guardian, court or other legal representative) for his own benefit is subject to the following rules (unless exempt from the general Medicaid rules):[26]

- Any payments that could be paid out of the trust to the grantor/beneficiary count as a resource.

- Any payments (whether made from accounting income or principal) actually made to the beneficiary/grantor are counted as income for Medicaid purposes.

- Any payments actually made to someone other than the grantor/beneficiary are considered a transfer for less than fair market value that could result in a penalty period.

- Any amounts that cannot be paid out to the grantor/beneficiary are considered a transfer for less than fair market value at the

[23] Medicaid Manual 525 B.1
[24] Medicaid Manual 525 B.1 and D
[25] The Alaska Medicaid manual defines an Irrevocable Trust as: **"**A trust that does not empower the beneficiary with the ability to revoke the trust in any way and use the principal for his or her own support and maintenance." (Medicaid Manual 525 A)
[26] Medicaid Manual 525 B.2

time the trust is funded, or the date on which the trust assets are no longer available. This could result in a penalty period.

E. Self-Settled Trusts Exempt from Alaska Medicaid Trust Rules

Medicaid recognizes two types of self-settled trusts that are useful for Medicaid planning when a beneficiary receives an inheritance, gift or personal injury award that would otherwise adversely affect the beneficiary's public assistance.[27] These trusts are statutorily recognized by federal law 42 U.S.C. §1396p(d). These trusts are commonly referred to as "Special Needs Trusts" ("SNT") or "(d)(4)(A) trusts" and "Pooled Trusts" or "(d)(4)(C) trusts." By meeting the statutory requirements, the beneficiary will be able to "benefit" from the trust assets for his nonsupport needs, and remain eligible for public assistance. The drawback to the Special Needs Trust is the required "payback" provision under which Medicaid must be reimbursed the medical assistance provided to the Beneficiary during the term of the trust.

1. Special Needs Trust Requirements[28]

   a. Beneficiary must be a person with disabilities under the age of 65 at the time the SNT is established.[29]

   b. The SNT must be established for the sole benefit of the beneficiary by a parent, grandparent, legal guardian of the beneficiary, or a court. (NOTE: the parent or grandparent must have the legal authority to manage the beneficiary's assets.)

   c. The SNT must be irrevocable.

---

[27] Medicaid also exempts from the general trust rules "Miller Trusts" that are established to ensure a beneficiary meets the income requirements for assistance. Miller Trusts are not useful for preserving an inheritance because the amount in the trust each month must be used to pay the individual's cost of care. See, Questions and Answers on Medicaid for Nursing Home Residents and the CHOICE Programs, Alaska Legal Services.

[28] Medicaid Manual 527 B. The proposed regulations require that the trust be registered with the court (all trusts must be registered under AS 13.36.005) and that the trust be approved by the DHSS before it is funded. In addition, the proposed regulations require the trust to recite the federal statute authorizing the type of trust being used; the age of the beneficiary; and the date on which the beneficiary was last determined to be disabled. Additional requirements include: The trust must also prevent the beneficiary from serving as trustee or having any ability to manage, access or control the trust; the trust must identify the trustee and the procedures for court-approved replacement of the trustee; and the trust must identify on each page the persons or organization that drafted the trusts. Proposed Reg. 7 AAC 100.604(b). Several of these provisions have been criticized by practitioners, and the DHSS has indicated that it might reconsider them.

[29] Additional contributions to the trust after the beneficiary reaches age 65 are not exempt from the general Medicaid Trust rules.

d. The SNT must contain the assets of the beneficiary.

e. The SNT must terminate on the earlier of the death of the beneficiary or court order.

f. Upon the death of the beneficiary (or termination of the trust, if earlier),[30] the State receives an amount from the remainder of the trust equal to the total amount of medical assistance paid on behalf of the beneficiary.[31]

2. Pooled Trust Requirements

a. The trust is established and managed by a non-profit entity for the benefit of more than one beneficiary;

b. The trust contains the assets of beneficiaries who are blind or disabled;

c. A separate account is maintained solely for each beneficiary of the trust, but for purposes of investment and management, the funds in each account are pooled together.

d. Each account in the trust is established solely for the benefit of the beneficiary by the beneficiary, the parent, grandparent, legal guardian of the beneficiary, or a court.

e. The trust and each individual account must be irrevocable.

f. The account must terminate upon the death of the beneficiary or (if earlier) court order.

g. Upon the death of a beneficiary (or termination of the trust), the non-profit entity may retain a portion of the beneficiary's trust account (for the purposes of maintaining the Pooled Trust for all beneficiaries). All amounts remaining in the beneficiary's trust account not retained by the nonprofit entity must be paid to the state up to an amount equal to the total

[30] The payback obligation can be deferred when the trust terminates, during the life of the beneficiary, by transferring the assets to a new trust that meets the SNT requirements. This can be useful if the grantor wants to change the terms of the trust (for example, the remainder beneficiaries) by establishing a new trust and transferring the trust assets into the new trust. See AS 13.36.157.

[31] The trust is authorized to pay for any outstanding legal and administrative fees associated with establishing and maintaining the trust and trust account before paying the State for Medicaid benefits received by the beneficiary.

amount of medical assistance paid on behalf of the beneficiary.[32]

h. Pooled trusts may be established by a person over the age of 65. However, the Pioneer's Home Payment Assistance Program may not recognize the trust for its financial eligibility program.

F. Third-Party Trusts

Third-Party Trusts are a valuable Medicaid planning vehicle.[33] Trusts established by a third party with assets not belonging to the Medicaid beneficiary ARE NOT subject to the general Medicaid trust rules.[34] Instead, the guidelines in the APA Manual[35] are used for determining whether trust principal or income is considered an available resource.[36] Properly drafted third-party trusts can provide a mechanism by which the grantor can provide for a beneficiary's non-support needs, ensure the beneficiary's continued eligibility for public assistance, and provide for remainder beneficiaries when the trust terminates.[37] But, a third-party trust that is not properly drafted could affect the beneficiary's eligibility for public assistance under the following applicable APA rules:

1. Assets are not considered resources if the individual does not have any ownership interests in the property and does not have the legal right, authority, or power to liquidate the assets; or does not have the legal right to use the assets for his or her own support and maintenance.[38]

2. The trust principal of an IRREVOCABLE trust is not considered resources of the beneficiary. Revocability depends on state law.

---

[32] Medicaid Manual 527 C.4; Proposed Reg. 7 AAC 100.614(a)(6)

[33] See Estate Planning for Disabled Family Members: Third Party Trust Planning (February 2007) by Peter Brautigam, which explains the various planning options available with third-party trusts.

[34] The Foster Care Independence Act of 1999 (Public Law 106-169) codified the exception from the Medicaid trust rules for trusts established by will.

[35] Medicaid Manual 525 B; APA Manual 431-2 F

[36] The proposed regulation is slightly different. "To determine if a trust created by will or other third party is a countable resource or if a payment from such a trust is income, the financial eligibility rules related to an applicant's or recipient's eligibility category are used." Prop. Reg. 7 AAC 100.600 (c). For example, a third-party trust established for a person with disabilities who receives SSI benefits will require compliance with the SSI rules. The SSI rules and APA rules differ in determining what effect certain distributions will have on financial eligibility.

[37] See Estate Planning for Disabled Family Members: Third Party Trust Planning (February 2007) by Peter Brautigam.

[38] APA Manual at 430-4

CAUTION: ALASKA LAW PRESUMES A TRUST EXECUTED ON OR AFTER AUGUST 30, 2000, AND GOVERNED BY THE LAWS OF ALASKA, IS REVOCABLE UNLESS IT IS EXPRESSLY MADE IRREVOCABLE IN THE TERMS OF THE TRUST. AS 13.36.338.

3. Trust principal is considered a resource to anyone who is legally empowered to revoke the trust and use the principal for his or her own support and maintenance.[39]

4. Trust principal of an irrevocable trust may be considered a resource to the beneficiary if the beneficiary is given the legal right to access the trust principal without trustee intervention.[40]

5. Disbursements from the principal of a revocable trust are never income, but represent the conversion of a resource. Trust earnings from a revocable trust are income to such an individual.

6. Trust earnings and disbursements are not income to the trustor or trustee unless designated as belonging to the trustor or trustee under the terms of the trust. Trust earnings are not income to the beneficiary unless the trust dictates, or the trustee allows, payment to the beneficiary.

7. The terms of a third-party trust must be reviewed carefully to ensure that the trust does not give the beneficiary any legal right to access the trust principal or cause any portion of the trust to be considered income for eligibility purposes. Some terms to look for include:

- Does the trust contain a spendthrift clause?
- Does the trust give the beneficiary a right of withdrawal (such as the right to withdraw the greater of $5,000 or 5% of the trust principal each year)?
- Does the trust give the beneficiary a Crummey withdrawal power?[41]
- Does the trust terminate at a stated time and require outright distribution to the beneficiary?

---

[39] A grantor can retain the right to revoke a third-party trust and the assets will not be considered a resource to the beneficiary.
[40] APA Manual at 431-2-F.2.a
[41] See Estate Planning for Disabled Family Members: Third Party Trust Planning (February 2007), by Peter Brautigam, for a discussion of Crummey powers and the annual exclusion from gift taxes.

- Does the trust mandate income/principal distributions to the beneficiary?
- Does the trust require payment to the beneficiary's estate when the beneficiary dies?
- Does the trust contain the "payback provision" required for first party trusts?

8. Any provisions in a third-party trust that grant access to the income or principal of the trust could affect the beneficiary's receipt of public assistance. As discussed later, there are options to modify the terms of an irrevocable trust to ensure continued eligibility for the beneficiary.

9. Inter vivos trust created by spouse of Medicaid beneficiary is treated as self-settled trust.

10. Testamentary trust created by spouse of Medicaid beneficiary is treated as third-party trust (if discretionary or supplemental needs, then Medicaid cannot reach).

III. SSI GENERAL INHERITANCE AND TRUST RULES

Individuals with disabilities may receive Supplemental Security Income (SSI) benefits from the Social Security Administration. These benefits are based on financial eligibility. A practitioner must consider the impact an inheritance, gift or trust (including trust distributions) could have on the beneficiary's receipt of SSI benefits. The practitioner should consult the federal statute (42 U.S.C. §§1381 et seq.), regulations, and Program Operations Manual System ("POMS") when analyzing the potential impacts. Another valuable information source is the Centers for Medicare & Medicaid Services (CMS).[42]

A. SSI Rules for Inheritance

1. An inheritance is defined as cash, a right, or a noncash item received as a result of someone's death, and is considered a death benefit.[43]

2. An inheritance is counted as income to the beneficiary and will be counted when the asset or right has a value (i.e., can be used to meet the heir's need for

[42] Refer to Attachment A for program links.
[43] POMS SI 00830.550

food or shelter). The inheritance is income in the first month it has value and can be used.[44]

3. An inheritance will be converted to a resource if it is accumulated for the beneficiary (i.e., money is received in February, 2007, and treated as income; if asset still exists on March 1, 2007, will be counted as a resource).[45]

4. An ownership interest in an unprobated estate may be a resource if any beneficiary is an heir or relative of the deceased, receives any income from the property, or under state intestacy laws, has acquired rights in the property due to the death of the deceased.[46]

5. An ownership interest in an unprobated estate exists if documents (will or court records) indicate an individual is an heir of the property of a deceased; an individual has use of a deceased's property or receives income from it; or documents establish, or the individual alleges, a relationship between himself and the deceased which, under State intestacy laws, awards the individual a share in the distribution of the deceased's property; AND, the inheritance, use of income, and distributions are uncontested.[47]

6. Resources include any other payment or property to which the individual or individual's spouse is entitled, but does not receive or have access to because of action by:

a. the individual or individual's spouse;

b. a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse; or

c. a person or entity (including a court) acting at the direction of, or on the request of, the individual or spouse.

B. SSI Third-Party[48] Trust Rules

1. A properly drafted discretionary trust (whether testamentary or inter vivos) established by a third party with assets that do not belong to the beneficiary and from which the beneficiary cannot compel distribution is not considered a resource or income to the beneficiary.

---

[44] POMS SI 00830.550A.2
[45] POMS SI 01120.215B
[46] Under Alaska law, an heir's interest in an estate vests at death subject to allowances, exemptions and estate administration. AS 13.16.005.
[47] POMS SI 01120.215
[48] Trusts not subject to the statutory trust provisions in section 1613(e) of the Social Security Act. POMS SI 01120.200.

2. A Trust established by a spouse for the benefit of the other spouse will not be considered a third-party trust, even if established with the spouse's separate assets (except if established by Will).

3. A discretionary trust established by Will is not considered a resource or income to the beneficiary. A testamentary trust may be established by the beneficiary's spouse. This provides significant planning opportunities.[49]

4. The third-party trust should contain a spendthrift clause to ensure that the beneficiary's creditors cannot attach the trust assets.

5. Distributions from a third-party trust may impact the income and/or resource eligibility of the beneficiary.

6. If the beneficiary has the legal right to direct the use of the trust for her support and maintenance, the trust principal is a resource.

7. Mandatory payments from the trust are treated as income. If the trust mandates payment and there is no spendthrift clause, the current value of the payment may be considered a resource.

8. If the trust is not considered a resource, disbursements from the trust may be income to the beneficiary:

a. Cash paid from the trust is unearned income to the beneficiary.

b. Food or shelter received as a result of disbursements from the trust to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rules.[50]

- **NOTE:** exception for home owned by the trust

c. Disbursements from the trust by the trustee to a third party that results in the beneficiary receiving items that are not food or shelter are not income. ("Supplemental needs")

d. Trust can own a home for the beneficiary and allow the beneficiary to live rent-free in the home. CAUTION must be taken because the purchase of a home could result in receipt

[49] Foster Care Independence Act of 1999, §205

[50] Prior to a regulation change on 03/09/2005, the SSI definition of what is not income included "clothing" as follows: An item received is not income if it is not food, clothing, or shelter or it cannot be used to obtain food, clothing, or shelter. POMS SI 00815.001.

of shelter in the month of purchase only and payment of a monthly mortgage will result in receipt of income in the form of in-kind support to the beneficiary, valued at no more than the presumed maximum value.

C. SSI Self-Settled Trust Rules

A trust established by a beneficiary, her spouse, or an individual or court with authority to act is subject to the general trust rules for determining whether a trust is considered a resource[51] or income.[52]

Certain self-settled trusts (trusts established with the beneficiary's assets) are exempt from the general trust rules and can be used to help protect a beneficiary's means-tested benefits.[53] (Social Security Act as amended in 1999, Section 1613(e); 42 U.S.C. 1382b; P.L. 106-169, Section 205).

1. Special Needs Trusts (SNT)

A special needs trust is a trust established for the benefit of a person with disabilities with the individual's own assets. These trusts are commonly referred to as "special needs trusts," "self-settled special needs trusts," "(d)(4)(A) trusts," or "first party trusts." They are established pursuant to 42 U.S.C. § 1396p(d)(4)(A).

A trust that meets the general requirements contained in the statute and the POMS published by the Social Security Administration will not be considered resource or income to the person with disabilities for financial eligibility purposes. The SNT requirements are:

a. Trust contains the assets of an individual under age 65 and who is disabled for SSI purposes.

b. Trust must be established for the benefit of such individual by a parent, grandparent, legal guardian or a court (the person establishing the trust must have legal authority to act with regard to the assets of the individual).

---

[51] "Resources" are cash and any other personal property, as well as any real property that an individual (or spouse, if any) owns; has the right, authority, or power to convert to cash (if not already cash); and is not legally restricted from using for his/her support and maintenance. POMS SI 01110.100.

[52] "Income" is any item an individual receives in cash or in-kind that can be used to meet his or her need for food or shelter. Income includes, for the purposes of title XVI, the receipt of any item which can be applied, either directly or by sale or conversion, to meet basic needs of food or shelter. POMS SI 00810.005.

[53] POMS SI 01730.048; These trusts are similar to the self-settled trusts exempt from the Alaska Medicaid Rules.

c. Trust must provide that 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 under a State Medicaid Plan. State must be listed as first payee and have priority over payment of other debts and administrative expenses except taxes due from the trust to the State or Federal government because of the death of the beneficiary and reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

- NOTE: The restrictions on payments from the trust apply only upon the death of the beneficiary. Payments of fees and administrative expenses during the beneficiary's life are allowed as provided in the trust instrument and under state law.

- NOTE: Assets remaining in the trust after the State has been repaid can be distributed to remainder beneficiaries as provided in the trust instrument.

d. Trust must be irrevocable.

- NOTE: Neither the statute nor the POMS manual requires that the trust be irrevocable to meet the special needs trust exemption. Instead, if a trust meets all the above requirements and is revocable (by the beneficiary), the trust will be considered an exempt trust but will be evaluated to determine if it is a countable resource and if so, would impact the beneficiary's receipt of means-tested benefits.[54]

e. Trust must be for the sole benefit of the person with disabilities.

D. <u>SSI Pooled Trust Rules</u>

A pooled trust is exempt from the general trust rules under Section 1917(d)(4)(C) of the Social Security Act. A pooled trust must be established and maintained by a nonprofit organization and must hold separate accounts for individuals

[54] POMS SI 01120.203B.1(a); POMS SI 01730.048

with disabilities. The following requirements must be met to ensure the trust account is an exempt resource:

a. A separate account within the pooled trust must be maintained for the beneficiary; although assets of the various accounts may be pooled for investment and management purposes.

b. The account must be established solely for the benefit of the disabled individual.

c. The account must be established by the individual, parent, grandparent, legal guardian or a court.

d. The trust must provide that any amounts remaining in the account upon the death of the beneficiary are not retained by the trust; the trust must repay the state the amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a state Medicaid plan.

e. There is NO AGE RESTRICTION to establish an account in a pooled trust.

f. The trust account must be irrevocable or it will be counted under the applicable resource rules.

IV. ALASKA TRUST MODIFICATION PROVISIONS

Alaska law contains several statutory provisions that allow individuals to modify the terms of an irrevocable trust. These provisions are useful for amending or reforming trusts to comply with Medicaid/SSI rules, whether the trusts were intended to qualify as third-party trusts or self-settled trusts. The beneficiary with disabilities or anyone with legal authority to act on behalf of the beneficiary cannot participate in any actions to amend or modify the terms of a trust. Remainder beneficiaries, the grantor, or the trustee may use these procedures to ensure that the trust fulfills the grantor's intent.

A. <u>"Decanting" Trust—Trustee's special power to appoint to other trust. AS 13.36.157</u>

1. Recently amended statute authorizes a trustee to create a new trust and move the assets from the old trust to the new trust. The trustee does not require court approval to exercise this discretionary authority. This statute reads as follows:

> (a) Subject to (d) of this section, unless the terms of the instrument expressly provide otherwise, a trustee who has authority under the terms of an instrument or irrevocable inter

vivos agreement to invade the principal of a trust for the benefit of a beneficiary who is eligible or entitled to the income of the trust may exercise without prior court approval the trustee's authority by appointing, whether or not there is a current need to invade the principal under any standard stated in the governing instrument, part or all of the principal of the trust in favor of a trustee of another trust under an instrument other than that under which the power to invade was created if the exercise of this authority

(1) does not reduce any fixed income interest of a beneficiary of the invaded trust;

(2) is in favor of the beneficiaries of the invaded trust;

(3) does not violate the limitations on validity under AS 34.27.051 or 34.27.100; and

(4) results, in the appointed trust, in a standard for invading principal that is the same as the standard for invading principal in the invaded trust.

(b) This section applies to a trust governed by the laws of this state, including a trust whose governing jurisdiction is transferred to this state.

(c) The exercise of the power to invade the principal of a trust under (a) of this section is considered to be the exercise of a special power of appointment.

(d) The governing instrument of an appointed trust may provide that, after a time or an event specified in the governing instrument, the trust assets of the appointed trust remaining after the time or event shall be held for the benefit of the beneficiaries of the invaded trust on terms and conditions regarding the nature and extent of the interests of the beneficiaries of the invaded trust that are substantially identical to the terms and conditions governing the interests of the beneficiaries in the invaded trust.

(e) In this section,

(1) "appointed trust" means the trust to which principal is appointed under (a) of this section;

(2) "invaded trust" means the trust whose principal is invaded under (a) of this section.

2. Other provisions allow an individual to seek court approval to modify or terminate the trusts. Notice of any proceeding is required and a person with disabilities may be represented by another beneficiary or person with legal authority to act on behalf of the individual.

B. <u>Modification or termination of irrevocable trusts because of unanticipated circumstances. AS 13.36.345</u>

(a) On petition by a trustee, settlor, or beneficiary, a court may modify the administrative or dispositive terms of an irrevocable trust or terminate an irrevocable trust if, because of circumstances not anticipated by the settlor, modification or termination would substantially further the settlor's purposes in creating the Trust.

(b) Upon termination of a trust under this section, the trust property shall be distributed in accordance with the settlor's probable intention.

C. <u>Reformation to correct mistakes in irrevocable trusts. AS 13.36.350</u>

(a) On petition by a trustee, settlor, or beneficiary, a court may reform the terms of an irrevocable trust, even if the trust instrument is not ambiguous, to conform to the settlor's intention if the failure to conform was due to a mistake of fact or law, whether in expression in the trust or inducement to create the trust, and if the settlor's intent can be established by clear and convincing evidence.

(b) A court may consider evidence, including direct evidence contradicting the plain meaning of the text, when determining the settlor's intent or for any other purpose under this section.

D. <u>Modification or termination of irrevocable trust by consent. AS 13.36.360</u>

(a) Except as otherwise provided by this section, on petition by a trustee, settlor, or beneficiary, a court may modify or terminate an irrevocable trust if all of the beneficiaries consent and if continuation of the trust on the existing terms of the trust is not necessary to further a material purpose of the trust. However, the court, in its discretion, may determine that the reason for modifying or terminating the trust under the circumstances outweighs the interest in accomplishing the material purposes of the trust. The inclusion of a restriction

on the voluntary or involuntary transfer of trust interests under AS 34.40.110 may constitute a material purpose of the trust under this subsection, but is not presumed to constitute a material purpose of the trust under this subsection.

(b)Unless otherwise provided in the trust instrument, an irrevocable trust may not be modified or terminated under this section while a settlor is also a discretionary beneficiary of the trust.

(c) If a beneficiary other than a qualified beneficiary does not consent to a modification or termination of an irrevocable trust that is proposed by the trustee, settlor, or other beneficiaries, a court may approve the proposed modification or termination if the court determines

(1) if all the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the rights of a beneficiary who does not consent will be adequately protected or not significantly impaired.

(d) In (c) of this section, "qualified beneficiary" means a beneficiary who

(1) on the date the beneficiary's qualification is determined, is entitled or eligible to receive a distribution of trust income or principal; or

(2) would be entitled to receive a distribution of trust income or principal if the event causing the trust's termination occurs.

Faulkner Banfield, P.C. is a diverse practice. The firm has an active estate planning group, and its seven attorneys represent individuals and corporations in real estate, employment and business transactions, as well as defend clients against personal injury, products liability and professional malpractice claims. In addition, Faulkner Banfield serves as general counsel to corporations and school districts, and represents major oil and gas companies in complex litigation and administrative proceedings. You can read more at www.faulknerbanfield.com.

BethAnn Boudah Chapman is a partner at Faulkner Banfield, P.C. She advises clients on complex estate planning, business succession planning, elder law, and probate and trust litigation. Ms. Chapman is recognized for her skill in delivering complex trust and estate strategies to meet the unique needs of Alaskans, as well as her ability to help non-Alaskans use Alaska's ground-breaking trust laws to achieve their estate planning goals. Ms. Chapman is a Fellow of the American College of Trust and Estate Counsel, and she holds an AV rating from Martindale Hubbell.

Mary F. Mearig is a legal assistant at Faulkner Banfield, P.C. Her work is concentrated in estate planning, probate and trust administration. Ms. Mearig holds a Bachelor of Business Administration from the University of Alaska.