NICAUD & SUNSERI, L.L.C.
A Group of Professional Law Corporations
3000 18th Street
Metairie, Louisiana 70002

*Albert J. Nicaud**
*J. Douglas Sunseri**
Svetlana "Lana" Crouch
Jeffrey M. Siemssen
*(*A Professional Law Corporation)*

Of Counsel
Edward C. Vocke, IV

Telephone (504) 837-1304
Facsimile (504) 833-2843

EXPLANATION OF MEDICAID LAW AND APPLICATION TO TRUST

A Service Of

DEVELOPMENTAL DISABILITY LEGAL NETWORK, LLC

J. Douglas Sunseri - Director
Nicaud & Sunseri Law Firm
3000 18th Street
Metairie, LA 70002
Phone: 504-837-1304
Fax: 504-833-2843
E-mail: jdsunseri@nslawla.com

Background Of Medicaid Law

Medicaid is the federal program administered by the states which provides health care for individual and families who are unable to afford such service. See 42 U.S.C. § 1396 et seq. Federal law establishes certain mandatory requirements which each state must adopt in its local Medicaid program, and the states are also given options to elect certain other components in the health care plan which they may decide to provide. Accordingly, Medicaid does vary from state to state in certain aspects, but there are also mandatory federal law provisions.

One significant governmental benefit which is available only through Medicaid is long-term nursing care which includes care for the physically disabled and the mentally disabled. Long-term nursing care can be extremely expensive. To qualify for Medicaid and its long-term nursing care benefits, the applicant must be "poor" and there is a limit to the countable assets which he or she can own. To qualify for Medicaid, the applicant must meet the asset guidelines for Supplemental Security Income (SSI). SSI allows a single applicant to own no more than $2,000 in countable assets and a married applicant to own no more than $3,000 in countable assets. Certain assets are specifically exempted and are not countable.

Trusts As Medicaid Countable Assets

A trust is a legal arrangement in which legal title to assets is held by a trustee under certain defined restrictions of a governing instrument (usually a will or written trust agreement) for the benefit of another party known as the beneficiary. Trusts can be used as a vehicle to make assets available to a beneficiary but still significantly restrict them. Recognizing the gray area which trusts can provide concerning the ownership of assets, Federal Medicaid provisions places significant restrictions on the types of trusts which can be used to preserve assets of a beneficiary and still qualify the beneficiary for governmental benefits.

In general, with limited exceptions, regardless of the purposes, provisions, or discretions contained in the trust, a self-settled trust which is created after August 11, 1993 will be treated as an available asset which can disqualify the settlor-beneficiary from Medicaid, 42 U.S.C. § 1396p(d)(2)(C). This means that generally a person cannot create his or her own trust, transfer his or her own assets into the trust, and still be qualified for Medicaid. However, spouses can leave property in a special needs trust at their death to care for their surviving spouses and not have the trust property considered as assets available for Medicaid, 42 U.S.C. § 1396p(d)(2)(A)(ii).

Medicaid Exempt Trusts

Since the effective date of the Omnibus Budget Reconciliation Act of 1993 (O.B.R.A.), only limited types of trusts can now be used and still preserve an applicant's Medicaid eligibility. One major distinction should be made when analyzing Medicaid trusts. Trusts created by the disabled beneficiary (or a third party with legal authority over the disabled beneficiary with the disabled person's own assets for the disabled person's own benefit are classified as first-party, self-settled trusts. These types of trusts must be distinguished from trusts created by a third party for the benefit of a disabled individual with the third party's own assets (such as a grandparent creating a trust for a grandchild). Legal restrictions generally exist for first-party, self-settled trusts which do not exist for third-party trusts. These trusts are a good thing to have if someone is expecting a windfall, such as an inheritance.

First-party, Self-settled Trusts

Most self-settled trusts holding the disabled beneficiary's own assets created after August 11, 1993 are countable resources for Medicaid. The Medicaid statute, however, provides for three specific types of trusts which can be funded with the applicant's own assets and which will not disqualify the applicant from Medicaid. These trusts are called "D-4A Trusts" after the subsection of the law which authorizes them. They are also called "Federalized Special Needs Trusts" because the Federal Medicaid statute makes them available in every state.

Because of the requirement that the State be reimbursed for medical assistance, D-4A Special Needs Trusts may have limited utility when the goal is to pass assets of the disabled individual to family members. The main benefit of the D-4A Trusts is to provide a quality of life for the Medicaid

beneficiary. Assets can be held in the trust and used to pay for the beneficiary's special or supplemental needs which the government does not provide, while Medicaid pays the significant medical bills. If the medical assistance provided during life does not turn out to be costly, then upon the death of the beneficiary, there is a chance that assets may be preserved in the trust and pass to loved ones.

Disabled Individual's Supplemental (Special) Needs Trust

Under the provisions of 42 U.S.C. § 1396p(d)(4)(A), a Disabled Individual's Trust will not be counted as a Medicaid asset even when it is funded with the applicant's own assets. The requirements for the trust are that the individual must be under age 65 at the time the trust is created (and funded), and disabled under the Social Security definition. Further, the trust must be for the "sole benefit" of the disabled individual. The trust must be created by a parent, grandparent, guardian, or court. Upon the death of the individual, the State Medicaid agency must be reimbursed for the costs of the medical assistance which was provided by Medicaid during the disabled individual's lifetime. This is often called the "payback" provision.

"Miller" Trust

A "Miller" Trust can be used to qualify a Medicaid applicant with income in excess of the eligibility limit (not imposed in all states) for long-term care assistance from Medicaid. The Trust is not funded with the beneficiary's assets. The Miller trust can be named as recipient of the individual's income, from a pension plan, Social Security, or other source. The Miller trust takes its name from the Colorado case of Miller v. Ibarra, 746 F. Supp. 19 (D. Colo. 1990), and is specifically sanctioned by 42 U.S.C. § 1396p(d)(4)(B). As with a self-settled special needs trust (referred to above as a "Disabled Individual's Trust"), upon the death of the beneficiary, the State Medicaid agency must be paid back for its medical assistance from any remaining assets in the Miller trust. The Miller trust is significant only in those states which impose an income cap on Medicaid long-term care eligibility in the State of Louisiana. It is often referred to as a qualified income trust.

Third-party Trusts

Medicaid law governing trusts is designed to prevent disabled individuals qualifying for benefits while still retaining full control over the assets. A third party, however, is still free to plan with his or her own assets and either give them outright to a disabled individual or tie them up and restrict them in trust as they see fit. Accordingly, trusts which are created by a third party with the third party's own assets to benefit a beneficiary who is on Medicaid have their own separate rules and treatment.

Generally, a properly drafted third-party, discretionary trust is not countable as an asset available to the beneficiary receiving Supplemental Security Income (SSI) and/or Medicaid benefits. Such a trust must be created by a party other than the SSI/Medicaid beneficiary, must not receive any assets belonging to the beneficiary, and must be restricted (not accessible or available) to the beneficiary.

The operative principle is whether the trust assets or income are available to the beneficiary. If appropriate trust language is used, Medicaid will not treat the resources in the trust as a countable resource. Typically, a third-party trust provides that the trustee is given unfettered discretion to distribute (or not to distribute) principal or income for the benefit of the disabled beneficiary. Often, the trustee is directed only to make distributions for the "supplemental" or "special" needs of the beneficiary or as long as the distributions do not disqualify the beneficiary from governmental benefits. Frequently the trustee will be specifically prohibited from making distributions which provide the beneficiary with food or shelter (the two disqualifying categories under SSI and Medicaid regulations). There is no requirement that the trustee be so restricted, however, it may be preferable in most cases to permit the trustee to make the decision to make distributions which reduce or even eliminate public benefits in cases where the availability of trust resources is more important than continued eligibility for SSI and Medicaid.

The Medicaid beneficiary should not be given any power to revoke the trust or direct the trustee to make distributions to the beneficiary. The trust can be revocable by the third-party settlor. This means that a parent can fund a trust for a disabled child with the parent's assets and give it a test run, revoking it later and re-acquiring the assets if the parent decides that it is not serving its purpose. Finally, the third-party trust does not need to include a D-4 "payback" provision reimbursing the State for the medical assistance of the beneficiary upon the beneficiary's death.

For More Information Regarding Special Needs Trusts Please Call

J Douglas Sunseri, Esq.
Program Director
Developmental Disability Legal Network, LLC
3000 18th Street
Metairie, Louisiana 70002
Phone: 504-837-1304
Facsimile: 504-833-2843
E-mail: jdsunseri@nslawla.com