

The Impacts of Trusts on Public Benefits for Disabled Persons

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This article discusses the impacts of various kinds of trusts on public benefits for disabled individuals.

Contrary to popular belief, establishing a trust for a disabled person does not always result in the loss of the disabled person's eligibility for public benefits. If a trust is drafted carefully and properly administered, it can provide significant benefits to a disabled person while maintaining eligibility for public benefits. Thus trusts can be a useful tool to increase a disabled person's quality of life.

This article addresses some of the most common benefits available and general considerations concerning the impacts of various types of trusts on such benefits. The appropriate use of trusts is fact-specific and practitioners must take care to consider all applicable laws and regulations, including the Social Security Administration's Program Operations Manual System (POMS).¹ (See accompanying Sidebar for abbreviation/acronym key.)

Social Security Programs Based on Disability

To be eligible for Social Security based on disability, a person must be unable to engage in any substantial gainful activity (SGA) "by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."²

SGA is determined when a person is able to work and earn at least \$1,170 (2017) per month for a period of nine months (months are not required to be consecutive) after the date of disability onset.³ If this occurs, the person is no longer considered disabled by Social Security.

Social Security Disability Income

Social Security Disability Income (SSDI) is a benefit provided to adults under age 65 who have worked and paid into Social Security from

earned income or self-employment income for a certain period of time before the date of disability onset.⁴ To qualify, a disabled person must be fully insured, which means that the person has sufficient earnings or work credits consisting of 20 full quarters (1 quarter = 3 months), or 5 years, within the full 40 quarters (10 years) preceding the date of disability.⁵ Alternatively, a person can meet the quarters of coverage criteria if he earned a sufficient amount of wages or self-employment income.⁶ For 2017, one work credit is received for each \$1,300 of income earned up to a maximum four credits per year, or \$5,200.⁷

There is a five-month waiting period that generally begins the first of the month following the date of disability onset, but no earlier than 17 months from the date an application is filed.⁸ This waiting period was established to allow an individual with a short-term disability an opportunity to recover.⁹

ABBREVIATIONS AND ACRONYMS

SSDI is based on disability and the person's average lifetime earnings.¹⁰ It is not a needs-based program with income or asset restrictions. The monthly amount payable is based on the person's average lifetime earnings with a maximum benefit of \$2,687 per month (2017).¹¹

A disabled adult child can qualify for SSDI based on her parent's work record, but only if the adult child was completely disabled before age 22, the parent has a qualified work record and is deceased, permanently disabled, or receiving retirement benefits.¹²

SSDI benefits are not available to minor children (who have no work record), but they can qualify for and receive "auxiliary benefits," such as disabled widow's benefits or childhood disability benefits.¹³ A minor child under age 18, disabled or not, can qualify for auxiliary benefits only if the parent receives retirement or SSDI benefits or was entitled to one of those benefits before the parent's death.¹⁴

Medicare

A disabled person under age 65 receiving SSDI benefits will be eligible for Medicare health coverage after a two-year waiting period (in addition to the five-month waiting period) from the date of eligibility.¹⁵ The basis for this waiting period is to require recipients to use any other health insurance coverage that may be available, including coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA).¹⁶ Medicare benefits are subject to the usual period limitations and payment of premiums, deductibles, and co-payments.¹⁷

Under programs referred to as Medicare Savings Programs (MSPs),¹⁸ Medicaid will pay the Medicare premiums, deductibles, and co-payments for individuals or couples who meet the eligibility criteria. The benefits and eligibility criteria for these programs in 2017 are:

Qualified Medicare Beneficiary (QMB) Program

Eligibility: Must receive or be eligible to receive Medicare and meet Medicaid income and resource limits

Benefits: Pays Medicare Parts A and B premiums, deductibles, and co-pays

ABLE	Achieving a Better Life Experience Act
ACA	Patient Protection and Affordable Care Act
ADL	Activities of Daily Living
BI Waiver	Brain Injury Waiver
COBRA	Consolidated Omnibus Budget Reconciliation Act
CWA Waiver	Children with Autism Waiver
DD Waiver	Developmental Disabilities Waiver
DRA	Deficit Reduction Act
EBD Waiver	Elderly Blind and Disabled Waiver
HCBS	Home and Community Based Services
ISM	In-Kind Support and Maintenance
LIS	Low Income Subsidy
LTC	Long Term Care
MI Waiver	Mental Health Waiver
MSP	Medicare Savings Program
PMV	Presumed Maximum Value
POMS	Program Operations Manual System for Social Security
QDWI	Qualified Disabled and Working Individual
QI	Qualified Individual
QMB	Qualified Medicare Beneficiary
SGA	Substantial Gainful Activity
SLMB	Specified Low Income Medicare Beneficiary
SSDI	Social Security Disability Income
SSI	Supplemental Security Income
VTR	Value of One-Third Reduction

Income Limits:
Individual, \$1,025; Couple, \$1,374
Resource Limits:
Individual, \$8,890; Couple, \$14,090¹⁹

Specified Low Income Medicare Beneficiary (SLMB) Program

Eligibility: Must receive or be eligible to

receive Medicare and meet Medicaid income and resource limits
Benefits: Pays Medicare Part B premium only
Income Limits:
Individual, \$1,226; Couple, \$1,644
Resource Limits:
Individual, \$8,890; Couple, \$14,090²⁰

Qualified Individual (QI) Program

Eligibility: Must receive or be eligible to receive Medicare and meet Medicaid income and resource limits

Benefits: Pays Medicare Part B premium only

Income Limits:

Individual, \$1,377; Couple, \$1,847

Resource Limits:

Individual, \$8,890; Couple, \$14,090²¹

Qualified Disabled and Working Individual (QDWI) Program

Eligibility: Must receive or be eligible to receive Medicare and meet Medicaid income and resource limits

Benefits: Pays Medicare Part A premium only

Income Limits:

Individual, \$2,030; Couple, \$2,727

Resource Limits:

Individual, \$4,000; Couple, \$6,000²²

Low Income Subsidy (LIS) Program

Eligibility: Receive both SSDI and Medicare; or receive SSI; or eligible for QMB, SLMB, or QI benefits; *and* meet Medicaid income and resource limits

Benefits: Pays Medicare Part D premium only (prescription drug plan)

Income Limits:

Individual, \$1,508; Couple, \$2,030

Resource Limits:

Individual, \$13,820; Couple, \$27,600²³

Supplemental Security Income

Supplemental Security Income (SSI) is a needs-based Social Security program that provides financial assistance to persons who are blind, disabled, or over age 65 and who meet certain income and asset standards.²⁴ To be eligible for SSI, an individual cannot have more than \$2,000 in *countable* resources²⁵ and must meet the income standards. The standard maximum SSI benefit is \$735 per month for 2017.²⁶ (SSI benefits are also available to qualified minors under certain circumstances, but this article focuses primarily on benefits for single, unmarried adults.)

All assets count toward the \$2,000 limitation except certain exempt assets, such as a home, a car, household goods and personal effects,

minimal life insurance, a burial plot, and an irrevocable burial/funeral plan.²⁷ In determining income eligibility, Social Security considers three types of income:

Earned income. Earned income is money that is paid to the individual in exchange for services performed (wages).²⁸ Earned income is counted by first excluding \$65, then one-half of the remaining amount is counted on a dollar-for-dollar basis. For example, if a disabled person earns \$1,500 per month, countable earned income is calculated as follows:

“
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administered, it can
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”

$$\begin{array}{r} \$1,500 \\ - \quad 65 \\ \hline \$1,435 \div 2 = \$717.50 \end{array}$$

Therefore, \$717.50 is deducted from the standard of \$735. If no other countable income is received, the SSI benefit would be \$735 - \$717.50 = \$17.50 per month. *If earned income is the only income received and it exceeds \$1,535 gross per month, the person is ineligible for SSI.*

Unearned income. Unearned income is money received that is not related to services performed by the individual, such as interest, pensions, gifts, personal injury settlements, and some types of royalties.²⁹ Unearned income is counted on a dollar-for-dollar basis, with the

first \$20 excluded. *An individual receiving only unearned income can receive up to \$755 before losing eligibility (\$735 + \$20 = \$755).*

In-kind support and maintenance (ISM) income.³⁰ ISM income is a non-monetary benefit an individual receives from someone else for food and shelter expenses. It does not necessarily cause a loss of eligibility. ISM is determined by Social Security under two separate rules, the Value of One-Third Reduction (VTR) rule and the Presumed Maximum Value (PMV) rule.³¹ Both rules cannot apply to the same living arrangement of an SSI recipient.

The VTR rule is used when a recipient receives both food and shelter from another person or persons residing in the same household owned by someone other than the recipient.³² Under the VTR rule, the full one-third amount is applied regardless of the actual amount of ISM received.³³ There are no reductions or offsets. The VTR rule does not apply if the recipient lives in his own household and owns any form of interest in the property (regardless of whether the recipient contributes to the household costs for food and shelter),³⁴ has a rental liability, or pays a pro rata share of the household operating expenses.³⁵

A recipient has a rental liability when she resides in her own household and has an obligation to a landlord to pay any amount of rent.³⁶ This can be a minimal amount. A recipient can reside in a home with other residents and still be considered a separate household as long as the recipient maintains a separate economic unit and does not receive food or shelter from other residents.³⁷ A flat fee arrangement is acceptable if it pays both food and shelter expenses and if the recipient maintains a separate household arrangement.³⁸ Services in exchange for cash is an acceptable form of payment for a portion of rent, but not if the services constitute 100% of the rental obligation.³⁹

When a recipient has a rental liability but the VTR rule does not apply and the recipient is related as a parent or child to the landlord or the landlord's spouse, Social Security will determine a fair market value for the rent and impute ISM in the amount of the difference from the rent obligation of the recipient and the fair market value.⁴⁰

The PMV rule is used when the recipient does not receive both food and shelter from within the household or if the recipient resides alone.⁴¹ The value of the PMV is one-third of the benefit rate plus \$20 = \$265.⁴² Under the PMV rule, Social Security assumes the ISM value exceeds \$265 per month.⁴³ This assumption can be rebutted if the recipient can show that the actual value received is less or that the recipient contributes to the cost⁴⁴ of the recipient's own food and shelter expenses.⁴⁵

The amount of the one-third reduction is always based on the full amount of the SSI benefit. If a recipient's benefit of \$735 is reduced to an amount less than \$245 for other reasons, such as repayment of an overpayment or the receipt of additional earned or unearned income, the one-third ISM deduction would render that individual ineligible for SSI.

If a person receives two or all three types of income, the income is split up and calculated independently. The results are then added together and deducted from the monthly SSI benefit. If the total countable income exceeds the standard monthly SSI benefit, the individual will lose eligibility. For example, if a disabled adult resides with a friend in the friend's home and maintains a separate household, does not contribute to food or shelter expenses, earns \$600 per month from employment, and receives a monthly gift from a grandparent in the amount of \$100, his SSI benefits would be calculated as follows:

Earned Income:
 $600 - 65 = 535 \div 2 = 267.50$
 Unearned Income: $100 - 20 = 80.00$
 ISM Income:
 $735 \times .333 = 245.00$ (using the VTR rule)
 Total Deduction: \$592.50
 SSI Monthly Grant:
 $735 - 592.50 = 142.50$

If the same individual pays his friend \$150 per month rent but does not contribute to food expenses, benefits would be calculated as follows:

Earned Income:
 $600 - 65 = 535 \div 2 = 267.50$
 Unearned Income: $100 - 20 = 80.00$
 ISM Income:
 $265 - 150 \text{ contribution} = 115.00$

(using the PMV rule)
 Total Deduction: \$462.50
 SSI Monthly Grant:
 $735 - 462.50 = 272.50$

In this example, in exchange for paying \$150 in rent, the SSI benefit increases by \$130.00 per month.

Equitable Ownership Under a Trust

ISM for free shelter is not imposed if a recipient's legal residence is titled in the name of an exempt trust for the SSI recipient's benefit. Social Security considers the recipient to have an "equitable ownership interest" under a trust.⁴⁶ This is true as long as the trust is exempt under SSI regulations (discussed below) and the SSI recipient is the sole beneficiary. The Social Security Administration, at POMS SI 01110.515.C.2, defines an equitable ownership interest under a trust as follows:

A trust is a right of property established by a trustor or grantor. One party (trustee) holds legal title to trust property which he or she manages for the benefit of another (beneficiary). The beneficiary does not have legal title but does have an equitable ownership interest.

Because the recipient has an ownership interest, ISM in the form of rent-free shelter is not applicable, and the one-third reduction is not imposed. However, under POMS SI 01120.200.F, if the trust pays for other food or shelter costs, those payments are considered ISM. This can be avoided by the beneficiary paying these expenses out of the SSI income.

If a disabled individual receiving SSI owns a home individually and wants to sell it and purchase a different home, the sale proceeds are permitted to be held for a period of 90 days while another home is being purchased.⁴⁷ The funds should be kept completely separate from any other funds owned by the SSI recipient.

Concurrent Medicaid

A person who receives SSI benefits is automatically eligible for regular Medicaid⁴⁸ (essentially health insurance coverage). There are no premiums for Medicaid, but there may be very small co-pays, for example, \$2. A separate application for Medicaid is not required for a person receiving SSI.

Dual Eligibility

A person can be eligible to receive both SSDI and SSI, with the corresponding Medicare and Medicaid, at the same time. If a person's SSDI is less than \$735 per month and the individual is eligible for SSI, SSI will supplement the SSDI income up to \$735 per month.⁴⁹ For example, if SSDI is \$600 per month, SSI will pay \$135 per month. The individual will receive both Medicare and Medicaid benefits. If SSDI benefits are in excess of \$735 per month, the individual will not be eligible for SSI, but can still currently receive Medicaid under the Affordable Care Act (discussed below) and other programs.⁵⁰

Because Medicaid is a "payer of last resort," when an individual receives both Medicaid and Medicare, Medicare first pays everything covered by Medicare and then Medicaid pays the balance.⁵¹

Medicaid: Health First Colorado

In Colorado, Medicaid is available to individuals through different programs. The program requirements vary based on individuals' particular circumstances.

Medicaid under the Affordable Care Act

The Patient Protection and Affordable Care Act (ACA) was signed into law by President Obama on March 23, 2010.⁵² Among other things, this program was designed to assist families and non-disabled, low income individuals under age 65 to obtain health insurance at a lower cost or no cost.⁵³ Eligibility for this program is based only on income; assets are unlimited, and non-income producing assets (e.g., a residence, or collections such as artwork or jewelry) will not affect eligibility.

Countable income is calculated based on IRS rules for determining taxable income.⁵⁴ If an individual's countable income is below 133% of the current federal poverty level, the individual is eligible for regular Medicaid with no premium requirement.⁵⁵ The federal poverty level for this program in 2017 is \$11,880 per year (\$990 per month).⁵⁶ The maximum income allowed for an individual living in Colorado to be eligible for this program in 2017 is \$16,044 (\$1,337 per month).⁵⁷ Higher levels of income can qualify for payment subsidies to help with the cost of

insurance, purchased through an insurance exchange.⁵⁸ (See the Income Guideline Chart referenced in endnote 57.)

Whether these benefits will continue is currently uncertain based on potential congressional changes to the ACA.

Medicaid Long Term Care Waiver Programs Under Home and Community Based Services

Long Term Care (LTC) Medicaid is a program that pays for medical and residential care for elderly and disabled individuals who require a certain level of care.⁵⁹ This program covers care received in places such as nursing homes, assisted living facilities, and mental institutions. LTC Medicaid benefits are also available under a multitude of “waiver” programs that have been designed for specific medical conditions: elderly/blind/disabled (EBD), brain injury (BI), mental health (MI), children with autism (CWA), developmental disability (DD), and many others. These programs fall under the umbrella of “Home and Community Based Services” (HCBS).⁶⁰ Qualified individuals can receive medical services at their homes in the community, in institutions other than nursing homes, or other certified residential placement facilities such as group homes. All LTC programs are needs-based and have income and resource eligibility requirements determined by a three-pronged test that considers medical need, income, and resources (assets).⁶¹

Medical need. To qualify for LTC Medicaid benefits, a person needs to be sick enough to require a certain level of care as determined by an assessment performed by a Medicaid subcontractor.⁶² The assessment is to determine the individual’s ability to perform activities of daily living (ADLs), such as bathing, dressing, cooking, memory, and safety.

Income. An individual can qualify for benefits if the person’s gross monthly income is less than \$2,205 (2017).⁶³

Because this income threshold is so much lower than the cost of nursing home care, it created a situation where individuals who received gross income in excess of the income cap but insufficient to pay for the cost of care were unable to qualify for Medicaid. This gap is sometimes referred to as the “Utah Gap.”⁶⁴

A solution for this problem was created in the Colorado case *Miller v. Ibarra*,⁶⁵ with the establishment of a special type of trust for the income of applicants, thus allowing them to qualify for benefits. This type of trust is commonly referred to as a *Miller Trust*, a Utah Gap Trust, an Income Trust, or a Qualified Income Trust (QIT or QUIT).

As a result, if a person’s gross income exceeds the regular income cap, but is less than the average cost of nursing home care in the region where the person lives, an income trust can be established. If a person’s gross monthly income exceeds this upper cap, it is presumed that the person can afford to privately pay the cost of nursing home care and cannot qualify for Medicaid at all. Federal law subsequently allowed for the creation of an income trust.⁶⁶

The income trust has one purpose: to allow individuals whose gross income exceeds the

basic income cap to qualify for Medicaid. All of the individual’s income must be deposited into an account titled in the name of the trust. The only distributions permitted from this trust are patient payments to the nursing home or other LTC facility, the individual’s monthly personal needs allowance (\$81.95 in 2017), and a spousal and/or dependent family member allowance, if applicable.⁶⁷ For nursing home care, these permitted payments are intentionally calculated to essentially deplete the trust balance each month (with the exception of \$20 per month, which is permitted to remain in the trust for account maintenance costs such as bank service charges).⁶⁸

Under HCBS programs, the trust can distribute funds to the recipient in an amount that would increase the individual’s gross income up to the basic income cap. The remaining funds must be kept in the trust account.⁶⁹ No

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distributions of any other kind are permitted to be paid from the trust, except any taxes specifically owed by the trust itself.⁷⁰ No distributions are permitted for trustee fees or costs such as funeral expenses. An accounting⁷¹ and any amount remaining in the trust at the time of the individual's death must be provided to the state.⁷²

The income trust form can be obtained from local county human services departments.⁷³ Practitioners are advised to use the form rather than draft their own because the form is approved by the state and its use will avoid potential processing delays.

Assets. Most Medicaid planning is focused on assets. An applicant for LTC Medicaid may have up to \$2,000 in countable assets to qualify.⁷⁴ Because eligibility is categorical, even one penny more than \$2,000 in countable assets will render the individual ineligible. All assets are countable except a home up to a certain equity value (\$560,000 for 2017 in Colorado), one car, minimal life insurance, burial plots and irrevocable burial plans, and wedding jewelry.⁷⁵ There is a plethora of exceptions and modifications under state and federal laws.⁷⁶

Transfers without Fair Consideration (Gifts)

If assets are given away within five years immediately preceding an application,⁷⁷ a penalty may be imposed in the form of a period of ineligibility for Medicaid benefits.⁷⁸ This penalty period is calculated by dividing the total amount of gifts made within the five years immediately preceding an application for Medicaid by the average cost of nursing home care in Colorado in the year of application.⁷⁹ The average cost of nursing home care in Colorado for 2017 is \$7,854 per month.⁸⁰ Thus, for example, if an individual makes total gifts of \$50,000 to family members in the immediately preceding five years, that individual will not be eligible to receive Medicaid benefits for a period of six months and 11 days ($\$50,000 \div \$7,854 = 6.366183$).

Until the passage of the Deficit Reduction Act (DRA) of 2006, each gift was treated independently, and separate penalty periods were imposed that ran consecutively and started on the date each gift was made.⁸¹ The DRA amended this so that penalty periods now begin on the

date an applicant is found "otherwise eligible" for Medicaid after an application is filed.⁸² Other significant changes in the DRA include a longer look back period, a limit imposed on the value of home equity (\$560,000 in 2017), stricter annuity rules, and stricter gifting rules.⁸³

Estate Recovery

Colorado Medicaid has a statutory right of recovery (reimbursement) from a decedent's estate in the amount of Medicaid benefits paid on behalf of a deceased individual who was over the age of 55 at the time benefits were received, institutionalized, or received HCBS, hospital care, and prescription drug benefits.⁸⁴ The decedent's residence is typically the sole probate asset. Medicaid is not permitted any recovery from a decedent's estate if the decedent was younger than age 55 at the time of death, or if a spouse or a minor or disabled child survives the decedent.⁸⁵

Medicaid also has the right to place a lien against a Medicaid recipient's home to recover Medicaid benefits paid on behalf of the owner, provided the owner is institutionalized and unable to return home.⁸⁶ If the owner does in fact return home, the lien must be dissolved.⁸⁷ The lien does not affect encumbrances on the property preceding the state's lien and would not apply to property that passes at death pursuant to any non-probate ownership arrangement, such as joint tenancy or life estate. Medicaid benefits will not be approved if a beneficiary deed exists on the property.⁸⁸

No lien is permitted if the recipient has a surviving spouse or a surviving minor or disabled child who resides on the property or a sibling who has an equity interest in the property and who resided in the property for at least one year before the owner's institutionalization and continues to live on the property.⁸⁹

Personal Injury Settlements

Colorado has an "automatic statutory lien" against any recovery a Medicaid recipient receives as a result of an action where a third party is liable.⁹⁰ When Medicaid pays benefits for a recipient, Medicaid is entitled to reimbursement in an amount up to the total amount Medicaid paid during the individual's lifetime.⁹¹

There has been significant national litigation over this reimbursement provision using the argument that Medicaid's right to recovery should only attach to recoveries designated for medical reimbursement. It has also been argued that there should be a standard procedure for determining the amount of the lien because such settlements rarely, if ever, compensate the injured party for the injuries suffered and anticipated life time expenses.⁹²

A new federal statute was passed as part of the Bipartisan Budget Act of 2013 allowing Medicaid recoveries to attach to entire settlement amounts regardless of how damages may be apportioned. This statute became effective October 1, 2017.⁹³ Colorado statutes already provide that the lien attaches to the entire amount of any judgment, award, or settlement.⁹⁴ CRS § 25.5-4-301(5)(d) requires the Medicaid lien to be reduced by an amount that is no more than 25% if the party has legal counsel. Colorado currently negotiates recoveries on a case-by-case basis.

Trusts

In addition to the income trust discussed above, three other types of trusts are exempt from Medicaid consideration as countable assets as long as they meet certain criteria: first party trusts, third party trusts, and pooled trusts. Each has strict requirements.

First party trusts. A first party trust is a pure discretionary trust funded with the beneficiary's own assets.⁹⁵ The Colorado Medicaid regulations refer to it as a "disability trust."⁹⁶ Strict requirements must be met for this trust to be exempt from consideration as an asset or for the funding of the trust to not be considered a transfer without fair consideration, and thus penalized.⁹⁷ This trust is the only practical option available for an individual receiving SSI and Medicaid to preserve funds when money is received from sources such as personal injury settlements, inheritances, or retroactive benefits. Any assets remaining in the trust at the beneficiary's death must first be used to reimburse the state of Colorado up to the amount of Medicaid benefits paid on behalf of the beneficiary during the beneficiary's lifetime.⁹⁸ Colorado law and Medicaid regulations require this type of trust

to terminate upon the beneficiary's death, or if the beneficiary no longer requires Medicaid in the state of Colorado. This gives Colorado priority for reimbursement above all other states that may also have a recovery right against the same trust under federal law. The Social Security Administration recently refused to approve a trust because of this provision and required the trust to be amended. Any other trust established by the individual is either an available resource or a transfer without fair consideration.⁹⁹

Third party trusts. A third party trust is a trust created by someone other than the beneficiary and funded with assets that do not belong to the beneficiary.¹⁰⁰ These trusts are routinely established in wills and funded with inheritances from family members. There is a wide range of names for these trusts as used in Medicaid planning, including special needs trusts, supplemental needs trusts, discretionary non-support trusts, and spendthrift trusts. To be exempt, third party trusts need only be purely discretionary, giving the trustee complete decision making authority regarding distributions.¹⁰¹ Colorado Medicaid regulations specifically state that trust principal and income cannot be counted against the beneficiary for eligibility purposes as long as the trustee can exercise discretion,¹⁰² but the beneficiary cannot have any control or influence on distributions, among other considerations.¹⁰³

Colorado Medicaid regulations exempt third party trusts that limit distributions to non-support, special, and/or supplemental needs.¹⁰⁴ Based on the beneficiary's circumstances, limiting distributions in this way may be unnecessarily restrictive because the trust is unable to help the beneficiary in case of emergencies or other changes of circumstances. Even if the trust is exempt as a resource, all distributions from the trust are subject to review and consideration as countable income.¹⁰⁵

Frequently, a disabled individual is named as a devisee in a will that does not provide any protection for such devise, resulting in the loss of the beneficiary's eligibility for benefits. Wills or other testamentary documents may permit a personal representative to establish a trust for the disabled individual's benefit as long as

such action is permitted under statute or the testamentary document.¹⁰⁶ Such inherited funds can also be spent by the personal representative to purchase an exempt home for the disabled individual or other exempt items.¹⁰⁷

Pooled trusts. A pooled trust is a "special needs" trust where all funds are "pooled" for investment purposes and managed by a nonprofit organization.¹⁰⁸ Each beneficiary has a separate account. The trust operates under the same rules and restrictions as a first party trust. The only exception is that the state is not entitled to receive any funds from the beneficiary's account upon the beneficiary's death so long as the pooled trust retains the funds for the functions of the nonprofit organization.¹⁰⁹

Sole Benefit Trust

Certain asset transfers are not penalized, such as the transfer of a home to a minor or disabled

child or a caretaker child.¹¹⁰ An individual applying for long term care Medicaid benefits is permitted to transfer a home to a disabled child under age 65, and/or liquid assets to a disabled child (or other disabled individual) under age 65, either outright or in a "sole benefit" trust, without incurring a transfer penalty.¹¹¹ Disability is determined by Social Security criteria.¹¹²

Medicaid requires a sole benefit trust to comply with all regulations for third party trusts in addition to the sole benefit rules.¹¹³ "For the sole benefit of" is defined by 10 CCR § 2505-10-8.100.7.G.6.c as:

- i. A transfer or a trust is considered to be for the sole benefit of the spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled



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child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

ii. To insure [sic] that the asset transferred is for the sole benefit of the spouse, blind or disabled child or disabled individual, the following criteria must be met:

1. The transfer must be accomplished by a written instrument which legally binds the parties to a specified course of action and sets forth:
 - a. The conditions under which the transfer was made, and
 - b. A statement as to whom can benefit from the transfer.
2. The written instrument must provide for the spending of funds or use of the transferred assets for the benefit of the individual on

a basis that is actuarially sound based on the life expectancy of the individual.

If the asset transferred into the trust is a home, no actuarially sound distribution formula is required.

Finally, the trust must be submitted to and approved by the state.¹¹⁴

If the property held in the sole benefit trust is sold during the Medicaid recipient's lifetime, the net proceeds can remain in the trust, but an actuarially sound distribution plan must be established.¹¹⁵ There may also be capital gains taxes imposed on the sale of the property during the Medicaid recipient's lifetime. Consideration must be given to the payment of expenses of the residence, for example taxes and insurance, either within the trust or outside the trust. Such payments may be considered ISM if the beneficiary receives SSI benefits.

A sample sole benefit trust follows this article.¹¹⁶

Interaction of Trusts and Benefits

The primary goal of using the above types of trusts is to preserve assets for the recipient so she can receive public benefits from the programs discussed herein. As stated throughout, countable assets in excess of \$2,000 render an individual ineligible for these programs, except SSDI.¹¹⁷ If a beneficiary receives funds outright, she will lose eligibility for the needs-based programs until the assets are spent back down to below \$2,000. The beneficiary would then have to start all over and submit new applications for the benefits programs.¹¹⁸ The medical expenses are usually quite substantial and could deplete the assets very quickly if an individual were to receive funds outright and lose eligibility for the programs.

It is not only necessary to protect the assets in carefully drafted trusts, but also critical that the trusts be managed appropriately to preserve the beneficiary's eligibility status. As stated above, all distributions from these trusts are usually at the discretion of the trustee. If the trustee does not strictly comply with the regulations for each program individually, the beneficiary is subject to losing eligibility. Furthermore, for trusts with a Medicaid pay back provision, the trustee can be liable to the state as a contingent beneficiary of the trust.¹¹⁹

The receipt of SSI income is often less important than the corresponding Medicaid payment of medical expenses. As long as a person maintains eligibility for at least \$1 of SSI, he will receive Medicaid coverage.¹²⁰ Some guidelines regarding the management of these trusts are as follows:

- No cash in excess of \$20 per month should be distributed directly to the recipient. Trust funds should not be used to pay for food or shelter expenses. The beneficiary should use the SSI income for such items and use distributions from the trust for "non-necessities." In some cases, it may be more important for the trust to pay for food and shelter and accept the one-third reduction in SSI benefits. Food and shelter expenses include mortgage payments,



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homeowner association fees, real property taxes, heating and cooling bills, electricity, water, sewage and garbage collections, groceries, and meals.

- Suppliers of goods and services for the beneficiary should be paid directly from trust funds.
- Trust funds should not be used to purchase any item or service that is otherwise available through any public benefit program. Medical expenses not covered should have a doctor's order or recommendation.
- With the exception of third party trusts, the funds held in these trusts cannot be used to benefit anyone other than the beneficiary for any reason and under any circumstances and are currently only permitted in Colorado for beneficiaries age 64 and under.
- The trust funds can be used for non-support needs of the beneficiary (although the trust does not have to specifically limit distributions to such non-support needs), such as improvements and repairs to a home owned by the individual or an exempt trust; tools and supplies; lawn and snow maintenance and upkeep; burglar alarm and monitoring/response system; school tuition, books, and supplies; books and subscriptions; entertainment (movies, plays, museums, sporting events); new furniture or other household items; paper goods and other non-food items (paper towels, toilet paper, cleaners, laundry soap); cable, satellite TV, Internet, telephone, and cell phone services; hobby supplies; vacations and/or trips to visit friends or relatives (as long as the tickets cannot be cashed); a travel companion, in some cases; bus passes or the purchase and maintenance of a car (repairs, gas, oil changes); support services; dental care; physical therapy; massages; other medical costs to the extent not covered by Medicaid; and home care services.

HCBS Waiver Programs

If a beneficiary does not receive SSI and is not institutionalized, but receives Medicaid under

the HCBS waiver programs, exempt trusts can be a little more flexible in making distributions to the recipient. As with an Income Trust, the trust can distribute income to the beneficiary to raise the beneficiary's gross monthly income up to the income cap of \$2,205 (2017).¹²¹ Keep in mind that the beneficiary's assets must remain below \$2,000, so distributions should not be made if such funds cannot be readily spent. Otherwise, the same rules should be followed in administering the trust for HCBS purposes.

Achieving a Better Life Experience Act of 2014

The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE) was enacted on December 19, 2014 when President Obama signed the bi-partisan bill, which is codified in the Internal Revenue Code at 26 USC § 529A.¹²² Colorado adopted the Act under House Bill 15-1359 on June 3, 2015 and it is codified at CRS § 23-3.1-301.

An ABLE account is a tax-advantaged account that allows an eligible individual to save funds for disability-related expenses. To be eligible, an individual must be disabled by a condition that began before the individual turned 26 years old.¹²³ Legislation is pending that would increase the age of disability onset from the 26th birthday to the 46th birthday.¹²⁴

The general guidelines for ABLE accounts are:

- An individual may own only one account.¹²⁵
- Total aggregate contributions to an ABLE account are limited to the annual gift tax exclusion amount, currently \$14,000, from all sources each year and must be in the form of cash. Such contributions do not qualify under IRC § 2503(e) for gifts to trusts in the amount of the annual exclusion.¹²⁶
- The account balance cannot exceed \$100,000.¹²⁷
- The account contributions and disbursements are not income or gifts for tax purposes as long as distributions are used only for "qualified disability expenses," including food and shelter expenses, which are not considered as ISM for Social Security purposes.¹²⁸

- The accounts cannot be considered available resources for SSI, Medicaid, and other needs-based public benefits programs.¹²⁹
- Medicaid, as a creditor (not a beneficiary or owner), must be reimbursed for Medicaid benefits paid from the date the ABLE account is established, not for the beneficiary's entire lifetime.¹³⁰

Colorado recently launched its own ABLE program, but accounts can be opened with any other state program and transferred to another state.

In some cases, an ABLE account could be a good complement or alternative to a disability or special needs trust.

Conclusion

It is possible for a trust to co-exist with needs-based public benefits programs without risking the disabled individual's eligibility status, as long as the trust is established and managed according to the laws and regulations for the relevant programs. Keep in mind that Social Security and Medicaid laws and regulations vary from state to state and are constantly in flux.



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NOTES

1. Social Security employees use the POMS as a guide when claims for Social Security benefits are processed. “The public version of POMS is identical to the version used by Social Security employees except that it does not include internal data entry and sensitive content instructions.” <https://secure.ssa.gov/apps10/poms.nsf/partlist>.
2. 42 USC § 1382c(a)(3)(A).
3. POMS DI 10501 et seq.
4. POMS DI 00115.001.
5. POMS RS 00301.101 through RS 00301.800.
6. *Id.*
7. POMS RS 00301.250.
8. POMS DI 10105.070.
9. *Id.*
10. POMS RS 00301.101 through RS 00301.800.
11. Social Security Administration Fact Sheet, 2017 Social Security Changes, www.ssa.gov/news/press/factsheets/colafacts2017.pdf.
12. 20 CFR §§ 404.350 to 404.366; POMS RS 00203.001.
13. *Id.*
14. *Id.*
15. 42 CFR § 406.12; POMS HI 00801.146.
16. Fact Sheet: Medicare Two-Year Waiting Period for People with Disabilities, www.medicarerights.org/pdf/two_year_waiting_period_fact_sheet.pdf.
17. 42 CFR § 406.12; POMS HI 00801.146.
18. Colorado Dep’t of Health Care Policy and Finance, MSP, www.colorado.gov/pacific/hcpf/medicare-savings-programs-msp.
19. CRS § 25.5-5-104; 10 CCR § 2505-10-8.100.6.L.
20. CRS § 25.5-5-104; 10 CCR § 2505-10-8.100.6.M.
21. CRS § 25.5-5-104; 10 CCR § 2505-10-8.100.6.N.
22. CRS § 25.5-5-104; 10 CCR § 2505-10-8.100.6.O.
23. CRS § 25.5-5-104; 10 CCR § 2505-10-8.100.6.I.
24. 20 CFR § 416.202.
25. Although the terms “assets” and “resources” are used interchangeably, the Social Security Administration makes a distinction. “Assets” refers to an applicant’s financial holdings regardless of nature. “Resources” refers to assets that are available for use by the applicant and are countable toward the \$2,000 limitation.
26. www.ssa.gov/oact/cola/SSI.html.
27. 20 CFR §§ 416.1203 to -1204, §§ 416.1210 to -1239, -1245, and -1247; POMS SI 01110.210.
28. 20 CFR §§ 416.1110 to -1112; POMS SI 00820.001.
29. 20 CFR §§ 416.1120 to -1124.
30. 20 CFR § 416.1130; POMS SI 00835.020.B.16.
31. POMS SI 00835.001.A; 20 CFR § 416.1130.
32. POMS SI 00835.200.A.
33. POMS SI 00835.200.A.2.
34. POMS SI 00835.200.D.3.
35. POMS SI 00835.200.B.1.
36. POMS SI 00835.120.A.1.
37. POMS SI 00835.120.A.4.
38. POMS SI 00835.120.A.5.
39. POMS SI 00835.120.F.
40. POMS SI 00835.380.
41. POMS SI 00835.300.A.
42. POMS SI 00835.300.C.2.A.
43. POMS SI 00835.300.B.
44. POMS SI 00835.300.C.3.
45. There are many variations of the living arrangements discussed herein, as well as other types of living arrangements, such as recipients who reside in institutions or are homeless, that are not discussed in this article.
46. POMS SI 01110.515.C.2.
47. POMS SI 01130.110.
48. *Ramey v. Reinertson*, 268 F.3d 955 (10th Cir. 2001); CRS 25.5-5-101(1)(f); 10 CCR § 2505-10-8.100.6.C.
49. Based on income and asset requirements of related programs.
50. Based on income and asset requirements of related programs.
51. CRS § 25.5-4-300.4; 10 CCR § 2505-10-8.100.5.E.
52. 42 USC § 18001 et seq.; www.congress.gov/bill/111th-congress/house-bill/3590
53. *Id.*
54. 26 USC § 61; CRS § 24-4-103(12.5); 10 CCR § 42 USC § 18001; 2505-10-8.100.4.C.
55. <https://obamacare.net/2017-federal-poverty-level>.
56. *Id.*
57. www.colorado.gov/pacific/sites/default/files/April%202017%20Medicaid%20Income%20Chart.pdf.
58. <https://obamacarefacts.com/insurance-exchange/colorado-health-insurance-exchange>.
59. CRS § 25.5-6-104(2)(h); 10 CCR § 2505-10-8.401; www.colorado.gov/pacific/hcpf/elderly-blind-disabled-waiver-ebd.
60. www.colorado.gov/pacific/sites/default/files/CO%20HCBS%20Adult%20Waiver%20Chart-14pt-September-2016.pdf.
61. 10 CCR § 2505-10-8.100.3.F.
62. 10 CCR § 2505-10-8.401.
63. www.colorado.gov/pacific/hcpf/elderly-blind-disabled-waiver-ebd.
64. Former Colorado State Nursing Home Ombudsman Virginia Fraiser is credited with coining the phrase by describing this gap as being as wide as the Utah canyons with no way out.
65. CRS § 15-14-412.7; *Miller v. Ibarra*, 746 F.Supp. 19 (D.Colo. 1990).
66. 42 USC § 1396p(d)(4)(B).
67. *Id.*; CRS § 25.5-6-102; www.colorado.gov/pacific/hcpf/elderly-blind-disabled-waiver-ebd.
68. 10 CCR § 2505-10-8.100.7.E.6.a.i.b.
69. 10 CCR § 2505-10-8.100.7.E.6.a.i.f.
70. 10 CCR § 2505-10-8.100.7.E.6.a.i.e.
71. 10 CCR § 2505-10-8.100.7.E.6.a.i.l.
72. 10 CCR § 2505-10-8.100.7.E.6.a.i.i.
73. www.colorado.gov/pacific/sites/default/files/2016%20Agency%20Letters%20Income%20Trust%20Form.pdf.
74. www.colorado.gov/pacific/hcpf/elderly-blind-disabled-waiver-ebd.
75. 10 CCR § 2505-10-8.100.5.M.
76. Certain assets can be exempt depending on the circumstances—for example, co-owned property, income producing property, assets required to accommodate disability such as a handicapped modified van, promissory notes, mineral rights, annuities, and funeral trusts.
77. 42 USC § 1396p(c); 10 CCR 2505-10-8.100.7.F.2.a.
78. 10 CCR § 2505-10-8.100.7.F.2.
79. 10 CCR § 2505-10-8.100.7.F.2.c.
80. www.cobar.org/portals/cobar/repository/sections/elder-law/colomedfig2017.pdf.
81. 10 CCR § 2505-10-8.100.7.F.2.c.ii.
82. *Id.*
83. www.congress.gov/bill/109th-congress/senate-bill/1932/text.
84. CRS § 25.5-4-302; 10 CCR § 2505-10-8.100.5.D.
85. 10 CCR § 2505-10-8.063.15.
86. 10 CCR § 2505-10-8.063.13.
87. 10 CCR § 2505-10-8.063.14.
88. 10 CCR § 2505-10-8.100.5.M.2.a.xiv.
89. 10 CCR § 2505-10-8.063.15 and -16. See also CRS § 25.5-4-302.
90. CRS § 15-14-412.8; CRS § 25.5-4-301(5)(a).
91. CRS § 25.5-4-301(5)(a).
92. See, e.g., *State Dep’t of Health Care Policy & Financing v. S.P.*, 356 P.3d 1033 (Colo.App. 2015); *Arkansas v. Ahlborn*, 547 US 268 (2006); *Wos v. E.M.A.*, 568 US 627 (2013).
93. H.J.Res. 59; Pub.L. 113-67.
94. CRS § 25.5-4-301(5)(c).
95. 10 CCR § 2505-10-8.100.7.E.6.
96. 42 USC § 1396p(d)(4)(A); CRS § 15-14-412.8; 10 CCR § 2505-10-8.100.7.E.6.
97. 10 CCR § 2505-10-8.100.7.E.6.
98. 10 CCR § 2505-10-8.100.7.E.6.b.i.h.
99. 10 CCR § 2505-10-8.100.7.E.3, 4 and 5.
100. 10 CCR § 2505-10-8.100.7.E.6.d.i.
101. See *Miller; In re Marriage of Jones*, 812 P.2d 1152; *Seidenberg v. Weil*, 1996 WL 33665490 (D.Colo).
102. 10 CCR § 2505-10-8.100.7.E.6.d.vi.
103. 10 CCR § 2505-10-8.100.7.E.5.
104. 10 CCR § 2505-10-8.100.7.E.6.d.iii.
105. 10 CCR § 2505-10-8.100.7.E.6.d.
106. One example of this provision is the CLE Colorado Estate Planning Forms “Orange Book,” paragraph entitled “Distribution to Disabled Persons or Persons Under 21.”
107. 20 CFR 416.1210; 20 CFR 416.1212; and

POMS SI 01130.100.

108. 42 USC § 1396p(d)(4)(c); CRS § 15-14-412.9; 10 CCR § 2505-10-8.100.7.E.6.c.

109. 10 CCR § 2505-10-8.100.7.E.6.c.

110. 42 USC § 1396p(c)(1)(J)(2)(B)(iii); 10 CCR 2505-10-8.100.7.G.6.a.i and ii.

111. 10 CCR § 2505-10-8.100.7.G.6.b.iv.

112. *Id.*

113. 10 CCR § 2505-10-8.100.7.G.6.c.

114. 10 CCR § 2505-10-8.100.7.E.7.

115. 10 CCR § 2505-10-8.100.7.G.6.c.ii.2.

116. This sample trust was drafted by attorney

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117. 10 CCR § 2505-10-8.100.5.M.

118. Other options may be available depending on the individual circumstances.

119. 10 CCR § 2505-10-8.100.6.C.

120. 10 CCR § 2505-10-8.100.7.E.6.d.iv.

121. www.colorado.gov/pacific/hcpf/elderly-blind-disabled-waiver-ebd and 10 CCR 2505-10-8.100.7.E.5.c.

122. See Germany, "ABLE Accounts: A New Tool in the Special Needs Planning Toolbox," 46

Colorado Lawyer 27 (June 2017).

123. 26 USC § 529A(e)(1)(A).

124. www.congress.gov/bill/115th-congress/senate-bill/817/related-bills?q=%7B%22search%22%3A%5B%22ABLE+Age%22%5D%7D&r=2.

125. 26 USC § 529A(b)(1)(B).

126. 26 USC § 529A(c)(2)(A)(ii).

127. POMS SI 01130.740(C)(3).

128. 26 USC § 529A(e)(5).

129. POMS SI 01130.740(C).

130. 26 USC § 529A(f).

DECLARATION OF TRUST

This Declaration of Trust is made this ____ day of _____, 2017 by *, of *, *, Colorado, as Parent and Settlor, and *, of *, *, Colorado, as Trustee, for the sole benefit of *, a disabled person, born *.

ARTICLE 1.00 – NAME OF TRUST AND BENEFICIARY

This Trust shall be known as the * SOLE BENEFIT DISCRETIONARY TRUST. It is created for the sole benefit of * (the "Beneficiary") who is a disabled person within the meaning of Section 1614(a)(3) of the Social Security Act (42 U.S.C. §1382c(a)(3)).

ARTICLE 2.00 – FAMILY INFORMATION

Beneficiary is not married and has no children. Beneficiary's mother is *. Beneficiary's father is *. Beneficiary has no siblings.

ARTICLE 3.00 – TRUST ESTATE

Trustee acknowledges receipt, in trust, of the property described in the attached Schedule A.

ARTICLE 4.00 – INVESTMENT AND ADDITIONS

During the term of the trust, Trustee shall hold, manage, invest, and reinvest the trust estate, collect the income and profits therefore, pay the necessary expenses of administration, and distribute the net income and principal as provided in this Trust Agreement.

ARTICLE 5.00 – DISPOSITION OF INCOME AND PRINCIPAL

5.01 PRINCIPAL AND INCOME DISTRIBUTIONS: An actuarially sound annual distribution to Beneficiary will be determined through the following formula. The Beneficiary's life expectancy is currently * years as determined using the Social Security Office of the Chief Actuary Period Life for both males and females located at <http://www.ssa.gov/oact/STATS/table4c6.html>. The annual distribution amount shall be determined by dividing the initial assets of the trust by the life expectancy of the Beneficiary. If additional assets are deposited into the trust, a redetermination of the annual distribution amount will be made. Any future calculations shall be based upon the Beneficiary's life expectancy, determined in the same fashion, at the time of the calculation. The annual distribution from the trust shall be not less than the annual distribution amount reduced by excess distributions in prior years plus the actual income earned by the trust in any calendar year as determined using IRS earned income rules. Excess distributions are defined as distributions in prior years in excess of the formula. The formula shall be set forth on the attached Schedule A.

Trustee may pay to or apply for the benefit of the Beneficiary, for Beneficiary's lifetime, such amounts from the principal or income, as the Trustee in Trustee's sole discretion may from time to time deem necessary or advisable for the support, maintenance, health and education of the Beneficiary. The Trustee may but need not consider all funds known to the Trustee to be available to the Beneficiary. Any property constituting part of the trust estate which constitutes the beneficiary's legal residence shall be presumed to satisfy the actuarial formula set forth in the preceding paragraph.

5.02 INTENT OF TRUST: The Settlor is transferring assets to this trust which is established solely for the benefit of the Settlor's [child] who has been determined to be totally disabled by the Social Security Administration. This transfer is considered to be for the sole benefit of Settlor's [child] since it is being arranged in such a way that no individual or entity except the disabled [child] can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future. The transfer is being accomplished by a written instrument which legally binds the parties to a specified course of action and sets forth the conditions under which the transfer is being made, includes a statement as to whom can benefit from the transfer, and provides for the spending of funds or use of the transferred assets for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual.

Trustee may seek support and maintenance for Beneficiary from all available public and private resources, including (but not limited to) SSI, SSDI, OASDI, Medicaid, and any benefits available from private or local, state or federal governmental sources, and any additional, similar, or successor programs. Trustee shall take into consideration the applicable resource and income limitations of any public assistance programs for which Beneficiary is eligible when determining whether to make any discretionary distributions under this Trust.

Within the discretion of the Trustee, no part of the corpus of the trust created herein may be used to supplant or replace public assistance benefits of any local, state, federal or governmental agency. The purpose of this trust is to provide Beneficiary with goods, services and other items that are not provided or reimbursed by agencies of government, including, but not limited to, education, rehabilitation, plans for self support, travel and transportation expenses, insurance, entertainment, medical and dental expenses, reading and cultural expenses, tax liability, long distance telephone, developmental services, social opportunities, companion services, durable medical equipment, case management services, consultant services, assistive and adaptive technologies, advocacy, respite care, personal attendant care, pre-death burial planning, repairs and upkeep on any residence owned by Beneficiary, and other goods and services not provided for by governmental agencies. Trustee may distribute trust funds for the purchase of a principal residence, furniture, and one motor vehicle to be used solely by Beneficiary. Said property may be titled in the

name of Beneficiary rather than in the name of this trust as deemed appropriate, within the sole discretion of Trustee. For purposes of determining Beneficiary's eligibility for such benefits, no part of the principal or income of the trust estate shall be considered available to Beneficiary.

ARTICLE 6.00 – SPENDTHRIFT PROVISIONS

No interest in the principal or income of this trust shall be anticipated, assigned, or encumbered, or be subject to any creditor's claim or to legal process, prior to its actual receipt by the Beneficiary. Furthermore, it is the intent of this trust as expressed herein, that because this trust is to be conserved and maintained primarily for the special needs of Beneficiary, no part of the corpus hereof, nor principal or undistributed income, shall be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential care, by any public entity, office, department or agency of any state, or of the United States or any other governmental agency.

ARTICLE 7.00 – APPROVAL BY MEDICAID AGENCY

Whenever required by law, Trustee shall submit the trust instrument for review to the Colorado Medicaid Agency, along with such proof as it shall require that the individual is disabled according to Social Security criteria. Trustee shall take whatever steps that are necessary, including amendment of this trust, to qualify this trust as an exempt trust pursuant to the requirements of C.R.S. §15-14-412.8, as amended, and rules adopted by the Medical Services Board.

ARTICLE 8.00 – APPROVAL BY SOCIAL SECURITY ADMINISTRATION

Whenever required by law, Trustee shall submit the trust instrument to the Social Security Administration for review along with such other proof as it may require. Trustee shall take whatever steps that are necessary, including amendment of the trust, to qualify this trust as an exempt trust pursuant to the requirements of 42 U.S.C. §1382b(e)(5) or any regulations or instructions adopted by the Commissioner of Social Security.

ARTICLE 9.00 – TERMINATION AND DISPOSITION

9.01 TERMINATION AND DISPOSITION: Upon the death of Beneficiary, the trustee may pay the expenses of Beneficiary's last illness and funeral, and all administrative expenses

relating to this trust, including reasonable attorney's and accountant's fees if, in Trustee's sole discretion, other satisfactory provisions have not been made for the payment of such expenses.

This trust shall cease and terminate on the death of the Beneficiary, and thereupon Trustee shall distribute and deliver the residue to Settlor outright and free of trust, if she survives Beneficiary. If she does not survive Beneficiary, such property shall be distributed to her issue, by representation.

9.02 CONTINGENT DISPOSITION: If at any time there is no person or entity qualified to receive final distribution of the trust estate or any part of it, then any such portion of the trust estate as to which such failure of qualified recipients has occurred shall be distributed to those persons who would inherit it had Beneficiary then died intestate owning such property, as determined and in the proportions provided by the laws of Colorado then in effect.

9.03 DISTRIBUTIONS TO DISABLED PERSONS OR PERSONS UNDER TWENTY-ONE: If under the terms of this trust, distribution of any property is to be made to a beneficiary who is under the age of twenty-one years or is, in the opinion of the Trustee, under any disability which renders such beneficiary unable to administer distributions properly when the distribution is to be made, the Trustee may, in Trustee's discretion, continue to hold such beneficiary's share as a separate trust until he or she reaches the age of twenty-one years or overcomes the disability. Upon the death of such beneficiary before that time, the Trustee shall distribute the trust including any accrued and undistributed income to such persons, or to the estate of such beneficiary, as such beneficiary may appoint by his or her will, made either before or after the death of Beneficiary making specific reference to this power and which shall have been admitted to probate in a formal or informal proceeding. To the extent this general power of appointment is not exercised on the death of such beneficiary, the trust property shall be distributed to his or her then living issue by representation, or if none, to the then living issue of Beneficiary by representation. While any trust is being held under this section, the Trustee may pay to, or apply for the benefit of, the beneficiary for whom the trust is held, such amounts of the net income or principal, or both, as the Trustee may determine to be necessary or advisable primarily for such beneficiary's education, but also for such beneficiary's support, maintenance and health, after taking

into consideration all other resources known to the Trustee to be available for such purposes. Any undistributed income may be added to principal from time to time in the discretion of the Trustee.

ARTICLE 10.00 – TRUST ADMINISTRATIVE AND PROTECTIVE PROVISIONS

10.01 JURISDICTION: This trust shall be administered expeditiously consistent with its terms, free of judicial intervention and without order, approval or other action by any court, subject only to the jurisdiction of a court being invoked by Trustee or other interested parties or as otherwise provided by law. Before termination of the trust during the lifetime of the Beneficiary, the Court shall determine if termination of the trust is in the best interest of the Beneficiary.

10.02 INALIENABILITY: No beneficiary shall have any right to anticipate, sell, assign, mortgage, pledge or otherwise dispose of or encumber all or any part of the trust estate nor shall any part of the trust estate including income, be liable for the debts or obligations, including alimony, of any beneficiary or be subject to attachment, garnishment, execution, creditor's bill or other legal or equitable process.

10.03 REPORTS: Periodic reports shall be tendered by Trustee to the beneficiaries eligible to receive the current income showing all of the receipts, disbursements and distributions during the period and assets then held as the principal of the trust estate, which reports shall be rendered not less frequently than annually. The records of Trustee with respect to the trust estate shall be open at all reasonable times to the inspection of the beneficiaries of a trust and their accredited representatives.

ARTICLE 11.00 – POWERS OF TRUSTEE

11.01 GRANT: Trustee may exercise the following powers: hold, retain, invest, reinvest and manage without diversification as to kind, amount or risk of non-productivity in realty or personalty and without limitation by statute or rule of law; partition, sell, exchange, grant, convey, deliver, assign, transfer, lease, option, mortgage, pledge, abandon, borrow, loan, contract, distribute in cash or kind or partly in each at fair market value on the date of distribution, without requiring pro rata distribution of specific assets and without requiring pro rata allocation of the tax bases of such assets; establish reserves, release powers, and abandon, settle or contest claims. The Trustee may invest and hold property which is used as the principal residence, furniture,

automobiles and other items meeting Beneficiary's "special needs" as defined in Article 5.00 despite the fact that such property is nonproductive.

11.02 ADDITIONAL POWERS: In addition to all of the above powers, my fiduciaries may exercise those powers set forth in the Colorado Fiduciaries' Powers Act, as amended after the date of this instrument. I incorporate such Act as it exists today by reference and make it a part of this instrument. If the situs of administration of the trust is removed outside Colorado, Trustee may exercise all such powers granted to fiduciaries under the laws of Colorado, which are incorporated by reference herein as such laws exist on the date first above written.

11.03 DISTRIBUTION: Trustee may make any payments under this trust (1) directly to Beneficiary, (2) in any form allowed by law for gifts to minors, (3) to Beneficiary's guardian or conservator, (4) to any person deemed suitable by Trustee, or (5) by direct payment of Beneficiary's expenses. In making payments, Trustee shall keep in mind Beneficiary's eligibility for public benefits and all other purposes of this trust.

11.04 PUBLIC BENEFITS: It is recognized that Trustee may not be skilled or well versed in public benefits which Beneficiary receives or may receive. Trustee may hire, at the expense of the trust, a person knowledgeable in public benefits programs in order to assist Trustee in identifying programs suitable to meeting Beneficiary's needs and in making distributions to Beneficiary in a manner which shall not disqualify Beneficiary from eligibility for such programs. Trustee has a duty to inquire regarding such programs but shall not be liable to Beneficiary for Trustee's failure to identify each and every program for which Beneficiary may be eligible or in making distributions to Beneficiary unless Trustee's failure is the result of willful misconduct or gross negligence.

11.05 POWERS WITH RESPECT TO COMPLIANCE WITH GOVERNMENTAL STATUTES AND REGULATIONS: The Trustee shall fully endeavor to comply with all governmental statutes and regulations which regulate these trusts. Trustee shall have the right to amend or revoke any part of the trust under this agreement, in order to comply with government statutes and regulations and/or to retain or comply with eligibility of government programs that will aid the Beneficiary. Where those regulations and statutes are inconsistent with each other, in the sole discretion of Trustee, the Trustee is empowered to resolve such conflict by engaging in, at the

expense of the trust, negotiation, administrative proceedings, or litigation. The expenses of the Trustee under this section are a proper expense to the trust.

ARTICLE 12.00 — TRUSTEE SUCCESSION AND ADMINISTRATIVE PROVISIONS

12.01 RESIGNATION: Any trustee may resign by giving thirty days written notice to each adult beneficiary.

12.02 VACANCY: If trustee shall fail to qualify or cease to act, Settlor may name a third party to serve as successor trustee, or, if Settlor is unable to name a successor trustee, then any court of competent jurisdiction may appoint a successor trustee with notice to all interested parties.

12.03 REPRESENTATIVE OF BENEFICIARY: The conservator of a Beneficiary under legal disability, or if none, the guardian of such person may act for such beneficiary for all purposes under the administrative provisions of this trust.

12.04 RIGHTS OF SUCCESSORS: Every successor trustee shall have all the title, rights, powers, privileges and duties conferred on or imposed upon the original trustee, without any conveyance or transfer. No trustee need examine the accounts, records and acts of any previous trustee or any allocation of the trust estate nor be responsible for any act or omission to act on the part of any previous trustee.

12.05 CORPORATE FIDUCIARY: Any corporate successor to the trust business of a corporate trustee shall become the successor corporate trustee with like powers, duties and obligations.

12.06 NO BOND AND LIABILITY OF TRUSTEE: No trustee, or any successor, shall be required to give any bond in any jurisdiction, and if, notwithstanding this direction, any bond is required by any law, statute or rule of court, no sureties shall be required. The trustee shall not be liable for any mistake or error of judgment in the administration of the trust, except for willful misconduct or gross negligence.

12.07 COMPENSATION: Any trustee shall be entitled to reasonable compensation commensurate with the services actually performed and to reimbursement for expenses properly incurred.

12.08 DEFINITIONS: Except as otherwise provided, definitions of terms in this trust shall be as defined under the laws of the State of Colorado as amended after the date of this trust.

12.09 MISCELLANEOUS: Unless some other meaning and intent is apparent from the context, the plural shall include

the singular and vice versa. Masculine, feminine and neuter words shall be used interchangeably.

ARTICLE 13.00 – TRUST IRREVOCABLE

No beneficiary may revoke or amend this trust. The Trustee may amend this trust to comply with any legal requirements with respect to disability trusts. Upon petition of Trustee or the state Medicaid agency, this trust may be amended by a court of competent jurisdiction for any valid legal purpose. If an amendment in the trust is sought, the Medicaid agency must be notified if Beneficiary is receiving Medicaid benefits at that time. In addition, Trustee may amend this trust pursuant to the authority granted to Trustee in Articles 7.00 and 8.00.

Signed on the day and year first above written.

*, Settlor

*, Trustee

STATE OF COLORADO)

) ss.

COUNTY OF _____)

Subscribed and sworn to before me on _____, by *, as Settlor.

Witness my hand and official seal.

My commission expires: _____

Notary Public

STATE OF COLORADO)

) ss.

COUNTY OF _____)

Subscribed and sworn to before me on _____, by *, as Trustee.

Witness my hand and official seal.

My commission expires: _____

Notary Public

SCHEDULE A OF THE

*** SOLE BENEFIT TRUST**

Source of Initial Funds: _____

Initial Funding Amount: \$*

Beneficiary's Life Expectancy: * years

Annual Distribution: \$* ^{CL}

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