

## Memo to Parents Concerning First Party OBRA '93 Special Needs Trusts

By Theresa M. Varnet, Esq.

This memo is being given to you to help explain the type of trust we have prepared for your child. On occasion, SSI may question the validity of this trust and may question whether future additions of child support to the OBRA '93 Trust be treated as income under SSI rules. It is important that you follow the rules in funding your child's special needs trust (SNT).

The trust we have prepared for you is called an OBRA '93 payback Special Needs Trust (sometimes referred to as a 1st party SNT or self settled SNT). The trust is created in compliance with federal legislation that was passed on August 11, 1993 and adopted by the Social Security Act on January 1, 2000. This legislation requires that the special needs trust be funded with assets belonging to the individual. Certain types of income can also be irrevocably assigned to a self settled SNT. Examples of income which can be assigned to a SNT include annuity payments from a law suit settlement, child support and alimony payments. All income payments must be irrevocably assigned to the OBRA '93 SNT by the court. The First Party OBRA '93 SNT we have created complies with the federal legislation in that:

- a) The individual beneficiary who is disabled is under 65 years of age at the time the trust is funded.
- b) The individual is disabled as defined in the Social Security Act.
- c) The trust is for the sole benefit of the individual with disabilities.
- d) The trust is established by a parent, grandparent, guardian, the individual or the court.
- e) The trust includes a so called "payback" clause which requires any state or state's Medicaid agency that provides services for the individual over the course of his or her lifetime to be reimbursed upon the death of the person with disabilities.
- f) The trust is irrevocable and is drafted to comply with SSI Program Operations Manual Systems (SI 01120.200)
- g) The trust is permanent and the trustee has sole discretionary authority to make distributions.
- h) The individual beneficiary has no demand rights and no right to revoke the trust.

In order for the trust to be treated as an exempt asset the following must occur:

- 1) The child support agreement must direct that the child support payments be irrevocably assigned to the SNT. The SSI Poms 01120.200G(1)(d) states "A legally assignable payment that is assigned to a trust/trustee is income for SSI purposes UNLESS the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust/trustee as a result of a court order, are not income. If the assignment is revocable, the payment is income to the individually legally entitled to receive it."

All checks should name the trustee of the trust on the payer. For example, the check must be made payable to "Mary Smith, as trustee of the Joan Smith OBRA '93 Trust". If a child support check is made payable just to Mary Smith, it will be deemed as income to Joan Smith.

- 2) Prior to funding the trust, you must obtain a tax identification number. It is important to not use your social security number or your child's social security number.
- 3) Prior to funding the trust with a child support payment, you must place \$10 or \$20 of your OWN money into the trust. This is called 'seeding' the trust. SSI requires a parent, grandparent, legal guardian or court of law to create these qualified trusts. If a parent is the settlor, he must 'settle' the trust with a personal gift to the trust. If the parent does not make a gift of a nominal amount of his or her own money to the trust, SSI may take the position that the trust is not properly 'settled' by the parent.
- 4) Should SSI question the OBRA '93 trust or future deposits made to the trust, please share a copy of this memo indicating that you have followed the above instructions. Give them a copy of the trust as well as a copy of the court order directing the personal injury award or child support to the OBRA '93 trust and a photocopy of the checks showing they were made payable to the trustee of the trust.
- 5) We recommend you attend our annual training, usually held in late fall, to learn how to best manage these trust fund accounts in a manner which will least affect future eligibility for needs based benefits. The general rule is that distributions from the trust should be for goods and services paid directly to the vendor. All distributions must be for the 'sole benefit' of the beneficiary.

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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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