

## **POTENTIAL BENEFITS OF USING A TANDEM TRUST FOLLOWING LARGE PERSONAL INJURY SETTLEMENTS**

This handout is applicable only when The Arc Trust is funded with the Beneficiary's own money following personal injury or medical malpractice litigation.

*Note: If you are considering using The Arc of Indiana Master Trust in a Tandem Trust arrangement, please review the Arc handout entitled "All About Medicaid Payback Trusts." A thorough understanding of how OBRA '93 Medicaid Payback Trusts work will assist you in understanding the Tandem Trust approach in the personal injury setting. This handout assumes that the reader has had the opportunity to review the "All About Medicaid Payback Trusts" handout. If you do not have a copy of "All About Medicaid Payback Trusts," please contact The Arc for a copy.*

In rare circumstances, The Arc of Indiana's mandatory 50% remainder requirement invades remainder shares that otherwise would pass to the remainderman or remaindermen of a self-settled OBRA '93 trust. This does not happen often. In the overwhelming majority of the situations, Medicaid's claim will be much larger than the amount of money remaining in the beneficiary's trust when he or she dies. Accordingly, it does not matter to the family of an Arc Trust beneficiary whether or not The Arc retains any of the beneficiary's trust once he or she passes away. Indeed, even if The Arc did not retain the first penny of the trust, Medicaid would take 100% of it anyway in order to satisfy its Medicaid Payback claim.

However, there are rare instances where several factors come together to create a situation whereby The Arc of Indiana's 50% remainder share represents money that otherwise would have passed to the remaindermen of the trust. This event is most likely to occur when the following factors are present:

1. The amount of money to be placed in trust is substantial; and
2. The beneficiary is relatively older; and
3. The beneficiary has been receiving Medicaid benefits only for a short period of time when the trust is created; or
4. For some other reason, the beneficiary can confidently expect the state's Medicaid claim to be substantially smaller than the amount of money that will remain in the trust at the time of his or her death.

When these situations present themselves at the time the trust is created, it may be appropriate to explore the option of the Tandem Trust arrangement. The Tandem Trust combines both a private OBRA '93 trust, created under 42 U.S.C. §1396p(d)(4)(A) and the Arc's pooled trust, created under 42 U.S.C. §1396p(d)(4)(C). The private trust is called a "Feeder Trust," and the Arc pooled trust is called the Subordinate trust. The trustee of the Feeder Trust is either given the discretion to "feed" or fund the subordinate Arc Trust among other disbursements, or is simply given authority *only* to feed or fund the subordinate Arc Trust—without having the authority to make other disbursements. This will depend on the preferences of the disabled beneficiary—taking into consideration factors such as the expected skill level of the trustee of the Feeder Trust, the level of involvement that the beneficiary wishes the trustee of the Feeder Trust to have, and other similar factors.

The majority of the trust assets will remain with the Feeder Trust, while the minority of the assets are placed into the Subordinate Trust. The duties of the trustee of the Feeder Trust will include keeping the Subordinate Trust funded at a specified minimum amount and/or feeding the Subordinate Trust at regular specified intervals.

In turn, the Subordinate Trust, administered by The Arc of Indiana Master Trust, will make all of the disbursements and handle all of the reporting requirements and other administrative responsibilities that are part and parcel to the day-to-day administration of a Special Needs Trust. This includes reporting the creation of the Subordinate Trust to all pertinent state and federal agencies, reporting all disbursements made by the Subordinate Trust to the pertinent state and federal agencies, researching all applicable state and federal regulatory and statutory schemes governing how the Subordinate Trust can be used, supplying Medicaid Recertification letters relating to the Subordinate Trust, answering questions from state and federal agencies regarding the existence or use of the Subordinate Trust, and, if necessary, handling challenges from state and federal agencies regarding the existence or administration of the Subordinate Trust. The trustee of the Feeder Trust will remain responsible for following all pertinent laws relating to the Feeder Trust, and The Arc of Indiana Master Trust does not assume any responsibility for the administration of the Feeder Trust.

So when is a Tandem Trust the right option? Again, the factors set forth above must be present in order for a Tandem Trust situation to make sense. Additionally, the following points must be taken into consideration:

1. If the amount of the Medicaid claim is or is expected to be greater than the total amount of money in trust, then a Tandem Trust will not create an advantage for the beneficiary.
2. If the amount of the Medicaid claim is or is expected to be equal to the total amount of money in trust, then a Tandem Trust will not create an advantage for the beneficiary.

3. The smaller the Medicaid claim is in proportion to the final remainder of the trust, the more the remaindermen of the trust potentially will benefit from the Tandem Trust situation.
4. When the Medicaid claim is expected to be smaller than the final remainder, a private trust oftentimes will yield more to the remaindermen of the trust than a pooled trust.
5. The benefit vs. costs of a Tandem Trust increasingly favors the remaindermen of the Tandem Trust as the percentage of the ratio of money in the subordinate trust vs. money in the Feeder Trust decreases.

EXAMPLES:

1. The beneficiary has **\$200,000** in trust at the time of his or her death. At death, Medicaid's claim against the remainder is **\$400,000**.

A. With a Private (d)(4)(A) Trust:

Medicaid will take the entire \$200,000 remaining in the trust. Taxpayers will absorb the rest. There will be no money left over for remaindermen or the beneficiary's estate.

B. With a Pooled (d)(4)(C) Arc Trust:

The Arc would take the first \$100,000. Medicaid will take the remaining \$100,000. Taxpayers would absorb the rest. Although there will be no money remaining for remaindermen or the beneficiary's estate, The Arc of Indiana will use the remainder share directly to assist other Hoosiers with disabilities.

C. With a Tandem Trust where **\$190,000** is in a (d)(4)(A) trust and **\$10,000** is in The Arc Trust:

A Tandem Trust would not help in this situation. The Arc would retain \$5,000 (50% of what is in the Subordinate trust). The State of Indiana would claim the remaining \$195,000 and return it to the State's general budget. Taxpayers would absorb the rest. There would be no money for remaindermen or the beneficiary's estate and The Arc of Indiana would get only \$5,000 instead of \$100,000 with which to assist other Hoosier families.

2. The beneficiary has **\$200,000** in trust at the time of his or her death. At death, Medicaid's claim against the remainder is **\$200,000**.

A. With a Private (d)(4)(A) Trust:

Medicaid will take the entire \$200,000 remaining in the trust. Taxpayers will absorb the rest. There will be no money left over for remaindermen or the beneficiary's estate.

B. With a Pooled (d)(4)(C) Arc Trust:

The Arc would take the first \$100,000. Medicaid will take the remaining \$100,000. Taxpayers would absorb the rest. Although there will be no money remaining for remaindermen or the beneficiary's estate, The Arc of Indiana uses the remainder share directly to assist other Hoosiers with disabilities, thereby alleviating future burdens on taxpayers and *directly* benefitting the beneficiary's Hoosier peers.

C. With a Tandem Trust where **\$190,000** is in a (d)(4)(A) trust and **\$10,000** is in The Arc Trust:

A Tandem Trust would not help in this situation. The Arc would retain \$5,000 (50% of what is in the Subordinate trust). The State of Indiana would claim the remaining \$195,000 and return it to the State's general budget. Taxpayers would absorb the rest. There would be no money for remaindermen or the beneficiary's estate and The Arc of Indiana would get only \$5,000 instead of \$100,000 with which to assist other Hoosier families.

3. The beneficiary has **\$200,000** in trust at the time of his or her death. At death, Medicaid's claim against the remainder is **\$100,000**.

A. With a Private (d)(4)(A) Trust:

Medicaid will take the first \$100,000. The remaining funds will pass to the remaindermen of the trust or the beneficiary's estate.

B. With a Pooled (d)(4)(C) Arc Trust:

The Arc would retain the first \$100,000 and use it to assist other Hoosiers with disabilities. The remaining \$100,000 would go to Medicaid. There would be no money remaining for remaindermen of the trust.

C. With a Tandem Trust where **\$190,000** is in a (d)(4)(A) trust and **\$10,000** is in The Arc Trust:

The Arc of Indiana would take \$5,000 (50% of the \$10,000 in the Arc Trust account) and use it to assist other Hoosiers with disabilities. Medicaid would take \$100,000. The remaining \$95,000 would go to the remaindermen of the trust.

Remember that a Tandem Trust is not for everyone. Generally speaking, The Arc Trust will consider a Tandem Trust arrangement only when the assets to be placed in trust exceed \$100,000. Some conditions may apply, such as minimum funding amounts. It is also worth considering the cost of setting up the Feeder Trust portion of the Tandem Trust. Although costs vary, a beneficiary can reasonably expect the drafting of the Feeder Trust to be at least \$1,500.00. Additionally, the trustee of the Feeder Trust must comply with all federal and state statutes and regulations governing the creation, reporting, administration and termination of the feeder trust. Such compliance can be confusing, time-consuming, and expensive.