

**Presented:**

11<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts

February 5-6, 2015  
InterContinental Stephen F. Austin  
Austin, Texas

## **Winding Up a Special Needs Trust Upon the Death of the Beneficiary**

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## **WINDING UP A SPECIAL NEEDS TRUST UPON THE DEATH OF THE BENEFICIARY**

I. **INTRODUCTION.** A self-settled special needs trust is designed to permit a disabled individual to receive means-tested public assistance (such as SSI and Medicaid), and at the same time be the beneficiary of a trust established with his or her own assets. Unfortunately, beneficiaries of self-settled spendthrift trusts often die prematurely due to their severe disabilities leaving assets in their trusts. The trust officer administering a self-settled special needs trust must be very cautious in terminating the trust and distributing the remaining trust assets upon the beneficiary's death. This outline will discuss the steps the trust officer should consider in winding up a self-settled special needs trust upon the death of the beneficiary.

II. **REIMBURSEMENT OF MEDICAID.** The federal statute governing self-settled special needs trusts is found at 42 U.S.C. § 1396p(d)(4)(A). This federal statute provides that the trust must meet the following requirements:

- The trust must contain the assets of an individual who is disabled (as defined under Social Security Act § 1614(a)(3));
- The trust beneficiary must be under age 65 at the time the trust is established;
- The trust must be established for the disabled person by their parent, grandparent, legal guardian, or a court;
- The trust must be established solely for the benefit of the disabled person; and
- **On the death of the beneficiary, the trust must provide that the State will receive all amounts remaining in the trust up to an amount equal to the total medical assistance paid on behalf of the beneficiary under the State's Medicaid plan.**

Upon the death of the beneficiary, the federal statute requires that the remaining trust assets be used to reimburse the State for medical services received by the beneficiary during his or her lifetime. Prior to making any distributions from the trust upon the beneficiary's death, the trustee must ascertain the Medicaid repayment claim and obtain a release for payment from the State Medicaid program. The collection contract in Texas has gone through some recent changes (and accompanying political firestorm): in May 2014 the Texas Health and Human Services Commission ("HHSC") announced that the state was terminating its contract with the Texas Medicaid and Health Partnership, and in August awarded a 3-year contract with extension options to Accenture until a new contractor was selected by a bidding process, but the effect of this on Medicaid repayment from self-settled trusts is unclear. HHSC is responsible for repayments arising from acute care, hospitalization and regular community Medicaid. The Texas Department

of Aging & Disability Services (“DADS”) is responsible for repayments arising from long-term care (*i.e.*, nursing home care) and waiver programs. Upon the death of the beneficiary, the trustee should take the following steps to satisfy the Medicaid repayment:

1. The trustee should contact DADS and HHSC to provide notice of the beneficiary’s death and to provide notice of representation. The contact information for DADS and HHSC (through TMHP) is provided below:

DADS Third Party Recovery Unit: 512-438-2200

TMHP (HHSC): 800-846-7307

Regarding Medicaid Estate Recovery Program (“MERP”) claims against an estate, see Section IV.A.4 below.

2. TMHP and/or DADS will send a subrogation claim letter to the Trustee (or personal representative) to provide notice of its right of recovery.
3. TMHP and/or DADS will provide a history letter to the Trustee (or personal representative) indicating the amount of their respective Medicaid reimbursement claims.
4. The trustee (or personal representative) should request an itemization of Medicaid expenditures for the beneficiary’s medical care and prescription drugs. Likewise, if the beneficiary received nursing home care, the trustee (or personal representative) should request an itemization of Medicaid expenditures for the beneficiary’s nursing home care from DADS. TMHP and DADS will require an original signed Authorization for Use and Release of Health Information (the “Authorization”) before they will provide an itemization of Medicaid expenditures.
5. The trustee (or personal representative) should review the itemization of Medicaid expenditures with the beneficiary’s family to determine whether all of the costs are correct. If any costs are incorrect, the trustee (or personal representative) should notify TMHP and/or DADS and dispute them.
6. The Trustee should negotiate and pay the Medicaid reimbursement amount. TMHP and/or DADS may be willing to reduce the lien upon a showing of undue hardship.

**Note:** If a residence is an asset of the special needs trust, then, upon the death of the beneficiary, the residence is subject to the payback provisions (just as any other asset remaining in the trust upon the beneficiary’s death). In cases where the liquid assets of the trust are insufficient to repay the amount of benefits provided, the State of Texas will have a claim to the residence.

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First appeared as part of the conference materials for the  
11<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts session  
"Closing Special Needs Trusts (with Current Medicaid Changes)"