



DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

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Center for Medicaid and State Operations
7500 Security Boulevard
Baltimore, MD 21244-1850

JUL 24 2000

Bridget O' Brien Swartz
Swartz & Bivens
Paragon Plaza
5333 North 7th Street
Suite B-300
Phoenix, Arizona 85014

Dear Ms. Swartz:

This is in response to your letter to Timothy Westmoreland, Director, Center for Medicaid and State Operations, concerning Arizona's treatment of special needs trusts under Medicaid. Your letter was referred to this office for reply. I apologize for the delay in my response.

The specific issue you raise concerns post-eligibility treatment of income as it relates to special needs trusts. Arizona counts structured settlement annuity payments placed in special needs trusts for post-eligibility purposes. This means that Arizona treats such payments as the trust beneficiary's income under its post-eligibility process, and calculates the beneficiary's share of cost based on those payments. You disagree with Arizona's policy because you believe it violates the basic Medicaid definition of what is income.

Under that definition, which is drawn from the definition of income used by the Supplemental Security Income (SSI) program, income is anything that is received by the individual which can be used for food, clothing or shelter. The structured settlement payments at issue are paid directly to the special needs trust, not the individual. Further, the ownership of those payments is specifically vested in the trust; the individual does not have any right of ownership. Thus, the individual does not receive, and has no right to receive, the payments. Only the special needs trust has the right to receive those payments, and therefore only the trust is the actual owner of the funds in question. Because the individual has no right of ownership to the funds in question, you argue that they should not be considered as part of the individual's income in determining his or her post-eligibility share of cost.

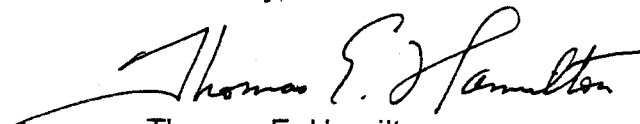
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After careful consideration of the issues presented, we agree that Arizona's policy of treating as the beneficiary's income for post-eligibility purposes structured settlement payments made to a special needs trust, where the trust is the actual owner of the payments, is incorrect. Where a structured settlement provides for payments to be made directly to a special needs trust, and provides that the trust, rather than the beneficiary of the trust, is the legal owner of those payments, the payments cannot be counted as income to the beneficiary because he or she has no legal right to the payments and has not in any way received them. Since the payments are not the beneficiary's income, they cannot be included in the post-eligibility calculation of the beneficiary's share of cost.

However, we must emphasize that this applies only in instances where the trust is the legal owner of the payments, and the beneficiary of the trust has no legal right to the payments in question. If the beneficiary is actually the legal owner of the payments, those payments are countable as income to the beneficiary for post-eligibility purposes even if the payments are made directly to the trust. Merely re-routing payments to which an individual is legally entitled directly to a trust so that the individual does not actually handle the funds does not change the fact that the individual is the legal owner of the payments. In that situation the individual has constructively received the funds since he or she is legally entitled to them, even though the funds may not actually pass through the individual's hands on their way to deposit in the trust.

If you have any questions, please contact Roy Trudel of my staff at 410-786-3417.

Sincerely,



Thomas E. Hamilton

Director

Disabled and Elderly Health Programs Group

cc: Associate Regional Administrator
Division of Medicaid
Region IX, San Francisco
Attn: Ron Reepen

Associate Regional Administrator
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