

## WHAT PROFESSIONAL ADVISORS NEED TO KNOW ABOUT SPECIAL NEEDS TRUSTS PURSUANT TO 42 U.S.C. § 1396p(d)(4)(A)

### **Why Does 42 U.S.C. § 1396p(d)(4)(A) Matter to an Individual with Disabilities?**

Many individuals with disabilities depend on public benefits like Supplemental Security Income (SSI) and Maine Medicaid (MaineCare). Those benefits are “means-tested” (or “needs-based”) which means they are only available to individuals with very limited income and limited assets. If an individual who is dependent on SSI and MaineCare receives a personal injury settlement or an inheritance, those assets will likely disqualify the individual from receiving public benefits until the assets have been spent down.

Congress addressed this problem in the Omnibus Budget Reconciliation Act of 1993 when it enacted 42 U.S.C. § 1396p(d)(4)(A). The Act permits the creation of a self-settled trust for an individual with disabilities who is under age 65. The individual is permitted to transfer the assets that would otherwise disqualify him or her for public benefits to a special needs trust. As with any special needs trust, the objective is to maximize resources. The individual with disabilities can become or remain eligible for benefits like SSI and MaineCare while benefiting from the trust assets, which can be used to purchase goods and services to improve quality of life.

This type of trust is referred to as a d4A trust. It may also be referred to as a “payback trust,” a “self-settled trust,” or an “under-65 trust.” (Note: For third parties who seek to provide from their own funds for an individual with disabilities, a third-party special needs trust should be considered. Please refer to this firm’s article entitled “Third-Party Special Needs Trusts: Protecting an Inheritance for a Loved One with Disabilities” for more information.)

### **When Should a d4A Trust Be Considered?**

The advantages of a d4A trust are only available to individuals with disabilities. An individual is generally considered to be disabled if he or she “is unable to engage in any substantial gainful activity” by reason of a medically determinable physical or mental impairment that is expected to result in death or has lasted or can be expected to last for a continuous period of at least twelve months. Children under the age of 18 are considered to be disabled if they suffer from a physical or mental impairment of comparable duration and severity. If your client is not disabled or is not expected to need significant additional medical care, then he or she may not benefit from a d4A trust. If you are unsure whether a d4A trust or another special needs trust can help your clients, consider the “Suitability of Special Needs Trusts Worksheet” available online at [www.maineelderlaw.com/forms/](http://www.maineelderlaw.com/forms/).

### **When Is the Best Time to Create a d4A Trust?**

If the d4A trust is to be funded with the individual's own assets, create the trust as soon as possible to avoid further spend-down of the assets destined for the trust. For the same reason, a trust to hold an inheritance should be created at or before the time the individual becomes legally entitled to the funds. (It would have been better for the decedent to have directed these funds to a third-party special needs trust.) For personal injury recoveries, make the decision about the suitability of a d4A trust before the settlement or judgment. It could be appropriate to have the court order that the trust be established and funded at the same time that the settlement or judgment is being finalized. This avoids the risk of ineligibility for SSI and MaineCare while waiting for the trust to be established.

### **What Are the Legal Requirements for a d4A Trust?**

The Social Security Administration's (SSA's) Program Operations Manual System (POMS) contains an action chart to determine whether a trust is compliant with section 1396p(d)(4)(A). If the trust fails any of the criteria, the trust assets will be considered countable resources to the individual with disabilities, and his or her eligibility for means-tested government assistance may be jeopardized. Some of the criteria considered by the SSA are as follows:

- Was the trust established for an individual with disabilities under age 65?
- Was the trust established with the assets of an individual with disabilities?
- Is the individual with disabilities the beneficiary of the trust?
- Did the individual with disabilities,<sup>1</sup> a parent, grandparent, legal guardian, or court establish the trust?
- Does the trust provide that, upon the death of an individual with disabilities, any states that have provided medical assistance be reimbursed?
- Does the trust meet the special needs trust exception to the extent that the assets of the individual with disabilities were transferred to the trust prior to the individual with disabilities attaining age 65? (Any assets transferred into the trust after the individual with disabilities' 65th birthday are not protected.)
- Is the trust irrevocable?

One reason for the SSA to declare a trust invalid under d4A is failure to comply with state trust laws regarding irrevocability. In addition to the factors listed above, individual states often impose additional requirements to qualify the trust property as non-countable assets under that state's Medicaid program. Therefore, it is essential that an experienced attorney who is well-acquainted with these local idiosyncrasies create the d4A trust for the individual with disabilities.

### **Who Should Serve as the Trustee of a d4A Trust?**

While the trustee may be a family member, consider the benefits of a professional trustee, possibly with one or more family members serving as cotrustees or as advisors. Bank trust

departments and trust companies have traditionally served as professional trustees, but other professionals also serve in this capacity, including certified public accountants and attorneys.

### **What Can Be Purchased Through the d4A Trust?**

The following are typical expenditures that a trustee of a d4A trust might make from the trust for the benefit of the individual with disabilities: clothing; travel and entertainment; personal belongings and household furnishings; motor vehicles, including insurance and maintenance; phone, cable, and internet service; mortuary trusts; televisions, computers, and electronics; durable medical equipment; care management; tuition, books, and tutoring; taxes; professional fees, including legal fees, accountant fees, and trustee compensation; alternative drugs; and experimental therapies.

When the trustee of a special needs trust provides from the trust for food and shelter, those payments implicate the SSA's rules regarding in-kind support and maintenance (ISM). When a trustee distributes from the trust for rent, real estate taxes, food, water and sewer, or mortgage payments, the beneficiary's SSI benefit will be reduced.<sup>2</sup> This is one of many reasons to choose a trustee who is familiar with or willing to assume the responsibility of understanding the intricacies of public benefits.

Because section 1396p(d)(4)(A) exempts the trust funds from consideration as countable resources of the beneficiary, arguably no limitation on trust distribution standards is required. This creates a potential for abuse if trust funds are spent for lavish homes and extravagant vacations. Regulations refer to such trusts as "special needs trusts," suggesting that distributions to provide for primary care may result in loss of the federal exclusion. Moreover, without supplemental or special needs limitations in the trust document, the trustee's decision not to pay for support or medical needs when the trust permits such expenditures may be alleged to be an abuse of discretion or a breach of fiduciary duty.

To date, there is limited case law to assist in determining the breadth of appropriate standards governing distribution of d4A trust assets. The better practice is to use reasonably well-defined supplemental needs or special needs trust provisions. The state may have a cause of action against a trustee who has improperly spent trust assets, leaving no assets to reimburse the state upon the beneficiary's death.

### **Should the d4A Trust Hold Assets from a Third Party?**

The assets of a third party should *never* be added to a d4A trust. If a relative or friend wants to make a gift to an individual with disabilities, and the gift or inheritance is directed to a d4A trust, any assets remaining in the trust on the death of the beneficiary must be made available to reimburse any state that provided medical assistance to the beneficiary. Create a third-party trust instead, as there are no payback requirements associated with these types of trusts.

### **Who Should Draft the d4A Trust?**

Planning for individuals with disabilities requires knowledge and understanding of fiduciary law, trust law, tax law, and public benefits law and regulations. This practice area requires experience and is not forms-driven. The d4A trust must conform to federal and state law and be customized to meet the current and anticipated future needs of the beneficiary. The attorney who creates the trust should communicate with the relevant government agencies, particularly in reporting the creation and funding of the d4A trust to the SSA and to the Maine Department of Health and Human Services. The attorney should also advise on the selection and education of the trustee of the d4A trust.

### **Where Can Additional Information Be Found?**

For additional information, please visit the Special Needs Alliance's website at [www.specialneedsalliance.com](http://www.specialneedsalliance.com).

*This article is intended to provide information of a general nature only. It does not provide or replace professional legal advice, and it does not establish an attorney-client relationship with the Maine Elder Law Firm or Rudman Winchell. Please consult an attorney for advice regarding your specific circumstances.*

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<sup>1</sup> An individual with disabilities is now allowed to establish and sign his or her own special needs trust. Previously, only a parent, grandparent, guardian, or court could establish a d4A trust for the individual. The Special Needs Fairness Act, which President Obama signed on December 14, 2016, made this important change in the law.

<sup>2</sup> If the trustee of the d4A special needs trust is likely to distribute from the trust for food and shelter, consider how an ABLE account might help to limit the reduction of the SSI benefit.