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Special Needs Trusts
A Guide for Attorneys, Financial Advisors and Trust Officers

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Case Law Update

A review of significant cases from the past year, including trends represented in those cases and suggestions for attorneys working with special needs clients.

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A Selection of Cases from 2015 about or Pertaining to SNTs
From Texas and Beyond

Cases about SNTs from Beyond[1]

DeCambre v. Brookline Housing Authority, 95 F. Supp. 3d 35 (D. Mass. 2015)
https://www.gpo.gov/fdsys/pkg/USCOURTS-mad-1_14-cv-13425/pdf/USCOURTS-mad-1_14-cv-13425-0.pdf (currently on appeal to the 1st Circuit).

This case concerned the question of whether disbursements from a beneficiary's first party SNT would impact the beneficiary's receipt of HUD Section 8. "The issue before the Court turns on the interpretation of HUD regulations for calculating annual income for housing assistance eligibility purposes; specifically, whether income should include disbursements from a special needs trust that was funded by lump-sum settlements from a personal injury lawsuit."

The court noted that lump-sum settlements are not included in calculating income but questioned whether the "settlement loses its identity as a lump-sum settlement once it is placed in an irrevocable trust." Looking at the regulations, cases outside of Massachusetts and other sources, the court determined that the disbursements from the SNT would be counted toward DeCambre's annual income. "To the extent the [housing authority] treated DeCambre's expenditures as spending from an irrevocable trust, rather than from a personal settlement fund, the Court holds that their determination was a reasonable one." Affirming the housing authority, the court held that

> Based upon its reasonable interpretation and application of HUD provisions defining special needs trusts principal in the determination of annual income, it can be concluded that DeCambre's income, as calculated by the BHA, exceeded the outlined limits of Section 8 housing eligibility.
>
> At the same time, this case demonstrates the serious problem that beneficiaries of irrevocable trusts face; in particular, those that seek to pour lump-sum settlement funds into irrevocable trusts. But until the rules and regulations are clarified, public housing authorities should provide clear guidance and instruction for potential tenants with regard to their financial planning and spending. A more thorough and thoughtful analysis is required by public housing authorities when determining Section 8 eligibility, until further guidance is provided by the HUD.

(The remainder of the opinion concerns the court's discussion of the plaintiff's due process and discrimination claims as well as the regulations' treatment of sporadic and excludable expenses).

Draper v. Colvin, 779 F.3d 556 (8th Cir. 2015)
http://media.ca8.uscourts.gov/opndir/15/03/132757P.pdf

[1] A portion of these case summaries are from *The Update* presented by Robert B. Fleming for Stetson's 2015 Annual Special Needs Trust National Conference and reprinted with permission.

Stephany Draper is a traumatic brain injury patient who, at age 20, in 2008, settled a personal injury claim. She had signed a durable power of attorney naming her parents as her agents shortly after she turned 18. Her parents (without referencing the power of attorney) signed a special needs trust intended to comply with 42 U.S.C. §1396p(d)(4)(A). Her father signed the settlement agreement and directed transfer of the $429,259.41 in net settlement proceeds to the trust. Seven months after her settlement and establishment of the SNT, she received a notice from SSA that she had lost her eligibility for SSI and Medicaid because her assets exceeded $2,000.

On appeal, the ALJ found that the trust was not an exempt asset, applying POMS SI 01120.203B(1)(g) (which requires the person establishing the trust to have the authority to do so). Since (according to the ALJ) the parents did not use their own funds to establish the trust (e.g.: "seed money"), they must have been acting as Stephany's agents rather than as parents – and the trust failed for having been improperly created.

While the appeal to SSA's Appeals Council was pending, her parents secured a state court order *nunc pro tunc* modifying the trust to show the parents as establishers as parents, not as agents. After the Appeals Council denied her appeal, Stephany then sought District Court review, which affirmed SSA and Stephany then appealed to the Eighth Circuit Court of Appeals.

The Eighth Circuit affirmed, denying eligibility. First, the Circuit Court discussed the proper use of POMS in analyzing the trust. While the Circuit Court noted that the federal statute does not explicitly resolve the controversy, it determines that POMS are agency determinations generally entitled to deference under *Skidmore v. Swift Co.*, 323 U.S. 134 (1944).

On the merits, the appellate court ruled that Stephany's parents did not create an "empty" or "dry" trust – it was initially and immediately funded with Stephany's personal injury settlement. Thus, the POMS interpretation that her parents acted as her agents in establishing the trust is supported by the record.

Stephany had maintained that, even if that argument was correct, the later state court action modifying the trust cured any error committed at the time. The appellate court disagreed; the POMS and the Social Security Administration that the court order could not change the role under which the parents acted at the initial establishment of the trust. Furthermore, the later court order did not amount to a court establishment of the trust, since it only "assigned itself a retroactive role in the already-established" trust.

***Herting v. California Dep't. of Health Care Services*,** 185 Cal. Rptr. 3d 401(Cal. App. 2015) http://www.courts.ca.gov/opinions/documents/H040220.PDF

Alexandria Pomianowski was the beneficiary of a self-settled special needs trust when she died at age 23 in 2013. The trustee of her SNT maintained that, since all the Medicaid services she had received had been before she turned 55, federal estate recovery rules prevented any post-death recovery from her SNT.

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