

Re: Effect on Applicant's Housing Assistance for Funding  
Special Needs Trust Under 42 U.S.C. § 1396p(d)(4)(a)

Dear Mr. Murphy:

We spoke by telephone earlier this week and you kindly agreed that you or a member of your staff would review our question concerning the eligibility for HOC benefits of a beneficiary of a supplemental needs trust.

**Circumstances.** This office represents the family of an individual who, at age 55, may qualify for one of the reduced rent programs available through your office, we understand that likely to be Section 8 housing vouchers. The individual is disabled. The family hopes to set aside funds of hers – all of her life savings, about \$200,000 – by court order into a special needs trust meeting the requirements of 42 U.S.C. § 1396p(d)(4)(a). This Federal law allows a disabled person under 65 who would qualify for Medicaid, but for having significant resources, to nonetheless get Medicaid benefits if he or she puts the funds into a trust with directions to the trustee to repay the Medicaid program on the person's death for whatever expenditures it made. A related provision even lets people get SSI income benefits with such a Medicaid payback trust.

**The Trust.** The trustee under this trust, likely a family member, would have sole discretion whether to make distributions to the individual. It would likely be spent mostly while the person is in HOC housing, paying for whatever goods or services she could not afford on fixed income but that will make her life significantly more comfortable. The individual would retain no power to demand a distribution. Upon her death, the Maryland Medicaid program would be repaid for any Medicaid benefits provided her. A copy of a prototype "(d)(4)(a)" trust is enclosed for your review.

**Discussion.** Before going through all of the work and expense of getting a court order to establish this trust, we would like to confirm that HOC agrees that a disabled, fixed income individual would not be shut out of its programs because they sought to preserve limited assets through the use of a supplemental needs trust.

We think the same policy and logic as with SSI and Medicaid appears in what we think are the relevant HUD guidelines. The Housing Choice Voucher Program Handbook ([http://www.hudclips.org/sub\\_nonhud/html/pdfforms/7420g05.pdf](http://www.hudclips.org/sub_nonhud/html/pdfforms/7420g05.pdf)), specifically the discussion of asset inclusions and exclusions in Exhibit 5-3, Summary of Asset Inclusions and Exclusions p. 5-25, copy enclosed for your reference. The key is control. "[T]he cash value of trusts that *may be withdrawn* by the family" (*emphasis added*) are includable in assessing income, whereas "assets not controlled by or accessible to the family" are not. I think you got to the nub of it when you suggested that the proper treatment of a (d)(4)(a) trust is to not count the trust as an asset or income except for distributions actually made by the trustee to the beneficiary.

HUD, like Medicaid and SSI, also has anti-transfer rules, and these supplemental needs trusts should be treated the same way under all three programs. Funding a supplemental needs trust is not a transfer because the trust is for the sole benefit of the beneficiary, a matter about which Maryland Medicaid is quite strict. No one can get benefits from the trust, not even paying family members for services provided, except for the beneficiary. The beneficiary during her lifetime is the only person for whom distributions may be made.

You agreed to have someone in your office review this question and respond so that we can be assured of protecting this person for their remaining years.

Thank you for taking the time to discuss this matter with me by telephone and for agreeing to consider the issue more formally, and feel free to call me with any questions.

Yours truly,



William M. Gatesman