



1-1-2011

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Estate Planning For Pennsylvania Families With A Disabled Family Member

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I. INTRODUCTION

Estate planners are constantly faced with creating particularized solutions for an individual client. A problem quickly arises when a family has a member with a disability. Long-term care nursing homes can easily become very expensive.¹ Disabled persons on governmental assistance typically are only able to maintain a low standard of living because the benefits only cover the bare essentials.² If a family member or caretaker wants to provide more than just the bare essentials after he is gone, he must plan his estate accordingly.³

Estate planners then need to ascertain a way to keep the disabled person on medical assistance, or Medicaid,⁴ or Supplemental Security Income ("SSI"),⁵ while still maintaining the same or similar quality of life to which that person has become

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1. See Buck Stinson, *Genworth Financial 2007 Cost of Care Survey, Health Care Providers, Assisted Living Facilities and Nursing Homes*, Genworth Financial, March 31, 2007, available at http://longtermcare.genworth.com/comweb/consumer/pdfs/long_term_care/Cost_Of_Care_Survey.pdf (last visited November 27, 2010) (the estimated average annual cost for a nursing home private room in Pennsylvania in 2007 is \$74,806).

2. See Elizabeth J. Jameson & Stephen C. King, *The Failure of the Federal Government to Care for Disabled Children: A Critical Analysis of the Supplemental Security Income Program*, 20 COLUM. HUM. RTS. L. REV. 309, 310 (1988); Andrea Hyatt, *Legislation Allowing Disabled Beneficiaries to Collect SSI: Providing Disabled Americans the American Dream of Comfort*, 6 WIDENER J. PUB. L. 1, 2-3 (1996).

3. Carol Ann Mooney, *Discretionary Trusts: An Estate Plan to Supplement Public Assistance for Disabled Persons*, 25 ARIZ. L. REV. 939, 940 (1983).

4. 42 U.S.C. §1396 (2010).

5. 42 U.S.C. §1381 (2010).

accustomed.⁶ Usually, a family member would like to bequeath money to a disabled loved one to maintain or improve her quality of life, whether it be in a will, an inter vivos gift, or a trust. However, Medicaid and SSI both have stringent resource (and income) thresholds that could be implicated by any significant bequest.⁷ The result is that an outright bequest or poorly drafted trust may cause the disabled individual to be removed from SSI and Medicaid benefits, and be forced to pay for, or forgo, nursing care or health care.

A “resource” is defined as “cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his support and maintenance. *If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource.*”⁸ Under Pennsylvania Department of Public Welfare (DPW) regulations, “available resources” are “[r]esources that the family unit has or can use to meet the cost of the services provided under [Medicaid].”⁹

Few have the requisite assets to meet the cost of nursing home and other services provided under Medicaid. Estate planners, though, have developed several techniques to keep a disabled individual on governmental assistance while still receiving benefits from family members who have died. Passing assets directly through a will or an inter vivos gift would not be a wise option in this situation because those assets, being readily available to the beneficiary, are an “available resource” for Medicaid purposes, thus potentially disqualifying the disabled beneficiary from Medicaid eligibility. The legislature and courts in Pennsylvania, however, have recognized special needs trusts, or supplemental needs trusts, that, when executed carefully, can reduce the costs to families, and provide additional resources for a disabled person in Medicaid-funded nursing home care.¹⁰

This article will highlight the three types of special needs trusts recognized in Pennsylvania. They are the: 1) payback trust; 2) pooled trust; and 3) third party discretionary trust. N.B. There is also a fourth type of special needs trust, called a Miller Trust, which is not recognized in Pennsylvania, and therefore beyond the parameters of this paper.

This article begins with an introduction to trusts in section II. Section III introduces the Medicaid Act and the Omnibus Budget and Reconciliation Act of 1993 (hereinafter “OBRA ’93”).¹¹ Section IV explains the evolution of the third party discretionary trust up until *Lang*¹² and its progeny. Section V explores how the courts have analyzed third party discretionary trusts, sometimes referred to as “common law discretionary trusts,” since the Pennsylvania Supreme Court’s decision in *Lang*.

Estate planners must take into account ever-changing federal and state programs providing support for persons with disabilities.

6. *Id.*

7. See 20 C.F.R. §416.1205(c) (2010); 55 PA. CODE §177.73 (2010).

8. 20 C.F.R. §416.1201(a) (2010) (emphasis added).

9. 55 PA. CODE §177.82 (2010).

10. Hyatt, *supra* note 2, at 4; See also Brent A. Mitchell, *Medicaid Planning for the Elderly: Using Supplemental Discretionary Trusts to Pay the Costs of Long-Term Care*, 31 WASHBURN L.J. 80, 82-83, 87 (1991) (stating that “many families are using [estate] planning techniques to ease the accompanying [home care] costs”).

11. 42 U.S.C. §1396p (2010).

12. *Lang v. Commonwealth*, 528 A.2d 1335 (Pa. 1987).

Section VI introduces payback trusts as defined in OBRA '93, illuminating how some courts have analyzed them, and highlighting their strengths and weaknesses. Section VII does the same with pooled trusts. Section VIII introduces some other possibilities that an estate planner may have to analyze when helping a client create a particularized solution for supporting a disabled family member. Section IX concludes by making suggestions as to which type of trust would generally be the best to implement under various conditions, notwithstanding the government's valid concerns about people wrongfully taking advantage of welfare programs and the increasing possibility of insufficient funding for future disabled individuals.

II. HISTORICAL BACKGROUND

Since feudal times in England, trusts have been used to manage property both before and after death.¹³ In 1376, Parliament became enraged that lawyers would use a trust (then called a "use") to avoid creditors, calling it a "spendthrift" device.¹⁴ In 1536, Parliament enacted the Statute of Uses supposedly as a response to the misuse of trusts, although this statute only applied to passive landholding uses and not to active uses that would later become the modern form of trusts.¹⁵ Despite Parliament's difficulty accepting some benefits of using a trust, one commentator has stated that trusts have been extolled as the most "distinctive achievement of English lawyers."¹⁶

Trusts use a form of bifurcated ownership in which the property of the settlor is transferred to a trustee who manages it for the sole benefit of the beneficiary.¹⁷ When the settlor transfers the property, the trustee acquires legal ownership, while the beneficiary or beneficiaries retain an equitable interest.¹⁸

The four most common types of trusts are mandatory trusts, "pure" support trusts, discretionary trusts, and spendthrift trusts.¹⁹ As the name implies, a mandatory trust requires the trustee to distribute all trust income to the beneficiary.²⁰ A mandatory trust will generally preclude a beneficiary from Medicaid and SSI eligibility because if the trust income is mandatory, then those assets are available to the beneficiary and therefore includable as a resource.²¹

A "pure" support trust, similarly, will generally preclude a beneficiary from Medicaid eligibility. A support trust directs the trustee to only distribute as much income or principal as necessary for the support and maintenance of the beneficiary.²² The Social Security Administration (SSA) naturally understands support and maintenance to include food, clothing, and shelter, as defined below, and therefore a resource for SSI asset guideline purposes.²³

13. Avisheh Avini, *The Origins of the Modern Trust Revisited*, 70 TUL. L. REV. 1139 (1996).

14. See, e.g. AUSTIN WAKEMAN SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS 9, 10 (1960) (During this time, there was enormous discontent in England among laborers, and the poll tax, renewed by the Parliament of 1380, ignited revolt among peasants). See JOHN RICHARD GREEN, A SHORT HISTORY OF THE ENGLISH PEOPLE 251 (1911) (Lawyers did not fare well at the hands of the peasants. In Blackheath, they killed every lawyer they could lay their hands on, shouting "not till all these were killed would the land enjoy its old freedom again." *Id.* at 252).

15. F.W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW 23, 34-39 (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1984)).

16. Joseph A. Rosenberg, *Supplemental Needs Trust for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 99 (2000) (quoting Maitland, *supra* note 15, at 7).

17. Maitland, *supra* note 15, at 44.

18. *Id.*

19. Mitchell, *supra* note 10, at 95.

20. *Id.*

21. *Id.*

22. Restatement (Second) of Trusts §154 (1959).

23. 20 C.F.R. §416.1201.

A discretionary trust, sometimes referred to as a “third party trust” or a “discretionary special needs trust,” in contrast to a mandatory trust, gives the trustee complete freedom to decide the amount the trustee will distribute out of trust income or assets.²⁴ This type of trust should allow a disabled beneficiary to retain Medicaid eligibility while still realizing certain trust income distributions.²⁵ A beneficiary does not have an interest in a discretionary trust until the distribution of income or principal.²⁶ SSA, therefore, does not include discretionary trust assets as a resource.

There is also a fourth type of trust called a spendthrift trust. A settlor would normally create this trust to prevent an irresponsible, indebted, or incapacitated beneficiary from assigning or alienating her right to the income.²⁷ A beneficiary can use a spendthrift trust to avoid creditors, although there are exceptions for self-settled spendthrift trusts to prevent an individual from avoiding a debt to a governmental agency, a tort plaintiff, or a dependent child.²⁸ A spendthrift trust, then, would not be a viable option to retain Medicaid eligibility.

Before examining discretionary trusts and other types of trusts that may work for a beneficiary to retain Medicaid eligibility, some information about the Medicaid Act may be useful.

III. THE MEDICAID ACT AND OBRA '93 CREATE TWO EXCEPTIONS TO SELF-SETTLED TRUSTS

Congress created the Medicaid program when it added Title XIX, the Medicaid Act, to the Social Security Act to improve access to medical benefits.²⁹ The Medicaid Act provides for the appropriation of funds to states for medical assistance programs that aid individuals who meet certain categorical, medical, and financial criteria.³⁰ Although participation by states in the Medicaid program is entirely optional, states, and their political subdivisions, which elect to receive federal government funding, must comply with all requirements of the Medicaid Act.³¹ The Commonwealth of Pennsylvania participates in the Medicaid program.³²

Among other medical services and items, Medicaid provides funding for long-term care nursing facilities, inpatient and outpatient hospital care, clinical services, psychiatric care, prescription drugs and medical devices.³³

Disabled persons are a category covered by Medicaid if they meet the financial criteria.³⁴ The financial criteria for Medicaid eligibility require that an applicant have assets, including income and resources,³⁵ below a certain threshold. Generally, for disabled individuals in Pennsylvania, the maximum for countable resources for Medicaid eligibility is \$2,000.00.³⁶ Similarly, a disabled individual is ineligible for SSI if the individual's non-excludable assets exceed \$2,000.00.³⁷ In addition to the

24. Restatement (Second) of Trusts §155 (1959).

25. Mitchell, *supra* note 10, at 95.

26. *Id.*

27. Rosenberg, *supra* note 16, at 107.

28. *Id.* (citing William F. Fratcher, *Scott on Trusts*, 4th Ed. 157.4, at 210).

29. See 42 U.S.C. §1396a.

30. See 42 U.S.C. §1396a(a)(10).

31. 42 U.S.C. §§1396a(a)(1), (a)(8), 42 C.F.R. §430.10 (2010).

32. See *Tristani v. Richman*, 609 F.Supp. 2d 423 (W.D. Pa. 2009).

33. 42 U.S.C. §1396d.

34. See 42 U.S.C. §1396a(10), 1396d(a).

35. 42 U.S.C. §1382.

36. 55 Pa. Code §178.1. *But See DeBone v. DPW*, 929 A.2d 1219 (Pa. Cmwlth. 2007), discussed *infra* (the maximum for countable resources for disabled individuals falling into the medically needy only medical assistance category is \$2,400.00). See *id.* at 1222.

37. 20 C.F.R. §416.1205(c) (2010).

previously mentioned regulatory and DPW definitions of “resources,” a resource is something owned by the disabled individual and is “an includable resource” if it is available for food, clothing, and shelter.³⁸ SSA’s Program Operations Manual further articulates that a trust is a resource if “an individual owns the assets in the trust and . . . has the legal right to use the assets for food, clothing or shelter.”³⁹ The guidelines provide the exception, however, that “property held in trust [is not] a resource [if the claimant’s] access to the property is restricted.”⁴⁰

Prior to 1985, a Medicaid claimant could remove her own access to her property in order to receive governmental benefits.⁴¹ Any income or assets above \$2,000.00 could be placed in a self-settled trust, naming herself as the beneficiary, known as a “Medicaid Qualifying Trust.”⁴² The trustee of the irrevocable trust could be given discretion to make distributions, thus allowing the grantor to preserve the trust funds and obtain public benefits.⁴³

In an apparent response to the perception that such trusts constituted an abuse of the Medicaid program, Congress passed the Consolidated Omnibus Budget Reduction Act of 1985 (hereinafter “COBRA ’85”).⁴⁴ Under COBRA ’85, the trust assets were deemed an available resource for Medicaid purposes, and the beneficiaries were disqualified from receiving governmental benefits.⁴⁵ However, COBRA ’85 failed to close a loophole for self-settled trusts in which the trustee did not have discretion in making distributions. If the mandatory distributions were made for less than the Medicaid eligibility asset guidelines, the trust assets were not considered resources, and the grantor retained Medicaid benefits.⁴⁶

In 1993, Congress again amended the Medicaid Act when President Clinton signed into law OBRA ’93.⁴⁷ OBRA ’93 prevented rich individuals from bequeathing all of their assets to their heirs while remaining on Medicaid and burdening the taxpayers. The new Medicaid rules essentially foreclosed the opportunity for individuals to shield their assets in trusts in order to be eligible for Medicaid benefits.⁴⁸ The elderly could no longer transfer their assets to their adult children or to “Medicaid Qualifying Trusts” to establish eligibility for Medicaid benefits. Further, it became impossible for disabled individuals to disclaim an inheritance to become or remain eligible for Medicaid benefits.⁴⁹ Because a third party discretionary trust is not created using a disabled individual’s assets, i.e. not a “self-settled trust,” the restrictive provisions of OBRA ’93⁵⁰ do not apply.

However, OBRA ’93 does contain two exceptions to the transfer-of-assets rules and general self-settled trust rules.⁵¹ Disabled individuals can retain Medicaid eli-

38. Hyatt, *supra* note 2, at 7 (quoting Richard J. Bergstrom, *Special Need Trusts: Financial and Estate Planning for the Disabled*, 172 J. ACCT. 52, 53 (1991)).

39. *Id.* at 8 (quoting Social Security Admin., Dep’t of Health and Human Servs., Program Operations Manual System, SI 01120.105 (Oct. 1981) [hereinafter “Program Operations Manual”], at A.2).

40. *Id.*

41. Jennifer Field, *Special Needs Trusts: Providing for Disabled Children Without Sacrificing Public Benefits*, 24 J. JUV. L. 79, 84-85 (2003-2004) (citing Daryl L. Gordon, *Special Needs Trust*, 15 QUINNIPIAC PROB. L.J. 121, 124-125 (2000)).

42. *Id.*

43. *Id.* at 125.

44. 42 U.S.C. §1396a(k) (2010).

45. Clifton B. Kruse, Jr., *Self-Settled Trusts Following OBRA 1993*, 23 COLO. LAW. 1297, 1297 (June, 1994)

46. *Id.* at 1298.

47. 42 U.S.C. §1396p (2010).

48. 42 U.S.C. §1396p(c) (2010); 42 U.S.C. §1396p(d)(3) (2010); Jacqueline D. Farinella, *Come on in, the Water’s Fine: Opening up the Special Needs Pooled Trust to the Eligible Elderly Population*, 14 ELDER L.J. 127, 128 (2006).

49. *See id.*

50. 42 U.S.C. §1396p(d)(3).

51. 42 U.S.C. §1396p(d)(4) (2010).

gibility if the trust assets are placed in two types special needs trusts: 1) payback trust⁵² and 2) pooled trust.⁵³ These two trusts, unlike the third party trust, are funded by the disabled beneficiary, as opposed to a third party.

IV. THIRD PARTY DISCRETIONARY TRUSTS UP UNTIL LANG

Commonwealth Reimbursement

In 1924, the Pennsylvania Supreme Court tackled the issue of whether a trustee was required to reimburse the Commonwealth for funds expended on behalf of a "lunatic."⁵⁴ The beneficiary, Walters, had been committed to a state mental hospital.⁵⁵ His mother, before she died, executed a trust, naming Walters' brother as trustee, for his "comfortable support and maintenance."⁵⁶ The Court labeled this trust a spendthrift trust, although today it could be considered a support trust.⁵⁷ Pursuant to the Act of June 1, 1915, P.L. 661, the Commonwealth demanded recovery of funds expended for support of Walters.⁵⁸ Although the Pennsylvania Supreme Court reasoned that the spendthrift trust made distributions of income and principal discretionary, the trust's intention was to secure Walters' comfort and support.⁵⁹ Satisfying obligations incurred on his behalf, the Court concluded, was within the testatrix's intention.⁶⁰

The Pennsylvania Supreme Court reached a similar conclusion fifteen years later in *In re Waits' Estate*.⁶¹ The decedent received state old-age assistance payments.⁶² When he died, the Commonwealth sought recovery of funds expended for his care.⁶³ The Court again concluded, this time pursuant to Section 15 of the Act of 1936, that the Commonwealth was entitled to reimbursement "out of the real and personal property of any beneficiary" for assistance furnished under that Act.⁶⁴ The Court further reasoned that there is an implied obligation to repay the Commonwealth, and that this obligation should constitute a claim upon the estate of a deceased beneficiary.⁶⁵ Additionally, the Court stated, in dicta, that governmental assistance is a form of public charity; the legislature did not intend for individuals who had sufficient property to sustain themselves by receiving state aid.⁶⁶

Only two years later, the Court again faced the issue of Commonwealth reimbursement, this time with respect to the Act of June 9, 1939, in *In re Reiver's Estate*.⁶⁷ A mother and three children were indigent and receiving public assistance.⁶⁸ The children's paternal grandfather died and relevantly bequeathed money to one of the children (Charles), which was held in trust by the York Trust Company.⁶⁹ After

52. 42 U.S.C. §1396p(d)(4)(A) (2010).

53. 42 U.S.C. §1396p(d)(4)(C) (2010).

54. *Walters' Case*, 123 A. 408 (Pa. 1924).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 409.

59. *Id.*

60. *Id.* However, the Court limited the Commonwealth's recovery to repayment of expenditures made after the trust was established.

61. *In re Waits' Estate*, 7 A.2d 329 (Pa. 1939).

62. *Id.* at 330.

63. *Id.*

64. *Id.*

65. *Waits' Estate*, 7 A.2d at 330.

66. *Id.*

67. *In re Reiver's Estate*, 22 A.2d 655 (Pa. 1941).

68. *Id.* at 656.

69. *Id.*

Charles reached the age of majority, the Commonwealth sought reimbursement from the trust. Using the “implied obligation to repay” language from *Waits*, the Court determined that when the Commonwealth has provided maintenance for an indigent person, “and it subsequently appears that the beneficiary has an estate or property of his own, the Commonwealth is entitled to recover from him the moneys expended on his behalf.”⁷⁰

Since 1941, up until *Lang*, the Pennsylvania courts have continued to order reimbursement to the Commonwealth for funds expended on the beneficiary’s behalf.⁷¹ As recently as 1983, in *Stoudt*,⁷² the Pennsylvania courts have used the mindset in *Waits* to reason that public assistance is a form of public charity and should be avoided at all costs.⁷³ In *Stoudt*, the decedent created a support trust for her daughter who was also receiving public assistance while living in a nursing home.⁷⁴ When the nursing home learned of the trust and informed the county, DPW determined that the daughter was no longer eligible for public assistance because the trust corpus was an available resource.⁷⁵

In agreement with DPW, the Commonwealth Court reasoned that the trustee had an “obligation to carry out the purpose of the trust and to provide for her support, rather than saving it all for the remaindermen and forcing her to resort to public welfare.”⁷⁶ The court further determined that the “purpose of the medical assistance program is to furnish care to those whose resources are insufficient to meet the costs of necessary care.”⁷⁷

Settlor's Intent

In 1889, the Pennsylvania Supreme Court stated that, “[i]n deeds, as in wills, the intent of the grantor is to be taken as the cardinal rule for their construction, and . . . it may now be regarded as settled, that even technical words of limitation, found in an executed conveyance, may be so qualified by the context as to make them conform to the intention of the grantor.”⁷⁸ Thereafter, the Pennsylvania Supreme Court continually reaffirmed the proposition that if the testator’s intent is not unlawful, it must prevail.⁷⁹ Furthermore, the testator’s intention is the “pole star in the construction of every will and that intention must be ascertained from the language and scheme of his [entire] will [together with the surrounding facts and circumstances]; it is not what the Court thinks he might or would or should have said in the existing circumstances, or even what the Court thinks he meant to say, but what is the meaning of his words.”⁸⁰

The problem, as shown above, is that the courts will construe “maintenance and support” language in support or spendthrift trusts to require trustees to reimburse

70. *Id.* The Court rejected the argument that since the state’s payments had been made to Charles’ mother, rather than Charles himself, Charles had no duty to repay the benefits received.

71. See, e.g., *Goodell Estate*, 59 Pa.D.&C. 2d 468 (Pa. C.P. 1972).

72. *Stoudt v. Commonwealth*, 464 A.2d 655 (Pa. Cmwlth. 1983).

73. See *id.* at 666; Scott Gardner, *Supplemental Needs Trusts: A Means to Conserve Family Assets and Provide Increased Quality of Life for the Disabled Family Member*, 32 DUQ. L. REV. 555, 561 (1994).

74. *Stoudt*, 464 A.2d at 665-666.

75. *Stoudt*, 464 A.2d at 666.

76. *Id.* (emphasis added).

77. *Id.* (citing 42 U.S.C. §1396).

78. *Appeal of Woelpper*, 17 A. 870 (Pa. 1889) (quoting *Criswell v. Grumbling*, 107 Pa. 408 (1885)).

79. *In re Estate of Walton*, 186 A.2d 32, 35 (Pa. 1962) (citing *In re Estate of Collins*, 143 A.2d 45, 47 (Pa. 1958)).

80. *Walton*, 186 A.2d at 35-36; *Kelsey Estate*, 143 A.2d 42, 44 (Pa. 1958); *Saunders Estate*, 143 A.2d 367, 368 (Pa. 1958); *Sowers Estate*, 119 A.2d 60, 62-63 (Pa. 1956); *Cannistra Estate*, 121 A.2d 157, 159-160 (Pa. 1956); *Britt Estate*, 87 A.2d 243, 244-245 (Pa. 1952); *Mulert Estate*, 61 A.2d 841, 842 (Pa. 1948); *In re Sarver's Estate*, 188 A. 141, 142 (Pa. 1936).

the Commonwealth if there are at least some mandatory distributions available to the beneficiary contained within the trust document.⁸¹ Although, in general, a court will give significant weight to the intention of the testator, public policy prior to *Lang* dictated that public assistance was a form of charity, which should only be used when absolutely necessary, and the trust corpus should supplant public assistance otherwise available to the beneficiary.

V. LANG AND ITS PROGENY

Finally, in 1987, the Pennsylvania Supreme Court reversed over sixty years of public policy to create the possibility for disabled beneficiaries to maintain or improve their quality of life through trust assets while remaining on medical assistance.⁸² In *Lang*, the testator created a testamentary discretionary trust for the benefit of all of his children, one of whom, William, was a mentally disabled adult institutionalized in a state mental retardation center.⁸³ The trustee was directed to pay the income of the trust and had “complete discretion” to invade the principal for the beneficiary’s welfare, benefit, support, and maintenance.⁸⁴ In fact, she “provided clothing, gifts and pocket money for William from the trust income.”⁸⁵

The trust’s use of the words “complete” and “welfare and benefit,” in addition to the usual “support and maintenance” language, suggested that it was the settlor’s intention to provide the trustee with broad discretion and to improve William’s quality of life beyond the minimum standard of living.⁸⁶ The *Lang* Court recognized that settlor’s intent must be determined “from all the language within the four corners of the trust instrument, the scheme of distribution and the circumstances surrounding the execution of the instrument.”⁸⁷ In changing years of public policy to the contrary, and rejecting the sentiment in *Stoudt*, the Court stated that, “[a] settlor should not be required to either bankrupt his family or run the risk of leaving a handicapped member destitute or in want because of vagaries in the requirements for public assistance or in the level of funding for such assistance.”⁸⁸ It is not in a beneficiary’s best interest not to be “forced to resort to public welfare.”⁸⁹

In further discerning the settlor’s intent for the trustee to consider public assistance before distributing trust funds to the disabled beneficiary, the Court noted several factors. First, the settlor chose to set up a discretionary support trust rather than a mandatory trust or a “pure” support trust.⁹⁰

Second, the Court reasoned that the testator chose to set up one trust for four children, rather than creating four separate trusts.⁹¹ The settlor gave the trustee broad discretion to make distributions to the disabled beneficiary knowing that those dis-

81. See *Stoudt*, 464 A.2d at 666.

82. See *Lang*, 528 A.2d at 1344-1345.

83. *Id.* at 1337.

84. *Id.* at 1342.

85. *Id.* at 1340.

86. *Id.* at 1342-1343 (citing 2 A. SCOTT, THE LAW OF TRUSTS, §187 at 1502 (3d ed. 1967)) (modifiers such as “absolute” or “unlimited” create an enlarged zone of discretion). The Restatement (Second) of Trusts, §187 comment j (1959), suggests that the use of modifiers such as “unlimited” or “absolute” dispenses with the standard of reasonableness. As commentators have noted, however, courts have rarely implemented this view and have instead held that trustees may not abuse the discretion granted them, however broadly that grant has been expressed. See Frolik, *Estate Planning for Parents of Mentally Disabled Children*, 40 U.PITT.L.REV. 305, 328 (1979).

87. *Lang*, 528 A.2d at 1342 (quoting *Farmers Trust Co. v. Bashore*, 445 A.2d 492, 494 (Pa. 1982)).

88. *Id.* at 1345.

90. *Id.* at 1343.

91. *Id.*

tributions may be at the expense of the remaining children's share. Any remaining income that was not necessary for William's benefit would then be distributed among the remaining children.⁹²

Lastly, during his lifetime, the settlor accepted public assistance in the form of partial subsidization for William's institutional care. The Court reasoned that the settlor wanted William to continue to receive public assistance while supplementing his income through the discretionary trust.⁹³ Based on these factors, the Court concluded that the trust assets were not an available resource for purposes of Medicaid eligibility.⁹⁴

In making its determination, the Court in *Lang* recognized that William had attained the age of majority (18).⁹⁵ Under the 1974 Amendments to the Mental Health Act, his father no longer had a legal duty to support him as long as William was already receiving benefits under the Act.⁹⁶ Although the Mental Health Act considers the entire available income from a mentally disabled person's own income, except for \$60 per month for personal use,⁹⁷ and therefore treats most trust assets as an available resource, the General Assembly has carved out an exception.⁹⁸ A restricted trust account is not considered an available resource for a disabled individual.⁹⁹ The client establishes the trust and it is legally restricted from invasion of the principal amount for care and maintenance. Income only may be assessed from such trusts.¹⁰⁰

In 1991, just four years after *Lang*, the Pennsylvania Supreme Court was again faced, in two cases decided concurrently, with determining whether a settlor intended that the trustee take into account public assistance funds when deciding to give distributions to a disabled beneficiary, and thus not preclude that beneficiary from medical assistance.¹⁰¹ In *Snyder*, the testator executed a will in January of 1985 and within its residuary clause, created a supplemental needs trust naming one of her sons as trustee for the benefit of her other son, Jay, and her daughter, Ethel.¹⁰² Five months after execution, Jay got into a car accident, which required him to be placed in a nursing home.¹⁰³ Jay was receiving public assistance prior to his mother's death in 1986.¹⁰⁴ DPW decided to terminate Jay's medical assistance when it discovered the trust assets.¹⁰⁵ DPW reasoned that the trust assets were resources available to Jay, thereby making him ineligible to receive benefits.¹⁰⁶

The Pennsylvania Supreme Court, echoing *Lang*, reasoned that the settlor's intention was the primary factor, looking at the four corners of the trust document to determine what the testator would have wanted under the circumstances.¹⁰⁷ The Court analyzed the language of the trust document to locate how much discretion the settlor gave the trustee to consider resources otherwise available from the Com-

92. *Id.*

93. *Id.* at 1343-1344.

94. *Id.* at 1342.

95. *Lang*, 528 A.2d at 1345.

96. *Id.* (see also 50 P.S. §4502 (2010)).

97. 55 PA. CODE §4310.7 (2010).

98. 55 PA. CODE §4310.12 (2010).

99. 55 PA. CODE §4310.12(2).

100. *Id.*

101. *Snyder v. Commonwealth, Dep't of Pub. Welfare*, 598 A.2d 1283 (Pa. 1991); *Commonwealth Bank and Trust Co. v. Commonwealth, Dep't of Pub. Welfare*, 598 A.2d 1279 (Pa. 1991); Gardner, *supra* note 73, at 564.

102. *Snyder*, 598 A.2d at 1284.

103. *Id.* at 1285.

104. *Id.*

105. *Id.* at 1285.

106. *Id.*

107. *Id.* at 1285.

monwealth, in making his decision to distribute trust income or principal.¹⁰⁸ The Court further reasoned that because at the time of the testator's death, her son was already receiving public benefits, and she failed to change anything in the will or trust, she wanted her son to receive the supplementary benefits from the trust in addition to public assistance.¹⁰⁹ Therefore, the Court determined that the trust principal was not an available resource for purposes of medical assistance eligibility guidelines.¹¹⁰

Unlike the determination in *Snyder*, the Court concluded in *Commonwealth Bank & Trust* that the trust assets were an available resource for purposes of medical assistance/nursing home benefits.¹¹¹ In *Commonwealth Bank & Trust*, the settlor executed a testamentary trust to benefit his mother who was receiving public assistance while living in a nursing home.¹¹² The trust provided that the trustee pay the income to the settlor's mother, and authorized the trustee to pay so much of the principal as was necessary for her support and maintenance, taking into consideration "income or principal" available to her from other sources.¹¹³

The Court, using similar factors to those stated in *Lang*, determined that the trust assets were available resources, and thereby precluded the settlor's mother from medical assistance.¹¹⁴ In distinguishing *Lang*, the Court reasoned that: 1) at the time the settlor executed the will, there did exist a duty to take care of his mother; 2) "income or principal available to her from other sources" does not specifically make reference to public benefits, which are neither income nor principal; and 3) all trust assets could be used by the settlor's mother without concern for the testator's other heirs, who were not co-beneficiaries and thus did not have a present interest in the trust assets.¹¹⁵

Five years after *Snyder* and *Commonwealth Bank & Trust*, the Pennsylvania Supreme Court, in *Estate of Rosenberg*, faced the question of whether a trustee had discretion to preserve the principal of the trust for the benefit of the remaindermen rather than to expend it for the sole life beneficiary.¹¹⁶ In *Rosenberg*, the testator executed a will that left \$157,000.00 outright to his widow and placed an additional \$65,000.00 in a trust.¹¹⁷ "The trustee was directed to pay the net income to the beneficiary quarterly, and was authorized, in his sole discretion, to use principal for the comfort, welfare, and maintenance and support . . ." of the beneficiary.¹¹⁸ After the widow's death, the trust dictated that the remainder would pass to the then living issue of the testator.¹¹⁹ Ten years after the testator died, his widow entered a nursing home.¹²⁰ Within five years, she had spent nearly all of her outright bequest on nursing care and then sought public assistance, despite having \$55,000.00 left in the trust.¹²¹ The Court, relying on *Lang*, *Snyder*, and *Commonwealth Bank & Trust*, determined that the trustee did not have discretion to preserve the trust assets, that the

108. *Id.* at 1286-1287.

109. *Id.* at 1287.

110. *Id.* The issue of trust income as a resource was not before the Court. *Id.* at 1285, n.3.

111. *Commonwealth Bank and Trust*, 598 A.2d at 1282.

112. *Id.* at 1279-1280.

113. *Id.* at 1280; Gardner, *supra* note 73, at 565.

114. *Commonwealth Bank and Trust*, 598 A.2d at 1282.

115. *See id.* at 1282.

116. *Estate of Rosenberg v. Dep't of Pub. Welfare*, 679 A.2d 767, 768 (Pa. 1996).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

assets were an available resource, and that the sole life beneficiary was ineligible for medical assistance.¹²² The settlor's widow had not received public assistance during the testator's lifetime.¹²³ The remaindermen of the trust were the testator's sons and grandchildren who were recipients of many gifts during the testator's lifetime, as well as an inter vivos support trust for their education.¹²⁴

The Court reasoned that the testator's lifetime gifts to his sons and grandchildren "would have reduced his concern that the sons and grandchildren receive any benefits as remaindermen of the estate."¹²⁵ Furthermore, the testator could have made his grandchildren life beneficiaries to place the trust more squarely in the realm of *Lang* and *Snyder*.¹²⁶ Instead, the Court determined that it was the settlor's intent "that the principal of the testamentary trust he established be available to his wife for her medical expenses, and that he did not intend for her to rely on public assistance for her health care after his death."¹²⁷

Practically, for estate planning purposes, the Court's decision in *Rosenberg* exemplifies how strictly the courts will construe third party discretionary trusts. When the testator created the trust in the 1980s, both he and his wife were healthy.¹²⁸ He bequeathed, in total, over \$200,000.00 to his wife, presumably to enable her to maintain the quality of life to which she had become accustomed. Instead, neither he nor his estate attorney planned for a worst case (although probable) scenario, i.e., that his wife would not remain healthy forever.

As a result, when his wife became ill and entered a nursing home, she depleted \$150,000.00 within five years, and via the Court's decision, the rest would, for all intents and purposes, be depleted over two years. Presumably, then, the widow would need to apply for medical assistance, anyway. Her family would never realize the benefit exceeding \$200,000.00, and the testator would have failed in providing his wife with a better quality of life after his passing. The Court stated, in dicta, that they do not subscribe to the notion that receiving public assistance is the presumed goal of estate planning.¹²⁹ Improving the quality of life of a spouse or loved one with a disability should be the presumed goal of estate planning. Note that if the grandchildren had been life beneficiaries, rather than remaindermen, the trust may not have been an available resource for purposes of Medicaid.¹³⁰ Additionally, there might have been a different result had the trust not employed the "maintenance and support" language.¹³¹

In 2000, in *Shaak*,¹³² the Court finally articulated the most important factors to be analyzed when determining a settlor's intent, in addition to the actual language of the trust. *Shaak* involved an inter vivos trust into which the settlor transferred ownership of her home. She reserved the right to live there while she remained able. Thereafter the trustees were empowered to dispose of the home and hold the trust estate for the primary benefit of the settlor. In their absolute discretion, the trustees were to distribute to the settlor so much of the income or principal of the trust, as they deemed "necessary or advisable for the maintenance, welfare, comfort and

122. *Id.*

123. *Id.* at 770.

124. *Id.* at 771.

125. *Id.*

126. *Id.*

127. *Id.* at 772.

128. *Id.*

129. *Id.*

130. See Hyatt, *supra* note 2, at 37.

131. See Stoudt, 464 A.2d at 666.

132. *Shaak v. Dep't of Pub. Welfare*, 747 A.2d 883, 886 (Pa. 2000).

happiness of the Settlor.”¹³³ The Court affirmed the denial of medical assistance benefits on the ground that the beneficiary of a irrevocable trust had assets in excess of the requisite asset guidelines.¹³⁴ The Court enumerated two salient factors for determining a settlor’s intent: 1) whether the trust provided for one or more beneficiaries; and 2) whether the beneficiary received public assistance during the settlor’s lifetime.¹³⁵ In *Shaak*, the trust document stated that the trust estate is “for the primary benefit of the Settlor” and allowed distribution of principal, without discretion, for “the maintenance, welfare, comfort and happiness of the Settlor.”¹³⁶ Additionally, Mrs. Shaak was the sole beneficiary, and was not receiving public assistance at the time the trust was created.¹³⁷ Therefore, the Court held, the trust corpus was an available resource under 55 Pa. Code §178.4, the pertinent DPW regulation.¹³⁸

Since *Shaak*, Pennsylvania courts have used, in addition to the actual language of the trust, those enumerated salient factors to discern the settlor’s intent. In both *Estate of Taylor*¹³⁹ and *DeBone*,¹⁴⁰ for example, the Pennsylvania Commonwealth Court used the *Shaak* salient factor analysis to uphold the denial of applications for medical assistance benefits.¹⁴¹

In *Estate of Taylor*, the Commonwealth Court considered an inter vivos trust that had been created by Mr. and Mrs. Taylor. The trust provided that, inter alia: “During Settlers’ lifetimes, the net income and personalty shall be paid to Settlers (the initial beneficiaries) and/or held in trust for settlors’ maintenance and support.” (emphasis added).¹⁴² Several years after Mr. Taylor died, Mrs. Taylor was admitted to a nursing home which filed an application for Medicaid nursing home benefits. At that time the trust held assets slightly in excess of \$100,000. DPW rejected the Medicaid application, and the estate appealed to Commonwealth Court.

Commonwealth Court rejected the estate’s argument that the term “personalty” did not include all personal property held by the trust. Additionally, the court noted that Ms. Taylor was the sole remaining beneficiary and was not receiving public assistance at the time her husband created the trust.¹⁴³ Therefore, her application for medical assistance was properly denied.¹⁴⁴

Similarly, in *DeBone*, Ms. DeBone was the sole life beneficiary of a trust with a balance of almost \$150,000, and had not been receiving public assistance at the time the trust was created.¹⁴⁵ The court discerned that the trust was created in response to federal estate tax concerns, rather than any intent to preserve the principal for the beneficiary’s children.¹⁴⁶ Furthermore, the actual language of the trust document stated that it was created for Ms. DeBone’s benefit, and that the principal was to be used for her “health, maintenance and support.”¹⁴⁷ Therefore, her application for medical assistance was properly denied.¹⁴⁸

133. *Id.* at 884.

134. *Id.* at 884.

135. *Id.* at 886.

136. *Id.*

137. *Id.*

138. *Id.* at 885-886.

139. *Estate of Taylor v. Dep’t of Pub. Welfare*, 825 A.2d 763 (Pa. Cmwlth. 2003).

140. *DeBone*, 929 A.2d at 1219

141. See *Estate of Taylor*, 825 A.2d at 766; *DeBone*, 929 A.2d at 1224.

142. *Estate of Taylor*, n.139 *supra*, at 765.

143. *Id.* at 766.

144. *Id.*

145. *DeBone*, 929 A.2d at 1224.

146. *Id.*

147. *Id.* at 1221, 1224.

148. *Id.*

Although there have been many results to the contrary, with careful estate planning, it is possible to improve or maintain a disabled loved one's quality of life after a testator passes away. If a beneficiary already has a disability, then it appears to be possible to create a non-support trust with the beneficiary still receiving medical assistance. Under the salient factors analysis in *Shaak*, as long as a beneficiary is receiving public assistance at the time the trust is created, and there is more than one life beneficiary included in the trust, a court is likely to allow the beneficiary of a non-support trust to continue to receive public benefits. However, a problem quickly arises when, as in the case of Mrs. Rosenberg, the beneficiary is healthy throughout the testator's lifetime, and only becomes sick after the testator dies.

Adequate estate planning will examine all possible contingencies and recognize that individuals are not likely to remain healthy indefinitely. Giving the trustee broad discretion and naming several life beneficiaries can mean the difference between using trust assets to improve a disabled loved one's quality of life, or using those funds to pay for medical care until they are depleted. And, with the ever-increasing costs of nursing and health care, what had taken a lifetime to earn, may only provide the beneficiary with adequate care for a relatively short period of time.

The courts and the General Assembly, however, properly are concerned that individuals with significant resources may take advantage of the Commonwealth's limited resources. They are essentially concerned with the rich elderly, who can afford medical care without public assistance, receiving governmental benefits just to retain trust assets for bequests to heirs or to keep "excess assets" for themselves. Most disabled persons, arguably, are like Mrs. Rosenberg, who did not receive a large inheritance, merely enough to maintain some quality of life, and perhaps even a sense of dignity in her later years. Medical Assistance only provides the bare essentials. With careful estate planning, though, a testator can provide for added benefits for a disabled loved one to give her an improved quality of life while she becomes eligible for, or remains on, medical assistance.

VI. OBRA '93 PAYBACK TRUST

As stated above, Congress carved out two exceptions to the usual transfer-of-assets rules and self-settled trust rules when it enacted OBRA '93, one of which, sometimes referred to as a "self-funded special needs trust," is a payback trust.¹⁴⁹ A payback trust cannot only be made by a parent, guardian, or other third party, similar to the common law discretionary trust, but it can also be effectuated by the disabled individual herself.¹⁵⁰ Congress carved out this exception because if a disabled minor has received a personal injury or medical malpractice award, under the general principles of OBRA '93, he would not be able to preserve the award in a supplemental needs trust and still remain on medical assistance.¹⁵¹ The award, then, would not be of any value to the disabled minor as it would be used entirely to cover the costs of medical care.

A payback trust, as the name implies, is a trust created from the funds of a disabled beneficiary and requires payback, at death, to the state for medical assistance benefits.¹⁵² During his lifetime, a disabled individual will be able to access the trust corpus, with limitations, but after death, the remaining assets must return to the

149. 42 U.S.C. §1396p(d)(4)(A).

150. *See id.*

151. *See Field, supra note 41, at 86 (citing Gordon, supra note 41, at 126).*

152. *Id.* at 87.

state.¹⁵³ Again, these trusts are usually created to hold the proceeds from personal injury or medical malpractice settlements to allow the disabled beneficiary to continue to receive medical assistance. The Pennsylvania Rules of Civil Procedure permit the use of payback trusts to resolve civil litigation.¹⁵⁴

OBRA '93 imposes two requirements for a valid payback trust: 1) the trust must be created irrevocably for the sole benefit of a disabled¹⁵⁵ beneficiary under the age of sixty-five; and 2) the trust must be created by the beneficiary's parent, guardian, or order of the court.¹⁵⁶ Pennsylvania's Act 42 of 2005 (hereinafter "Act 42"),¹⁵⁷ however, requires that before funding a payback trust, all liens and claims in favor of the DPW "for repayment of cash and [m]edical [a]ssistance shall first be satisfied."¹⁵⁸ Furthermore, Act 42 requires payback trusts to only be funded with a beneficiary's own money when "the beneficiary [has] special needs that will not be met without the [t]rust."¹⁵⁹ Moreover, any distribution from the trust must have a "reasonable relationship to the needs of the beneficiary."¹⁶⁰ The statutory language does not define exactly which special needs are covered under the Act, nor does it provide any guidance as to what constitutes a "reasonable relationship to the needs of the beneficiary." OBRA '93 does not have a similar provision.¹⁶¹

Additionally, under the Pennsylvania Fraud and Abuse Control Act of 1980,¹⁶² DPW is authorized to recover medical assistance payments, either by commencing an action against a third party and/or insurer, or intervening in a pending action by a beneficiary.¹⁶³ The Act also allows DPW to place a lien on the beneficiary's settlement, regardless of whether the claim is brought by both the DPW and the beneficiary,¹⁶⁴ or just the beneficiary.¹⁶⁵

In *E.D.B. v. Clair*,¹⁶⁶ the Pennsylvania Supreme Court, relying on the Fraud and Abuse Control Act, held that DPW was entitled to reimbursement for medical assistance paid prior to the beneficiary's reaching the age of majority.¹⁶⁷ E.D.B. (hereinafter "Emily") was born with severe mental and physical disabilities.¹⁶⁸ Negligence on the part of Centre Community Hospital in State College was the proximate cause.¹⁶⁹ The parties agreed to, and the trial court accepted, a settlement which included placing the funds in a "special needs trust" (payback trust).¹⁷⁰ DPW, pursuant to the Fraud and Abuse Control Act,¹⁷¹ sought reimbursement for monies expended for Emily's care, totaling \$56,517.81.¹⁷² The Court determined that the DPW was authorized to seek reimbursement for medical assistance paid prior to

153. 42 U.S.C. §1396p(d)(4)(A).

154. See Pa.R.C.P. No. 2039, 2064, and 2206.

155. 42 U.S.C. §1982c (a)(3) (2010).

156. *Id.*

157. 62 P.S. §1414 (2010).

158. 62 P.S. §1414(d).

159. 62 P.S. §1414(b)(2).

160. 62 P.S. §1414(b)(3)(ii).

161. See 42 U.S.C. §1396p(d)(4).

162. 62 P.S. §1401 *et seq.*

163. 62 P.S. §1409(b)(1); *Shaffer-Doan v. Commonwealth*, 960 A.2d 500, 506 (Pa. Cmwlth. 2008).

164. 62 P.S. §1409(b)(7)(ii); *Shaffer-Doan*, 960 A.2d at 507-508.

165. 62 P.S. §1409(b)(7)(i); *Shaffer-Doan*, 960 A.2d at 507-508.

166. *E.D.B. v. Clair*, 987 A.2d 681 (Pa. 2009).

167. *Id.* at 691.

168. *Id.* at 682.

169. *Id.*

170. *Id.* at 682-683.

171. 62 P.S. §1409(b)(1).

172. *E.D.B.*, 987 A.2d at 683.

Emily's reaching the age of majority.¹⁷³ Although the Court apparently allowed the payback trust, DPW received over \$50,000.00 in settlement proceeds.¹⁷⁴

An estate planner can create a payback trust if a disabled beneficiary under the age of sixty-five recovers a personal injury or medical malpractice settlement. In Pennsylvania, the laws appear to be strict, and DPW will seek reimbursement for monies expended on the beneficiary's behalf. The Fraud and Abuse Control Act even requires that if someone receiving public benefits initiates a cause of action for personal injury or medical malpractice, he must give proper notice to DPW.¹⁷⁵ Additionally, both OBRA '93 and Act 42 fail to provide guidance as to what happens after the disabled individual reaches the age of sixty-five.¹⁷⁶ Do the trust assets then become available for medical assistance asset purposes?¹⁷⁷ Are Act 42's stricter provisions consistent with OBRA '93?¹⁷⁸ Estate planners must keep these statutes in mind when deciding the best course of action for a disabled individual and know that, perhaps, a significant portion of any litigation proceeds may wind up in DPW's hands.

VII. OBRA '93 POOLED TRUSTS

Congress also carved out a pooled trust exception in OBRA '93, also referred to as a "special needs pooled trust," "master trust" or a "pay-to trust."¹⁷⁹ In a pooled trust, many different disabled individuals place assets in the trust, each in separate individual accounts, in order to achieve efficiency.¹⁸⁰ By analogy, the pooled trust is like a bank that holds the assets of individual account holders, or like a mutual fund in which individuals invest funds into a common fund but everyone has his own individual account.

The trust must be established and maintained by a non-profit association.¹⁸¹ In Pennsylvania, there are several pooled trusts currently operating, including The ARC Community Trust of Pennsylvania, Berks Community Trust, and The Achieva Family Trust.¹⁸² As with a payback trust, an individual must be disabled under the definition in 42 U.S.C. §1382c(a)(3) in Title XVI of the Social Security Act.¹⁸³ Unlike the payback trust, however, under OBRA '93, funds do not need to be paid back to the Commonwealth when the disabled beneficiary dies, but resources remain in the pooled trust for the benefit of the other disabled individuals in the trust.¹⁸⁴ Any excess assets, then, cannot be bequeathed to heirs, remaindermen, or life beneficiaries.

173. *Id.* at 691.

174. *Id.* at 682.

175. See 62 P.S. §1409(b)(5).

176. Field, *supra* note 41, at 88 (citing Wiesner, *OBRA '93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 47 WEST'S SOC. SEC. REP. SRVC. 757, 777 (May, 1995).

177. *Id.*

178. See *Lewis v. Rendell*, 501 F.Supp. 2d 671 (E.D. Pa. 2007). Although the court determined that the plaintiff's substantive due process claims failed, *id.* at 688, the procedural due process claims survived in part because the plaintiff had a property interest in Medicaid benefits. *Id.* at 691-692. The court further reasoned that 42 U.S.C. §1396a(a)(3) and 62 P.S. §423 provided adequate procedural protections. *Id.* The court also recognized a §1983 claim for rights violated under 42 U.S.C. §§1396p(d)(4), 1396d(a), and 1396a(a)(8), (10), and (18). *Id.* at 685.

179. 42 U.S.C. §1396p(d)(4)(C) (2010).

180. Field, *supra* note 41, at 88 (citing A. Frank Johns, *Legal Ethics Applied to Initial Client-Lawyer Engagements in Which Lawyers Develop Special Needs Pooled Trusts*, 29 WM. MITCHELL L. REV. 47, 63 (2002).

181. 42 U.S.C. §1396p(d)(4)(C)(i) (2010).

182. Jeffrey A. Marshall, *A Pennsylvania Guide to Special Needs Trusts*, 2009, available at http://www.paelderlaw.com/pdf/special_needs_beneficiary.pdf (last visited November 29, 2010).

183. See 42 U.S.C. §1396p(d)(4)

184. See 42 U.S.C. §1396p(d)(4)(C).

Act 42 imposes an additional limitation on pooled trusts. It requires that “upon the death of the beneficiary or upon the earlier termination of the [t]rust, the Department . . . must be reimbursed from the funds remaining in the [t]rust” and that “no more than fifty (50%) percent of the amount remaining in the beneficiary’s [p]ooled [t]rust account may be retained by the [t]rust without any obligation to reimburse the Department.”¹⁸⁵ OBRA '93 does not contain a similar reimbursement provision.¹⁸⁶

Despite this limitation, the pooled trust does have some advantages over the pay-back trust. For example, fees may be lower since the trustee is a non-profit association, there may be broader investment options, and the pooled trust is already established, making it relatively easier to execute than a payback trust. Additionally, it does not require a disabled beneficiary to be under the age of sixty-five.¹⁸⁷ A disabled beneficiary can, theoretically, enter a pooled trust after turning sixty-five and receive its benefits regardless of age. One drawback for an estate planner to consider, however, is that when the beneficiary dies or the trust is terminated, any remaining assets cannot be bequeathed to any family member or loved one; they must remain in the pooled trust for another disabled beneficiary’s consumption.¹⁸⁸

VIII. OTHER POSSIBILITIES

Aside from the three types of trusts described above, OBRA '93, Act 42, and the Pennsylvania Fraud and Abuse Control Act, have made it considerably difficult for estate planners to ensure that disabled beneficiaries will be able to retain their entire settlement or inheritance, without having to reimburse DPW for monies expended on their behalf. With third party trusts, the difficulty was not to retain all trust assets while remaining on medical assistance, but to remain on medical assistance without having to pay for medical care out of trust assets.

One possibility to ensure medical assistance eligibility may be to disinherit the disabled family member. An estate planner may be loathe to recommend this, especially with children of a testator. To disinherit any child, especially a disabled child, could have a deleterious effect on him. It might be difficult or impossible to explain to the child that the rationale for his exclusion was based solely for him to remain on medical assistance.¹⁸⁹ Also, the testator may not have another beneficiary to which he wishes to leave his estate. There are enough judicial and legislative solutions to make disinheritance a last resort.

Creating a so-called “Faith Trust” is another possibility. For example, where the testator has two children, one of whom is disabled, the testator may disinherit the disabled child but put precatory language in a will or trust that the non-disabled child should help out with the disabled child financially. However, with precatory language expressing a future intent, wish, or hope that the non-disabled child will share assets with a disabled sibling, the disabled child obtains no enforceable rights or guaranteed benefit.¹⁹⁰ There would be a real risk of the beneficiary retaining all assets, without providing anything to the disabled person.¹⁹¹ Additionally, the beneficiary may predecease the disabled person and the remaining assets would be left in the beneficiary’s estate and be distributed accordingly.¹⁹²

185. 62 P.S. §1414 (b)(3)(iii) (2010) (emphasis added).

186. 42 U.S.C. §1396p(d)(4)(C).

187. See 42 U.S.C. §1396p(d)(4)(C).

188. *Id.*

189. Judith G. McMullen, *Family Support of the Disabled: A Legislative Proposal to Create Incentives to Support Disabled Family Members*, 23 U. MICH. J. L. REFORM 439, 453 (1990).

190. See, e.g., *In re Bellas Estate*, 34 A. 1003 (Pa. 1896).

191. McMullen, *supra* note 189, at 453.

192. *Id.* at 454.

A possibility that an estate planner must consider in a relatively few cases is that a disabled person might become healthy later in life. With a third party discretionary trust, an estate planner can write provisions into the trust to account for that contingency, by authorizing the trustee to distribute more trust assets to the once-disabled beneficiary, under the condition that he is improved, and no longer requires medical assistance.

Lastly, it is possible, as exemplified in *Rosenberg*, that a healthy individual can become disabled later in life. With careful estate planning, Mrs. Rosenberg could have received public benefits as well as trust assets if the settlor planned for that possibility. If Mrs. Rosenberg, instead, received a settlement from a personal injury or medical malpractice lawsuit, she could have set up a payback trust, or have placed her assets in a pooled trust, in order to receive public benefits. An estate planner would need to explain that under OBRA '93, Act 42, and the Pennsylvania Fraud and Abuse Control Act, DPW may receive potentially significant portions of her settlement.

IX. TRUST DISTRIBUTIONS

In making distributions to the beneficiary, the trustee needs to keep several things in mind. As already noted, Act 42 provides that "any expenditure from the trust must have a reasonable relationship to the needs of the beneficiary."¹⁹³

Moreover, SSA has complex regulations on "how income affects SSI payments."¹⁹⁴ There are two important concepts. First, some benefits simply do not count as income.¹⁹⁵ Second, earned income and unearned income are treated differently.¹⁹⁶

Income is generally defined as "anything you receive in cash or in kind that you can use to meet your needs for food and shelter."¹⁹⁷ Certain items the recipient may receive are not counted as income. For example, a trustee could purchase a specially equipped van for the recipient which would not count as income as long as it is the recipient's only vehicle.¹⁹⁸ A trustee could pay bills directly to the supplier on behalf of a recipient, and those payments would not count as income. Only the value of the goods would count and only to the extent that they come under the headings of food and shelter.¹⁹⁹ Thus a trustee could purchase a television set for the recipient and it would not constitute income for SSI purposes.

To the extent that payment from a trust is counted as income, it will be "unearned income."²⁰⁰ Certain unearned income is "disregarded" by SSA. SSA will disregard gifts used for paying necessary educational expenses.²⁰¹ Likewise, SSA will disregard "the first \$60 of unearned income received in a calendar quarter if you receive it infrequently or irregularly."²⁰² After "income disregards," there is a dollar for dollar reduction in SSI for countable income.²⁰³

It is important to note that an eligible individual residing in a medical treatment facility where a substantial part of the cost of care is paid by Medicaid will have her

193. 62 P.S. §1414(b)(3)(ii).

194. 20 C.F.R. §416.1100 *et seq.*

195. 20 C.F.R. §416.1103.

196. *Compare* 20 C.F.R. §§416.1110-1112 and 20 C.F.R. §§416.1120-1124.

197. 20 C.F.R. §416.1102.

198. 20 C.F.R. §416.1103(j).

199. 20 C.F.R. §416.1103(g).

200. 29 C.F.R. §§416.1120, 1121.

201. 20 C.F.R. §§416.1124(c)(3).

202. 20 C.F.R. §416.1124(c)(6).

203. 20 C.F.R. §416.420.

SSI reduced to \$30/month.²⁰⁴ In some circumstances, this reduction will not occur until the recipient has been in the facility for two (2) full months.²⁰⁵

Finally, trustees should be aware that there is one category of disabled adult children whose Social Security benefits will not be affected by income or resources. These are people receiving "childhood disability benefits" (CDB), formerly and more accurately known as "disabled adult child" (DAC) benefits. The adult child of a deceased, retired, or disabled wage earner, can receive monthly benefits on that parent's Social Security account, if the child was dependent on that parent, is unmarried, and became disabled before age 22.²⁰⁶ Because this is part of the Social Security insurance program and not SSI, there is no financial means test for eligibility.

X. CONCLUSION

Trusts have been available since the 1300s, but only recently have the state and federal legislatures and the court system made it possible for disabled individuals to receive distributions from a trust while retaining medical assistance. Congress and the General Assembly are legitimately concerned about the wealthy taking advantage of taxpayer dollars, and the state not retaining enough funds for indigent disabled persons who may need medical assistance. OBRA '93, Act 42, and the Pennsylvania Fraud and Abuse Control Act have been able to strike a balance between allowing disabled beneficiaries to maintain or improve their quality of life and imposing less of a burden on the taxpayer to ensure medical assistance for disabled people. With these statutes in place, disabled beneficiaries can reimburse DPW for monies expended on their behalf while remaining on medical assistance, and not having to foot the bill of ever-increasing medical and nursing home costs.

Although estate planners can utilize a third party discretionary trust, payback trust, or pooled trust to ensure a disabled beneficiary has a future on which to depend, they still need to plan for every possible contingency that may occur. If a disabled individual receives a personal injury or medical malpractice settlement, for example, an estate planner should suggest either a payback or pooled trust, depending on how much money would be placed in the trust, the age of the disabled beneficiary, and who, or what entity, the client wants to be the trustee handling the trust assets.

A third party discretionary trust should be used if a parent, guardian, or other loved one is funding the trust. Especially since *Lang*, the Pennsylvania courts have established a new public policy in support of these trusts, as long as the beneficiary is on medical assistance before creation of the trust, there are multiple life beneficiaries, and the language of the document permits the trustee complete discretion of exactly how to distribute trust assets.

The truth is that no one can predict exactly what the future will bring. With careful estate planning, however, and use of language in the trust document consistent with the applicable statutes and case law, a disabled beneficiary can likely have an improved quality of life even after the settlor's death.

204. 20 C.F.R. §416.414(b).

205. 20 C.F.R. §416.212.

206. 20 C.F.R. §404.350.