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2010 SPECIAL NEEDS TRUSTS

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THE ESSENTIALS OF SNTs

THE BASICS OF SPECIAL NEEDS TRUSTS

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TABLE OF CONTENTS

- A. The Basics of Special Needs Trusts
- B. Attorney as Trustee
- C. ElderCounsel: Trust Administrative Provisions
- D. POMS SI 01120.199 Early Termination Provisions and Trusts

A. The Basics of Special Needs Trusts

I. Medicaid: OBRA 1993-- OBRA 1993 Exempt Trusts

In spite of Congressional efforts to place greater controls on Trusts and expand Medicaid's ability to access Trust funds, OBRA 1993 did establish a class of Trusts that are exempt from the expanded Medicaid Qualifying Trust rules, and from the 60 month look-back period. For the first time in Medicaid history, Congress authorized a class of Trusts in which neither their creation nor their funding would affect the Medicaid eligibility of the creator or the beneficiary.

There are three (3) types of Trusts that are exempt under OBRA 1993:

A. Special Needs Trust

1) The Special Needs Trust, also referred to as a "Supplemental Needs Trust," a "Disability Trust," or a "Payback Trust," is available only to individuals who are disabled and under the age of 65 years. The Trust must be funded with the assets of the individual who is disabled and must be created for his or her benefit by a parent, a grandparent, or a legal guardian of the individual or a court. The funding will not affect the Medicaid eligibility of the individual.

There is a statutory requirement that the disabled beneficiary be under the age of sixty-five (65) upon the creation of the Trust. If a Special Needs Trust is created for an individual who is under the age of 65, that Trust will remain exempt if the individual lives beyond the age of 65. However, any assets added to the Trust after the individual reaches age 65 will be subject to the Medicaid transfer penalty rules.

Although the Special Needs Trust authorized by OBRA 1993 is exempt for Medicaid eligibility purposes, it is subject to certain statutory restrictions. In order to meet statutory requirements for exemption, the Special Needs Trust must contain a pay back provision. Upon the death of the individual, any balance left in the Trust must be paid back to the Department of Health in an amount not to exceed the Medicaid benefits paid on behalf of the individual.

The language of the federal statute regarding the pay back provides that the "... state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total Medicaid assistance paid on behalf of the individual under a state plan under this subchapter." (42 U.S.C.A. §1396p(d)(4)(B)(ii)). This language raises an issue: Whether Medicaid is entitled to recover any assistance paid on behalf of the individual prior to the creation of the Trust. Since, upon the death of the disabled individual the balance of the Trust funds will not be part of that individual's probate estate; it would not be subject to

a Medicaid estate claim. Thus, if the individual received Medicaid assistance prior to the creation of the Trust, and if the Trust was left with considerable assets after the individual's death, the issue of whether Medicaid benefits granted prior to the creation of the Trust are recoverable is an important one.

There is no longer any question in New York State as to whether the payback provision requires payback of all Medicaid previously paid, including payments prior to the creation of the Trust. The New York Court of Appeals, reversing an Appellate Division decision, ruled that all Medicaid payments including pre-trust payments are subject to the payback provision.¹

If the Special Needs Trust is funded with the proceeds of a negligence or medical malpractice suit brought on behalf of the beneficiary of the Special Needs Trust, it is possible that there would be a Medicaid lien against the proceeds for the repayment of Medicaid benefits paid to treat the injury or condition caused by the negligence or medical malpractice. It has been determined that such liens must be satisfied prior to the funding of a Special Needs Trust.

B. Qualified Income Trusts

2) The Qualified Income Trust, the second exempt Trust authorized by OBRA 1993 is a Trust funded solely with an individual's income. It was intended for use only in an income cap state. An income cap state is one in which the state establishes a maximum income level for Medicaid recipients. If an individual has income, even one dollar, in excess of the maximum income level or income cap, such individual is not eligible for Medicaid, even if the medical expenses are greater than the amount of income over the income cap. For example, an individual in an income cap state could be ineligible for Medicaid because of a \$10.00 per month income excess, and have no Medicaid coverage for a \$3,000 per month nursing home bill.

OBRA 1993 helped alleviate this situation by authorizing a Qualified Income Trust to accept an individual's monthly income. The Trust would then authorize payment to the individual of a monthly amount that is less than the income cap of the state. The Trust would hold all of the excess income, and the individual would be Medicaid eligible. This type of Trust has no age or disability requirements. It does, however, have the same pay back requirements as the Special Needs Trust. All Trust funds remaining upon the death of the individual are to be paid back to the state up to the total amount of Medicaid benefits paid on behalf of the individual. Being an income trust with monthly disbursements, there is not likely to be very much in the trust at the time of the death of the beneficiary.

New York State is an income spend-down rather than an income cap state.

¹ In re Abraham XX., 11 N.Y.3d 429, 871 N.Y.S.2d 599, 900 N.E.2d 136 (2008).

In New York State, an individual with income in excess of the Medicaid income limit is eligible if his or her medical expenses exceed the excess income. Recently, elder law attorneys have successfully used qualified income trusts in New York State to shelter excess income, preventing its payment for medical expenses.

C. Pooled Trusts

3) The third exempt Trust established by OBRA 1993 is the "pooled" Trust, which is available to residents of every state, including New York. In a "Pooled Trust," the assets of many individuals who are disabled are held in a single Trust with a separate account for each individual.

Like the Special Needs Trust, this Trust is limited to individuals who are disabled, and under the age of 65. For a pooled Trust to be exempt, the law² requires that it be established and managed by a nonprofit association. A separate account for each disabled individual must be maintained within the Trust. These Trusts may be funded by the disabled individual, or his or her parents, grandparents, legal guardian or by a court. Pooled Trusts must have language similar to the Special Needs Trust, so that payments from the Trust will not replace or reduce Medicaid benefits.

As with the other exempt trusts, any contributions by an individual over the age of 65 are considered transfers subject to a Medicaid transfer penalty for nursing home care. This position was materially altered on July 24, 2008 by the issuance of GIS 08 MA/20.

This GIS reiterates that any additions to a pooled trust after an individual becomes 65 years old are subject to the Medicaid transfer penalty rules.

This GIS then proceeds to explain how income additions to a pooled trust by an over 65 Medicaid Applicant/Recipient (A/R) can be treated as compensated transfers, not subject to a Medicaid transfer penalty.

To the extent that the deposit is used by the pooled trust to pay the monthly expenses of the A/R, they are considered as compensated additions not subject to Medicaid transfer penalties. If the pooled trust pays for items such as rent and/or utilities, then these payments reduce or eliminate the Medicaid transfer penalty.

Planning for individuals over the age of 65 who have income being deposited into a pooled trust should consider using all the income for said

² Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, August 10, 1993, 107 Stat. 312.

individual's expenses each month, to maximize the monthly income under this GIS.

Like the two exempt Trusts discussed above, the Pooled Trust also requires a pay back provision. Upon the death of the beneficiary of the Pooled Trust, the balance in his or her account, up to the amount of Medicaid paid on his or her behalf, must be paid back to New York State or its designated Department of Social Services. However, unlike the other two exempt Trusts, the pay back provision can be avoided with a Pooled Trust. If the individual elects to leave the remaining funds in the Trust after his or her death, the pay back requirement will not apply. There is no explanation in the statute as to how the remaining funds of a deceased disabled individual will be handled. Since each individual must have a separate account, it is unexplained in the law where the funds of a deceased individual would pass. Will the funds be divided into the remaining accounts, which would make it subject to a possible future pay back, or will a separate general account be established for the benefit of all Trust beneficiaries? It is likely that a general account for the benefit of all would be preferable to dividing the remaining balance among all the surviving beneficiaries.

The circumstances of each case should determine which of the exempt Trusts discussed in this section is most advantageous.

II. Should an Exempt Trust be Used.

Assuming the individual who is disabled has mental capacity, a decision must be made as to whether it is more advantageous to implement Medicaid planning by asset transfers or by placing his or her assets into an exempt Special Needs Trust or Pooled Trust.

Consideration will have to be given to the possible transfer penalty period, if an exempt Trust is not established, and whether the individual is better off with transfers either outright or to an Irrevocable Income Only Trust as compared to funding a Special Needs or Pooled Trust. If the individual does not require immediate Medicaid benefits, then he or she may be willing to forgo Medicaid during the shorter of the look-back period and the transfer penalty period. In such a plan, the transferred assets will not be subject to recovery by Medicaid.³

The age of the individual must also be considered. If the disabled individual is young, counsel must consider that Medicaid benefits paid when the individual was under the age of 55 are not recoverable and that a Medicaid estate claim can only go back ten (10) years. In some cases, divesting assets which can create a Medicaid transfer penalty period may be more advantageous than funding an exempt Trust coupled with a pay back requirement or retention by a non-profit organization. It will be critical to determine

³ Health Care Financing Administration, State Medicaid Manual Transmittal No. 64.

whether the disabled individual receives community based home care or nursing home care under Medicaid, since there are no transfer penalties for community based home care under Medicaid.

Which approach is taken will depend only partially on the financial consequences of either using or not using an exempt Trust. The elder law attorney should be sensitive to the needs and desires of his or her clients when recommending alternative plans regarding the funds of a disabled individual.

A. Sole Benefit Trusts

An individual can make an exempt transfer to a trust created for the sole benefit of a spouse, a blind or disabled child of any age or to any disabled individual who is under the age of 65.⁴

The New York State position as stated in ADM 96-8 explains sole benefit trust only in the context of the spousal transfers⁵

There are significant differences between the federal and the state directives, in spite of the fact that they both refer to sole benefit trusts.⁶ The Federal document authorizes sole use and benefit trusts for a:

1. spouse;
2. blind or disabled child of any age;
3. a disabled individual who is under the age of 65. There is no requirement that the disabled individual under 65 be related to the grantor/settlor of the trust.

New York State Administrative Directive, referred to above relates only to a spouse or to another for the sole benefit of the spouse,

This distinction is eliminated by New York State regulations.⁷ which includes the same class of individuals as the Federal document.

⁴ Health Care Financing Administration, State Medicaid Manual Transmittal No. 64 (November, 1994), HCFA Pub. 45-3.

⁵ N.Y.S. Department of Social Services Administrative Directive Transmittal, 96 ADM-8.

⁶ Health Care Financing Administration, State Medicaid Manual Transmittal No. 64 (November, 1994), HCFA Pub. 45-3.

⁷ 18 NYCRR §360-4.4(c)(2)(iii)(C).

There is another major difference between the Federal and the State requirements for sole use and benefit trusts.

The HCFA transmittal requires that for a trust to be considered a sole use as a benefit trust, the trust must provide for spending that is actuarially sound, based on the life expectancy of the beneficiary. If the trust fails to meet this standard, there is a Medicaid transfer penalty.

As a practical matter, the effect of this provision is that the entire corpus of the trust must be paid for the sole benefit of the beneficiary during his/her actuarial lifetime.

The New York State position as evidenced by both the Administrative Directive⁸ and the regulations makes no direct reference to "actuarial soundness" but does provide that:

the social services district must conclude, based on the age of the individual's spouse, the amount of assets transferred, and the rate and amount of expenditures from the transferred assets for the benefit of the individual's spouse, that the transferred assets are likely to be totally expended with the spouse's lifetime.

The New York State Administrative Directive also requires that the trust benefit only the beneficiary and that upon termination the trust balance must be paid to the beneficiary's estate.

This creates the possibility of a Medicaid estate claim, provided Medicaid was paid when the beneficiary was over the age of fifty-five (55). The same requirement is found in the regulations.⁹

There is no explanation as to why the estate requirement is found in the Administrative Directive, which refers only to spouses, and in the portion of the New York State regulations which is designated as "Transfers for the Sole benefit of a Spouse"¹⁰

Why New York State authorizes sole benefit trusts for a spouse; a blind or disabled child; or a disabled person under the age of 65, but sets forth the estate requirement only in reference to spouses remains a puzzle.

⁸ N.Y.S. Department of Social Services Administrative Directive Transmittal, 96 ADM-8.

⁹ 18 NYCRR §360-4.4(C)(2)(iii)(d)(V).

¹⁰ N.Y.S. Department of Social Services Administrative Directive Transmittal, 96 ADM-8.

It should be noted that although a trust for a disabled individual under the age of sixty-five (65) can continue in effect beyond the age of sixty-five, any funding or additional funding of the trust beyond the sixty-fifth birthday of the disabled individual will be considered a transfer subject to a Medicaid transfer penalty period.

It is recommended that when preparing a sole benefit trust a disabled individual under the age of sixty-five (65) in New York State, that any remaining assets be left to the estate of the beneficiary, this approach has been accepted by the local Medicaid agencies. It is the authors' belief that this approach will have the advantage of avoiding an estate recovery if all of the Medicaid was granted when the disabled individual was under the age of fifty-five (55).

The Federal guidelines specifically authorize the payment of trust funds for trustee compensation and expenses. New York regulations and directive make no reference to these expenses. There is general acceptance in New York that the payment of trustee commissions and expenses does not interfere with the sole benefit concept.

III. Special Needs Trust

OBRA 1993 authorizes the funding of a Trust for the benefit of an individual who is disabled under the age of 65 using such individual's own assets (referred to as a "Special Needs Trust," "Supplemental Needs Trust," "Disability Trust," "(d)(4)(a) Trust," or a "Payback Trust"). In order to qualify as an exempt Trust, the document must provide for a payback to Medicaid following the death of the individual who was disabled, from any balance remaining in the Trust. The elder law attorney drafting a Trust pursuant to the statutory exemption of OBRA 1993 must use great care to assure that the payments from the Trust to the individual do not affect such individual's Medicaid eligibility. Payments from the Trust to the individual receive no statutory protection, and must therefore, be designed so as not to duplicate or replace any Medicaid funding. Any duplication or replacement of Medicaid funding would result in the Trust having to pay for expenses that would otherwise be covered by Medicaid. Thus, if a Special Needs Trust authorized the trustee to pay the beneficiary's medical expenses with no qualifying language, Trust funds would have to be exhausted before Medicaid would pay any medical expenses.

Special Needs Trusts are intended to supplement rather than duplicate or replace Medicaid benefits. To accomplish this and achieve the benefits of a Special Needs Trust, the trustee's authority must be carefully defined and limited. There has to be a specific limitation to prohibit paying for any expense that would otherwise be paid for by Medicaid or any other means tested entitlement program. Statutory guidance for the language of a Special Needs Trust or Supplemental Needs Trust can be found in New

York law.¹¹ It is recommended that the statute be cited in the Trust and that the statutory language be used where appropriate.

Care must also be taken to prevent direct payments to the individual, because direct unrestricted payments are income to the individual which would affect his or her Medicaid eligibility.¹² Provision can be made for the trustee to spend Trust funds on specific items that would not be covered by Medicaid. For example, the trustee could be authorized to purchase a television set for the individual. Since a television set is not a medical item provided by Medicaid, such authorization or purchase would not affect the individual's Medicaid eligibility. The type and number of items and services that can be authorized by a Special Needs Trust are limited only by the experience of the elder law attorney cognizant of the need to avoid any replacement or duplication of items or services available from Medicaid and of the needs of the beneficiary.

In *Matter of La Barbera (Donovan)*,¹³ the Court did not authorize a Special Needs Trust because the record did not establish that the current expenses exceeded the income of the individual.

In *Matter of Sutton*, the Court ordered the establishment of a Special Needs Trust for an infant Medicaid recipient as requested by the guardian appointed under S.C.P.A. Article 17A. In this case, the infant, who suffered from multiple physical disabilities but had no mental impairments, was entitled to an inheritance from his mother's estate.¹⁴

Special Needs Trust and Supplemental Security Income (SSI). Special needs trusts are a valuable planning tool for SSI. In New York State, SSI eligibility creates automatic Medicaid eligibility, the special needs trust for an SSI individual must protect not only SSI eligibility, but Medicaid eligibility as well.

Because SSI is a cash maintenance program for living expenses, and Medicaid pays various medical expenses, trust language must not allow duplication of living expenses as well as medical expenses. To properly draft a trust, the elder law attorney must be familiar with the benefits covered and provided by both SSI and Medicaid. Thus, if the trust fully protected assets regarding medical expenses but allowed the trustee to pay for or provide housing or pay utility bills, such powers would affect the beneficiary's SSI eligibility.

A trustee can be authorized to provide many items that would enhance the life of

¹¹ EPTL §7-1.12.

¹² EPTL §7-1.12.

¹³ *Matter of La Barbera (Donovan)*, N.Y.L.J. 4/26/96, p.36, col.6 (Sup.Ct., Suffolk County).

¹⁴ *Matter of Sutton*, 167 Misc. 2d 956, 641 N.Y.S.2d 515 (Sur. Ct. 1996).

the person with special needs while protecting SSI and Medicaid eligibility. The trust can provide recreational opportunities, trips to see family and friends, and even the purchase of a specially equipped van to permit travel. Entertainment devices such as television sets, radios, computers and various electronic devices can be purchased by the trustee for the beneficiary. The trust can be tailored to meet the specific needs of the beneficiary without interfering with SSI or Medicaid eligibility.

A special needs trust should be designed to meet the special needs of the beneficiary. Doing so will result in a document that enhances the life of the beneficiary while protecting SSI and Medicaid eligibility. Knowing your special needs client will enable you to design a document that will truly benefit the client.

Disposition of trust assets upon the death of the disabled beneficiary is also an issue for SSI. Trust provisions that provide for the payment of funeral expenses prior to the payback to Medicaid will not be approved by SSI. For SSI purposes, the trust should provide for the Medicaid payback first, and then provide for funeral, estate, legal and accounting expenses from the remaining balance, if any.

Social Security Administration has also changed the payback language that it will accept for SSI purposes. The payback must not be state specific. SSI requires that "the State" will receive ..., without having a specific state (POMS §SI 01120.203).

IV. Special Needs Trust-- Funding a Special Needs Trust

Frequently the need for a Special Needs Trust arises as a result of a recovery in a medical malpractice or negligence action. The services of elder law attorneys are often sought by medical malpractice and negligence attorneys when Medicaid may be involved. A thorough knowledge of Special Needs Trusts is essential to protect the damages recovered.

Funding a Special Needs Trust with the proceeds of a medical malpractice or negligence action against which a Medicaid lien had been placed was usually a problem, depending on the amount of the lien as compared to the amount of the settlement. There were times when Medicaid would voluntarily reduce or waive its lien to permit funding the Trust, and times when it would refuse.

In a recent case, an attempt was made to fund a special needs trust with the monthly Social Security Disability payments being received by the disabled person in an attempt to reduce the income spend down for Medicaid community home care. The Surrogate's Court ruled that the proposed "hoarding" of entitlement funds is contrary to the purpose of the entitlement, and therefore violates public policy.¹⁵ The court on re-

¹⁵ In re Lynch, 703 N.Y.S.2d 653 (Sur. Ct. 1999), withdrawn at request of court from Official Publication.

argument reversed itself and permitted the Social Security Disability payments to be paid into the trust.

Later, the same court was confronted with a similar case, this time involving SSI payments.¹⁶ In this case, the court held that SSI payments which have specific definitions as to what the benefits are for, cannot be diverted into a special needs trust.

Litigation arose as to the right of Medicaid to enforce a lien against proceeds that would otherwise go into an exempt Special Needs Trust. Both the Supreme Court and the Appellate Division Second Department ruled that Medicaid could not enforce its lien, except from any remaining assets of the Special Needs Trust after the death of the disabled individual.¹⁷

On appeal¹⁸ the Court of Appeals reversed the Appellate Division, holding that Medicaid was a preferred creditor entitled to recovery from the proceeds prior to funding the Special Needs Trust.

There is no longer any legal issue in New York State regarding the ability of Medicaid to recover its lien from proceeds that would otherwise go into a Special Needs Trust. Given its legal ability to recover, it is up to the elder law attorney to negotiate a reduction or waiver of the lien based on the circumstances of the case. It will be more difficult to negotiate if a large sum of money will be left for the Trust after payment of the lien.

The elder law attorney should make every effort to avoid paying a Medicaid lien which will reduce the amount available to be placed in the Trust. Because there is no certainty as to the amount that will be left in the Special Needs Trust following the individual's death, funds that would otherwise have been paid back to Medicaid may be used for the benefit of the individual during his or her lifetime.

¹⁶ In re Ullman, 184 Misc. 2d 7, 707 N.Y.S.2d 603 (Sur. Ct. 2000).

¹⁷ Matter of Gibson, 162 Misc. 2d 530, 616 N.Y.S.2d 171 (Sup 1994), amended on reargument, 162 Misc. 2d 587, 620 N.Y.S.2d 729 (Sup 1994), order aff'd, 226 A.D.2d 351, 640 N.Y.S.2d 768 (2d Dep't 1996), rev'd, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301, 53 Soc. Sec. Rep. Serv. 1010 (1997); Cricchio v. Pennisi, 220 A.D.2d 100, 640 N.Y.S.2d 573 (2d Dep't 1996), order rev'd, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301, 53 Soc. Sec. Rep. Serv. 1010 (1997); *see also*, Merer v. Romoff, N.Y.L.J. 1/23/97, p.28, col.4 (Sup.Ct., New York County).

¹⁸ Cricchio v. Pennisi, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301, 53 Soc. Sec. Rep. Serv. 1010 (1997), *see also* Calvanese v. Calvanese, 250 A.D.2d 564, 672 N.Y.S.2d 410 (2d Dep't 1998), aff'd, 93 N.Y.2d 111, 688 N.Y.S.2d 479, 710 N.E.2d 1079 (1999) and Matter of Link, N.Y.L.J. 1/6/98 24 (col.1) (Sup.Ct., Suffolk County, 1998).

If a Medicaid lien has been filed against the proceeds of an action which proceeds are intended for a special needs trust, having the lien waived or reduced will be most difficult. Since there is a legal basis for collecting the lien prior to funding the trust, only special circumstances of the individual case can be used in the effort to waive or reduce the lien.

Before agreeing to pay any outstanding Medicaid lien prior to funding a special needs trust, it is important to understand the limitations that the U.S. Supreme Court has placed on Medicaid recoveries. Medicaid cannot recover any portion of the settlement that is allocated to pain and suffering or for loss of income. Only the portion of the recovery allocated for medical expenses can be claimed by Medicaid.¹⁹

Whenever possible an attempt should be made to have the court, or the parties to a settlement allocate an amount for medical expenses. Simply allocating a majority of the funds to pain and suffering rather than medical expenses will likely not be successful. An accurate allocation, considering liability, medical expenses and the pain and suffering is most likely to result in a reduction of the Medicaid lien and an increase in the funds available for the trust.

Frequently, a court is involved with the proceeds of a medical malpractice or negligence action on behalf of a disabled person. The services of an elder law attorney are necessary if the proceeds are to be placed into a Special Needs Trust. The elder law attorney should draft the Trust and it should be presented to the court to be used as the vehicle into which the funds will be placed. Not only should the language of the Trust be carefully drafted to prevent any loss or diminution of Medicaid benefits, but also the timing of the funding of the Trust must be carefully planned.

The proceeds of a personal injury or medical malpractice lawsuit will not be counted by Medicaid from the date of receipt or entitlement until the first day of the second month following the receipt or entitlement, provided the individual intends to place the proceeds into a Special Needs Trust.²⁰

In addition, such assets will be disregarded from the date a proceeding to place the assets into the Special Needs Trust is commenced, until the resolution of such proceeding.²¹ As a result, some alternate source of payment of the individual's medical expenses will have to be found for at least one month, or longer if the Trust is not funded during the same calendar month that the proceeds are made available.

¹⁹ Arkansas Dept. of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

²⁰ N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

²¹ N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

A better alternative is to have the Special Needs Trust prepared and executed prior to the payment of the proceeds and have the proceeds paid directly into the Trust, without being made available to the individual. This will help assure a continuity of Medicaid coverage, without the necessity of privately funding medical expenses for one month or longer.

V. Pooled Trusts

The elder law attorney should explore the Pooled Trust as an alternative to a Special Needs Trust when the individual with disabilities who is under age 65 is in need of long term care.

The Pooled Trust can avoid a payback for Medicaid services provided. The Pooled Trust may be the preference of a family that desires to have any remaining funds benefit the other beneficiaries of the nonprofit organization rather than having the Trust assets paid to the government in satisfaction of the cost of services provided under the Medicaid program.

A drawback (or advantage?) of the Pooled Trust is that the individual's family has no control over the administration or expenditures of the Trust. All such decisions would be made by the trustees of the nonprofit organization. If control of the Trust assets is an important factor for a family, and the disabled individual is under the age of 65, the establishment of an individual Special Needs Trust may be preferable. If upon the creation of an Exempt Trust there is no family member or other appropriate party to administer the Trust on behalf of the individual who is disabled, a Pooled Trust may be preferred. This may also be the choice for the individual who is disabled and for the children of aged or infirmed parents who are concerned about the long-term administration of a Special Needs Trust.

Although Pooled Trusts are available for disabled persons over the age of sixty-five (65), the funding of a Pooled Trust is exempt by Medicaid and not considered a transfer only if the disabled individual is under the age of sixty-five (65). Funding a Pooled Trust by an individual over the age of 65 will result in a Medicaid transfer penalty.²² This position may be the subject of litigation in the future.

Another type of Pooled Trust has recently come into favor and has been successfully used. It is called a "Pooled Income Trust." Such a trust becomes useful for an individual who has excess income after all exclusions have been used. A choice must be made whether the excess income is paid to the medical provider; thereby reducing the amount paid by Medicaid, or is paid into a Pooled Trust. If the income is paid into the Trust, the overage is eliminated and the income can be used to meet the supplemental needs of the beneficiary.

²² N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

New York State Association of Retarded Children (NYSARC) which is a charitable organization has a Pooled Income Trust. A separate trust share account is established through the use of a joinder agreement with NYSARC Pooled Income Trust. Like all Pooled Trusts, the Pooled Income Trust must contain a payback provision. In the NYSARC Trust, the payback is to the NYSARC Guardian Trust, instead of to New York State (to reimburse the State for Medicaid provided to the Trust beneficiary).

This Trust should be discussed whenever there is a significant excess income situation with an individual with disabilities on Medicaid who is under the age of 65.

NYSARC--Pooled Income Trusts. On April 19, 2005, the New York State Department of Health authorized the use of the NYSARC Pooled Trust for the excess income of disabled individuals who are 65 or older.²³

Although OBRA 1993 eliminated the distinction between income and resources for Medicaid transfer penalty purposes by referring to both as assets, the Income Pooled Trust requirements clearly reestablish the distinction. The informational letter specifically permits the funding of excess income into the NYSARC Pooled Trust by disabled individuals over the age of 65, but makes the transfer of resources into said trust by said individual subject to the transfer penalty rules.

The disability determination is a prerequisite to funding a NYSARC Pooled Trust with the excess income of an individual over the age of 65. Unlike other disability determinations this determination can only be made by the State Disability review team in Albany. The submission process must include:

- a) a signed release of medical information;
- b) a completed and signed "DSS-1151" which is a Disability Interview form; and
- c) DSS Form 486T which is the Medical Report for Determination of Disability. This form must be filled out and signed by a doctor or a psychiatrist or a "qualified" psychologist.

These documents when completed must be submitted to the local Medicaid agency, who then forwards it to New York State Department of Health in Albany. All of the forms are available from the local Medicaid agency. It is significant that the State Disability Review Team has 90 days to approve or deny disability.

In order to become part of the NYSARC Pooled Income Trust, there is a "Joinder Agreement" that must be completed and submitted. A check in the sum of \$300 must accompany the Joinder Agreement. This check must come from the beneficiaries account, and must have the beneficiaries name printed on the check.

²³ 05 OMM/INF-1.

While the Medicaid application is pending, the beneficiary must pay a \$30 per month administrative fee to NYSARC to keep the Pooled Trust account active. These payments are not refundable even if the application is denied.

The Joinder Agreement should be completed by the attorney, whose name should be added as an authorized person. The completed disability form should be submitted with the Medicaid application.

Once approved by the local Medicaid agency and NYSARC the excess income can be transferred to the Trust and used to enhance the life of the beneficiary. For the individual receiving Medicaid home care, the NYSARC Pooled Trust can be particularly useful. It is common for the number of hours of approved home care to be inadequate to meet the needs of the individual. The excess income can be used to supplement the approved hours by paying for additional hours. There is a requirement in the Trust that the payments are made only to a certified agency, and further that payments be made by NYSARC directly to the certified agency.

NYSARC will accept the excess income during the period when Medicaid is pending. The use of the NYSARC Pooled Income Trust is recommended for clients who are 65 or older, disabled and have excess income under the Medicaid home care income budget.

VI. Third Party Supplemental Needs Trust

Third Party Supplemental Needs Trusts that are designed to supplement, but not duplicate or reduce, Medicaid benefits are often established by an individual with the individual's own assets for the benefit of a third party. This type of Trust is to be distinguished from a Special Needs Trust. Most frequently such Trusts are created by a parent or grandparent with his or her assets for a child or grandchild with disabilities. The Trust is designed to prevent any payment made on behalf of the disabled beneficiary that could result in a reduction of benefits or termination of Medicaid eligibility. The funding of such Trusts will have no effect on the beneficiary's Medicaid eligibility because the beneficiary's money is not used to create the Trust. The language of a third party Supplemental Needs Trust can be based upon the suggested language of EPTL §7-1.12. The pay out restrictions and limitations of payments under a Supplemental Needs Trust can be similar or identical to the provisions of a Special Needs Trust. There is no Medicaid payback in a third party supplemental needs trust. The settlor can provide for the disposition of trust assets upon the death of the beneficiary, without any restrictions.

VII. Recovery of Medicaid properly paid: estate claims-- Age of 55 and older limitation

It is necessary to understand the age limitation of the Medicaid recipient on Medicaid estate recoveries. If an individual began receiving Medicaid at the age of 20, and dies at age 50 after receiving benefits for 30 continuous years, Medicaid has no claim against his estate because all Medicaid benefits were paid when he was under the age of 55. If however, the individual continued to receive Medicaid benefits until he died at the

age of 56, Medicaid would have the right to place a lien against the estate, but that lien is limited to recovering Medicaid paid only during the last year, when the person was 55 and older (See 42 U.S.C.A. §1396p(b)(1)(B)). Thus, Medicaid benefits paid to an individual prior to age 55 are not subject to estate recovery and only the benefits paid when an individual was age 55 and older are subject to recovery.

Whenever a lien is placed against the estate of an individual who was age 55 or older when the Medicaid was paid, it is important to be certain that the lien does not include any assistance paid when the individual was younger than age 55.

Notes:

The above outline is based on New York law.

The above outline is in part excerpted from "*New York Elder Law and Special Needs Practice, 2009 Edition*" by Vincent J. Russo and Marvin Rachlin (Thomson Reuter), 1-800-328-4880.

Thanks to Marvin Rachlin for his assistance in preparing this outline.

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B. ATTORNEYS AS TRUSTEE

There has been an on-going discussion as to whether special needs attorneys should act as Trustee under Special Needs Trusts. Often, the attorney will be retaining the legal services of his or her law firm. This will create a number of issues the attorney will need to be clear with the creator of the Trust and the beneficiaries, since he or she may be wearing two hats with regard to the planning and administration of the trust.

The client has a number of choices when selecting a Trustee: Family members, friends, a corporate trustee or individual professionals, such as an attorney.

The following talking points identify some of the practical considerations of the attorney acting as a Trustee.

1. **Systems and Procedures.** The attorney must set up systems and procedures when acting as a Trustee. A separate matter number and file should be created, and time expended when acting as a Trustee should be tracked separately.
2. **Professional Advisors.** The attorney should seek appropriate professional counsel and services, which may include a financial advisor, accountant, health care providers etc.
3. **Trust Administration.** The attorney should consider retaining the services of a third party administrator for the handling of the day to day affairs of the Trust.
4. **Trustee versus Co-Trustee.** The attorney will need to consider whether he or she is willing to act as a Co-Trustee with another family member. What are the pros and cons of a Co-Trustee arrangement, as opposed to the attorney-Trustee acting alone. Will it make a difference if the Trustee's

role is further defined in the Trust Agreement such as a Distribution Trustee or an Investment Trustee.

5. **Bookkeeping and Accounting.** Will bookkeeping and accounting services be delegated to a staff person of the law firm, such as the bookkeeper or legal assistant?
6. **Investment of Trust Assets.** Is the attorney-Trustee prepared and equipped to deal with the investment of the Trust Assets? In light of the collapse of the stock market in recent months, are the attorney-Trustee experienced in how assets should be invested? What guidelines will the attorney-Trustee use in choosing among investment products?
7. **Distribution of Assets.** What guidelines will the attorney-trustee use in making distribution decisions? What if the attorney-Trustee distributes income or assets for a particular purpose and then later realizes that the distribution was inappropriate?
8. **Taxes.** The payment of taxes and the filing of tax returns will be the Trustee's responsibility. Is the attorney-Trustee prepared to understand and handle the tax issues while acting as Trustee?
9. **Communication with the Beneficiaries.** It will be the attorney's job to make sure that the beneficiaries (and the Settlor) are aware of the Trustee's duties and responsibilities. Will the attorney-trustee seek the beneficiary's approval before acting on certain matters?
10. **Conflicts of Interest.** The attorney as Trustee wears the fiduciary hat. He or she may also be providing legal services to the Trust.

A simple decision as to the amount paid to the law firm for legal services rendered to the Trust may pose an actual or potential conflict of interest. In order to eliminate actual and potential conflicts of interest, the Trust

instrument should specifically authorize attorney-Trustee commissions and permit the attorney-Trustee to hire his or her own law firm to provide legal services to the Trust. The Trust instrument should also specifically permit the attorney-Trustee's law firm to receive compensation for the legal services to be rendered. It is also highly recommended that the client execute an instrument of disclosure which specifically allows the attorney-Trustee to receive compensation and the attorney-Trustee's law firm to receive legal fees. The attorney-Trustee needs to decide which services are classified as Trustee services and which services are classified as legal services, which will generate a fee in addition to the Trustee compensation.

C. Supplemental Needs Trust Provisions Prepared by ElderCounsel, LLC

Section 1.01 Social Needs

It is important that Jim Jones is not isolated and that he is supported in his efforts to build a fulfilling life that includes meaningful social activities, social contacts, and leisure, recreation and travel experiences. Trustmaker encourages and supports Jim Jones's interests, hobbies, and choice of entertainment. In no event does Trustmaker want Jim Jones to feel so constrained by his financial status as a public benefits recipient that he is unable to enjoy these important life experiences.

Trustmaker recognizes and appreciates Jim Jones's strengths and capabilities and wholeheartedly supports his development to his full potential as well as his integration into the larger community of non-disabled persons. Trustmaker feels strongly that integration is essential to Jim Jones's development, and also helps others overcome their fears and prejudices about persons with disabilities.

The Trustee should make every effort to ensure that Jim Jones is involved in social activities including, but not limited to, participating in Special Olympics, participating in sporting activities, attending sporting events, participating in cultural activities, attending cultural events, participating in religious activities, and attending religious events.

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Section 1.02 Support Family Activities

Maintaining contact with family is of the highest priority. Trustmaker encourages Jim Jones to have regular visits with family; and Trustmaker supports the use of trust funds to facilitate such contact, if that becomes necessary. This also includes funds for family to visit Jim Jones. Trustmaker also directs funds to be used for Jim Jones to participate in family reunions, vacations or other family events.

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Section 1.03 Employment of Advocate

The Trustee may employ or retain the services of a qualified care manager or other person as an Advocate for Jim Jones's benefit. The Advocate shall provide advisement concerning Jim Jones's needs, rights, and entitlement to public benefits.

Section 1.04 Requirements for Advocate

If a care manager is employed or retained as the Advocate, he or she shall be a licensed clinical social worker, licensed care management agency, or registered nurse or similarly

qualified professional who is familiar with public benefits rules and regulations and the developmental needs of persons with disabilities similar to Jim Jones's.

The Advocate shall be responsible for making recommendations as to what discretionary distributions should be made for needs not covered by public benefits, as well as recommendations concerning distributions otherwise covered by public benefits, including, but not limited to, payment for supplemental medical and therapeutic care, education and habilitation services, attendant care services whenever the need arises, residential services, and daily support services.

Section 1.05 Annual Care Plan

The Trustee shall have the option of requiring, in its discretion, the Advocate to provide an annual care plan to the Trustee and to Jim Jones. If Jim Jones is incapacitated, the care plan shall be provided to his parent or legal guardian.

The annual care plan should evaluate the status of Jim Jones's overall involvement in the community as well as health and well-being, particularly medical status.

Trustmaker wants to ensure that Jim Jones receives proper health care, including therapeutic care that may help him maintain and develop as much as possible. The care plan shall include recommendations concerning treatment, resources and services beneficial to Jim Jones. The annual care plan shall also include recommendations concerning unmet needs, if any.

Section 1.06 Personal Assessments

The Trustee shall have the option of requiring, in its discretion, the Advocate to visit Jim Jones on a regular recurring basis to assess his needs, including assessing required entitlements and resources, and maintaining a safe, healthy and comfortable living situation, and making and keeping necessary appointments. These visits shall include both announced and unannounced visits. If Jim Jones is not visited by caregivers at least monthly, then the Trustee shall require the Advocate to visit on a recurring basis that includes both announced and unannounced visits.

Section 1.07 Bank Account for Advocate

The Trustee may establish an account for part or all of the payments authorized under this agreement and direct that adequate funds, not to exceed that amount necessary for one month's care, be paid to this account for disbursement by the Advocate under the guidelines of **Error! Reference source not found.** The account shall be established as a separate bank account in the name of the trust, bearing the trust's federal tax identification number. At least monthly, the Advocate shall provide information on receipts and disbursements from this account to the Trustee. The Trustee shall be indemnified for amounts paid from this account, until the Trustee receives the monthly accounting or has actual knowledge of the receipts and disbursements.

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Section 1.08 Trust Advisory Committee

This trust incorporates a Trust Advisory Committee. The responsibility of the Trust Advisory Committee is to advise the Trustee as to distributions that would be in Jim Jones's best interests. The Trust Advisory Committee serves in an advisory capacity only and its role is to make recommendations to the Trustee. The Trustee has discretion with regard to trust distributions. The Trust Advisory Committee members were chosen because of their knowledge and experience in assisting persons with disabilities and/or their personal interest in Jim Jones.

The Trust Advisory Committee shall consist of a minimum of three (3) members, and a maximum of seven (7) members.

There shall always be one professional member of the Trust Advisory Committee. The professional member shall be an individual or agency experienced with Medicaid and other programs of public benefits as well as Jim Jones's service needs and in addition shall be Clinical social worker, Care management agency, or Registered nurse. The initial professional member is Steve Person.

The initial non-professional Trust Advisory Committee members are Lois Myrne and Mary Murdoch.

Section 1.09 Distribution Advisement

The Trust Advisory Committee may advise the Trustee regarding distributions the Committee believes to be in Jim Jones's best interests. Before the Trustee makes distributions under any authority granted under this agreement, the Trustee may first consult with the Trust Advisory Committee and consider the Committee's advice and recommendations. If the Trustee so decides in the Trustee's discretion, the Trustee may make a distribution without contacting or soliciting the advice of any member of the Committee. Notwithstanding anything to the contrary, this Section in no way shall affect the discretion of the Trustee under this agreement.

(a) Distributions for Supportive Services

The Trust Advisory Committee shall determine when and if Jim Jones needs supportive services, including, but not limited to, employment of a care manager and/or supplemental attendant care, therapy, and educational assistance. The Trustee shall consider the advice of the Trust Advisory Committee with respect to the foregoing, but shall exercise its own discretion in making such distributions for supportive services.

(b) Major Purchases

The Trustee shall consider the advice of the Trust Advisory Committee on all major purchases, including, but not limited to, a primary residence or automobile. In the event that the Trustee purchases a primary residence, the Trustee shall have the discretion to allow Jim Jones to reside in the residence without payment of rent.

However, purchase of or payment for major medical equipment or Jim Jones's needs that are deemed necessary and appropriate by Jim Jones's

physician or other medical professional, which are not available to Jim Jones through or covered by government benefit programs, shall not be restricted as a result of the provisions of this subparagraph, and will not be considered a Trust investment.

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D.

TN 43 (09-10)

SI 01120.199 Early Termination Provisions and Trusts

A. How to determine when to apply the policies in this section

1. New trusts and trusts that have not been previously excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that is either newly formed or not previously excepted from resource counting must meet all of the criteria set forth in SI 01120.199 through SI 01120.203 to be excepted under section 1917(d)(4)(A) or (C). Do not except such a trust from resource counting unless the trust meets all of the requirements in SI 01120.199 through SI 01120.203.

2. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that was previously determined to be exempt from resource counting under section 1917(d)(4)(A) or (C) shall continue to be excepted from resource counting, provided the trust is amended to conform with the requirements of SI 01120.199 through SI 01120.203 within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains provisions that must be amended in order to continue qualifying for the exception under section 1917(d)(4)(A) or (C).

Do not count a previously exempted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of SI 01120.199 through SI 01120.203 after the expiration of the 90-day amendment period, begin counting the trust as a resource under normal resource counting rules.

NOTE: Each previously excepted trust is permitted only one 90-day amendment period.

B. Applicability of early termination provisions and trusts

This section provides the policy for evaluating special needs and pooled trusts established with the assets of an individual that contain early termination provisions. If certain criteria are met, such trusts can be excepted from counting as a resource under Section 1613(e)(5) of the Social Security Act (the Act). If those criteria are not met, such trusts should instead be evaluated under Section 1613(e) of the Act. For more information about evaluating trusts under Section 1613(e) of the Act, see SI 01120.201.

Use the instructions in this section to evaluate the following types of trusts:

- Special needs trust established under Section 1917(d)(4)(A) of the Act

For information on special needs trusts established under Section 1917(d)(4)(A) of the Act, see SI 01120.203.

- Pooled trusts established under Section 1917(d)(4)(C) of the Act

For information on pooled trusts established under Section 1917(d)(4)(C) of the Act, see SI 01120.203.

C. Case processing alert regarding early termination provisions and trusts

Trusts are often complex legal arrangements involving State law and legal principles that require obtaining legal counsel. Therefore, the following instructions may only be sufficient to recognize that an issue is present that should be referred to the regional office (RO) for possible referral to the Regional Chief Counsel. When in doubt, discuss the issue with the RO staff. Many issues can be resolved by phone.

D. What is an early termination provision?

An early termination provision or clause would allow a trust to terminate before the death of the beneficiary. Commonly, such provisions or clauses provide for termination of the trust when, for example, the beneficiary is no longer disabled or otherwise becomes ineligible for Supplemental Security Income (SSI) and Medicaid, or when the trust fund no longer contains enough assets to justify its continued administration.

E. Defining terms for trusts

1. Trust

A trust is a property interest whereby property is held by an individual or entity (e.g., a bank) called the trustee, subject to a fiduciary duty to use the property for the benefit of another (i.e., the beneficiary).

2. Trust established with the assets of an individual

A trust is considered to have been established with the assets of an individual if any assets of the individual or spouse, regardless of how little, were transferred to a trust other than by a will. For more information on how to determine whether something is considered an "asset", see SI 01120.201B.2.

3. Grantor

A grantor, also referred to as a settlor or trustor, is the individual who provides the trust principal or corpus. The grantor must be the owner or have legal right to the property or otherwise be qualified to transfer it. For more information on grantors, see SI 01120.200B.2.

4. Trustee

A trustee is a person or entity who holds legal title to property for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for his or her own benefit.

5. Trust beneficiary

A trust beneficiary is a person for whose benefit a trust exists. A beneficiary does not hold legal title to trust property but does have an equitable ownership interest in it. As equitable owner, the beneficiary has certain rights that will be enforced by a court because the trust exists for his or her benefit. The beneficiary receives the benefits of the trust while the trustee holds the title and duties.

6. Trust principal

The trust principal is the property placed in trust by the grantor which the trustee holds, subject to the rights of the beneficiary, and includes any trust earnings paid into the trust and left to accumulate. It is also called "the corpus of the trust."

7. Other definitions

For other definitions applicable to this section, see SI 01120.200B.

F. Policy for Section 1917(d)(4)(A) and (C) trusts that contain an early termination provision

1. Criteria for determining whether an early termination clause is acceptable

For the purpose of SSI eligibility, a trust that contains an early termination provision or clause may not be excepted from the resource counting rules at Section 1613(e) of the Act unless it satisfies either the requirements in Section 1917(d)(4)(A) or (C). Additionally, a trust must also satisfy the resource counting rules found at SI 01120.200D and SI 01110.100B to not be a countable resource. In order to meet those requirements, all of the following criteria must be met:

- Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and
- Other than payment for those expenses listed in SI 01120.199D.3. in this section, no entity other than the trust beneficiary may benefit from the early termination (i.e., After reimbursement to the State(s), all remaining funds are disbursed to the trust beneficiary); and
- The early termination clause gives the power to terminate to someone other than the trust beneficiary.

NOTE: For trusts that are excepted from resource counting under Section 1917(d)(4)(C) as a pooled trust and do not contain an early termination clause, it is permissible for the trust to retain amounts remaining in the individual's account upon the death of the individual. For more information, see SI 01120.203B.2.

2. Exception for early termination clauses in Section 1917(d)(4)(C) trusts

For pooled trusts established under Section 1917(d)(4)(C), an early termination clause does not need to meet the above criteria if the clause solely allows for a transfer of the beneficiary's assets from one Section 1917(d)(4)(C) trust to another Section 1917(d)(4)(C) trust. The early termination clause must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary Section 1917(d)(4)(C) trust or to pay for the expenses listed in SI 01120.199D.3. in this section.

3. Allowable administrative expenses paid from the trust

The following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):

- Taxes due from the trust to the State(s) or Federal government due to the termination of the trust; and
- Reasonable fees and administrative expenses associated with the termination of the trust.

For more information about allowable and prohibited expenses, see SI 01120.203B.3.

References

- SI 01120.200, Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
- SI 01120.201, Trusts Established with the Assets of an Individual on or after 1/1/00
- SI 01120.203, Exceptions to Counting Trusts Established on or after 1/1/00

G. Procedure for the development and documentation of trusts established on or after 1/1/00

See SI 01120.202.

H. Examples of trust evaluations and determinations

The following examples are illustrative of situations that you may encounter. You should not rely solely on the analysis provided in the examples in making determinations in a specific case as laws vary from State to State and the language of individual trust documents may provide different results from those given in an example. You can refer to regional instructions, if any, and consult your regional office as necessary. Also, be aware of the implications that the trust may have for Medicaid eligibility. For more information on the effect upon Medicaid eligibility, see SI 01730.048.

1. Trust principal is a resource

Example 1:

A disabled child is the beneficiary of a special needs trust that was established after 1/1/00 with assets of

the child. The trust contains an early termination clause that states that, upon early termination, all assets remaining in the trust will be distributed to the beneficiary.

The field office (FO) evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(A) trust (i.e., a special needs trust). However, the FO determines that the trust is a countable resource because, upon early termination, the document does not allow for reimbursement first to the State(s) for providing medical assistance to the trust beneficiary.

Example 2:

A disabled individual, under age 65, is the beneficiary of a pooled trust that was established after 1/1/00 with the assets of the individual. The trust contains an early termination clause that states that, upon early termination, all assets remaining in the trust will be retained by the trust.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(C) trust (i.e., a pooled trust). However, the FO determines that the trust is a countable resource because, upon early termination, the State(s) is not designated as the primary assignee to receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). Also, the trust allows for an entity other than the beneficiary (i.e., the trust) to benefit from the early termination.

Example 3:

A disabled individual, under age 65, is the beneficiary of a special needs trust that was established after 1/1/00 with assets of the individual. The trust contains an early termination clause that gives the beneficiary the authority to terminate the trust and states that, upon early termination, first, the State(s) will be reimbursed for medical assistance provided to the trust beneficiary. Per the trust document, after reimbursement to the State(s), any remaining assets will be distributed to the beneficiary.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(A) trust (i.e., special needs trust). However, the FO determines that the trust is a countable resource because the early termination clause gives the beneficiary the authority to terminate the trust.

2. Trust principal is not a resource

Example 1:

A disabled child is the beneficiary of a special needs trust that was established after 1/1/00 with assets of the individual. The trust contains an early termination clause that states that, upon early termination, first, the State(s) will be reimbursed for medical assistance provided to the trust beneficiary. Per the trust document, after reimbursement to the State(s), any remaining assets will be distributed to the beneficiary. The clause bestows the power to terminate to the trustee, a bank.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(A) trust (i.e., a special needs trust). The FO determines that the early termination clause would not prevent the trust from meeting the criteria to be excepted from resource counting under the special needs trust exception. Additionally, the FO evaluates the trust under SI 01120.200D. and determines that it is not a countable resource.

Example 2:

A disabled adult, under age 65, is the beneficiary of a pooled trust that was established after 1/1/00 with assets of the individual. The trust contains an early termination clause that states that, upon early termination, first, the State(s) will be reimbursed for medical assistance provided to the trust beneficiary. Per the trust document, after reimbursement to the State(s), any remaining assets will be distributed to the beneficiary. The clause bestows the power to terminate to the trustee.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(C) trust (i.e., pooled trust). The FO determines that the early termination clause would not prevent the trust from being excepted from resource counting under the pooled trust exception. Additionally, the FO evaluates the trust under SI 01120.200D, and determines that it is not a countable resource.

I. References

- SI 01120.200, Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
- SI 01120.201, Trusts Established with the Assets of an Individual on or after 1/1/00
- SI 01120.202, Development and Documentation of Trusts Established on or after 1/1/00
- SI 01120.203, Exceptions to Counting Trusts Established on or after 1/1/00
- SI 01150.100, What is a Resource Transfer
- SI 01150.121, Exceptions – Transfers to a Trust
- SI 01730.048, Medicaid Trusts

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