



## **Care and Caregiving Fees in Special Needs Trust Planning**

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Special needs trusts (SNTs) provide a plethora of benefits for beneficiaries requiring care and assistance programs. Yet, with one of the possible disqualifying distributions being care and medical assistance, there is a gray area in some jurisdictions about what the SNT can provide.

In some jurisdictions, an SNT can pay in-home care providers for hours they are working beyond the Medicaid-approved hours. For instance, if a care provider is working 40 hours and Medicaid has only allotted 20 hours a week for in-home care, then the SNT can pay the remaining 20 hours to the care provider. What is important to note and ask within the state's Medicaid agency are the following:

### **Do the state's Medicaid rules allow for payment to care providers in general?**

Some states have no Medicaid issues with care providers being paid so long as Medicaid, Medicare, and other insurance have denied coverage of the care expense. The Social Security Administration's (SSA) Program Operations Manual System (POMS) states that these distributions should be allowed. However, some state Medicaid agencies have implemented rules otherwise.

### **Does the compensation rate need to be the Medicaid compensation rate, or can it be a private pay rate?**

In some states, the care provider must be paid the Medicaid rate, even if it is being paid privately from the SNT. In other states, the compensation can be at a private pay rate. The POMS has a specific note on this subject: **"NOTE:** You should not routinely question the reasonableness of a service provider's compensation. However, if there is a reason to question the reasonableness of the compensation, you should consider the time and effort involved in providing the services as well as the prevailing rate of compensation for similar services in the geographic area."

The SSA's Seattle Regional Office provided guidance on this under with a region-specific notation in the POMS, by stating that "personal care, chore services, and attendant care

services” that allow for a disabled person “to remain in their homes rather than live in a skilled nursing facility” can allow programs that provide payment to workers providing such care. These payments “should be treated as wages” to the care provider. The beneficiary’s spouse’s or child’s income may be considered excluded income from the household for eligibility purposes. The same Seattle regional note also outlines the programs in each of the region’s states and how the state deems these services for eligibility.

### **Can any care provider be compensated, including family?**

Some states have rules about family members being compensated for care. This can be spouses, parents, children, etc. It is important to understand if the state regulations allow for family members to be compensated for care before distributions and agreements with family members are finalized. The POMS specifically states that family members are not prohibited from compensation.

### **Creative approaches for family**

When family members are contributing to the beneficiary’s care, there are multiple options for how to distribute funds in forms of compensation to the family member.

#### **Trustee fees.**

If the family member is a trustee, the family member can be compensated for their trustee role. The fee itself can be determined based on state standards, state rules, and the rules regulating the fee within the special needs trust itself. The POMS clearly provides for the trustee fee.

#### **Companion care.**

Companions are often not seen as medical care providers and therefore payments are considered qualifying distributions for special needs trusts. If the family member is acting as a companion, a companion care fee may be an approach to compensate family members for the time and energy assisting the beneficiary.

#### **Trust for caregiver.**

Outside of the SNT, a family member can create an irrevocable trust that provides for the caregiver of a beneficiary. For instance, the irrevocable trust would compensate the caregiver of the beneficiary. This is not a trust for the benefit of the disabled beneficiary; this is a trust for the benefit of the disabled beneficiary’s caregiver. An example of this is if a disabled beneficiary is going to require a guardian. The disabled beneficiary’s parent could create an irrevocable trust, funded upon their death, to pay for the guardianship and expenses that the guardian and/or caregiver would require to appropriately take care of

what needs to happen legally and practically to achieve the goals. This works well in situations where the guardian and/or caregiver is a family member of the disabled beneficiary. Please note that this strategy may be in conflict with the POMS if implemented in a way that creates a benefit to the disabled beneficiary.

**ABLE account.**

An ABLE account can assist with providing for expenses and compensation.

There are many ways to take a holistic approach to planning. To achieve this successfully, a combination of creative planning needs to incorporate an understanding of the state's Medicaid rules and the SSA's POMS guidance.

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