
MASTER TRUST ISSUES FOR CHILDREN AND YOUTH IN FOSTER CARE

INTRODUCTION

The Master Trust is a legal trust document that has been filed by the Department of Children and Families (the department) in the Circuit Court in Leon County, Florida and approved by that Court. It was created to hold in trust the money and property intended for the use and benefit of those individuals who are in the legal custody, care or control, or who are receiving services from, the department. For these children, individual accounts, and sometimes subaccounts, are created within the Master Trust.

“Master Trust” is also the name commonly used to describe the department’s fiscal program where the department recovers the money due and owing to children in its custody, pays itself from that money for the cost of care of the children in its custody, and makes the remaining money available to these children.

The funds typically received by children in the department’s custody are disability funds or death benefits from the Social Security Administration. These funds often exceed the cost of care and thus there is a remaining balance. The department has a fiduciary duty to conserve or invest these funds. There are a number of complicated laws and regulations that the department should follow in regard to Master Trusts.

It is crucial for the child advocate to be extremely vigilant in regard to Master Trust issues. Many of the children who have Master Trust Accounts will turn 18 while in the custody of the department. It is imperative that their income and resources are protected.

WHO ARE THE CHILDREN WITH MASTER TRUST ACCOUNTS?

Not all children in the department’s custody will be beneficiaries of the Master Trust. According to the trust’s terms, the beneficiary class consists of those individuals who are in the legal custody, care or control, or who are receiving services from the department “and who have received or who will receive money and tangible or intangible property for their sole use and benefit from any other person or entity that is placed in the possession or control of the department and for whom a separate trust for such individual does not exist.” See, Declaration of Master Trust at 01.

Money in the Master Trust Accounts can come from a variety of sources. However, most of the children with subaccounts in the Master Trust receive SSI benefits due to their own disability. However, money also comes from other government benefits such as derivative Social Security benefits (disability or survivor benefits), Veteran’s benefits, and Railroad Retirement benefits. Occasionally, child support and private insurance benefits will be placed into Master Trust Accounts.

Social Security Benefits (SSA)

- These benefits are available for a child of an individual who is age 62 or above, disabled or deceased, based on the wage-earner's contributions to Social Security
- The child beneficiary must be under the age of 18; or in elementary school or secondary school and under the age of 19; or disabled before the age of 22. 20 C.F.R. 404.

Supplemental Security Benefits (SSI)

- These benefits are based on financial need, rather than contributions by wage-earners and are provided to individuals with a disability.
- There are elaborate criteria regarding eligibility, both financial and substantive.
- Criteria for establishing disability for a child are different from those for an adult and when the child turns 18, there will be a re-determination of eligibility based on the adult criteria. 20 C.F.R. 416.

Rules and policies and procedures (POMS) for both SSA and SSI funds can be found in the Social Security Administration's website at, www.ssa.gov.

The application for SSA or SSI funds can be a time consuming and cumbersome process. The first step in dealing with potential Master Trust Funds is to determine if the child in fact receives SSA or SSI benefits. If the child does not receive social security funds and the advocate believes the child may qualify, the advocate should immediately file a motion to compel the department to apply for social security disability funds on behalf of the child. The advocate should also provide as much information as possible to the department case worker so the application will be complete. It takes approximately three to six months from the date of the initial application for the child to begin receiving the funds, assuming the application is granted upon the initial filing.

Once the child qualifies for social security benefits, the Social Security Administration will designate a representative payee to receive the benefits on behalf of the child. The department typically will be the representative payee. However, 20 C.F.R. §§404.2010 and 20 C.F.R. §416.621 provide for an order of preference of representative payees. An agency may be appointed as the representative payee, but it is low on the order of preference list. It is unclear what efforts the department takes to seek an alternative representative payee.

In addition to creating individual accounts, the Declaration of Master Trust, the legal trust document that has been filed by the department in the Circuit Court in Leon County, Florida and approved by that Court, provides for separate sub-accounts. The sub-accounts are as follows:

Current Needs Sub-Account

The funds in this account are used for the child's ongoing, recurring, monthly needs. These funds may also be used for clothing, personal items, sports activities, computers, recreational activities and similar items. The department's maintenance fees are withdrawn from this account. Funds in this account are subject to the SSI asset limit of \$2000.

Disabled Special Needs Sub-Account (or Dedicated Sub-Account)

The funds in this account may only be used for specially designated medical services and goods that are related to the disabled child's special needs, or otherwise with special permission of the SSA. The SSI asset limit of \$2000 does not apply to funds in this account. Often a child will receive a lump sum retroactive SSI benefit in several payments when eligibility is established prior to the commencement of actual payments. Lump sum payments are placed in this account.

Underpayments by the SSA and past-due benefits also result in funds that, if deposited in the current needs account, would render the child immediately ineligible for SSI benefits.

Plan To Achieve Self-Support (PASS) Sub-Account for Disabled Children

The funds in this account must be used to effectuate a PASS, a plan approved by the SSA for long-term vocational or educational needs of the disabled child. As long as this plan is in effect, the child's funds may be deposited into this account without affecting SSI asset limits. 65C-17.003 F.A.C. requires the department to create a PASS, independent living or other Case Plan to submit to the dependency court and the Social Security Administration. At the time of the publication of this chapter, there are only a few PASS Accounts for dependent children in Florida.

Sub-Account for Children Who Receive SSA, Veteran's Benefits or Other Regular Benefits

The funds in this account must be used to effectuate long-term vocational or educational goals. The children who receive SSA, Veteran's Benefits or other regular benefits are eligible for a PASS-ND (non-disabled) plan which serves as all or part of the required case plan for independent living transition services, pursuant to § 409.1451(4). These plans are not submitted to the SSA but must be filed in the court's case file and the court file.

DEPARTMENT'S DUTIES WITH RESPECT TO THE TRUST

The department has fiduciary duties as trustee over Master Trust funds pursuant to §402.17. Section 402.17(2) states:

(2) MONEY OR OTHER PROPERTY RECEIVED FOR PERSONAL USE OR BENEFIT OF ANY CLIENT.

The department or agency shall perform the following acts:

(a) Accept and administer in trust, as trustee having a fiduciary responsibility to a client, any money or other property received for personal use or benefit of that client. In the case of children in the legal custody of the department, following the termination of the parental rights, until the child leaves the legal custody of the department due to adoption or attaining the age of 18, or in the case of children who are otherwise in the custody of the department, the court having jurisdiction over such child shall have jurisdiction, upon application of the department or other interested party, to review or approve any extraordinary action of the department acting as trustee as to the child's money or other property. . . .

Moreover, the department has duties as a fiduciary pursuant to general Florida laws regulating trusts, §518.11 and §737.302, and section 6 of the General Provisions of the Declaration of Trust.

The department is required to obtain a court order prior to taking action which is in conflict with its duties as trustee. §402.17(6)(b).

SSA rules also detail the department's fiduciary duty as representative payee 20 C.F.R. §§404.2035(a) and 416.635(a) require that SSA funds be used "only for the use of the beneficiary in a manner and for the purposes he or she determines... to be in the best interests of the beneficiary." Where a child's current monthly benefits exceed the amount used by the department--the representative payee, the department must conserve or invest the excess funds. 20 C.F.R. §§ 404.2045(a),(c), 416.645(a).

SSI Asset Limitations and Spending Down Accounts

SSI is a needs based benefit with an asset limit of \$2000. As part of its fiduciary duty, the department must ensure that funds in the Master Trust current needs sub account do not exceed \$2000 for children who receive SSI. Certain assets are excluded from this provision, including normal possessions such as clothing, books, electronic equipment, etc. It is important to note that children who do not receive SSI are not subject to an asset limit so their accounts may exceed \$2000.

Caseworkers and fiscal office personnel are responsible for planning and budgeting for the child's needs. Ideally, they should create a spending plan—with the child's input where possible—that addresses the child's specific needs so that purchases are designed to improve the child's life, not just empty the trust account. Children receive SSI because they have a disability so advocates should look for ways to spend SSI money to ameliorate the effects of that disability. SSI money can be spent on tutoring for kids with learning disabilities or who are behind in school because of frequent moves. It can be spent on therapies that are not otherwise covered by Medicaid. It can be spent for music or art lessons or sports equipment and after school activities.

In order to ensure that the current needs Master Trust Account balance does not exceed \$2000, the department must closely monitor the account and spend down the account when necessary. 65C-17.003(1) requires the caseworker to keep the child informed of all purchases from the Master Trust account. If the expenditures equal \$500 or more, the department caseworker must notify the child's parents (if prior to TPR), the guardian ad litem and the child's attorney.

Rule 65C.17-006, F.A.C. requires the department to provide a quarterly Master Trust accounting at each Judicial Review hearing. These accountings may contain mathematical errors so it is crucial that each accounting is analyzed closely by the advocate.

Tools for Preserving Assets in Excess of \$2,000 for Youth with Disabilities

Rather than spending down the child's Master Trust funds, there are tools which may be utilized to preserve the assets and make them available for children when they reach the age of 18. These tools include:

PASS Plans

If a youth has a source of income *other than SSI*, he or she may be able to accumulate assets in excess of \$2,000 in a PASS plan. PASS, (Plan for Achieving Self Sufficiency), is a Social Security program designed to allow people with disabilities to accumulate and use assets for the purpose of enhancing their employment opportunities without jeopardizing their SSI (and as adults, their disability) benefits. The money must be saved for a specific job related purpose such as to purchase a vehicle to drive to work or to purchase work related tools. A PASS plan must be approved by the Social Security Administration before money can be set aside. It is important to note that SSI money cannot be saved in a PASS plan.

Special Needs Trusts

If a youth with disabilities receives a large sum of money, and if he or she will require expensive care and services, the advocate should consider a special needs trust. Money in a special needs

trust does not count as an asset for purpose of government benefits, such as SSI and Medicaid. Depending on who created the trust and what money went into it, the money left in the trust after the disabled person dies may be sent to Medicaid for its medical assistance. The money can be used only for limited purposes.

Pooled Trusts

Pooled trusts are a good alternative if the funds available do not justify the cost of creating and managing a special needs trust. A nonprofit pooled income special needs trust is run by a nonprofit organization that invests and manages money from many people. Upon the death of the disabled individual, the balance is either retained in the trust for the nonprofit association or is paid back to Medicaid for its medical assistance. The money can be used only for limited purposes.

HOW ARE THE FUNDS MANAGED AND SPENT?

Pursuant to the Declaration of Master Trust, the department, as Trustee, “is to exercise sole and absolute discretion to distribute the income or principal from each client’s account or subaccount(s) to that client directly, or for that client’s sole use or benefit, as the Trustee deems advisable for the needs and circumstances of each such client respectively, and subject to the restrictions stated elsewhere in this Declaration of Trust.” See, Declaration of Master Trust at 05. For many children, the largest distribution of account assets goes to the department itself as part of its fiscal program to recover money spent for the cost of care for children in its custody. Funds are also used to provide an allowance to the children. Whatever funds remain in the account when the child turns 18 should be disbursed.

Cost of Care, Fee Waiver and Right to Notice of Right to Request Fee Waiver

Washington State Department of Social and Health Services et. al. v. Guardianship Estate of Keffeler, et. al., 537 U.S. 371, 123 S.Ct. 1017, 154 L.Ed.2nd 972 (2003) allows states to use Social Security (SSA) funds to reimburse themselves for the costs incurred in providing services to children in foster care. It is important to note that Keffeler only details the reimbursement of the cost of care. Under §402.33, Fla. Stat. (2007), the department is authorized to charge fees for any services it renders, and to assess those fees against its clients, including children in foster care. Florida Law also contains more specific provisions regarding the child’s right to request a fee waiver and the notice required in this regard.

The child may request a full or partial waiver of the cost of care. This request can be made at any time. The request should be case specific, with necessary documentation attached to the request. §65C-17.005(2). Fee waivers are ordinarily of limited duration or for a limited sum, for example, the need for a security and utility deposit when a child transitioning to independent living. Fee waivers may be used to pay for: specialized classes if the child has a special talent or interest such as music, arts or sports; visual aids or wheelchair for mobility-limited child; remedial tutoring; items required to implement the child’s independent living or PASS plan; prepaid college tuition program; or childcare if the youth is a parent. The fee waiver is not a substitute for other available resources such as educational supports under an IDEA individual education plan (IEP).

The department is required to provide a notice of the child’s right to request a fee waiver with every judicial review. 65C-17.005 F.A.C.

A committee of three persons determines whether to grant a fee waiver. Children and their advocates should be encouraged to meet with that committee in order to explain why the additional funds are needed.

Appeal Rights of Waiver Denial

Appeals of denials of fee waivers are handled by the Division of Administrative Hearings (DOAH) under Chapter 120, Fl. Stat. (See § 402.33(7), F.S.). If the committee denies the child's requested fee waiver, the request for hearing must be made within 21 days of the date of the denial. 65C-17.005(5), F.A.C. However, there is no time limit for when the committee making the decision on the request must act. These proceedings can be complicated for the child and the advocate so it is important that an attorney familiar with Chapter 120 assist with this stage of the litigation, including when the committee does not act on a request within a reasonable time.

Allowances for Children in the Department's Custody

Children in the department's custody who receive SSI or SSA benefits are entitled to two types of allowances:

Foster Care Allowance

All children in the department's custody are entitled to receive a monthly case allowance. This money is to be given to them by the foster parent or group home operator and is included in the foster care board payment sent to the foster parent for the personal needs of each child living in the home. CBC's determine the amount of allowance for youth; the current range is typically \$10-20 per month.

Personal Allowance

"Youth for whom the cost of care is being deducted from their Master Trust Account are also entitled to a personal allowance." This is an additional amount set aside for the child's personal needs before any funds are applied to the cost of care. The child does not actually receive this money as spending money, rather it is available to the caseworker to be used for the child's needs. The minimum amount set aside as personal allowance is \$15 per month. 65C-17.002 (9), F.A.C. But the child's needs must be considered before the department's maintenance fee is withdrawn. So, if for example, the child needs \$30 per month to participate in a school club, the "personal allowance" could be increased if those funds were available. The same form used to apply for a fee waiver can be used to seek a change in personal allowance.

Disbursement of Master Trust Funds

When the child turns eighteen or is discharged from the custody of the department, there are three options:

- 1) the department may release the money to the child or as the child directs;
- 2) if a physical or mental disability renders the child unable to handle financial affairs, the department must apply for a court order to establish a trust on behalf of the child (if no relative or friend of the child is available, then the department is the trustee of this new trust); or
- 3) if the child is under 18 and leaves the custody of the department due to an adoption or other permanent placement, the department must seek a court order directing disposition of the money and property. §402.17

Department of Children and Families v. R.G., 950 So.2d 497 (Fla. 5th DCA 2007) upholds a trial court's order directing the department disburse funds in the Master Trust Accounts directly to the child upon turning 18. It is critical that the advocate seek an order directing the department to disburse the funds directly to the child as it can take months (sometimes as many as 11-12) to get the funds redirected to the child.

There are still many unresolved issues regarding disbursement of Master Trust conserved SSA or SSI benefits when a mentally handicapped child turns 18 and the department is no longer the "representative payee" for the child. Effective advocacy requires early planning in these cases, well before the child's 18th birthday, to ensure that the department meets its fiduciary duty as trustee.

Additional Resources

Department's Operating Procedures

The department's operating procedures regarding Master Trusts are found in CF Operating Procedure No. 175-59, dated October 18th, 2006 and are available on-line at www.dcf.state.fl.us/publications/policies/175-59.

BASIC MASTER TRUST ISSUE SPOTTING

- Has the department applied for SSI benefits on behalf of the child?
- Is the child eligible for any derivative benefits (parents deceased or disabled)?
- Is there an appropriate adult who can serve as the representative payee for the child rather than the department?
- Has the department filed the required Master Trust accountings?
- Is there a spending plan in place to ensure that funds are used to meet the child's specific needs?
- If the child receives SSI, is the balance of the Master Trust current needs sub account close to the \$2000 limit?
- How has the department spent the child's money? Is the child's specific need being met by the expenditures? Are there accurate records? Does the child actually have the property purchased with his or her money?
- Has the advocate considered a PASS account, Special Needs Trust or Pooled Trust for the child's Master Trust funds?
- Has the department provided notice of the child's right to request a fee waiver with every judicial review?
- Does the child need a lump sum of money to address a specific need? If so, has a waiver request been filed?
- Does the child have an ongoing need for additional funds to be expended? If so, has a request to increase the personal allowance been filed?
- Is the child close to turning 18? If so, has a motion regarding the disbursement of the funds to the child been filed?