

ADVOCATE

ARIZONA TRIAL LAWYERS ASSOCIATION

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PRESIDENT'S MESSAGE

By Chris Jensen

Let's Listen to David, Elliot and Stanley

David Ball (the National Jury Consultant who speaks at our annual Marable Advanced Trial Advocacy Conference) has repeatedly warned us to "take control of the way jurors think about you. Not you as part of a group, but you as an individual attorney. [I]f you [do] not quickly start doing the kinds of things [to help people unselfishly, work for charities, provide public service, etc.] without waiting for your [AzTLA] to do it for you, your profession will die and with it a lot more. As of this writing, your profession is in intensive care. Unfortunately, no one is providing the care. You have to do it yourself." *Ball on Damages – The Essential Update* at 259.

Ball tells us it is no longer enough to just seem credible at trial. Public resentment against plaintiffs' attorneys is at a high point due to tort "reformers," but also due to advertising P.I. lawyers. The advertising lawyers often go over the line, far beyond what good taste permits. Corporate defendants systematically use professional publicists, focus groups, etc. to mold their message artfully. The result is a public perception crisis: the stereotype of the trial lawyer is that of a greedy, selfish, un-

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ARIZONA CHARITIES POOLED TRUST, INC.:

What Is It and Why Should It Be of Interest to You?

By Bridget O'Brien Swartz

So, what is a Pooled Special Needs Trust (hereinafter "PSNT") anyway? You are familiar with a Special Needs Trusts (hereinafter "SNT"), the type of trust that a parent, grandparent, guardian/conservator, or court can establish for an individual who is under age 65, so they can transfer his/her assets and not be disqualified from benefits, namely, Supplemental Security Income (hereinafter "SSI") and Arizona Health Care Cost Containment System (hereinafter "AHCCCS") benefits. They seem to have been around for awhile, since OBRA '93. Well, guess what?! So has a PSNT! Arizona just never got around to establishing one and getting it up off the ground and running. That has now changed with the arrival of Arizona Charities Pooled Trust, Inc. (hereinafter "AzCPT"). So, it is time to get familiar with these animals and know when it might be an option for your clients.

For purposes of this discussion, when referring to a SNT, this author is referring to one that contains the assets belonging to an individual who is, or may be, eligible for SSI and/or AHCCCS, inclusive of Arizona Long Term Care System (hereinafter "ALTCS") benefits. The assets may have been acquired by the individual before the advent of the disability, or at a later date, such as by way of a personal injury settlement or award. SNTs were codified in the Omnibus Budget Reconciliation Act of 1993 (hereinafter "OBRA '93") at 42 U.S.C. §§ 1396p(d)(4)(A)

- the individual SNT- and 1396p(d)(4)(C) - the pooled SNT. In 1999, the Foster Care Independence Act (hereinafter "FCIA") adopted such provisions for purposes of an individual's eligibility for SSI benefits.

What both of these trusts have in common are that upon termination of the trust, which is typically upon the death of the beneficiary, the State Medicaid agency, in our case, AHCCCS, must be reimbursed the cost of medical services it has provided the beneficiary during his/her lifetime¹ and, if funds remain after such reimbursement, the balance can be distributed to the beneficiary's heirs.² Of course, in many case, the funds are long spent or depleted before the beneficiary dies.

As discussed above, the (d)(4)(A) trust allows an SSI or AHCCCS recipient to transfer their assets into a trust without causing him/her to be disqualified from benefits due to the transfer or having countable resources in excess of the applicable limit. The (d)(4)(A) must meet three basic requirements under federal and state law: (1) The beneficiary must be **under age 65** at the time the trust is initially established and funded; (2) the beneficiary must be **disabled** according to SSA criteria, and medically eligible for ALTCS benefits, or determined Seriously Mentally Ill (hereinafter "SMI") by the State, and entitled to mental health services;³ and (3) the trust must be **established by a parent, grandparent, guardian/conservator, or court.**⁴

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Pooled Trust

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A d(4)(C) trust or PSNT also permits an individual who is eligible for SSI and/or AHCCCS benefits to transfer his/her assets into a trust and allowing the beneficiary to have such funds available to meet his/her supplemental or special needs and remain eligible for public assistance. Under federal and state law, the following conditions must be met for the PSNT to be exempt or excluded for purposes of a beneficiary's financial eligibility for SSI and/or AHCCCS benefits:

The trust must be established and managed by a non-profit association.

A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of the funds, the trust pools these accounts.

Accounts in the trust are established solely for the benefit of a disabled individual **by such individual**, or by a parent, grandparent, guardian/conservator, or court.

To the extent assets remain in the beneficiary's account upon its termination, which is typically at death,⁵ **and are not retained by the trust**, the trust must reimburse AHCCCS.

A PSNT is best described as a cross between a 401(k) and a d(4)(A) trust. Beneficiaries do not get their own trust agreement, but instead join the existing master trust arrangement and establish an account for their sole benefit. The account is then administered like any other special needs trust.⁶

Three of the major differences between a d(4)(A) and d(4)(C) trust, both of which are advantages, are the following: (1) A PSNT has no age limitation;⁷ (2) if mentally capable or competent, the beneficiary can join and participate in the PSNT without a parent or grandparent's "permission" or court intervention; and (3) as alluded to above, to the extent assets are retained by the PSNT on termination of the arrangement, AHCCCS has no right to reimbursement.

The AzCPT is a non-profit which is a coalition of charities and non-profits, such as the Brain Injury Association of Arizona and Spinal Cord Injury Association of Arizona, who wish to offer pooled trust services to the individuals they serve, as well as others who are disabled. The AzCPT was established to provide individuals who are disabled an opportunity to have their funds invested in a pool with others, allow-

ing for them to have their funds administered by a corporate trustee, North Side Bank & Trust; invested in one of multiple models with A.G. Edwards; and administered by a third party administrator, Knights Administration, that ensures payments out of the trust are in compliance with SSI and Medicaid rules. Normally, such an arrangement would be cost prohibitive, but the AzCPT model provides such a construct in a cost effective manner. The annual administrative fee is very competitive and, unlike many instances where a corporate trustee is administering a trust, provides an independent investment platform at no additional cost and a third party administrator that is knowledgeable and familiar with SSI and Medicaid.

The Coalition's structure provides a system of checks and balances that is often lacking in such arrangements, and provides for the ability to remove and replace the various players without putting the beneficiaries of the pooled trust at risk. Moreover, if a non-profit chooses to no longer participate, its beneficiaries may be associated with another non-profit of the AzCPT without having to terminate the arrangement, thereby potentially resulting in the requirement to reimburse Medicaid for the cost of medical services provided to the beneficiary.

An example where the AzCPT may be an option, or the only option, is the following. Lester is 72 years old and living in a skilled nursing facility. He is ALTCS-eligible. He has received \$40,000 from an elder abuse case. Lester is unlikely to be discharged from the care facility at any time in the future, and he certainly cannot afford the cost of his care. Lester's children would like to use the funds to furnish their father's room and pay for a companion to take him on outings once or twice a week. If mentally capable or competent, Lester can join the AzPSNT; otherwise, he can do so through a guardian, conservator, or the court. Despite the transfer penalty that may result from funding the trust after the age of 65, careful planning may allow for nearly half of the funds to be preserved for his benefit. Note, although Lester's recovery is limited, had it been more substantial, the AzCPT would still be an option. Enrollment is not based on the amount of funds to be transferred to the AzCPT, and, because the beneficiaries'

funds are pooled for investment and administrative purposes, it can be a cost-effective alternative to having a corporate trustee or private fiduciary act as trustee.

So, your clients now have one more option to consider in preserving their eligibility for needs-based public benefits, namely, SSI and AHCCCS, that they didn't have previously regardless of their age, the amount of recovery, their mental capacity, and absence of a family member to assist in managing the funds. For more information, go to www.snthelp.com. ■

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- 1 Note subtle yet important distinction in discussion below regarding d(4)(C) trusts or PSNTs.
- 2 In Arizona, our State Medicaid agency, or AHCCCS, contracts with a Program Contractor to coordinate and deliver services, and pays the Program Contractor a capitated rate regardless of level of need, or actual services delivered or utilized. The capitated rate in Maricopa County is currently about \$3,000 per month, or \$36,000 per year. That is the rate at which AHCCCS is accumulating a claim against the trust.
- 3 Arizona is much more generous than most states in broadly defining "disabled" for purposes of qualifying for a SNT to include medical eligibility for ALTCS and SMI status.
- 4 This is the case whether or not the beneficiary is mentally capable or competent.
- 5 Note, states vary on whether Medicaid can seek reimbursement upon termination of the trust during an individual's lifetime versus at time of death. Unfortunately, Arizona is one of those states that will seek reimbursement under any circumstance of termination.
- 6 I'm sorry to say, but not as sorry as I used to be with the enactment of SB 1184, that distributions out of a PSNT are subject to A.R.S. § 36-2934.01 just as a d(4)(A) trust are.
- 7 However, the ALTCS Eligibility Policy and Procedures Manual MS 905.C states that transfers to a PSNT after age 65 will be treated as an uncompensated transfer. Federal law is ambiguous on this point, and states vary as to their treatment of such transfers.

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