

PRESENTED AT

**15th ANNUAL CHANGES AND TRENDS AFFECTING
SPECIAL NEEDS TRUSTS**

**FEBRUARY 7-8, 2019
AUSTIN, TEXAS**

**Paying Debts, Expenses, and Claims
From a First Party SNT After
the Beneficiary's Death**

**Presented by
Scott Stebler**

**Paper by
Scott Stebler & Sarah Sulak**

Author Contact Info:
Scott Stebler
scott@stebler.sulak.com
Sarah Sulak
sarah@stebler.sulak.com
Stebler & Sulak, PLLC
Austin, Texas
(512) 368-9323

TABLE OF CONTENTS

I. Introduction - A Story	3
II. The Medicaid Payback Requirement.....	5
A. OBRA '93 and First Party SNTs - Origins of Medicaid Payback.....	5
B. POMS Provisions Relating to the Medicaid Reimbursement Requirement	6
III. Claims or Expenses Post-Death Under the POMS.....	7
A. Administrative Expenses that Can Be Paid Prior to Medicaid Payback.....	7
B. Expenses Expressly Not Allowed to Be Paid Prior to Medicaid Payback	7
C. Summary & Conclusion	8
IV. Lack of Guidance Under Texas Statute and MEPD Handbook.....	8
V. Practical Aspects of Medicaid Reimbursement in Texas	9
A. Reimbursement to Medicaid . . . NOT to Social Security or Medicare	9
B. Notifying Texas Medicaid Agencies of Death	9
C. Addressing the Claim	10
VI. Allowable Administrative Expenses on Death of Beneficiary	11
A. Trustee Fees & Expenses	11
B. Attorney's Fees & Expenses.....	12
C. Other Professional Fees.....	12
D. Taxes.....	12
VII. Prohibited and Questionable Debts and Expenses on Death of Trust Beneficiary ..	12
A. Funeral Bills and Related Expenses	13
B. Payments of Debts Owed to Third Parties	13
C. Taxes Other Than Estate Taxes.....	14
D. Payments to Residual Beneficiaries	14
VIII. Pooled Trusts.....	14
A. Permissive Retention of Deceased Beneficiary's Share in the Trust	15
B. POMS Provisions on Medicaid Reimbursement from Pooled Trusts	15
C. Expenses/Debts Payable before Medicaid Payback.....	16
IX. Arguments for Repayment of Family Claims or Debts Before Medicaid Payback	16
A. Argument #1: Paying Debts Owed as Trust Administrative Expenses	16
B. Argument #2: MERP Exceptions Should Apply	17
C. Argument #3: <i>Ahlborn</i> Applies to Medicaid Payback from SNT	19
D. Argument #4: Quantum Meruit or "Unjust Enrichment"	20
E. Summary and Conclusion.....	21
X. Planning to Avoid Medicaid Reimbursement.....	21
A. Limit Reliance on Medicaid When Possible	21
B. Purchase the House Outside of Trust.....	22
C. Purchase a Pre-Need Burial Plan	22
D. Utilize an ABLE Account When Eligible	23
E. Pay Family Caregivers When Appropriate.....	23
F. Written Agreement with Family Members Regarding Future Payment.....	24

Paying Debts, Expenses, and Claims from a First Party Special Needs Trust After the Death of the Beneficiary

By Scott Stebler and Sarah Sulak

I. Introduction - A Story

The story that follows is fictional, yet familiar, in the sense that it describes situations faced often by trustees administering first party, (d)(4)(A) special needs trusts, and by attorneys assisting families with a disabled child or other family member. Any similarities or likeness to past, present, or future clients of the author, or colleagues of the author, are unintentional, coincidental, and should be ignored:

The Accident: Imagine a child, Samantha, severely injured at age nine in an automobile accident caused by the negligence of a truck driver who fell asleep at the wheel and drove his truck head-first into the vehicle driven by Samantha's mother. While Samantha's mother and younger sister were only minimally injured in the accident, Samantha has a severe head injury and a resulting seizure disorder that will cause her to be totally dependent on others for her care for the rest of her life. She is a wheelchair-bound quadriplegic, who cannot speak, feed herself, bathe herself, or handle any other basic activities of daily living without assistance.

The Settlement: Because only modest insurance coverage is available, a lengthy lawsuit and subsequent settlement nets Samantha only about \$600,000.00, which is placed in a court-created, first party special needs trust. A corporate fiduciary is appointed to serve as trustee. Samantha's mom acts as her primary caregiver, and has to quit her prior job as a preschool teacher to oversee Samantha's care. Samantha's father is out of the picture, having divorced her mother before the accident, and he is marginally employed and pays little to no child support. Samantha's mom also does her best to be a good mom to Samantha's younger sister.

Medicaid Benefits are Obtained: With the help of a special needs attorney and a professional care manager, both engaged by Samantha's trust, Samantha becomes qualified for a small amount of SSI, plus Medicaid benefits and services. A Medicaid Waiver program begins paying for up to 60 hours per week of in-home caregiving, which enables Samantha's mom to work part-time as a substitute teacher, and earn some income, but she is constantly on the verge of financial ruin, with mounting credit card debts and bounced checks. The trust purchases a small home for Samantha and her mother to live in, as mom cannot qualify for a mortgage and struggles even to pay rent. The home is owned by the trust to avoid the necessity of establishing a guardianship proceeding, which would likely be required in order to hold and manage the house in Samantha's name individually.

Over the next 10 years, Samantha's mom struggles to take care of Samantha in the trust-owned home, but manages to get by with a revolving-door of caregivers. Some are paid through the Medicaid Waiver program; others are paid by the trust. The trustee, a special needs attorney, and a professional care manager all suggest at times that Samantha's mom could be paid as a caregiver for a portion of the hours

that she cares for her daughter. Mom refuses to be paid, out of a concern that the trust will be depleted too rapidly, which would leave Samantha with insufficient resources for the rest of her life. The trustee repeatedly tries to work with Samantha's mom to purchase a pre-need burial plan for Samantha, but her mother never seems to be able to focus on that, perhaps because she is an overwhelmed caregiver, or perhaps because she does not want to think about the death of her child.

The Death of Samantha: After years of relative stability in Samantha's health, she takes a sudden turn for the worse at age 21. Her seizures return and seem to be uncontrollable. She is hospitalized repeatedly, at first just for a few days, and then for more than a week at a time. Mom gives up even her part-time work, and stands vigil over her daughter for all of these difficult hospitalizations. Samantha nearly dies several times, but each time seems to rally and recover. Just when she seems to be improving and stabilizing, the seizures return with a vengeance, and she dies, quite suddenly.

The Aftermath: At the time of the child's death, the trust assets are valued at around \$500,000.00, of which \$200,000.00 is the trust-owned house. The trust, like all first party SNTs, has a Medicaid reimbursement provision. The Medicaid reimbursement claim at Samantha's death is well over \$1 million.

- Samantha's mom approaches the trustee and requests that the trust pay for Samantha's funeral. The trustee's response: "No, I'm sorry, we cannot do that because Medicaid gets reimbursed first, and the Medicaid claim exceeds the remaining assets of the trust."
- Samantha's mom asks if the trust will at least help with the travel expenses of family members who wish to come from out of state to Samantha's funeral. The trustee's answer: "No, we cannot do that because of the Medicaid reimbursement claim."
- Mom has purchased some expensive medical supplies for Samantha over the past few months, with her own credit card, and asks the trustee to reimburse her for those supplies. The trustee's response: "No, I am sorry, we cannot pay for anything more at this point, as all assets have to be used to repay the state Medicaid agency."
- Mom asks if she can at least keep the home, as it has been her home for more than seven years. The trustee responds: "No, I'm sorry, the house must be sold, so that the proceeds can be used to pay Medicaid back."
- Mom is dumbfounded and asks, "Are you saying I have to move out of the house while I am still struggling with the death of my daughter?" The trustee's response: "Yes, I am sorry, but you will need to begin looking for a new place to live as soon as possible. Remember, we told you this would happen when the trust terminated."

Has the trustee responded correctly to Samantha's mother? Could the situation really be this harsh for Mom, after all of the hours, days, and years that she has invested in the care of Samantha? After all of the sacrifice of her own career, her own financial stability, and her own life, to care for her child, she is left with nothing?

This paper will explain why the trustee's responses to Samantha's mother - harsh as they may sound and be - were essentially correct. The statutory origins of "Medicaid payback" (the sometimes tragic trade-off that is inherently involved with first party special needs trusts) will be explained, along with a discussion of the relevant POMS provisions, Texas Medicaid regulations, and relevant court opinions addressing

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Paying Debts, Expenses, and Claims From a First Party SNT After the Beneficiary's Death

Also available as part of the eCourse

[Death, Divorce, and Special Needs Trusts: What to Expect and How to Help Your Clients](#)

First appeared as part of the conference materials for the
15th Annual Changes and Trends Affecting Special Needs Trusts session
"Outstanding Debts vs. Medicaid Payback: Does Death Kill the Debt?"