

Special Needs Trust Panel

Special Needs Trusts Basics

Submitted By

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**Special Needs Trusts:
The Cornerstone of Planning for
Beneficiaries With Disabilities**

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Special Needs Trust: General Definition

- ✦ Privately and professionally managed
- ✦ Administered by a Trustee, ideally an experienced professional fiduciary
- ✦ Administered for the benefit of a person with disabilities or other impairments
- ✦ Trustee holds legal title to SNT funds
- ✦ Beneficiary holds equitable title to SNT funds
- ✦ SNT established by one or more Settlers
- ✦ Most states (including Georgia) have no specific statutory provisions governing single beneficiary SNTs (however, *see infra* for statutory authority governing the “pooled” SNT in Georgia)
- ✦ State Medicaid Programs may have specific guidelines or “requirements” for SNTs (*see Appendix*)
- ✦ Social Security Administration’s Program Operations Manual System (“POMS”) sets forth guidelines for SNTs (*see Appendix*)

Source of Trust Funds

- ✦ “Self-settled” or “first-party” SNT: funded with assets owned by the Beneficiary, or to which the Beneficiary is already legally entitled
 - ◆ Many SNTs derive from litigation proceeds payable to the disabled Beneficiary, including lump sums and annuity payments
 - ◆ Other assets belonging to the Beneficiary may be used to fund a SNT, *e.g.*, an inheritance or gift
 - ◆ Divorce settlements and child support payments may fund first-party SNTs with proper planning and coordination
 - ◆ Some types of income are effectively non-assignable to a SNT, including Social Security Disability Income and Supplemental Security Income payments, veteran’s pension and assistance payments, certain federal retirement and pension payments. *See POMS SI 01120.200.G.1.c.*
- ✦ “Third-party” SNT: funded with assets of a person other than the Beneficiary

“Support” SNT

- ✦ Serves as the primary source of benefits for the Beneficiary
- ✦ Provides for the Beneficiary’s support and maintenance, including food and shelter (as well as extraordinary needs)
- ✦ Support SNT will be counted as a disqualifying asset for purposes of determining the Beneficiary’s eligibility for means-tested government benefits, such as Medicaid and Supplemental Security Income
 - ◆ The vast majority of clients (even those of great wealth) will elect against a support SNT when given a choice in order to preserve the Beneficiary’s eligibility for means-tested benefits and related programs, *e.g.* “life skills” programs which require the participant to be “Medicaid-eligible” even if not actually receiving Medicaid assistance

“Supplemental Care” SNT

- ✦ Beneficiary cannot access a supplemental care SNT for support or maintenance; Trustee is not obligated to provide for Beneficiary’s support and maintenance
- ✦ Beneficiary relies on local, state or federal governments or agencies for basic support and maintenance
- ✦ Supplemental care SNT provides for needs of the Beneficiary that are not fully funded by government programs
- ✦ If drafted properly, a supplemental care SNT does not supplant means-tested government benefits for which the Beneficiary may be eligible as a result of his disabilities
 - ◆ Means-tested government benefits include Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. Section 1380 *et seq.*, and Medicaid under Title XIX of the Social Security Act, 42 U.S.C. Section 1396 *et seq.*
 - *Caveat:* Certain Veterans Administration pension benefits may be adversely affected by a first-party supplemental care SNT
 - ◆ In addition to SSI and Medicaid, a Beneficiary can often qualify for local or private programs which require the Beneficiary to be “Medicaid-eligible,” *e.g.* life skills programs

Self-Settled Supplemental Care SNT

Under 42 U.S.C. Section 1396p(d)(4)(A)

- ✦ Federal statutory requirements for a self-settled, first-party “(d)(4)(A)” supplemental care SNT:
 - ◆ Specifies permissible Settlers (*see infra* at page 16)
 - ◆ Beneficiary is “disabled” under 42 U.S.C. Section 1382c(a)(3)(A), *i.e.* “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months” (or if the Beneficiary is a child, has such an impairment which results in “marked and severe functional limitations”)
 - ◆ SNT is irrevocable and for the sole benefit of the Beneficiary
 - ◆ Beneficiary is under age 65 when SNT is established and funded, *i.e.* no additions are permitted after age 65
 - ◆ Upon the death of the Beneficiary, medical assistance providers (*i.e.* Medicaid, but not SSI) will be reimbursed up to the total amount of medical assistance benefits paid on behalf of the Beneficiary during his lifetime (thus also known as a “pay-back trust”)
 - Courts have been split as to the scope of the “total amount” concept. *See e.g. In the Matter of Ruben N. v. Elizabeth T.* (N.Y. App. Div., 2d Dept., 55 A.D.3d 257, September 16, 2008), which initially held that Medicaid should be paid back only for assistance

paid after the SNT was established. *In the Matter of Abraham XX, Deceased v. State of New York* (11 N.Y.3d 429 (2008) next held that Medicaid should be paid back for assistance paid even before the SNT was established. Subsequently, the earlier opinion and order in *Ruben N.* were recalled and vacated, citing *Abraham XX*, allowing the State to recover the cost of care provided over the course of the plaintiff's entire lifetime. *In the Matter of Ruben N. v. Elizabeth T.*, N.Y. App. Div., 2d Dep't., No. 2006-05776, 2010 N.Y. Slip Op. 02152, March 16, 2010.

- New POMS provisions issued after the first two of the decisions noted above take the position that Medicaid's pay-back "cannot be limited to the period after establishment of the trust." See POMS SI 01120.203.B.1.h.
- ✦ Case law requirement: In the context of a personal injury claim that yields a recovery for the Beneficiary of a (d)(4)(A) SNT, before the SNT may be funded, Medicaid must first be reimbursed for those benefits paid prior to the establishment of the SNT for medical care necessitated by the wrongful acts that generated the recovery. This "pre-trust lien" may be satisfied only from that portion of the recovery that is specifically allocable to past medical expenses and costs. See *Arkansas Dep't of Health & Human Services v. Ahlborn*, 547 U. S. 268 (2006).
- ✦ Transfers of a Beneficiary's assets to a (d)(4)(A) SNT are not penalized for purposes of means-tested benefits. See 42 U.S.C. Sections 1396p(c)(2)(B)(IV) and 1382b(c)(1)(C)(ii)(iv).
- ✦ Assets held in a (d)(4)(A) SNT are not deemed to be available resources to the Beneficiary for purposes of means-tested benefits. See POMS SI 00120.200 and 01120.203, and Section 2346 of the Georgia Medicaid Manual in the Appendix.

Third-Party Supplemental Care SNT

- ✦ Federal statutory requirements set forth on page 5 do not apply, including the Medicaid “pay-back” requirement; no particular definition of “disability;” no age limitation on Beneficiary
 - ◆ Thus, do not add third-party assets to a self-settled supplemental care SNT, unnecessarily subjecting third-party assets to a “pay-back” requirement
- ✦ Third-party supplemental care SNTs may be established *inter vivos*, *i.e.*, during the Settlor’s life, or as part of the Settlor’s estate plan, *e.g.*, under a Will or “Will substitute” such as a probate-avoidance “Revocable Living Trust”
 - ◆ *Caveat:* 42 U.S.C. Section 1382b(e) provides that if the Settlor’s spouse is the beneficiary of the third-party supplemental care SNT, it will be disregarded as an available resource to the spouse *only* if it is created under the terms of the Settlor’s Will (and not pursuant to a Will substitute such as a Revocable Living Trust)
- ✦ POMS Section 01120.200.D.2 provides that if the Beneficiary of a third-party supplemental care SNT does not have the legal authority to revoke or terminate the SNT, or to direct the use of the SNT assets for his or her own support and maintenance, then the SNT assets are not an available resource to the Beneficiary for purposes of means-tested benefits

“Convertible” SNT

- ✦ Option to begin with a support SNT while retaining the right to “convert” to a supplemental care SNT at a later date, *e.g.* especially if Beneficiary’s disability determination has not been secured
- ✦ Although current law and policy allow supplemental care SNT planning, there is no guarantee that will be the case indefinitely if the “wait and see” approach is taken
- ✦ Beware “reverse” conversion, *i.e.* begin with a (d)(4)(A) supplemental care SNT while retaining the right during the Beneficiary’s lifetime to “convert” to a support SNT (or other arrangement) after satisfying Medicaid’s “pay-back” interest
 - ◆ Well-respected SNT practitioners believe that this provision will disqualify a (d)(4)(A) SNT even if Medicaid’s “pay-back” interest is fully satisfied prior to conversion; POMS are reportedly being clarified to confirm this position

Coordination of Trusts for the SNT Beneficiary

- ✦ Once a supplemental care SNT is in place, whether first-party or third-party, all future trusts for the Beneficiary must also be drafted as supplemental care SNTs to maintain the Beneficiary's eligibility for means-tested benefits
- ✦ Any non-qualifying SNT, or any transfer such as an outright gift or bequest, will count against the Beneficiary as an available asset for purposes of means-tested benefits
- ✦ Typical "bypass/credit shelter" trust provisions will disqualify the Beneficiary of properly drafted supplemental care SNTs from ongoing eligibility for means-tested benefits
- ✦ Existing SNTs may be rendered ineffective without proper planning by well-intentioned benefactors
- ✦ Coordinate efforts with others who may wish to benefit the SNT Beneficiary, *e.g.* utilize a third-party "stand-by" supplemental care SNT designed to receive gifts and bequests from family or friends

Primary Consideration

- ✦ Consider whether the Beneficiary's assets and other resources are likely to cover the full cost of his lifetime needs, or whether means-tested government benefits should help fund such needs
 - ◆ Even if a Beneficiary does not financially need to rely on Medicaid for health insurance or on SSI for the monthly payments, the Beneficiary may need to be "Medicaid-eligible" to participate in beneficial state or local programs, *e.g.* life skills training
- ✦ Procure a Life Care Plan to establish an objective estimate of Beneficiary's future expenses
- ✦ Current law encourages persons with disabilities to utilize the public-private partnership embodied in a SNT arrangement
 - ◆ Proper SNT planning is not contrary to public policy or against the law!

Attorney Liability for Failure to Use SNTs

- ✦ Do not overlook the issue of maintaining a disabled Beneficiary's eligibility for means-tested government benefits!
- ✦ Numerous cases hold attorneys liable for failure to consider the option of supplemental care SNTs as part of the litigation settlement process, as well as in the estate planning context. *See, e.g. Grillo v. Pettiette et al.*, Cause No. 96-145090-92, and *Grillo v. Henry*, Cause No. 96-167-9213-97, 96th District Court, Tarrant County, Texas; *Board of Overseers of the Bar v. Brown*, 2002 Me. Lexis 190.
- ✦ Connecticut Supreme Court held that a state Probate Court could have been "in dereliction of [its] duties" had it not approved the establishment of a first-party SNT funded with settlement proceeds to which an adult ward was entitled. *See Department of Social Services v. Saunders*, 247 Conn. 686, 724 A.2d 1093 (1999).

SNT versus Conservatorship

- ✦ Conservatorship assets are generally considered “available” resources for purposes of means-tested government benefits eligibility
- ✦ Certain conservatorship assets may be exempt under eligibility rules for means-tested benefits, *e.g.*, a home and one vehicle used to transport the disabled ward
- ✦ Probate Court will often allow conservatorship assets to be transferred to a (d)(4)(A) SNT, characterizing the SNT funding as an “exchange” of such assets for Medicaid and SSI benefits (*see e.g.* O.C.G.A. Sections 29-3-35(c) and 29-5-35(c), and *Marjorie A. G. v. Dodge County Dep’t. of Human Services*, 659 N.W.2d 438 (Wis. Ct. App. 2003))

Court Approval Required for Many SNTs

- ✦ If the Beneficiary is a competent adult, it is not necessary for a court to approve a self-settled, first-party SNT
 - ◆ However, if a competent adult Beneficiary has no living parent or grandparent, a Court may need to order the establishment of the (d)(4)(A) SNT, as required by the federal enabling statute (*see infra* at page 16)
- ✦ Approval of the Probate Court is generally necessary if the Beneficiary is a minor or an incapacitated adult, and the Beneficiary's assets are used to fund the SNT, especially in the context of personal injury settlements (*see e.g.* O.C.G.A. Sections 29-3-3(h), 29-3-22(c)(5) and 29-5-23(c)(5))
- ✦ No court approval necessary for third-party SNTs, if drafted properly from the outset

Requirements of Government Agencies

- ✦ State Medicaid Program may require pre-approval of a self-settled (d)(4)(A) SNT, the inclusion of certain provisions in the trust agreement designed to secure its “pay-back” interest, and detailed annual accountings and audits (*see e.g.* Section 2346 of the Georgia Medicaid Manual in the Appendix)
 - ◆ Some states reportedly restrict certain purposes for which SNT disbursements may be made by the Trustee in the exercise of its fiduciary discretion, *e.g.*, compensation of family members for personal services rendered to the Beneficiary, and ownership of a family home by the SNT
- ✦ POMS SI 01120.203.D.1 sets forth a “checklist” of requirements for a self-settled (d)(4)(A) SNT if the Beneficiary is also receiving Supplemental Security Income (*see Appendix*)
- ✦ Include provisions in SNT that allow Trustee to amend SNT without court approval if required by state Medicaid agency, Social Security Administration, or as otherwise necessary to ensure ongoing compliance with relevant law

Settlor of SNT

- ✦ Settlor is a person willing and able to establish a SNT by executing the SNT agreement with the Trustee
- ✦ Settlor not required to have any further or ongoing responsibilities, but may continue to be involved as appropriate
- ✦ No restrictions on identity of Settlor of a third-party SNT
- ✦ A competent adult Beneficiary cannot serve as the Settlor of his own (d)(4)(A) supplemental care SNT; however, he could serve as the Settlor of a support SNT or a “pooled” SNT under 42 U.S.C. Section 1396p(d)(4)(C), discussed *infra* at page 35
 - ◆ See next page for permissible Settlers of a (d)(4)(A) SNT

Permissible Settlers of Self-Settled Supplemental Care SNT

Under 42 U.S.C. Section 1396p(d)(4)(A)

- ✦ Legal guardian/conservator of a minor or incapacitated adult Beneficiary
- ✦ Parent or grandparent of Beneficiary
 - ◆ Notwithstanding the clearly stated statutory authority of a “parent or grandparent” to serve as the Settlor of a (d)(4)(A) SNT, SSA requires that such person (i) also have independent legal authority to act with respect to the Beneficiary’s assets, *e.g.* as the Beneficiary’s court-appointed guardian/conservator, or (ii) establish the (d)(4)(A) SNT as a “seed-trust” and initially fund it nominally with such person’s own property. *See* POMS SI 01120.203.B.1.g.
- ✦ Court or other administrative entity
 - ◆ If Beneficiary has no living parent or grandparent, and is mentally competent and thus cannot qualify for the appointment of a guardian/conservator, this is the only option for establishing a (d)(4)(A) SNT. The creation of the SNT must be required by a court order; mere approval of the SNT by a court is not sufficient. *See* POMS SI 01120.203.B.1.f.

Income Tax Issues for Self-Settled SNT

- ✦ Regardless of who serves as the Settlor of a (d)(4)(A) SNT, the IRS considers it to be a “grantor trust” with respect to the Beneficiary for income tax purposes if neither the Trustee nor any other person is an “adverse party” who must consent to distributions for the Beneficiary. *See* I.R.C. Section 677.
- ✦ If a (d)(4)(A) SNT is a “grantor trust,” then all income, deductions and credits with respect to the assets of the SNT are reported by the Beneficiary under his Social Security Number on his individual Income Tax Returns, regardless of whether the income or gains are actually distributed to, or for the benefit of, the Beneficiary. *See* I.R.C. Section 671.
 - ◆ The Trustee of a (d)(4)(A) SNT that is treated as a “grantor trust” may nevertheless obtain a separate Federal Employer Identification Number for the SNT, and file an “informational” Income Tax Return for the SNT on IRS Form 1041, indicating that the income, gains, deductions and credits of the SNT will be fully reported by the Beneficiary on his Form 1040.
- ✦ If the Trustee of a (d)(4)(A) SNT is also an “adverse party” with respect to the Beneficiary, *e.g.* a named remainderman after Medicaid is “paid back,” there are other methods to help assure “grantor trust” status for the SNT, if desired.
 - ◆ A (d)(4)(A) SNT will be a “grantor trust” if the Beneficiary has the power to reacquire the corpus by substituting other property of equivalent value, under I.R.C. Section 675(4)(C). *Caveat:* some Medicaid agencies have held that such a power is tantamount to an impermissible right to revoke the SNT.

- ✦ Other mechanisms for assuring “grantor trust” status for a (d)(4)(A) SNT may include vesting the Beneficiary with a non-testamentary special power of appointment over the trust corpus *remaining at death* after the Medicaid pay-back is satisfied, under I.R.C. Section 674, or allowing the Trustee to pay insurance premiums on the life of the Beneficiary, under I.R.C. Section 677(a).
- ✦ Vesting the Beneficiary of a (d)(4)(A) SNT with a testamentary general power of appointment would cause “grantor trust” status under I.R.C. Section 673 as a “reversionary interest.” (*Note: such an approach could result in an inadvertent violation of the “Doctrine of Worthier Title” or the “Settlor-Sole Beneficiary Rule” in some jurisdictions, causing the SNT to be deemed revocable, and thus available, for purposes of means-tested benefits.*)
- ✦ If a (d)(4)(A) SNT is not taxed as a “grantor trust,” it is taxed as a “complex trust” under I.R.C. Section 641. The Beneficiary of a (d)(4)(A) SNT is often in a lower tax bracket than an irrevocable non-grantor trust. In 2010, a single person reaches the 35% bracket at \$373,650, while an irrevocable non-grantor trust reaches the 35% bracket at \$11,200.
- ✦ Furthermore, a (d)(4)(A) SNT that is not a “grantor trust” may also qualify as a “qualified disability trust” under I.R.C. Section 642(b)(2)(ii), and be entitled to a deduction equal to the exemption that a single taxpayer could claim under I.R.C. Section 151(d).
- ✦ Trust agreement should affirm that if the SNT is a “grantor trust” for income tax purposes, the Trustee is authorized to make distributions from the SNT to satisfy the Beneficiary’s federal, state and local tax liabilities.

Gift Tax Issues for SNTs

- ✦ If a self-settled SNT provides that the Beneficiary shall have a testamentary power of appointment over the property remaining in the SNT at his death (and after the Medicaid “pay-back” is satisfied), then funding an irrevocable SNT with the Beneficiary’s assets does not result in a completed gift for federal gift tax purposes. See Treas. Reg. Section 25.2511-2(c).
 - ◆ Even if the Beneficiary is not capable of exercising the power of appointment, the mere possession of the power is sufficient to preclude a completed gift upon funding. See Rev. Rul. 55-518, 1955-2 C.B. 384; *Boeving v. U.S.*, 493 F. Supp. 665 (D. Mo. 1980), rev’d 650 F.2d 493 (8th Cir. 1981), *Alperstein v. Commissioner*, 613 F.2d 1213 (2d Cir. 1979), cert. denied, 446 U.S. 981 (1980).
- ✦ If the funding transfer to a self-settled SNT is deemed to be a completed gift to the remainder beneficiaries for purposes of the federal gift tax under I.R.C. Section 2501, the Beneficiary may shelter the first \$1 million of any gift by applying his federal lifetime gift tax exclusion. See I.R.C. Section 2505(a)(1).
- ✦ Gifts to a third-party SNT generally will not (and should not) qualify as a “present interest” with respect to the Beneficiary under I.R.C. Section 2503(b). Giving the Beneficiary a “Crummey” right of withdrawal will impact his means-tested benefits.
 - ◆ With third-party SNTs, consider adding other secondary permissible beneficiaries who may safely hold rights of withdrawal under the rationale of *Estate of Cristofani v. Commissioner*, 97 T.C. 74 (1991).

Trustee of SNT

- ✦ Professional Trustee recommended due to labor-intensive nature of SNT administration
 - ◆ Trustee must be capable of recognizing and discharging “regular” fiduciary duties, in addition to undertaking an appropriate ongoing analysis of relevant means-tested government programs and the impact of trust distributions on the Beneficiary’s eligibility for same
- ✦ Many judges insist on a professional Trustee when the SNT is to be funded with assets that would otherwise be subject to a Conservatorship
- ✦ Some states specifically prohibit parents, guardians or other family members from serving as Trustee; these persons are often remainder beneficiaries of the SNT (or heirs-apparent of the Beneficiary) and may be tempted to “skimp” on disbursements for the Beneficiary to assure that a larger fund is available for them at the death of the Beneficiary
- ✦ Beneficiary should not serve as Trustee under any circumstances

Duties of SNT Trustee

- ✦ Investing assets of SNT to reflect the needs and risk tolerances of the Beneficiary; risk tolerance tends to be low
- ✦ SNT funds should be invested to produce an appropriate mix of current income and long-term growth
- ✦ Flexibility necessary to achieve balance is enhanced if Trustee is not “locked in” to a particular investment posture, as happens with a structured settlement
- ✦ Both annuity and lump sum payments derived from personal injury settlements are tax-free upon receipt by SNT, under I.R.C. Section 104(a)(2); taxability of reinvested funds depends on chosen investment vehicle
- ✦ Disbursements of income and principal “for the sole benefit” of the Beneficiary, preferably directly to providers of goods and services to avoid misuse of funds or inadvertent impact on means-tested benefits
- ✦ Reimbursement of persons who have expended their own funds for items that are permissible SNT disbursements
- ✦ Consultations regarding current and anticipated needs of Beneficiary, including Life Care Plan preparation and updates
- ✦ Accurate accounting, periodic reporting of receipts and disbursements, and assistance to Beneficiary with income tax reporting obligations
- ✦ Verification that SNT distributions do not defray a legal obligation of support owed by another to the Beneficiary

Benefits Eligibility Determinations

- ✦ Prior to any disbursement from SNT, Trustee must determine whether government or private benefits or programs may satisfy the need fully
- ✦ SNT should contain provisions allowing Trustee to delegate benefits eligibility issues to health care consultants or “allied professionals” and requiring annual review/update of relevant government programs
- ✦ Once determined that no programs will satisfy the Beneficiary’s need fully, Trustee must verify that the manner of disbursement will not jeopardize any benefits for which Beneficiary is eligible and upon which he currently relies
- ✦ *See “Seven-Step Chart for SNT Disbursement Decisions” prepared by David J. Lillesand, Esq., on page 36*
- ✦ Benefits Committee and Trust Protector used by some, but difficult to implement; allow limited power to remove “for cause” only

Trustee Fees

- ✦ Corporate fiduciaries generally charge “market value” fees according to a regularly published schedule; alternative minimum fee may apply
- ✦ Some may have fee schedules that specifically apply to SNTs
- ✦ Additional hourly rates may apply for specified services, *e.g.* tax return preparation
- ✦ If corporate fiduciary is necessary or advisable, nominal initial corpus often makes corporate fiduciary cost-prohibitive (*e.g.* if SNT is funded solely or largely with annuity payments rather than a lump sum)
- ✦ Corporate fiduciaries are often more cost-effective than an individual, non-professional fiduciary who must separately retain the paid services of investment advisors, accountants, claims processors, bonding agents, *etc.*

Resignation and Removal of Trustee

- ✦ Due to the irrevocable and long-term nature of a SNT, both Beneficiary and Trustee should have the ability to disengage from an unsatisfactory fiduciary relationship
- ✦ Specify mechanism for Trustee resignation and procedure for appointment of successor
- ✦ Contemplate arbitration, mediation or court-facilitated resolution of disputes
- ✦ “For cause” grounds for removal of Trustee could include breach of fiduciary duty; mismanagement of funds; failure to comply with fee agreement; uneconomical fee schedule
- ✦ Additional Trustee removal grounds could include documented lack of cooperation regarding client inquiries about investments or disbursements; high turnover of trust officers; failure to consult with caregivers regarding needs of Beneficiary

Dispositive Terms of SNT

- ✦ SNT should state that it is designed to supplement, not supplant, any means-tested benefits for which the Beneficiary is otherwise eligible
- ✦ SNT should state that Trustee is not obligated to provide for Beneficiary's basic support and maintenance, and that the Beneficiary cannot access the SNT for such purposes
- ✦ SNT should provide that, in general, no distribution should be made to, or for the benefit of, the Beneficiary if:
 - ◆ a governmental or other program or resource can fully satisfy the need
 - ◆ the manner of disbursement would adversely affect the eligibility of the Beneficiary for such programs
- ✦ SNT document should provide flexibility for Trustee to "opt out" of government benefits that are not "reasonably available"
 - ◆ Nominal government benefits may not be worth the expense to the SNT of obtaining the benefits
- ✦ Government benefits alone may be insufficient to provide fully for Beneficiary's basic support needs (especially housing), and SNT may have to "make up the difference"
 - ◆ Drafting attorneys should not prohibit disbursements by Trustee of SNT for shelter-related and household expenses, but Trustee must be mindful of impact on means-tested benefits if such disbursements are made
- ✦ Detailed list of permissible expenditures preferred by Trustee and Beneficiary

- ✦ Some states restrict certain types of SNT disbursements
- ✦ “Life Care Plan” is an invaluable source of information about anticipated needs; if no Plan is available at outset, SNT should authorize Trustee to obtain at expense of SNT
 - ◆ Even if an expense is contemplated by the Life Care Plan, the Trustee must still use good judgment in the exercise of its discretion
 - ◆ Payments to a third party that result in the receipt by the Beneficiary of goods or services are considered “for the sole benefit of” the Beneficiary under POMS SI 01120.201.F.1.
- ✦ Permissible “routine” expenditures for the Beneficiary, that should not affect his means-tested benefits, could include:
 - ◆ reasonable compensation of SNT Trustee, and allied professionals advising the Trustee, *e.g.* investment manager, attorney, fiduciary accountant
 - ◆ reasonable compensation of care providers, including family members, where appropriate (Medicaid is often resistant to paid family or friends of Beneficiary due to frequent abuses)
 - ◆ medical services and equipment not covered by government programs
 - ◆ domestic and personal care services (housekeeper, grooming, meal preparation)
 - ◆ household costs other than food, mortgage or rent, real property taxes, heating fuel, gas, electricity, water, sewer and garbage removal (*see* POMS SI 00835.465.D.1)

- ◆ pre-paid funeral and burial arrangements (*note: if the Beneficiary dies before arrangements have been pre-paid, no payments for same may be made from the SNT until after Medicaid pay-back is fully satisfied, under POMS SI 01120.203.B.3.b*)
- ◆ computer or augmentative communications devices, and internet service
- ◆ television or other electronic equipment
- ◆ apparel, including maintenance and repair of same
- ◆ one vehicle used for transporting the Beneficiary (not including a purely recreational vehicle)
- ◆ membership in recreational clubs, cultural institutions
- ◆ professional services: attorneys, accountants, claims processors, advocates, coaches
- ◆ academic or recreational courses or classes
- ◆ home décor, furniture, furnishings, appliances
- ◆ dry cleaning and laundry services and supplies
- ◆ fitness equipment and club membership
- ◆ auto maintenance and supplies
- ◆ home security alarm and monitoring service
- ◆ yard service and maintenance
- ◆ insurance for home, auto, liability
- ◆ linens, towels, bedding

- ◆ personal care items and supplies
- ◆ music lessons, cost of instruments
- ◆ non-food groceries and sundries
- ◆ educational needs and supplies
- ◆ over-the-counter medications
- ◆ pet, service animal and supplies, veterinary services
- ◆ sporting goods and equipment
- ◆ stationery, stamps
- ◆ telephone service and equipment
- ◆ therapies not covered by benefits programs
- ◆ tickets to cultural or sporting events
- ◆ transportation costs (bus, subway, paid driver)
- ◆ cable TV
- ◆ vacation for Beneficiary and one attendant
- ◆ catch-all: “such uses and purposes as the Trustee deems appropriate under all circumstances” for the sole benefit of the Beneficiary
 - *Note:* Many thanks to Patricia Kefelas Dudek, Esq. for widely disseminating her suggested list of permissible SNT expenditures for use by practitioners and Trustees, many of which are included in the above list.

“Big Ticket” Expenses

- ✦ SNT document should carefully address disbursements for “big ticket” expenses, especially in the case of a self-settled (d)(4)(A) SNT in which Medicaid has a “pay-back” interest
 - ◆ Medicaid will be wary of SNT disbursements to improve assets not titled in name of the SNT, *e.g.* SNT-funded renovations or improvements to a home owned by the Beneficiary’s parents
 - ◆ SNT should provide detailed procedures for balancing the interests of the Beneficiary with governmental entities such as Medicaid
- ✦ Certain “exempt” assets funded by the SNT, *e.g.* an automobile or van used to transport the Beneficiary, are frequently titled in the name of the Beneficiary, or his Guardian or Conservator, for liability purposes; however, if SNT funds were used to purchase the vehicle, the interest of the SNT should be noted on the vehicle title, and the Trustee should outline clearly the duties and responsibilities of any authorized driver(s)
- ✦ Although the Trustee of a (d)(4)(A) SNT may, in the exercise of its fiduciary discretion, make disbursements to provide housing for the Beneficiary, or to defray the household costs listed in POMS SI 00835.465.D.1, such disbursements generally count against the Beneficiary as “In-Kind Support and Maintenance” and could reduce the Beneficiary’s SSI payment in accordance with the “Presumed Maximum Value” Rule (POMS SI 00835.300) or the “One-Third Reduction” Rule (POMS SI 00835.200)
 - ◆ **WARNING:** If the Beneficiary’s Medicaid eligibility is tied to SSI benefits, Trustee must assure that trust

disbursements do not reduce the Beneficiary's SSI payment to below \$1 or Medicaid coverage may also be lost.

- ✦ If members of the Beneficiary's family also reside in a home owned by the SNT, beware violation of "the sole benefit" rule.
 - ◆ Trustee should consider requiring such family members to contribute their share of household costs and expenses (Medicaid may insist), or to otherwise "earn their keep" by rendering services to, or for the benefit of, the Beneficiary that they are not already legally obligated to provide.
- ✦ "Joint" ownership of a home by a SNT and other persons living in the home is highly inadvisable.

Funding Considerations and Lifetime Care Issues

- ✦ Major concerns are “running out of money” to fund the Beneficiary’s lifetime needs, and the ready availability of funds for both anticipated and unexpected needs
- ✦ No Life Care Plan is fool-proof; unexpected care needs always arise
- ✦ Annuity contracts typically provide for a rigid schedule of payments that cannot be altered regardless of the Beneficiary’s needs; beware over-funding a SNT with annuity contracts, as often recommended by plaintiff’s attorneys in the context of personal injury litigation
- ✦ Lump sums held by the Trustee are available for the Beneficiary’s needs at all times, and may be utilized for recurring or unexpected needs, as well as big ticket items
- ✦ Ideal funding of SNT will typically include a combination of annuity and lump sum options

Distributions At Death of Beneficiary: “Pay-Back” Obligation

- ✦ When the Beneficiary of a (d)(4)(A) SNT dies, the Trustee must work with Medicaid to verify the amount of its “pay-back” interest for medical assistance paid for the Beneficiary during his lifetime.
 - ◆ A careful review of Medicaid’s itemized print-out often reveals significant errors!
- ✦ “Pay-back” of Medicaid benefits must occur before Beneficiary’s funeral and burial expenses may be paid by SNT, if not pre-paid at time of death. *See* POMS SI 01120.203.B.3.b. (Thus, Trustee should *always* “pre-pay” for such expenses during the Beneficiary’s lifetime.)
- ✦ Certain “winding up” expenses of SNT, *e.g.* final accounting to court, Trustee’s fees, may be paid before Medicaid. *See* POMS SI 01120.203.B.3.a.
- ✦ Reminder: pay-back requirement generally does not apply to a third-party supplemental care SNT.
- ✦ Pay-back obligation may require Trustee to liquidate SNT assets, *e.g.* home where Beneficiary (and family) resided at time of death (advise them of this possibility in writing before SNT buys the home, as they will not remember this!).
- ✦ Pay-back claims of multiple Medicaid agencies should be satisfied *pro rata* if insufficient funds remain to fully satisfy all claims.

Distributions At Death of Beneficiary: Estate Obligations

- ✦ Property remaining in a self-settled (d)(4)(A) SNT is included in the gross estate of the Beneficiary at death under I.R.C. Section 2036 (if the funding of the SNT was not a completed gift)
 - ◆ Third-party SNT is not included in the gross estate of the Beneficiary, if drafted properly
- ✦ “Present value” of remaining future guaranteed annuity payments to a self-settled SNT is fully includable in the Beneficiary’s gross estate under I.R.C. Section 2039
 - ◆ Annuity contracts do not typically provide for future payments to be accelerated to help pay estate tax liability
 - ◆ Right to “commute” annuity stream for payment of estate taxes may be available for a hefty charge of 5% or more
- ✦ Estate of Beneficiary of a self-settled SNT can claim an estate tax deduction for Medicaid “pay-back” under I.R.C. Section 2053(a)(2)
 - ◆ Alternatively, POMS SI 01120.203.B.3.a allows payment of Beneficiary’s state and federal estate or inheritance taxes attributable to inclusion of SNT in Beneficiary’s gross estate, prior to satisfaction of Medicaid pay-back interest
- ✦ “Stepped-up” basis available for assets remaining in a self-settled SNT at death of Beneficiary under I.R.C. Section 1014(b)(9), minimizing capital gains tax payable upon sale of assets to satisfy “pay-back” interest of Medicaid

Distributions At Death of Beneficiary: SNT Remainder Beneficiaries

- ✦ In the case of a self-settled SNT, specifying remainder beneficiaries can be problematic if the Beneficiary is a minor or an incapacitated adult, tantamount to impermissibly “making a Will” for the Beneficiary.
 - ◆ Beware the applicability of the “Doctrine of Worthier Title” or the “Settlor-Sole Beneficiary Rule” when designating the Beneficiary’s heirs or estate as remainder beneficiaries. *See, e.g.*, POMS SI ATL 01120.201 (which incorrectly asserts the viability of these concepts under Georgia law). In such cases, the application of the Doctrine or Rule results in the SNT being deemed revocable, and thus available to the Beneficiary. *See* POMS SI 01120.200.D.3.
 - ◆ To address this problem, consider a nominal distribution of \$100 to a named remainder Beneficiary, *e.g.* the Beneficiary’s parent, sibling or other living relative, with the remaining property to pass by Beneficiary’s Will or by intestacy.
- ✦ Beneficiary of self-settled SNT can be given testamentary power of appointment, which also avoids a completed gift to the SNT remainder beneficiaries upon funding, per Treas. Reg. Section 25.2511-2(c).
- ✦ Beneficiary of a third-party SNT should only be given a “limited” power of appointment to assure that the assets are not included in the gross estate of Beneficiary under I.R.C. Section 2041. If not exercised, remaindermen are generally specified by Settlor, *e.g.* descendants, siblings or other relatives of Beneficiary, or charity.

Additional Planning Opportunity: “Pooled” SNT Under 42 U.S.C. Section 1396p(d)(4)(C)

- ✦ “Pooled” SNT, established and managed by a non-profit entity, is useful for a person who is disabled (as defined in 42 U.S.C. Section 1382c(a)(3)) whose assets are sufficient to disqualify him for means-tested benefits but insufficient to warrant the expense of establishing an individual (d)(4)(A) trust
- ✦ Each Beneficiary maintains a separate account, but assets of all Beneficiaries are pooled for investment and management
- ✦ Accounts for the Beneficiary may be either “first-party” or “third-party”
- ✦ First-party accounts may be established by the Beneficiary himself, or by his parent, grandparent or legal guardian/conservator, or by a court
- ✦ Accounts are governed by a “Master Trust Agreement”
- ✦ Medical assistance providers have a “pay-back” interest, as with a (d)(4)(A) SNT, or the pooled trust may elect to retain the assets remaining in the Beneficiary’s account at death for the benefit of other account beneficiaries
- ✦ Some states allow the establishment of (d)(4)(C) SNT accounts for persons over age 65 without penalty; others (including Georgia) will penalize transfers to a (d)(4)(C) account if the Beneficiary is over 65
- ✦ The Georgia Community Trust, Georgia’s first (d)(4)(C) pooled SNT, and The Georgia Community Pooled Trust administered by the Center for Special Needs Administration, Inc., are statutorily authorized by O.C.G.A. Section 30-10-1 *et seq.*

Lillesand's SSI Trust Compliance

Seven Step Chart for Special Needs Trust Disbursement Decisions

STEP 1. IN MAKING THE DISTRIBUTION, WILL THE TRUSTEE BE IN COMPLIANCE WITH STATE TRUST CODE RULES? –

Is the distribution consistent with trustee's duties to avoid conflict of interests, avoid self-dealing, not act arbitrarily, use best judgment, act in good faith, follow the trust terms, use reasonable skill and care, act in the beneficiary's best interests, and use trustee's special skills, if any - - or any other state trust code requirements.

If YES, GO TO STEP 2

If NO, STOP (DENY)

STEP 2. IS THE PROPOSED DISTRIBUTION "FOR THE SOLE BENEFIT" OF THE DISABLED INDIVIDUAL? – See the Sole Benefit Rule in POMS SI 01120.201.F as modified by traditional trust law (a self-settled or first party grantor trust cannot legally avoid creditors' claims) and criminal law (e.g., felony child neglect to fail to provide food, clothing shelter and medical care for minor children; failure to pay IRS and state taxes, etc.): Does the disabled beneficiary reasonably receive some benefit, even if not exclusive benefit, from the distribution. Examples: trustee paying the mother's admission tickets to Disney World to accompany of a disabled minor; discharging the child support or alimony obligation of a disabled adult beneficiary, or paying obligations to avoid criminal penalties for nonpayment of income taxes, traffic tickets, or neglect of children and spousal maintenance.

If YES, GO TO STEP 3.

If NO, STOP (DENY)

STEP 3. IS IT A SERVICE OR CONSUMABLE ITEM? (e.g., tank of gas for car, travel, medical service, caretaker, baseball tickets, etc.)

If YES, GO TO STEP 6

If NO, GO TO STEP 4

STEP 4. FOR RESOURCES – WOULD THE PURCHASED RESOURCE BE WITHIN THE SPECIAL SSI RULES THAT LIMIT THE AMOUNT, TYPE OR TITLING OF THE RESOURCE TO BE PURCHASED? IS THE PURCHASE ONE OF THE FOLLOWING?

- the only principal residence for the beneficiary – POMS SI 01130.100; SI 01120.200.F;
- one vehicle in accord with POMS SI 01130.200
- household effects of the disabled individual – POMS SI 01130.430
- personal effects of the disabled individual – POMS SI 1130.430
- other limited or excluded resources listed in POMS SI 01130, including burial plots, prepaid burial contracts, limited life insurance, etc.

If YES, GO TO STEP 6.

If NO, GO TO STEP 5.

STEP 5. IF THE DISABLED BENEFICIARY CANNOT HOLD TITLE TO RESOURCE (ASSET), CAN THE OVER-LIMIT RESOURCE BE HELD BY THE TRUSTEE, IN THE TRUST, AS A TRUST ASSET? For example, buying a camper (second vehicle), time share or vacation condo, held in trust's name

- Should resource/asset be held in name of trust [auto liability laws exposing trust assets if there is an accident with the second car], or create a second trust to hold the asset, e.g., a "Transportation Trust", for example; and
- Does the Institutional Trustee have a rule against holding, in trust, real property, cars, etc

If YES, GO TO STEP 6.

If NO, STOP (Deny)

STEP 6. DOES THE METHOD OF PURCHASING THE GOODS OR SERVICES, VIOLATE THE SSI INCOME RULES? – The trustee must consider POMS SI 01120.201.I. - the three rules for distributions from a trust and the impact on benefits: 1) cash payments to a beneficiary are unearned income; 2) payments of items to third parties directly f/b/o beneficiary that are NOT "food or shelter" have no effect on amount of SSI benefit check; and 3) direct third party payments for "food or shelter" items reducing the SSI check, but the reduction is capped by the PMV rule (permissible unless the SSI check is already less than the PMV amount); Be aware also of the special limitations on Gift Card [POMS SI 00830.522] and Travel Tickets [POMS SI 01120.150].

If YES, STOP (Look for a different method)

If NO, PROCEED WITH DISBURSEMENT FROM TRUST

STEP 7. ARE THERE REASONS TO GO AHEAD ANYWAY, AND PURPOSELY GIVE UP SSI AND SSI-RELATED MEDICAID BENEFITS FOR A PERIOD OF TIME? [e.g., family going to live in Europe for three months]

If YES, MAKE THE DISBURSEMENT but only if it results in an income disqualification (temporary disqualification) vs. a sole benefit transfer violation (disqualification for up to 36 months).

If NO, STOP (DENY)

Appendix

2346 – SPECIAL NEEDS TRUST

POLICY STATEMENT	A Special Needs Trust (SNT) is a trust that contains the assets of certain individuals for his/her benefit. It also limits the trustee's discretion as to the purpose of the distributions.
BASIC CONSIDERATIONS	<p>A Special Needs Trust (SNT) must meet the following specific guidelines:</p> <ul style="list-style-type: none"> • Be established for the sole benefit of the individual by a parent, grandparent, legal guardian of the individual, or a court. Refer to Section 2502-7, Chart 2502.1 for definition of "sole benefit of". • Provide that the State will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual • May contain the assets of individuals other than the disabled individual. • Must be established by a disabled individual under 65 and contain only their assets (income and resources). • Must have had no additions to or augmentation of since member turned 65. <p>NOTE: Certain payments are not assignable by law and, therefore, are income to the individual entitled to receive payment under regular income rules. They may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. Important examples of non-assignable payments include:</p> <ul style="list-style-type: none"> • TANF • Railroad Retirement Board - administered pensions • Veterans pensions and assistance • Federal employee retirement payments administered by the Office of Personnel Management • Social Security title II and SSI payments • Private pensions under the Employee Retirement Income Security Act <p>Effective April 1, 2005, DCH Legal Services will determine the validity of all SNTs.</p> <p>To be a valid SNT, attorneys drawing up the SNT should adhere to the following guidelines:</p> <p>Step 1 The attorney should send the SNT to DCH Legal Services two months prior to execution and/or judicial approval. Use the "Special Needs Trust Review Routing Form" found in Appendix F of the Medicaid Manual.</p>

**BASIC
CONSIDERATIONS
(cont.)**

- Step 2** If the trust is to be funded with the proceeds of a settlement, a certified copy of the settlement and the court order must be submitted with the trust.
- Step 3** Notice of the time and place of any hearing regarding a Court approval of the settlement and SNT should be served upon the DCH at least 15 business days before the hearing.
- Step 4** The DCH will not recognize the validity of any SNT until all liens in favor of the DCH shall be first satisfied in full.
- Step 5** All SNTs are subject to a yearly audit by DCH or its agents. DCH may also audit prior years of the trust.
- Step 6** No payment can be made from the trust except for the benefit of the beneficiary and may not exceed the amount that can be determined to reasonably meet the special needs of the beneficiary. Refer to Section 2502-7, Chart 2502.1 for definition of "sole benefit of".
- Step 7** The SNT shall specifically identify, in an attached schedule, the initial source of the trust, all assets of the trust, all assets purchased with trust funds and all wages or payment for caregiver or other services. The trustee must update the schedule yearly. Schedules must be submitted to DFCS and to DCH Legal Services.
- Step 8** The SNT shall specifically state the age of the trust beneficiary and affirm that the trust beneficiary is disabled within the definition of 42 U.S. C. Section 1382c(a)(3), and whether the trust beneficiary is competent or incompetent at the time the trust is established.
- Step 9** The SNT shall specifically state that its purpose is to permit the use of SNT assets to supplement, and not to supplant, impair or diminish benefits or assistance of any Federal, State or other governmental entity for which the beneficiary may otherwise be eligible or for which the beneficiary is competent at the time the trust is established.
- Step 10** The DCH shall be given a minimum of 30 days notice if there is a change in the trustee.
- Step 11** The DCH must be given notice within 5 days of the death of the beneficiary.
- Step 12** Beneficiaries are required to comply with SSI income rules. See 20 CFR 416.
- Step 13** Failure to comply with policy will result in the SNT being counted as an asset or transfer of resources.

PROCEDURES

- Follow the procedures below for processing applications/reviews containing SNTs:
- Step 1** For applications pending on or after April 1, 2005, send a copy of the SNT to DCH Legal Services Section, along with proof of disability, prior to approval of the case. Use the routing form in Appendix F, entitled "Special Needs Trust Review Routing Form". Some attorneys may submit SNTs to DCH prior to the application at DFCS. Obtain copies of the submission to DCH and its determination. If not, submit SNT upon receipt during application process. Submit the same documents that are required above.
- For **active cases where a previously unknown SNT** is discovered, send a copy of the SNT to DCH Legal Services Section, along with proof of disability, prior to completion of the annual review or special review. Submit two months prior to review if possible. Use the routing form in Appendix F, entitled "Special Needs Trust Review Routing Form".
- Step 2** Do not finalize the application or review until DCH Legal has either approved or denied the validity of the trust.
- Step 3** If the trust is irrevocable and cannot be used by the A/R for his/her support and maintenance, it is not a resource. If the A/R does not have the legal authority to revoke the trust or direct the use of the trust assets, the trust principal is not the A/R's resource.
- Step 4** Treat disbursements from the trust as follows:
- Cash paid directly to the A/R is unearned income.
 - Food, clothing or shelter received as a result of a disbursement from the trust is income in the form of in-kind support and maintenance. Use the presumed maximum value (PMV) rule. See Section 2430, Living Arrangement and In-Kind Support and Maintenance for ABD Medicaid.
 - Disbursements by the trustee to a third party that result in the A/R receiving items that are **NOT** food, clothing or shelter are not considered income (example personal sitters, handicapped van, etc.).
 - If the trust principal is a countable resource to the A/R, disbursements from the trust principal received by the A/R are not income, but a conversion of a resource. However, the trust earnings (interest) are counted as unearned income.
- Step 5** If you find there have been additions to or augmentations of the trust since the member reached age 65, then count as an asset or transfer of asset.

PROCEDURES**(cont.)****Step 6**

Should you discover during an annual or special review that the requirements of the trust are not being followed, consult your Medicaid Program Specialist for instructions.

TN 40 (01-09)

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

Topic	Reference
Introduction to Trusts	SI 01120.200A
Glossary of Terms – Trusts	SI 01120.200B
Policy - Accounts That May Or May Not Be Trusts	SI 01120.200C
Policy - Trusts As Resources	SI 01120.200D
Policy - Disbursements From Trusts	SI 01120.200E
Policy - Home Ownership/Purchase Of A Home By A Trust	SI 01120.200F
Policy - Earnings/Additions To Trusts	SI 01120.200G
Policy - Medicaid Trusts And Medicaid Qualifying Trusts	SI 01120.200H
Policy - Representative Payees And Trusts	SI 01120.200I
Procedure - Development And Documentation of Trusts	SI 01120.200J
Procedure - Discussing SSI Trust Policy With The Public	SI 01120.200K
Examples of Trusts	SI 01120.200L
References	SI 01120.200M

A. Introduction to Trusts

1. General

A trust is a legal arrangement involving property and ownership interests. Property held in trust may or may not be considered a resource for SSI purposes. The general rules concerning resources apply to evaluating the resource status of property held in trust.

2. Applicability of this Section

Generally, this section applies to trusts not subject to the statutory trust provisions in section 1613(e) of the Social Security Act, instructions for which are found in SI 01120.201 – SI 01120.204. Use the instructions in this section to evaluate the following types of trusts:

a. Trusts Established prior to 1/1/00 that Contain Assets of the Individual

Trusts established before 1/1/00 that contain assets of the individual, any of which were transferred before 1/1/00. If the trust was established prior to 1/1/00, but no assets of the individual were transferred to the trust prior to 1/1/00, see SI 01120.201.

b. Trusts that Contain Assets of Third Parties

- Trusts established before 1/1/00 that contain assets of third parties.
- Trusts established on or after 1/1/00 that contain only assets of third parties or the portion of a commingled trust attributable to assets of third parties. (Trusts established on or after 1/1/00 that contain assets of a Supplemental Security Income (SSI) claimant or recipient or the portion of a commingled trust attributable to assets of an SSI claimant or recipient must be evaluated under SI 01120.201 through SI 01120.204.)

c. Other Trusts Not Subject to Section 1613(e) of the Social Security Act

Trusts established on or after 1/1/00 to which the instructions in SI 01120.201–SI 01120.204 do not apply. (The instructions in those sections will refer you back to this section where applicable.)

3. Case Processing Alert

Trusts are often complex legal arrangements involving State law and legal principles that a claims representative (CR) may not be able to apply without legal counsel. Therefore, the following instructions may only be sufficient for you to recognize that an issue is present that should be referred to your 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.

B. Glossary of Terms -- Trusts

1. Trust

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

2. Grantor

A **grantor** (also called 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 be otherwise qualified to transfer it. Therefore, an individual may be a grantor even if an agent, or other individual legally empowered to act on his/her behalf (e.g., a legal guardian, representative payee for Title II/XVI benefits, person acting under a power of attorney, or conservator), establishes the trust with funds or property that belong to the

individual. The individual funding the trust is the grantor, even in situations where the trust agreement shows a person legally empowered to act on the individual's behalf as the grantor. Where more than one person provides property to the trust, there may be multiple grantors. The terms grantor, trustor, and settlor may be used interchangeably.

3. 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/her own benefit.

4. 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/her benefit. The beneficiary receives the benefits of the trust while the trustee holds the title and duties.

5. 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. Also called "the corpus of the trust."

6. Trust Earnings (Income)

Trust earnings or income are amounts earned by the trust principal. They may take such forms as interest, dividends, royalties, rents, etc. These amounts are unearned income to any person legally able to use them for personal support and maintenance.

7. Totten Trust

A **Totten trust**, or "**bank account trust**" is a tentative trust in which a grantor makes himself/herself trustee of his/her own funds for the benefit of another. Typically this is done by an individual depositing funds in a savings account and either titling the account or filing a writing with the bank indicating he/she is trustee of the account for another person. The trustee can revoke a Totten trust at any time. Should the trustee die without revoking the trust, ownership of the money passes to the beneficiary. Totten trusts are valid in most jurisdictions, but other jurisdictions have held them invalid because they are too tentative, i.e., they lack formal requirements and do not state a trust intent or purpose.

8. Grantor Trust

Subject to State law, a **grantor trust** is a trust in which the grantor of the trust is also the sole beneficiary of the trust. See SI 01120.200B.2. for who may be a grantor. State law on grantor trusts varies. Consult with your Regional Office if necessary.

9. Mandatory Trust

A **mandatory trust** is a trust that requires the trustee to pay trust earnings or principal to or for the benefit of the beneficiary at certain times. The trust may require disbursement of a specified percentage

or dollar amount of the trust earnings or may obligate the trustee to spend income and principal, as necessary, to provide a specified standard of care. The trustee has no discretion as to the amount of the payment or to whom it will be distributed.

10. Discretionary Trust

A **discretionary trust** is a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions. The trustee may pay to or for the benefit of the beneficiary, all or none of the trust as he/she considers appropriate. The beneficiary has no control over the trust.

11. Medicaid Trust or Medicaid Qualifying Trust

See SI 01730.048 for definitions of a **Medicaid trust** or a **Medicaid qualifying trust** and see SI 01120.200H. for additional guidance on these trusts. See SI 01120.203 for SSI treatment of Medicaid trust exceptions.

12. Residual Beneficiary

A **residual beneficiary** (also referred to as a **contingent beneficiary**) is not a current beneficiary of a trust, but will receive the residual benefit of the trust contingent upon the occurrence of a specific event, e.g., the death of the primary beneficiary.

13. Supplemental Needs Trust

A **supplemental needs trust** is a type of trust that limits the trustee's discretion as to the purpose of the distributions. This type of trust typically contains language that distributions should supplement, but not supplant, sources of income including SSI or other government benefits.

14. Inter Vivos Trust

An **inter vivos trust** is a trust established during the lifetime of the grantor. It may also be called a living trust.

15. Testamentary Trust

A **testamentary trust** is a trust established by a will and effective at the time of the testator's death.

16. Spendthrift Clause or Spendthrift Trust

A **spendthrift clause or trust** prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. This means that the beneficiary's creditors must wait until money is paid from the trust to the beneficiary before they can attempt to claim it to satisfy debts. It also means that, for example, if the beneficiary is entitled to \$100 a month from the trust, the beneficiary cannot sell his/her right to receive the monthly payments to a third party for a lump sum. In other words, a valid spendthrift clause would make the value of the beneficiary's right to receive payments not countable as a resource. However, spendthrift clauses are not recognized in all States. Additionally, States that recognize spendthrift trusts generally do not allow a grantor to establish a spendthrift trust for his/her own benefit, i.e., as a beneficiary. Thus, using the example from above, in those States where spendthrift clauses are not recognized (whether at all or because the trust is a grantor trust), the value of

the beneficiary's right to receive monthly payments should be counted as a resource because it may be sold for a lump sum.

17. Third-Party Trust

A **third-party trust** is a trust established with the assets of someone other than the beneficiary. For example, a third-party trust may be established by a grandparent for a grandchild. Be alert for situations where a trust is allegedly established with the assets of a third party, but in reality is created with the beneficiary's property. In such cases, the trust is a grantor trust, not a third-party trust.

18. Fiduciary Duty

Fiduciary duty is the obligation of the trustee in dealing with the trust property and income. The trustee holds the property solely for the benefit of the beneficiary with due care. The trustee owes duties of good faith and loyalty to exercise reasonable care and skill, to preserve the trust property and make it productive and to account for it. Because the trustee is a fiduciary does not mean that he/she is an agent of the beneficiary. The person who establishes a trust should not be confused with the grantor, who provides the assets that form the principal of the trust.

19. Revoke

The grantor of a trust may have the power or authority to **revoke** (i.e., reclaim or take back) the assets deposited in the trust. If the individual at issue (a claimant, recipient, or deemor (see SI 01310.127)) is the grantor of the trust, the trust will generally be a resource to that individual if that individual can revoke the trust and reclaim the trust assets. However, if a third party is the grantor of the trust, the trust will not be a resource to the beneficiary of the trust merely because the trust is revocable by the grantor. In a third party trust situation, the focus should be on whether the individual (claimant, recipient, or deemor) can terminate the trust and obtain the assets for him or herself.

20. Terminate

In rare instances, a trustee or beneficiary of a third-party trust (i.e., a trust established with the assets of a third party) can **terminate** (i.e., end) a trust and obtain the assets for him or herself.

C. Policy - Accounts That May Or May Not Be Trusts

1. Accounts That Are Not Trusts

The following accounts and instruments are similar to trusts and may be titled as trusts, but should generally not be developed under these instructions for SSI purposes:

a. Conservatorship Accounts

These accounts, established by a court, are usually administered by a court-appointed conservator for the benefit of an individual. They differ from a trust in that the "beneficiary" retains ownership of all of the assets, although in some cases they may not be available for support and maintenance. (See SI 01140.215 for instructions pertaining to conservatorship accounts.)

b. Patient Trust Accounts

Many nursing homes, institutions and government social services agencies maintain so called “patient trust accounts” for individuals to provide them with toiletries, cigarettes, candy and sundries. Although titled trust accounts, they are not; they are agency accounts. The individual owns the money in the account, which the institution is merely holding for him/her and making disbursements on his/her behalf as necessary. (See SI 01120.020, SI 00810.120 and GN 00603.020 for information on transactions involving agents.)

2. “In Trust For” Financial Accounts

These accounts may or may not be trusts depending on the circumstances in the individual case. Examples of the most common situations follow:

a. Representative Payee Accounts

One of the most common types of “in trust for” accounts are representative payee accounts. These accounts are not trusts, but improperly titled accounts that are misleading as to the actual owner of the funds. If a representative payee deposits current or conserved benefits in an account, the account must be titled to reflect the beneficiary's ownership interest. (See SI 01120.020 and SI 00810.120 for instructions pertaining to agency accounts. See GN 00603.010 for instructions pertaining to titling of accounts established by representative payees.)

b. Totten Trusts

An “in trust for” financial institution account may be a Totten trust if an individual deposits his/her own funds in an account and holds the account as owner for the benefit of another individual(s).

D. Policy - Trusts As Resources

1. Trusts Which Are Resources

a. Trust Principal is a Resource

If an individual (claimant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

Additionally, if the individual can sell his or her beneficial interest in the trust, that interest is a resource. For example, if the trust provides for payment of \$100 per month to the beneficiary for spending money, absent a prohibition to the contrary (e.g., a valid spendthrift clause, see SI 01120.200B.16.), the beneficiary may be able to sell the right to future payments for a lump-sum settlement.

b. Authority to Revoke or Terminate Trust or Use Assets

- **Grantor**

In some cases, the authority to revoke a trust is held by the grantor. Even if the power to revoke a trust is not specifically retained, a trust may be revocable in certain situations. (See SI 01120.200B.8. and SI

01120.200D.3. for information on grantor trusts.) Additionally, State law may contain presumptions as to the revocability of trusts. If the trust principal reverts to the grantor upon revocation and can be used for support and maintenance, then the principal is a resource to the grantor.

- **Beneficiary**

A beneficiary generally does not have the power to terminate a trust. However, the trust may be a resource to the beneficiary in the rare instance where he/she has the authority to terminate the trust and gain access to the trust assets. In addition, the beneficiary may, in rare instances, have the authority under the trust to direct the use of the trust principal. (The authority to control the trust principal may be either specific trust provisions allowing the beneficiary to act on his/her own or by permitting the beneficiary to order actions by the trustee.) In such a case, the beneficiary's equitable ownership in the trust principal and his/her ability to use it for support and maintenance means it is a resource.

The beneficiary's right to mandatory periodic payments **may be** a resource equal to the present value of the anticipated string of payments unless a valid spendthrift clause (see SI 01120.200B.16.) or other language prohibits anticipation of payments.

While a trustee may have discretion to use the trust principal for the benefit of the beneficiary, the trustee should be considered a third party and not an agent of the beneficiary, i.e., the actions of the trustee are not the actions of the beneficiary, unless the trust specifically states otherwise.

- **Trustee**

Occasionally, a trustee may have the legal authority to terminate a trust. However, the trust is not a resource to the trustee unless he/she becomes the owner of the trust principal upon termination. The trustee should be considered a third party. Although the trustee has access to the principal for the benefit of the beneficiary, this does not mean that the principal is the trustee's resource. If the trustee has the legal authority to withdraw and use the trust principal for his/her **own** support and maintenance, the principal is the trustee's resource for SSI purposes in the amount that can be used.

- **Totten trust**

The creator of a Totten trust has the authority to revoke the financial account trust at any time. Therefore, the funds in the account **are** his/her resource.

2. Trusts Which Are Not Resources

If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his/her own support and maintenance, the trust principal is **not** the individual's resource for SSI purposes.

The revocability of a trust and the ability to direct the use of the trust principal depend on the terms of the trust agreement and/or on State law. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance (e.g., it contains a valid spendthrift clause, see SI 01120.200B.16.), it is **not** a resource.

3. Revocability of Grantor Trusts

Some States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is **revocable** regardless of language in the trust to the contrary.

However, many of these States recognize that the grantor cannot unilaterally revoke the trust if there is a named "residual beneficiary" in the trust document who would, for example, receive the principal upon the grantor's death or the occurrence of some other specific event.

Under the modern view, residual beneficiaries are assumed to be created, absent evidence of a contrary

intent, when a grantor names heirs, next of kin, or similar groups to receive the remaining assets in the trust upon the grantor's death. In such case, the trust is considered to be irrevocable.

NOTE: The policies regarding grantor trusts may or may not apply in your particular State. Field offices should consult regional POMS or your regional office program staff if in doubt.

E. Policy - Disbursements From Trusts

1. Trust Principal Is Not a Resource

If the trust principal is not a resource, disbursements from the trust may be income to the SSI recipient, depending on the nature of the disbursements. Regular rules to determine when income is available apply.

a. Disbursements Which Are Income

Cash paid directly from the trust to the individual is unearned income.

Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550 and SI 01110.210).

For example, if a trust buys a car for the beneficiary and the beneficiary's spouse already has a car which is excluded for SSI, the second car is income in the month of receipt since it would not be an excluded resource in the following month.

b. Disbursements Which Result in Receipt of In-kind Support and Maintenance

Food or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule. (See SI 00835.300 for instructions pertaining to the PMV rule. See SI 01120.200F. for rules pertaining to a home.)

c. Disbursements Which Are Not Income

Disbursements from the trust other than those described in SI 01120.200E.1.a. and SI 01120.200E.1.b. are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc (see SI 00815.400).

Disbursements made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if those items would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550 and SI 01110.210).

For example, a trust purchases a computer for the beneficiary. Since the computer would be excluded from resources as household goods in the following month, the computer is not income (see SI 01130.430).

2. Trust Principal Is a Resource

a. Disbursements to or for the Benefit of the Beneficiary

If the trust principal is a resource to the individual, disbursements from the trust principal received by the individual or that result in receipt of something by the individual are not income, but conversion of a resource. (However, trust earnings are income. See SI 01110.100 for instructions pertaining to conversion of resources from one form to another. See SI 01120.200G.2. for treatment of income when the trust principal is a resource and SI 00830.500 for treatment of dividends and interest as income).

b. Disbursements Not to or for the Benefit of the Beneficiary

If the trust is established with the assets of an individual or his or her spouse and the trust (or portion of the trust) is a resource to the individual:

- any disbursement from the trust (or from that portion of the trust that is a resource) that is not made to, or for the benefit of, the individual is considered a transfer of resources as of the date of the payment and is not considered income to the individual (see SI 01150.110); and
- any foreclosure of payment (an instance in which no disbursement can be made to the individual under any circumstances) is considered to be a transfer of resources as of the date of foreclosure. Such foreclosure is not considered income to the individual.

F. Policy - Home Ownership/Purchase Of A Home By A Trust

1. Home as a Resource

If the trustee of a trust which is not a resource for SSI purposes purchases and holds title to a house as a home for the beneficiary, the house would not be a resource to the beneficiary. It would also not be a resource if the beneficiary moved from the house. The trust holds legal title to the house, therefore, the eligible individual would be considered to be living in his/her own home based on having an “equitable ownership under a trust.”

If the trust is a resource to the individual, the home is subject to exclusion under SI 01130.100.

2. Rent-Free Shelter

An eligible individual does not receive in-kind support and maintenance (ISM) in the form of rent-free shelter while living in a home in which he/she has an ownership interest. Accordingly, an individual with “equitable home ownership under a trust” (see SI 01120.200F.1.) does not receive rent-free shelter. Also, because we consider such an individual to have an ownership interest, payment of rent by the beneficiary to the trust has no effect on the SSI payment.

3. Receipt of Income from a Home Purchase

Since the purchase of a home by a trust for the beneficiary establishes an equitable ownership interest for the beneficiary of the trust, the purchase results in the receipt of shelter in the month of purchase that is income in the form of ISM (see SI 00835.400). This ISM is valued at no more than the presumed maximum value (PMV).

Even though the beneficiary has an ownership interest in the home and, if living in the home, does not receive ISM in the form of rent-free shelter, purchase of the home or payment of the monthly mortgage by the trust is a disbursement from the trust to a third party that results in the receipt of ISM in the form of shelter. (See SI 01120.200E.1.b.)

a. Outright Purchase of a Home

If the trust, which is not a resource, purchases the home outright and the individual lives in the home in the month of purchase, the home would be income in the form of ISM and would reduce the individual's payment no more than the PMV **in the month of purchase only**, regardless of the value of the home. (See SI 01120.200E.1.b.)

b. Purchase by Mortgage or Similar Agreement

If the trust, which is not a resource, purchases the home with a mortgage and the individual lives in the home in the month of purchase, the home would be ISM in the month of purchase. Each of the subsequent monthly mortgage payments would result in the receipt of income in the form of ISM to the beneficiary living in the house, each valued at no more than the PMV (see SI 01120.200E.1.b.).

c. Additional Household Expenses

If the trust pays for other shelter or household operating expenses, these payments would be income in the form of ISM in the month the individual has use of the item (see SI 00835.350). Countable shelter expenses are listed at SI 00835.465D.

If the trust pays for improvements or renovations to the home, e.g., renovations to the bathroom to make it handicapped accessible or installation of a wheelchair ramp or assistance devices, etc., the individual does not receive income. Disbursements from the trust for improvements increase the value of the resource and, unlike household operating expenses, do not provide ISM. (See SI 01120.200E.1.c.).

G. Policy - Earnings/Additions To Trusts

1. Trust Principal Is Not a Resource

a. Trust Earnings

Trust earnings are not income to the trustee or grantor **unless** designated as belonging to the trustee or grantor under the terms of the trust; e.g., as fees payable to the trustee or interest payable to the grantor. Trust earnings are not income to the SSI claimant or recipient who is a trust beneficiary **unless** the trust directs, or the trustee makes, payment to the beneficiary.

b. Additions to Principal

Additions to trust principal made directly to the trust are not income to the grantor, trustee or beneficiary. Exceptions to this rule are listed in SI 01120.200G.1.c. and SI 01120.200G.1.d.

c. Exceptions

Certain payments are non-assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. They may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. Non-assignable payments include:

- Temporary Assistance to Needy Families (TANF)/Aid to Families with Dependent Children (AFDC);

- Railroad Retirement Board-administered pensions;
- Veterans pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security title II and SSI payments; and
- Private pensions under the Employee Retirement Income Security Act (ERISA) (29 U.S.C.A. section 1056(d)).

d. Assignment of Income

A legally assignable payment (see SI 01120.200G.1.c. for what is **not** assignable), that is assigned to a trust, is income for SSI purposes **unless** the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust as a result of a court order, are not income. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

2. Trust Principal Is a Resource

a. Trust Earnings

Trust earnings are income to the individual for whom trust principal is a resource, unless the terms of the trust make the earnings the property of another. (See SI 00810.030 for when income is counted.)

b. Additions to Principal

Additions to principal may be income or conversion of a resource, depending on the source of the funds. If funds from a third party are deposited into the trust, the funds are income to the individual. If funds are transferred from an account owned by the individual to the trust, the funds are not income, but conversion of a resource from one account to another.

H. Policy - Medicaid Trusts And Medicaid Qualifying Trusts

1. Medicaid Trusts

a. General

Medicaid trusts are trusts established by an individual on or after 8/11/93, that are made up, in whole or in part, of assets (income and/or resources) of that individual. These trusts are created by a means other than a will. A trust is considered established by an individual if it was established by:

- the individual;
- the individual's spouse; or
- a person, including a court or administrative body with legal authority to act for the individual or spouse or who acts at the direction or request of the individual or spouse.

Medicaid trusts may contain terms such as "OBRA 1993 pay-back trust," "trust established in accordance with 42 USC 1396" or may be mislabeled as an "MQT." The Medicaid trust law affects the individual's eligibility for **Medicaid only**, and has no effect on the SSI income and resource

determination.

See SI 01730.048 for additional information and procedures for coding and referring these trusts to the State Medicaid agencies.

b. State Reimbursement Provisions

Medicaid trusts generally have a payback provision stating that upon termination of the trust, or the death of the beneficiary, the State Medicaid agency will be reimbursed for medical assistance paid on behalf of the individual. According to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt, unless the trust instrument reflects a clear intent that the State be considered a beneficiary, rather than a mere creditor. This law may or may not apply in your State so consult your regional instructions or regional office.

2. Medicaid Qualifying Trusts (MQT)

An MQT is a trust or similar legal device established prior to 10/1/93, other than by a will, under which the grantor (or spouse) may be the beneficiary of all or part of the payments from the trust. The amount from the MQT considered available as a resource to the individual for Medicaid purposes is the maximum amount of payments that may be distributed under the terms of the trust to the individual by the trustee. This **Medicaid-only** provision has no effect on the income and resource determination for SSI purposes.

NOTE: An MQT must have been established prior to 10/1/93, when section 1902(k) of the Social Security Act was repealed.

I. Policy - Representative Payees and Trusts

If a trust was established by a representative payee with an underpayment or conserved funds, see GN 00602.075 for additional rules that may apply.

Also, if a trust was established with a *Zebley v. Sullivan* underpayment, see SI 02008.011E. and SI 02008.011H. concerning notices *Zebley* recipients received concerning establishing trusts with *Zebley* underpayments.

J. Procedure - Development And Documentation of Trusts

1. Written Trust

a. Review the Trust Document

Obtain a copy of the trust document and related documents and, if possible, review it to determine whether the:

- individual (claimant, recipient or deemor) is grantor, trustee, or beneficiary;
- trust is revocable or can be terminated and, if so, whether the individual has authority to revoke or terminate the trust and to use the principal for his/her own support and maintenance;
- individual has unrestricted access to the trust principal;
- trust provides for payments to the individual or on his/her behalf;
- trust principal generates income (earnings) and, if so, whether the individual has the right to any

of that income;

- trust contains a spendthrift clause that prohibits the voluntary and involuntary alienation of any trust payments; and
- trust is receiving payments from another source.

b. Consult Regional Instructions

Consult any regional instructions which pertain to trusts to see if there are State laws governing revocability or irrevocability, State laws governing grantor trusts or other State law issues to consider.

c. Referral to Regional Office

If there are any unresolved issues that prevent you from determining the resource status of the trust, or there are issues for which you believe you need a legal opinion, follow your regional instructions or consult with your RO program staff. Many issues can be resolved over the phone. If necessary, they will tell you to refer the document with any relevant information or statements to your Assistant Regional Commissioner, Management and Operations Support (ARC, MOS) for possible referral to the Regional Chief Counsel.

NOTE: When referring a trust to the RO, make sure to include all documentation and identify the applicant/recipient, source of funds/assets and relevant relationships of others named in the trust.

2. Oral Trusts

a. State Recognizes as Binding

If the State in question recognizes oral trusts as binding (see regional instructions):

- record all relevant information;
- obtain from all parties signed statements describing the arrangement; and
- unless regional instructions specify otherwise, refer the case, through the ARC, MOS, to the Regional Chief Counsel.

b. State Does Not Recognize as Binding

If the State does not recognize oral trusts as binding (see regional instructions), see SI 01120.020 if an agency relationship (i.e., a person is acting as an agent of the individual) is involved.

3. Determining the Nature and Value of Trust Property (Written or Oral Trust)

Apply the policies in SI 01120.200D. and in any regional instructions to determine whether the trust is a resource.

NOTE: When you are unsure about any relevant issue, do not make a determination, but discuss the case with the RO programs staff. They will refer the case to the Regional Chief Counsel, if necessary.

When trust principal is a resource and its value is material to eligibility, determine the nature of the principal and establish its value by:

- contacting the holder of the funds, if cash; or

- developing as required under the applicable POMS section for the specific type(s) of property, if the trust principal is not cash.

4. Documentation – Trust Evidence

Record all information used in determining whether the trust is a resource or creates income. Record your conclusions on the DROC (and subsequently lock the DROC), or the EVID screen. When a certified electronic folder exists, fax the following into Section D. (Non-Disability Development) of the Electronic Disability Collect System (EDCS):

- a copy of the trust document;
- copies of any signed agreements between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned to the trust;
- records of payments from the trust, as necessary; and
- any other pertinent documents.

In the case of a paper folder, fax these materials into the NonDisability Repository for Evidentiary Documents (NDRed), or record any development electronically in EVID.

5. Medicaid Trust/Medicaid Qualifying Trust Determination

Consult SI 01730.048 regarding Medicaid trusts and MQTS and the procedure to follow.

6. Systems Input -- Trusts

Make the appropriate entries to the MSSICS ROTH (other resources) screen. (See MSOM MSSICS 013.011.) You may also make a CG field entry (RE06 or RE07) per SM 01301.820. On non-MSSICS cases or where otherwise warranted, use Remarks (see MSSICS 023.003).

7. Posteligibility Change in Resource Status

If a trust was previously determined not to be a resource, but because of policy clarifications you now determine that it is a resource (or vice versa), reopen the prior determination subject to the rules of administrative finality. (See the overpayment waiver rules in SI 02260.001)

K. Procedure - Discussing SSI Trust Policy With The Public

1. What to Discuss

When you discuss SSI trust policy with a member of the public, consider the following points in your discussion, as applicable:

- a. Do not advise a claimant, recipient, representative payee, or legal guardian on how to invest funds or hold property in trust. Remember that you cannot provide the kind of financial guidance that attorneys, accountants, and financial advisors are usually able to provide. Do not attempt to provide legal advice.

Never recommend to an individual that he/she set up a trust or suggest that you think a trust would be beneficial to him/her. Be aware that by not knowing all of the legal implications of such an action, you

could endanger their eligibility for other programs or benefits (e.g., Medicaid).

Be aware that a trust allowing eligibility for SSI does not mean that the trust will allow eligibility for Medicaid. Suggest that the individual check with the State Medicaid office.

- b. Explain how trusts affect SSI eligibility and payment amount, in general terms or in terms specific to a particular trust arrangement. In the latter case, examine the trust document or a draft of the proposed trust provisions, as necessary. Do not, however, advocate specific changes to a trust.
- c. Remember that an individual's ability to access and use the trust principal depends on the terms of the trust document and on State law. Since State laws in this area may be complex, discuss the individual's documents with your Regional Office if you are unable to make a determination.

2. Use “SSI Spotlight” on Trusts

Consider giving the individual a copy of the “SSI Spotlight” on trusts. A copy of the Spotlight is available on the Internet at: <http://www.socialsecurity.gov/ssi/spotlights/spot-trusts.htm> .

L. Examples of Trusts

The following examples are illustrative of situations that you may encounter. You should not rely solely on the analysis given 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 the example. You can refer to regional instructions, if any, and consult your Regional Office, as necessary. Also you should be aware of the implications the trust may have for Medicaid eligibility. SI 01730.048 contains instructions on trusts and Medicaid.

1. Trust Principal Is a Resource

a. Situation

The claimant is the beneficiary of a trust established on her behalf by her mother, who is her legal guardian. The money used to establish the trust was inherited by the claimant from her grandmother. The mother is also the trustee. The trust document clearly indicates that the trust may be revoked at any time by the grantor.

b. Analysis

Since the grantor may revoke the trust at any time, the trust is a resource to the grantor. In this situation, the child is the grantor (see SI 01120.200B.2.) and the trust is her resource. This is the case because the actions of the mother, as her legal guardian, are as an agent for the child.

2. Trust Principal Is Not a Resource

a. Example 1

• Situation

The SSI recipient is the beneficiary of an irrevocable trust created by her deceased parents. Her brother is the trustee. The terms of the trust give the brother full discretionary power to withdraw funds for his sister's educational expenses. The trustee uses these funds to pay the recipient's tuition and room and

board at a boarding school. The trust document also specifies that \$25 of monthly interest income be paid into a separate account that designates the recipient as owner. She has the right to use these funds in any way she wishes. The trust also contains a valid spendthrift clause that prohibits the beneficiary from transferring her interest in the trust payments prior to receipt.

- **Analysis**

Since the recipient, as beneficiary, has no authority to terminate the trust established with her parents' assets or access the principal directly, the trust principal is not her resource. While trust disbursements on a beneficiary's behalf may be income, the disbursements for tuition are not income since they do not provide food or shelter in any form. However, the trust disbursements for room and board are in-kind support and maintenance valued under the PMV rule. The \$25 deposits of trust earnings into the recipient's personal account are income when the deposit is made and are resources to the extent retained into the following month. The beneficiary's right to the stream of \$25 monthly payments is not a resource because she cannot sell or assign them prior to receiving them because of the valid spendthrift clause. (See SI 01120.200B.16. for a definition of spendthrift clauses.)

b. Example 2

- **Situation**

The claimant is a minor and the beneficiary of an irrevocable trust established with the child's annuity payment by his father, who is his representative payee. The father is also the trustee. The claimant's brothers and sisters will become the trust beneficiaries in the event of the claimant's death. In the State where the claimant lives, the grantor can revoke the trust if he is also the sole beneficiary. The brothers and sisters are "residual beneficiaries" who become the beneficiaries upon the prior beneficiary's death or occurrence of another event.

- **Analysis**

The trust principal is not a resource to the claimant. Under the general rule in SI 01120.200D.2., the trust document provides that the trust is irrevocable. Although the claimant can be considered the grantor of the trust (because the actions of the father as payee are as an agent of the claimant), the trust is not revocable under the rule for grantor trusts in SI 01120.200D.3. because the claimant is not the sole beneficiary.

3. Principal Held in a Grantor Trust Is a Resource

a. Situation

The trust beneficiary, a 17-year-old SSI recipient, received a \$125,000 judgment as the result of a car accident that left him disabled. His mother, as his legal guardian, placed the money in an irrevocable trust for the sole benefit of the recipient with the recipient's sister as trustee. The trustee has absolute discretion as to how the trust funds are to be spent and the trust has a prohibition against the trustee spending an amount of funds that would make the recipient ineligible for Federal or State assistance payments. Applicable State law recognizes the principle that if an individual is both the grantor of a trust and the sole beneficiary, the trust is revocable, regardless of language in the trust to the contrary.

b. Analysis

Since the recipient's mother, as his legal guardian, established the trust with funds that belonged to the recipient, it is treated as if the recipient established the trust himself. Therefore, he is considered the grantor of the trust. Since he is also the sole beneficiary of the trust, the trust is revocable and is the

recipient's resource, regardless of the language in the trust document. The recipient is ineligible due to excess resources.

4. Trust Requires Legal Review

a. Example 1

- **Situation**

The SSI claimant is the beneficiary of a revocable trust established with her father's assets for her future care. Her father is her legal guardian. The claimant, as trust beneficiary, has no authority to terminate the trust. The CR reviews the trust document to see if the claimant, through her legal guardian, has unrestricted access to the trust principal, whether the trust provides for payments on her behalf or whether the trust principal generates income.

The trust document is very complex and the situation is further complicated by the fact that the claimant's father is grantor, trustee, and her legal guardian. The CR cannot determine whether the trust principal is available to the trust beneficiary through the grantor/trustee.

- **Analysis**

Because it is not clear from the trust document whether the father, as legal guardian, "stands in the claimant's shoes" and controls the trust, the CR consults with the RO staff for possible referral through the ARC, MOS, to the Regional Chief Counsel for an opinion.

b. Example 2

- **Situation**

The recipient is the beneficiary of an irrevocable trust. The trust document indicates that the recipient is the sole named beneficiary and also the grantor of the trust. The document also indicates that there are unnamed residual beneficiaries, the recipient's "heirs."

- **Analysis**

The adjudicator consults regional instructions on State law pertaining to grantor trusts. According to those instructions, a grantor trust may be a resource to the recipient, but the State law is unclear about the effect of the unnamed residual beneficiaries. The adjudicator consults with the RO staff for possible referral through the ARC, MOS, to the Regional Chief Counsel.

M. References

- Trusts Established with the Assets of an Individual on or After 1/1/00, SI 01120.201-SI 01120.204
- Conservatorship Accounts, SI 01140.215
- Agency Relationships, SI 01120.020, SI 00810.120
- Checking and Savings Accounts, SI 01140.200
- Medicaid Qualifying Trusts, SI 01730.048
- When to Charge ISM from Third Party Vendor Payments, SI 00835.360
- Transfer of Resources for Less Than Fair Market Value, SI 01150.100 ff

- Excluded Resources, SI 01110.210

To Link to this section - Use this URL:

<http://policy.ssa.gov/poms.nsf/links/0501120200>

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 - 01/13/2009



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TN 40 (01-09)

SI 01120.201 Trusts Established with the Assets of an Individual on or after 1/1/00

Citations:

Social Security Act as amended in 1999, Section 1613(e); 42 U.S.C. 1382b; P.L. 106-169, Section 205

Topic	Reference
Background – Trusts	SI 01120.201A
Definitions – Trusts	SI 01120.201B
Policy--General	SI 01120.201C
Policy--Treatment Of Trusts	SI 01120.201D
Policy—Relationship To Transfer Penalty (Irrevocable Trust)	SI 01120.201E
Policy—For The Benefit Of/On Behalf Of/For The Sole Benefit Of An Individual	SI 01120.201F
Policy—Legal Instrument Or Device Similar To A Trust	SI 01120.201G
Policy--Burial Trusts	SI 01120.201H
Policy--Disbursements From Trusts	SI 01120.201I
Policy--Earnings/Additions To Trusts	SI 01120.201J
References	SI 01120.201K

A. Background

1. Legislative Enactment

On 12/14/99, the President signed into law the Foster Care Independence Act of 1999 (P.L. 106-169). Section 205 of this law provides, generally, that trusts established with the assets of an individual (or spouse) will be considered a resource for Supplemental Security Income (SSI) eligibility purposes. It also addresses when earnings or additions to trusts will be considered income. The legislation also provides **exceptions to the statutory rules in Section 1613(e) of the Act** for counting trusts as resources and income (see SI 01120.203). These provisions are effective for trusts established on or after 1/1/00.

See SI 01120.200 for trusts established prior to 1/1/00, trusts established with the assets of third parties, and trusts that meet an exception to the statutory provisions of Section 1613(e) but meet the definition of a resource in SI 01110.100B.1.

2. Case Processing Alert

Trusts are often complex legal arrangements involving State law and legal principles that a claims representative may not be able to apply without legal counsel. Therefore, the following instructions may only be sufficient for you to recognize that an issue is present that should be referred to your 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.

B. Definitions -- Trusts

1. Corpus or Principal

The **corpus or principal** of the trust is all property and other interests held by the trust, including accumulated earnings and any other additions, such as new deposits, to the trust after its establishment. However, do not consider earnings or additions to be included in the corpus in the month they are credited or otherwise transferred to the trust.

NOTE: Earnings or additions are not included in the corpus in the month that they are credited or transferred into the trust because they are considered under income counting rules in that month (see SI 00810.000).

2. Asset

For purposes of this section, an **asset** is **any income or resource** of the individual or the individual's spouse including:

- income excluded under section 1612(b) of the Social Security Act (the Act) (See SI 00830.099 and SI 00820.500 for income exclusions that are found in the Act);
- resources excluded under section 1613 of the Act (see SI 01130.050 for resource exclusions that are found in the Act);
- any other payment or property to which the individual or individual's spouse is entitled, but does not receive or have access to because of action by:
 - the individual or individual's spouse;
 - a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse; or
 - a person or entity (including a court) acting at the direction of, or on the request of, the individual or spouse.

3. Trust Income

For purposes of this section, **trust income** includes any earnings of, and additions to, a trust established by an individual:

- of which the individual is a beneficiary;
- to which the new trust provisions apply; and
- in the case of an irrevocable trust, if any circumstances exist under which payment from the earnings or additions could be made to or for the benefit of the individual.

4. Spouse

For the purposes of this section, the individual's **spouse** is the individual we consider to be the spouse for normal SSI purposes (see SI 00501.150B.).

5. Legal Instrument or Device Similar to a Trust

This is a legal instrument, device, or arrangement, which may not be called a trust under State law, but is similar to a trust. That is, it involves

- a grantor (see SI 01120.200B.2.) or individual who provides the assets to fund the legal instrument, device, or arrangement (see SI 01120.201B.7.).
- who transfers property (or whose property is transferred by another).
- to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section).

The grantor makes the transfer with the intention that it be held, managed or administered by the individual or entity for the benefit of the grantor or others. A legal instrument or device similar to a trust can include (but is not limited to) escrow accounts, investment accounts, conservatorship accounts (SI 01140.215), pension funds, annuities, certain Uniform Transfers to Minors Act (UTMA) accounts and other similar devices managed by an individual or entity with fiduciary obligations.

6. Trust Established by a Will

A **trust established by a will** or a **testamentary trust** (see SI 01120.200B.15.) is a trust established under the terms of a will and which is only effective upon the individual's death. A trust to which property is transferred during the life of the individual who created the will is not a trust established by a will, even if the will transfers additional property to that trust. Field offices should obtain and review a copy of the last will and testament.

7. 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.

NOTE: The grantor (see SI 01120.200B.2.) named in the trust document who provided the assets funding the trust and the individual whose actions established the trust may not be the same. The trust may name the individual (e.g. a parent or legal guardian) who physically took action to establish the trust rather than the individual who provided the trust assets. This distinction is important, especially in developing Medicaid trust exceptions in SI 01120.203.

8. Foreclosure

For purposes of this section, **foreclosure** is an event that bars or prevents access to, or payment from, a trust to an individual now or in the future.

9. Other Definitions

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

C. Policy – Certain Trusts Established on or After 1/1/2000

1. Effective Date

- The trust provisions of P.L. 106-169 apply to certain trusts **established on or after 1/1/00**.
- The trust provisions of P.L. 106-169 do not apply to trusts established with the assets of an individual prior to 1/1/00, regardless of the individual's filing date. Trusts established prior to 1/1/00 are treated under instructions in SI 01120.200.
- A trust established with the assets of an individual (see SI 01120.201B.7.) prior to 1/1/00 but added to or augmented on or after 1/1/00 is still considered to be established prior to 1/1/00. (However, additions to such a trust may be considered a transfer of resources, see SI 01150.100 ff.)

Example 1: Emily Lombardozi, age 67, has a settlement agreement as a result of an automobile accident in 1994 in which she was paralyzed. Under the agreement, she receives a lump-sum payment in March of each year. Since 1995, the payments have been paid into an irrevocable trust. The payments received in 3/00 and following are not considered to be establishment of a trust for purposes of these provisions. They are additions to a trust established prior to 1/1/00 and are evaluated under SI 01120.200.

Example 2: Same situation as example 1 except that Ms. Lombardozi receives an inheritance of \$3,000 that she deposits into the trust. The trust is evaluated under the rules in SI 01120.200, but the deposit of the inheritance is evaluated as a transfer of resources under SI 01150.100 ff.

- The transfer of an individual's property to an existing trust is considered to be the establishment of a trust subject to the provisions of this section if:
 - the transfer occurs on or after 1/1/00; and
 - the corpus of the trust does not contain property transferred from the individual prior to 1/1/00.

Example: Robert Gates is a disabled child. His grandmother established an irrevocable \$2,000 trust, of which he is the beneficiary, in 12/97. Robert won a lawsuit in 2/00 and the money from the judgment (\$50,000) was placed in the trust his grandmother established. Since Robert transferred all of the money in the trust after 1/1/00, deposit of the judgment funds (\$50,000) is considered establishment of a trust on or after 1/1/00 for purposes of these provisions. However, the funds deposited by his grandmother are not subject to these provisions since they are funds of a third party and are subject to evaluation under SI 01120.200.

- These provisions do not apply to trusts established **solely** with the assets of a third party, either before or after 1/1/00. (See SI 01120.200 for development.) However, if at any point in the future the individual's assets are added to such a trust, the trust then becomes subject to development under SI 01120.201-SI 01120.204.

2. Applicability

a. Trusts to Which This Provision Applies

Except as provided in SI 01120.203A., this section applies to trusts “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. (See SI 01120.201B.2. for a definition of an asset.)

b. Examples

- An individual who was the plaintiff in a medical malpractice lawsuit is the beneficiary of a trust. The trust states that the defendant doctor's insurance company established it so the settlement funds were never paid to the plaintiff directly. However, for SSI eligibility purposes, the trust was **established with the assets of the individual** because the trust contains assets of the individual (see SI 01120.201B.2.) which he/she did not receive because of action on behalf of, in the place of, at the direction of, or on the request of, the individual.
- Likewise, the same result would occur if a court had ordered the settlement to be placed in a trust, even if the individual was a child and whether State law did or did not require the settlement to be placed in a trust for the child.
- A disabled SSI recipient over age 18 receives child support which is assigned by court order directly into the trust. Since the child support is the SSI recipient's income, the recipient is the grantor of the trust and the trust is a resource unless it meets an exception in SSI 01120.203. If the trust meets an exception and is not a resource, the child support is income unless it is irrevocably assigned to the trust, per SI 01120.201J.1.d. In this example, the court ordered the child support to be paid directly into the trust, so we consider it to be irrevocably assigned to the trust.

c. Individual's Assets Form Only a Part of the Trust

In the case of an irrevocable trust where the assets of the individual (or the individual's spouse) were transferred along with the assets of another individual(s), these provisions apply to the portion of the trust attributable to the assets of the individual (or spouse). Thus, in determining countable resources in the trust, you must prorate any amounts of resources, based on the proportion of the individual's assets in the trust.

Example: Jimmy Smith is an adult with cerebral palsy. His grandparents left \$75,000 in trust for him in their wills. Recently (after 1/1/00), Mr. Smith won an employment discrimination lawsuit and was awarded a \$1,500 judgment which was deposited into the trust his grandparents established. The \$1,500 of Mr. Smith's funds are subject to these provisions and could be a resource if payment could be made to or for Mr. Smith's benefit (see SI 01120.201D.2.). The \$75,000 deposited by his grandparents is not subject to these provisions (see SI 01120.200).

d. Application of the Trust Provisions

These provisions apply to trusts without regard to:

- the purpose for which the trust was established;
- whether the trustees have or exercise any discretion under the trust;
- any restrictions on when or whether distributions may be made from the trust; or
- any restrictions on the use of distributions from the trust.

This means that any trust established with the assets of an individual on or after 1/1/00 will be subject to these provisions and may be counted in determining SSI eligibility. No clause or requirement in the trust, no matter how specifically it applies to SSI or other Federal or State program (i.e., **exculpatory clause**), precludes a trust from being considered under the rules in this section. An exculpatory clause is one that attempts to exempt the trust from the applicability of these rules. For example, an exculpatory clause would be one that states, "Section 1613(e) of the Social Security Act does not apply to this trust." Such a statement has no effect as to whether these rules apply to the trust.

NOTE: While exculpatory clauses, use clauses, trustee discretion and restrictions on distributions, etc. do not affect a trust's countability, they do have an impact on how the various components are treated. For example, a prohibition in a discretionary irrevocable trust that limits the trustee to distributing no more than \$10,000 to an individual has no effect on whether or not the trust is countable, but does affect the amount that is countable.

3. Income

For purposes of the SSI program, income includes any earnings or additions to a trust established with the assets of an individual: of which the individual is a beneficiary; and

- which is a resource under these trust provisions; and
- in the case of an irrevocable trust, if any circumstances exist under which payment from the earnings or additions could be made to or for the benefit of the individual.

(See SI 01120.201J. for additional income instructions.)

D. Policy--Treatment Of Trusts

1. Revocable Trusts

a. General Rule Revocable Trusts

In the case of a revocable trust established with the assets of the individual, the entire corpus of the trust is a resource to the individual. However, certain exceptions may apply. (See SI 01120.203A.)

NOTE: The exceptions in SI 01120.203A. only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the definition of a resource is still countable and must be developed under SI 01120.200.

b. Relationship to Transfer Penalty

Any disbursements from a trust that is a resource that are not made to, or for the benefit of, the individual (SI 01120.201F.1.) are considered a transfer of resources. (See SI 01150.100 ff. for transfer of resource provisions.)

c. Example

Willie Jones is a young adult with mental retardation. Mr. Jones had a revocable trust established after 1/1/00. All but \$5,000 of funds in the trust had been spent on Mr. Jones' behalf. His mother files for SSI for him and is told that he is not eligible because of the money in the trust. His mother takes \$4,500 of the money and makes a down payment on a new car that she says she will use to transport Mr. Jones. However, she registers the car in her own name. Even though his mother will use the car to transport Mr. Jones, the purchase of the car is a transfer of resources since the car does not belong to him. (See SI 01120.201F.1. for policy on purchases for the benefit of the individual and titling of property.)

2. Irrevocable Trusts

a. General Rule – Irrevocable Trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how payments from the trust can be made. If payments from the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F.1.), the portion of the trust from which payment could be made that is attributable to the individual is a resource. However, certain exceptions may apply (see SI 01120.203).

b. Circumstance under Which Payment Can or Cannot be Made

In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. However, if a payment can be made to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. applies (i.e., the portion of the trust that is attributable to the individual is a resource, provided no exception from SI 01120.203 applies).

c. Examples

- An irrevocable trust provides that the trustee can disburse \$2,000 to, or for the benefit of, the individual out of a \$20,000 trust. Only \$2,000 is considered to be a resource under SI 01120.201D.2.a. The other \$18,000 is considered to be an amount which cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources rule in SI 01120.201E. and SI 01150.100 ff.
- If a trust contains \$50,000 that the trustee can pay to the beneficiary only in the event that he/she needs a heart transplant or on his/her 100th birthday, the entire \$50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.
- An individual establishes an irrevocable trust with \$10,000 of his assets. His parents contribute another \$10,000 to the trust. The trust only permits distributions to, or for the benefit of, the individual from the portion of the trust contributed by his parents. The trust is not subject to the rules of this section. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources rules in SI 01150.100 ff. (see also SI 01120.201E.). The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200.

3. Types of Payments from the Trust

a. Payments to an Individual

Payments are considered to be made **to the individual** when any amount from the trust, including amounts from the corpus or income produced by the trust, are paid directly to the individual or someone acting on his/her behalf, e.g., guardian or legal representative.

b. Payments on Behalf of/for the Benefit of an Individual

See SI 01120.201F.1. Also see SI 01120.201I. for more instructions on disbursements from trusts.

4. Placing Excluded Resources in a Trust

If an individual places an excluded resource in a trust and the trust is a countable resource, the resource

exclusion can still be applied to that resource. For example, if an individual transfers ownership of his/her excluded home to a trust and the trust is a countable resource, the home is still subject to exclusion under SI 01130.100. (See SI 01120.200F. for a discussion of ownership of a home by a trust and the effect of payment of home expenses by the trust.)

5. Trust Rules Versus Transfer Rules for Assets in a Trust

When an individual transfers assets to a trust, he/she generally transfers ownership of the asset to the trustee. In some cases, this could be considered a transfer of resources. In order to avoid both counting a trust as a resource and imposing a transfer of resources penalty for the same transaction, **the trust provisions take precedence over the transfer provisions**. If there are portions of the trust that cannot be counted as a resource, then the transfer rules may apply to that portion of the trust.

E. Policy—Relationship To Transfer Penalty (Irrevocable Trust)

1. Trust Established with Individual's Resources

a. Foreclosure of Payment

When all or a portion of the corpus of a trust, established with the assets of an individual (or spouse) with the individual's (or spouse's) resources, cannot be paid to, or for the benefit of, the individual, the portion which cannot be paid is considered a transfer of resources for less than fair market value.

The date of the transfer is considered to be:

- the date the trust was established; or
- if later, the date on which payment to the individual was foreclosed (i.e., an action was taken which precludes future payments from the trust).

In determining the value of the transfer, do not subtract the value of any disbursements made after the date determined above. Additions to the foreclosed portion of the trust after the above date may be new transfers that must be developed separately.

(See SI 01150.100 ff. for instructions related to transfers of resources.)

b. Payment to or for the Benefit of Another

When all or a portion of a trust, established with the individual's or spouse's resources, is a resource to the individual, if payment is made from the portion of the trust that is a resource to the individual to, or for the benefit of, another, then such a payment is a transfer of resources.

c. Examples

- **Example 1**

Millie Russell is an adult SSI recipient. Upon the death of her mother, Ms. Russell receives the proceeds of a life insurance policy in the amount of \$30,000. She uses the proceeds to establish an irrevocable trust solely to pay for the college expenses of her younger sister, in accordance with her mother's wishes. Receipt of the insurance proceeds is income to Ms. Russell. Establishment of the trust is a transfer of resources by Ms. Russell since payment to or for her own behalf is foreclosed by terms of the trust. Even though establishing the trust was her mother's wish, she was not legally obligated to do so. Her mother could have established a trust in her will or named the younger sister as beneficiary of the insurance

policy.

- **Example 2**

Same scenario as in Example 1 except that Ms. Russell establishes an irrevocable trust for the benefit of her sister and herself. The trust is a resource to Ms. Russell and makes her ineligible. The trust makes a \$5,000 payment to State College on behalf of her sister for tuition. The \$5,000 payment is a transfer of resources for Ms. Russell. Although counting the trust as a resource would make her ineligible, if the trust principal was spent down to the point where it would allow resource eligibility, we still have to consider the tuition payments or other payments to or on behalf of her sister made within the 36-month transfer look-back period. (See SI 01150.100 ff. for more information on the transfer penalty.)

2. Trust Established with Individual's Non-Resource Assets

a. What Is a Non-Resource Asset?

A **non-resource asset** is an asset that meets the definition in SI 01120.201B.2., but that does not meet the definition of a resource (SI 01110.100B.1. and SI 01110.115).

b. Transfer Penalty

When all or a portion of the corpus of a trust established by an individual or spouse with the individual's or spouse's non-resource assets is considered to be a resource under the trust provisions of P.L. 106-169, the transfer of resources penalty may apply in the following circumstances:

- If an event occurs which forecloses (see SI 01120.201B.8.) payment from the portion of the trust that is a resource, then such foreclosure is a transfer of resources as of the date that payment was foreclosed.
- If payment is made from the portion of the trust that is a resource to or for the benefit of another individual, then such payment is a transfer of resources.

In determining the value of the transfer, do not subtract the value of any disbursements made after the date of foreclosure. Additions, by the individual, to the foreclosed portion of the trust after the foreclosure date may be new transfers that must be developed separately.

(See SI 01150.100 ff. for instructions related to transfers of resources.)

NOTE: If a trust established with the individual's non-resource assets is not a resource to the individual, payments to or for the benefit of another person or foreclosure of payment to the individual is not subject to the transfer of resources penalty because the trust was not a resource. For example, an individual has non-resource assets of \$10,000 that she places into an irrevocable trust for the benefit of her daughter. The trust is not a resource to the individual because nothing can be paid to or for her benefit. It is also not a transfer of resources subject to the penalty provision since the trust is not a resource and the trust was established with non-resource assets. Likewise, payments from the trust to or for the benefit of the daughter are not transfers of resources.

F. Policy—For The Benefit Of/On Behalf Of/For The Sole Benefit Of An Individual

1. Trust Established for the Benefit of/on Behalf of an Individual

Consider a trust established **for the benefit** of an individual if payments of any sort from the corpus or

income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

Likewise, consider payments to be made **on behalf of**, or **to or for the benefit of** an individual, if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

For example, such payments could include purchase of food or shelter, or household goods and personal items that count as income. The payments could also include services for medical or personal attendant care that the individual may need which does not count as income.

NOTE: These payments are evaluated under regular income-counting rules. However, they do not have to meet the definition of income for SSI purposes to be considered to be made **on behalf of**, or **to or for the benefit of** the individual.

If funds from a trust that is a resource are used to purchase durable items, e.g., a car or a house, **the individual (or the trust) must be shown as the owner of the item** in the percentage that the funds represent the value of the item. When there is a deed or titling document, the individual (or trust) must be listed as an owner. Failure to do so may constitute evidence of a transfer of resources.

2. Trust Established for the Sole Benefit of an Individual

Consider a trust established **for the sole benefit of** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life. However, the trust may provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust.

NOTE: This should not routinely be questioned unless compensation is being provided to a family member or the adjudicator has some other reason to question reasonableness of the compensation.

Do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual. However, payments to a third party that result in the receipt of goods or services by the individual are considered for the sole benefit of the individual. The following disbursements or distributions are also permitted:

- reimbursement to the State, after the individual's death, for medical expenses paid on the individual's behalf (see SI 01120.203B.1.f. and SI 01120.203B.2.g.);
- upon death of the beneficiary, retention of a certain percentage of the funds in a "pooled trust" established through the actions of a nonprofit association in accordance with the trust agreement (see SI 01120.203B.2.); and
- transfer of the remaining trust corpus to a residual trust beneficiary after the individual's death.

G. Policy—Legal Instrument Or Device Similar To A Trust

1. What Is a Legal Instrument or Device?

Consider under trust rules a legal instrument, device, or arrangement, which may not be called a trust under State law, but which is similar to a trust. We will consider such an instrument, device or arrangement as a trust if:

- it involves a grantor (see SI 01120.200B.2.) who transfers property (or whose property is

transferred by another);

- the property is transferred to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section); and
- the grantor transfers the assets to be held, managed or administered by the individual or entity for the benefit of the grantor or others.

However, we will not consider these arrangements under trust rules if they would be counted as resources under regular SSI resource-counting rules.

2. Examples of a Legal Instrument or Device

A legal instrument or device similar to a trust can include (but is not limited to):

- escrow accounts;
- investment accounts;
- conservatorship accounts (SI 01140.215);
- pension funds (SI 01120.210);
- annuities;
- certain Uniform Transfers to Minors Act (UTMA) accounts; and
- other similar devices managed by an individual or entity with fiduciary obligations.

H. Policy--Burial Trusts

It is important to determine whether a burial trust was established with the individual's funds or funds that have been irrevocably paid to the funeral director. Since the trust provisions of P.L. 106-169 apply without regard to the purpose for which the trust was established, burial trusts that may be irrevocable under State law may be countable resources for SSI resource-counting purposes if established with the individual's assets.

1. Burial Trusts to Which These Provisions Do Not Apply

a. Irrevocable Burial Contract

These provisions do not apply to a burial trust where:

- an individual irrevocably contracts with a provider of funeral goods and services for a funeral; and
- the individual funds the contract by prepaying for the goods and services; and
- the funeral provider subsequently places the funds in a trust; or
- the individual establishes an irrevocable trust, naming the funeral provider as the beneficiary.

b. Revocable Burial Contract

These provisions do not apply to a burial trust where:

- an individual revocably contracts with a provider of funeral goods and services; and

- the individual subsequently funds the contract by irrevocably assigning ownership of a life insurance policy to the provider; and
- State law does not prohibit the individual from irrevocably assigning ownership of a life insurance policy to the funeral provider; and
- the funeral provider subsequently places the life insurance policy in an irrevocable trust.

These transactions constitute a purchase of goods and services by the individual and establishment of a trust with the funeral provider's funds, not the funds of the individual.

These arrangements should be evaluated under regular resource rules. Specifically, see the burial contract instructions in SI 01130.420–SI 01130.425. However, if the individual who purchased the funeral was named as the beneficiary of the burial trust that a funeral director established, and thus retains an equitable interest, see the rules applicable to third party trusts in SI 01120.200.

2. Burial Trusts to Which These Provisions Apply

The provisions of this section apply to a trust if:

- an individual does not enter into a pre-need funeral contract with a funeral provider, but establishes a burial trust with his/her own assets; or
- an individual enters into an irrevocable funeral contract with a funeral provider, but establishes a revocable trust to fund the contract; or
- an individual enters into a revocable funeral contract with a funeral provider, even if the funeral provider places the money in a trust (except as provided in SI 01120.201H.1.b).

3. Applicable Exclusions

If application of this provision results in the counting of a burial trust as a resource, the burial space and burial funds exclusions may apply.

- Burial spaces may be excluded without limit for an individual, spouse and members of the individual's immediate family. (See SI 01130.400 for a definition of burial spaces and applicable policy.)
- Burial funds may be excluded up to \$1,500 each for an individual and spouse. (See SI 01130.409-SI 01130.425 for applicable instructions.)

The undue hardship waiver may also apply (see SI 01120.203C.).

I. Policy--Disbursements From Trusts

1. Trust Principal Is Not a Resource

If the trust principal (or a portion of the trust principal) is not a resource, disbursements from the trust (or that portion) may be income to the SSI recipient, depending on the nature of the disbursements. Regular rules apply to determine when income is available.

a. Disbursements Which Are Income

Cash paid directly from the trust to the individual is unearned income.

Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550).

For example, if a trust buys a car for the beneficiary and the beneficiary's spouse already has a car which is excluded for SSI, the second car is income in the month of receipt since it would not be an excluded resource in the following month

b. Disbursements Which Result in Receipt of In-kind Support and Maintenance

Food or shelter received as a result of disbursements from a trust by the trustee to a third party is income in the form of in-kind support (ISM) and maintenance and is valued under the presumed maximum value (PMV) rule. (See SI 00835.300 for instructions pertaining to the PMV rule. See SI 01120.200F. for rules pertaining to a home.)

c. Disbursements Which Are Not Income

Disbursements from the trust that are not cash to the individual or are third party payments that do not result in the receipt of support and maintenance are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc (see SI 00815.400).

Disbursements made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if it would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550).

For example, a trust purchases a computer for the beneficiary. Since the computer would be excluded from resources as household goods in the following month, the computer is not income (see SI 01130.430).

d. Disbursements for Credit Card Bills

If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month

For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

e. Disbursements for Gift Cards and Gift Certificates

Gift cards and gift certificates are considered cash equivalents. If a gift card/certificate can be used to buy food or shelter (e.g. restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card/certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g. bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income (see SI 00830.522).

2. Trust Principal Is a Resource

a. Disbursements to or for the Benefit of the Individual

If the trust principal (or a portion of the trust principal) is a resource to the individual, disbursements from the trust principal (or that portion of the principal) to or for the benefit of the individual are not income, but conversion of a resource. However, trust earnings, e.g., interest, are income. (See SI 01110.100 for instructions pertaining to conversion of resources from one form to another and SI 01120.201J.2. and SI 01120.201J.3. for treatment of earnings/additions when the trust principal is a resource.)

b. Disbursements Not to or for the Benefit of the Individual

In the case of a trust established with the assets of an individual (or his/her spouse), if from the trust, or portion of the trust, that is considered to be a resource:

- a disbursement is made other than to or for the benefit of the individual, such a disbursement is considered to be a transfer of resources (see SI 01150.100 ff.) as of the date of the payment; or
- no disbursement could be made to the individual under any circumstances, foreclosure of payment is considered to be a transfer of resources as of the date of the foreclosure.

(See SI 01120.201F.1. for a definition of “to or for the benefit of.”)

3. Mixed Trust—Part of Trust Is a Resource and Part Is Not a Resource

In a situation where part of the trust was established with assets of the individual (or spouse) and part was established with the assets of other individuals, consult the trust document to determine from which portion of the trust disbursements were made. If the trust document does not specify, a statement from the trustee regarding the source of the disbursements will be determinative. If the trustee is unable to provide a statement, presume that disbursements were made first from the portion of the trust established with the funds of other individuals. When that portion is depleted, then presume that disbursements were made from the portion of the trust established with funds of the individual.

J. Policy--Earnings/Additions To Trusts

1. Trust Principal Is Not a Resource

a. Trust Earnings

Trust earnings are not income to the SSI claimant or recipient who is a trust beneficiary **unless** the trust directs, or the trustee makes, payment to the beneficiary.

Trust earnings are not income to the trustee or grantor **unless** designated as belonging to the trustee or grantor under the terms of the trust, e.g., as fees payable to the trustee or interest payable to the grantor.

b. Additions to Principal

Additions to the trust principal made directly to the trust are not income to the grantor, trustee or beneficiary. Exceptions to this rule are listed in SI 01120.201J.1.c. and SI 01120.201J.1.d.

c. Exceptions

Certain payments are not assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. They may not be paid directly into a trust, but

individuals may attempt to structure trusts so that it appears that they are so paid. Important examples of non-assignable payments include:

- Temporary Assistance for Needy Families (TANF);
- Railroad Retirement Board-administered pensions;
- Veterans pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security title II and SSI payments;
- Private pensions under the Employee Retirement Income Security Act (ERISA)(29 U.S.C.A. section 1056(d)).

d. Assignment of Income

A legally assignable payment (see SI 01120.201J.1.c. for what is not assignable), that is assigned to a trust, is income for SSI purposes **unless** the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

2. Trust Principal Is a Resource--Revocable Trust

a. Trust Earnings

Any earnings on a revocable trust are unearned income to the individual if:

- the trust was established with the assets of an individual;
- the individual is a beneficiary of the trust; and
- the trust is a resource under this section (see SI 00830.500 for exclusion of interest income).

b. Additions to Principal--Revocable Trust

Any additions to a revocable trust are unearned income to the individual if:

- the trust was established with the assets of an individual,
- the individual is a beneficiary of the trust; and
- the trust is a resource under this section.

EXCEPTION: If the source of the additions is the individual's resources, the additions are not income but conversion of a resource.

3. Trust Principal Is a Resource--Irrevocable Trust

a. Trust Earnings

Any earnings on an irrevocable trust are unearned income to the individual in the percentage that he/she provided the assets that constitute the corpus of the trust. This is the case if:

- the trust was established with the assets of an individual;

- the individual is a beneficiary of the trust;
- the trust is a resource under this section; and
- circumstances exist under which payment from the trust earnings could be made to or for the benefit of the individual.

For example, if the individual's assets constitute 75% of the trust corpus and the trust earns \$100 interest in April, \$75 of interest is income to the individual if the interest could be paid to or for the benefit of the individual (see SI 00830.500 for exclusion of interest income).

b. Additions to Principal--Irrevocable Trust

Any additions to an irrevocable trust are unearned income to the individual if:

- the trust was established with the assets of an individual;
- the individual is a beneficiary of the trust;
- the trust is a resource under this section; and
- circumstances exist under which payment from the trust additions could be made to or for the benefit of the individual.

EXCEPTION: If the source of the additions to the trust is the individual's other resources, then the additions are not income, but a conversion of a resource.

4. Individual's Assets Form Only a Part of the Trust

In the case of an irrevocable trust where the assets of the individual (or the individual's spouse) were transferred along with the assets of another individual(s), these provisions apply to the portion of the trust attributable to the assets of the individual (or spouse). Thus, in determining income to the trust, you must prorate any amounts of income, based on the proportion of the individual's assets in the trust.

Example: Jimmy Smith is an adult with cerebral palsy. His grandparents left \$75,000 in trust for him in their wills. Recently (after 1/1/00), Mr. Smith won an employment discrimination lawsuit and was awarded a \$1,500 judgment, which was deposited into the trust that his grandparents established. The \$1,500 of Mr. Smith's funds are subject to these provisions and could be a resource if payment could be made to or for Mr. Smith's benefit (see SI 01120.201D.2.). The \$75,000 deposited by his grandparents is not subject to these provisions (see SI 01120.200) and is not a resource.

In determining income to the trust (see SI 01120.201C.3.), we must prorate the income in proportion to the percentage of funds placed in the trust by Mr. Smith. Since this is an irrevocable trust, we will count 1.96% (\$1,500/\$76,500) of the trust earnings as income and not count 98.04% (\$75,000/\$76,500) of the earnings. Disbursements from, or additions to, the trust may require recalculation of the percentages.

K. References

- 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 01120.200
- Transfer of Resources for Less Than Fair Market Value, SI 01150.100 ff
- Development and Documentation of Trusts Established on or after 1/1/00, SI 01120.202
- Exceptions to Counting Trusts Established on or after 1/1/00, SI 01120.203

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SI 01120.201 - Trusts Established with the Assets of an Individual on or after 1/1/00 - 02/03/2010



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SI ATL01120.201 Trust Property

See SI 01120.201

A. Background

Trusts involving SSI recipients/deemors must be reviewed to determine if they are a countable resource. Several factors must be evaluated, including irrevocability of the trust, and the identity of the grantor and the beneficiary.

Even though the trust document has a provision stating that it is irrevocable, the trust might still be revocable under state law depending on the beneficiary designations.

The beneficiary and the grantor may be the same person in some instances. The actions of a representative payee, legal guardian, a parent, or any other individual legally empowered to act on behalf of the recipient with respect to his/her funds, in establishing a trust with these funds, are the actions of an agent for the recipient. The actions of the agent are equivalent to the actions of the SSI recipient. Thus, in such cases, it may be said that the SSI recipient has established the trust and therefore is both the trust grantor and beneficiary.

B. Sole Beneficiary Trust

Laws for each state in the Atlanta Region follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary.

However, if there is a residual beneficiary properly designated in the trust document, then the trust is irrevocable by its terms and is not a resource for SSI purposes.

C. Residual Beneficiary

A residual beneficiary, while not a current beneficiary of a trust, is named to receive the benefit of the trust after a specific event occurs, e.g., the death of the primary beneficiary. The trust would no longer be a grantor trust if there is a properly named residual beneficiary and may or may not be revocable according to the language used to name the residual beneficiary.

1. State Laws

State laws differ with respect to the language that must be used to name a residual beneficiary.

2. General

For Alabama, Georgia, South Carolina and Kentucky, the trust must specify a particular person or entity as the residual beneficiary. In these states, if the trust states that after death the trust will go to a specifically named person or entity, or if it states that the trust is to go "to my children, or issue, or descendants", this is specific enough to identify a person and the trust is irrevocable.

If, on the other hand, the trust language says that after death, the trust will go "to my estate" or "to the heirs" of the primary beneficiary (or some other non-specific general term), this is not sufficient. This trust would be revocable by the grantor because this wording is not specific enough to identify persons who, upon his death, may become his heirs.

For Florida, Mississippi, North Carolina and Tennessee, the above general principle is not followed.

3. Tennessee

For Tennessee, as long as the trust names any residual beneficiary, even an unborn child, it is not a sole beneficiary trust and, therefore, may not be revoked by the grantor.

4. Mississippi

For Mississippi, as long as the trust names a residual beneficiary, other than an unborn child, it is not a sole beneficiary trust and, therefore, can not be revoked by the grantor. Where the residual beneficiary is an unborn child or children, and the grantor has no children, examine the file for evidence that the grantor is unable to have children. If such evidence exists in the file, then the trust would be revocable by the grantor and is a resource. Do not question the grantor or seek additional evidence outside of the file concerning their ability to procreate. If no evidence exists in file, the trust is irrevocable.

5. North Carolina

In North Carolina, a specific person or entity may be designated. In addition, wording such as "to my estate" or "to the heirs" (or some other general non-specific term) is sufficient to name a residual beneficiary.

Refer any questionable trust document to the Office of General Counsel through the Assistance Programs Section in the Regional Office.

6. Florida

In Florida, a specific person or entity may be designated. In addition, wording such as "to my heirs," "to my heirs at law," "to my next of kin," "to my distributees," "to my relatives" or "to my family" (or language of similar intent) is sufficient to name a residual beneficiary.

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TN 40 (01-09)

SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00

Topic	Reference
Introduction to Medicaid Trust Exceptions	SI 01120.203A
Policy—Exception To Counting Medicaid Trusts	SI 01120.203B
Policy—Waiver For Undue Hardship	SI 01120.203C
Procedure— Developing Exceptions To Resource Counting	SI 01120.203D
Procedure—Development Of Undue Hardship Waiver	SI 01120.203E
Procedure—Nonprofit Associations	SI 01120.203F
Procedure—Follow-Up To A Finding Of Undue Hardship	SI 01120.203G
Procedure—Reevaluating Revocable Trusts Processed Under The Policy In Effect From 1/1/2000 Through 1/31/2001	SI 01120.203H

A. Introduction to Medicaid Trust Exceptions

We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because sections 1917 (d)(4)(A) and (C) of the Social Security Act (the Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) set forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid provisions of the Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI law (e.g., undue hardship) and because the term has become a term of common usage.

Development and evaluation of Medicaid trust exceptions are based on the type of trust under review. There are two types of Medicaid trusts to consider:

- Special Needs Trusts
- Pooled Trusts

B. Policy—Exception To Counting Medicaid Trusts

1. Special Needs Trusts Established under Section 1917(d)(4)(A) of the Act

a. General -- Special Needs Trusts

NOTE: Although this exception is commonly referred to as the **special needs** trust exception, the exception applies to any trust meeting the following requirements and does not have to be a strict **special needs** trust.

The resource counting provisions of Section 1613(e) do not apply to a trust:

- Which contains the assets of an individual **under age 65** and who is **disabled**; and
- Which is **established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court**; and
- Which provides that the **State(s) will receive all amounts remaining** in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan.

CAUTION: A trust which meets the exception to counting the trust under the SSI statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource. If the trust meets the definition of a resource (SI 01110.100B.1.), it would will be subject to regular resource-counting rules.

b. Under Age 65

To qualify for the special needs trust exception, the trust must be established for the benefit of a disabled individual under age 65. This exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

c. Additions to Trust After Age 65

Additions to or augmentation of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust, depending on the source of the funds (see SI 01120.201J.) and may be counted as resources in the following months under regular SSI trust rules.

Additions or augmentation do not include interest, dividends or other earnings of the trust or portion of the trust meeting the special needs trust exception. If the trust contains the irrevocable assignment of the right to receive payments from an annuity or support payments made when the trust beneficiary was less than 65 years of age, annuity or support payments paid to a special needs trust are treated the same as payments made before the individual attained age 65 and do not disqualify the trust from the special needs trust exception.

d. Disabled

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act.

e. Established for the Benefit of the Individual

Under the special needs trust exception, the trust must be established for and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of

the individual, as described in SI 01120.201F.2. Any provisions that:

- provide benefits to other individuals or entities during the disabled individual's lifetime, or
- allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual), will result in disqualification for the special needs trust exception.

Payments to third parties for goods and services provided to the trust beneficiary are allowed. However, such payments should be evaluated under POMS SI 01120.200E. - SI 01120.200F. and SI 01120.201I. to determine whether the payments may be income to the individual.

f. Who Established the Trust

The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself/herself. To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

In the case of a legally competent, disabled adult, a parent or grandparent may establish a “seed” trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust. After the seed trust is established, the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g. power of attorney) may transfer the individual's assets into the trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

NOTE: Under 1613(e) of the Act, a trust is considered to have been “established by” an individual if any of the individual's (or the individual's spouse) assets are transferred to the trust other by will. Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be “established by” an individual who does not provide the corpus of the trust, or transfer any of his/her assets to the trust, but rather someone who took action to establish the trust. To avoid confusion, we use the phrase “established through the actions of” rather than “established by” when referring to the individual who physically took action to establish a special needs or pooled trust.

g. Legal Authority and Trusts

The person establishing the trust with the assets of the individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of that individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust.

For example, a parent establishing a seed trust for his adult child with his own assets has legal authority over his own assets to establish a trust. He only needs legal authority over his child's assets if he actually takes action with the child's assets, e.g., transfers them to a previously established trust.

A power of attorney (POA) is legal authority to act with respect to the assets of a disabled individual. However, a trust established under a POA will result in a trust we consider to be established through the actions of the disabled individual himself/herself because the POA merely establishes an agency

relationship.

h. State Medicaid Reimbursement Requirement

To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

NOTE: Labeling the trust as a **Medicaid pay-back trust**, **OBRA 1993 pay-back trust**, trust **established in accordance with 42 U.S.C. § 1396p**, or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

2. Pooled Trusts Established under Section 1917(d)(4)(C) of the Act

a. General – Pooled Trusts

A pooled trust is a trust established and administered by an organization. It is sometimes called a “master trust” because it contains the assets of many different individuals, each in separate accounts established through the actions of individuals, and each with a beneficiary. By analogy, the pooled trust is like a bank that holds the assets of individual account holders.

Whenever you are evaluating the trust, it is important to distinguish between the master trust, which is established through the actions of the nonprofit association, and the individual trust accounts within the master trust, which are established through the actions of the individual or another person for the individual.

The provisions of the SSI trust statute do not apply to a trust containing the **assets of a disabled individual** which meets the following conditions:

- The pooled trust is established and maintained by a **nonprofit association**;
- **Separate accounts** are maintained for each beneficiary, but assets are pooled for investing and management purposes;
- Accounts **are established solely for the benefit of the disabled individuals**;
- The account in the trust is **established through the actions of the individual, a parent, grandparent, legal guardian, or a court**; and
- The trust provides that to the extent any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, **the trust will pay to the State(s)** the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).

NOTE: There is no age restriction under this exception. However, a transfer of resources to a trust for an individual age 65 or over may result in a transfer penalty (see SI 01150.121.).

CAUTION: A trust which meets the exception to counting the trust under the SSI statutory trust provisions of 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource.

b. Disabled

Under the pooled trust exception, the individual whose assets were used to establish the trust account must meet the definition of disabled for purposes of the SSI program.

c. Nonprofit Association

The pooled trust must be established through the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute or defined in section 501(c) of the Internal Revenue Code (IRC) and that also has tax-exempt status under section 501(a) of the IRC. (See SI 01120.203F. for development.)

d. Separate Account

A **separate account within the trust** must be maintained for each beneficiary of the pooled trust, but for purposes of investment and management of funds, the trust may pool the funds in the individual accounts. The trust must be able to provide an individual accounting for the individual.

e. Established for the Sole Benefit of the Individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (See SI 01120.201F.2. for a definition of sole benefit.) This exception does not apply if the account

- provides a benefit to any other individual or entities during the disabled individual's lifetime, or
- allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity

f. Who Established the Trust Account

In order to qualify for the pooled trust exception, the trust **account** must have been established through the actions of the disabled individual himself/herself or through the actions of the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

A legally competent, disabled adult who is establishing or adding to a trust account with his or her own funds has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of another individual with that individual's assets must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of an individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

g. State Medicaid Reimbursement Provision

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to

the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust pays to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

NOTE: Labeling the trust as a **Medicaid pay-back trust, OBRA 1993 pay-back trust, trust established in accordance with 42 U.S.C. § 1396p**, or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

3. Allowable and Prohibited Expenses

The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.

a. Allowable Administrative Expenses

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 because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

b. Prohibited Expenses and Payments

The following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

NOTE: For the purpose of prohibiting payments prior to reimbursement of medical assistance to the State(s), a pooled trust is not considered a residual beneficiary.

c. Applicability

This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees

and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement.

4. Reevaluate Trusts Processed under the Policy in Effect From 1/1/2000 through 1/31/01

a. Applicability

Trusts evaluated under the policy in effect from 1/1/2000 through 1/31/2001 that were found to meet the requirements of a Medicaid special needs trust or a Medicaid pooled trust must be reevaluated under these instructions.

b. Policy Change

These instructions contain a policy change that is effective prospectively from 2/1/2001. Under the prior policy, we did not count as a resource any trust meeting the requirements of a Medicaid special needs trust or a Medicaid pooled trust. Effective 2/1/2001, a trust determined to meet the requirements of a Medicaid special needs trust in SI 01120.203B.1. or Medicaid pooled trust in or SI 01120.203B.2. must also be evaluated using the instructions in SI 01120.200. This is the case because even though a trust may meet the requirements for an exception to counting under Section 1613 (e)(5) of the Act, a trust may still meet the definition of a resource and be countable. The special needs and pooled trust exceptions are **not** resource exclusions.

c. Trusts That Become Countable

If a trust previously not counted under the policy in effect 1/1/2000 – 1/31/2001 is now found to be a countable resource under SI 01120.200, we will not reopen the case retroactively, but will count the trust as a resource prospectively beginning with 2/1/2001. Any payments made to the individual between the month the case was initially adjudicated using the prior policy and the readjudication under these instructions are **not overpayments**. See SI 01120.203H.

NOTE: The undue hardship waiver in SI 01120.203C. does **not** apply to trusts counted as resources under SI 01120.200. The waiver only applies to trusts counted under section 1613(e) (SI 01120.201 through SI 01120.203).

5. Income Trusts Established under Section 1917(d)(4)(B) of the Act

Income trusts, sometimes called *Miller* trusts (after a court case), established under section 1917(d)(4) (B) of the Act are **not** considered exceptions to trust rules for SSI eligibility purposes. However, some States may exclude these trusts from counting as a resource for Medicaid eligibility purposes.

C. Policy—Waiver For Undue Hardship

1. Definition

a. Undue Hardship

For purposes of the trust provisions of section 1613(e) of the Act, undue hardship exists in a month if:

- failure to receive SSI payments would deprive the individual of food or shelter; **and**

- the individual's available funds do not equal or exceed the Federal benefit rate (FBR) plus federally administered State supplement, if any.

NOTE: Inability to obtain medical care does not constitute undue hardship for SSI purposes although it may under a State Medicaid plan. Also, the undue hardship waiver does not apply to a trust counted as a resource under SI 01120.200. It only applies to trusts counted under section 1613(e) of the Act (SI 01120.201 through SI 01120.203).

b. Loss of Shelter

For purposes of this provision, an individual would be deprived of shelter if:

- he/she would be subject to eviction from their current residence if SSI payments were not received; and
- there is no other affordable housing available, or there is no other housing available with necessary modifications for a disabled individual.

2. Application of the Undue Hardship Waiver

a. Applicability

We will consider the possibility of undue hardship under this provision only when:

- counting an **irrevocable** trust as a resource results in the individual's ineligibility for SSI due to excess resources;
- the individual alleges (or information in the file indicates) that not receiving SSI would deprive him/her of food or shelter; and
- the trust specifically prohibits disbursements or prohibits the trustee from exercising his/her discretion to disburse funds from the trust for the individual's support and maintenance.

NOTE: Since an individual may revoke a revocable trust and access the funds for his/her support and maintenance, the requirements for undue hardship cannot be met if the individual established a revocable trust.

b. Suspension of Resource Counting

The counting of an irrevocable trust as a resource is not applicable in any month for which counting the trust would cause undue hardship.

c. Resource Counting Resumes

Resource counting of a trust resumes for any month(s) for which it would not result in undue hardship.

3. Available Funds

In determining the individual's available funds we include:

a. Income

- All countable income received in the month(s) for which undue hardship is an issue.

- All income excluded under the Act received in the month(s) for which undue hardship is an issue. (See SI 00830.099 and SI 00820.500, respectively, for a list of unearned and earned income exclusions provided under the Act.)
- The value of in-kind support and maintenance (ISM) being charged, i.e., the presumed maximum value (PMV), the value of the one-third reduction (VTR), or the actual lesser amount.

(Do not include SSI payments received or items that are not income per SI 00815.000 ff.)

NOTE: The receipt of ISM, in and of itself, does not preclude a finding of undue hardship.

b. Resources

- All countable liquid resources as of the first moment of the month(s) for which undue hardship is at issue. (See SI 01110.300 for a definition of liquid resources.)
- All liquid resources excluded under the Act as of the first moment of the month(s) for which undue hardship is at issue. (See SI 01130.050 for a list of resource exclusions under the Act.)

SSI benefits retained into the month following the month of receipt are counted as a resource for purposes of determining available funds.

(Do not include nonliquid resources or assets determined not to be a resource per SI 01120.000 ff.)

4. Example

Frank Williams filed for SSI in 3/2008 as an aged individual. In 2/2008, he received an insurance settlement from an accident that was placed in an irrevocable trust. After determining that he met the other requirements for undue hardship (including a prohibition on the trustee from disbursing any funds for Mr. Williams' support and maintenance), the claims representative (CR) determined Mr. Williams' available funds. He receives \$450 in title II benefits per month. His only liquid resource is a bank account that has \$500 in it. The total of \$950 in available funds (\$450 title II and \$500 bank account balance) means that undue hardship does not apply in 3/2008 because that amount exceeds the FBR. (His State has no federally-administered State supplement.)

Mr. Williams comes back into the office in 6/2008. He presents evidence that he has spent down the \$500 in his bank account on living expenses in the past 3 months. As of 6/2008, he has no liquid resources and his income total of \$450 is below the \$637 FBR. Mr. Williams meets the undue hardship test for 6/2008 (which is his E02 month). The trust does not count as his resource in that month. If his situation does not change, he will qualify for an SSI payment in 7/2008.

D. Procedure— Developing Medicaid Trust Exceptions To Resource Counting

1. Special Needs Trusts under Section 1917(d)(4)(A) of the Act

The following is a summary of special needs trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (SI 01120.203B.1.b.)

	<ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.
2	<p>Does the trust contain the assets of a disabled individual? (SI 011203B.1.d.)</p> <ul style="list-style-type: none"> • If yes, go to Step 3. • If no, go to Step 8.
3	<p>Is the disabled individual the sole beneficiary of the trust? (SI 01120.203B.1.e.)</p> <ul style="list-style-type: none"> • If yes, go to Step 4. • If no, go to Step 8.
4	<p>Did a parent, grandparent, legal guardian or a court establish the trust? (SI 01120.203B.1.f.)</p> <ul style="list-style-type: none"> • If yes, go to Step 5. • If no, go to Step 8.
5	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.1.h.?</p> <ul style="list-style-type: none"> • If yes, go to Step 6. • If no, go to Step 8.
6	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.1.c.</p> <p>Go to Step 7 for treatment of assets placed in trust prior to age 65. Go to Step 8 for treatment of assets placed in trust after attaining age 65.</p>
7	<p>Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.</p>
8	<p>The trust (or portion thereof) does not meet the requirements for the special needs trust exception.</p> <p>Determine whether the pooled trust exception in SI 01120.203B.2. applies.</p>

2. Pooled Trusts Established under Section 1917(d)(4)(C) of the Act

The following is a summary of pooled trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	<p>Does the trust account contain the assets of a disabled individual? (See SI 01120.203B.2.b.)</p> <ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.

2	<p>Was the pooled trust established and maintained by a nonprofit association? (See SI 01120.203B.2.a., SI 01120.203B.2.c. and development instructions in SI 01120.203F.)</p> <ul style="list-style-type: none"> • If yes, go to Step 3. • If no, go to Step 8.
3	<p>Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (SI 01120.203B.2.d.)</p> <ul style="list-style-type: none"> • If yes, go to Step 4. • If no, go to Step 8.
4	<p>Is the disabled individual the sole beneficiary of the trust account? (SI 01120.203B.2.e.)</p> <ul style="list-style-type: none"> • If yes, go to Step 5. • If no, go to Step 8.
5	<p>Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (SI 01120.203B.2.a. and SI 01120.203B.2.f.)</p> <ul style="list-style-type: none"> • If yes, go to Step 6. • If no, go to Step 8.
6	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203B.2.g.?</p> <ul style="list-style-type: none"> • If yes, go to Step 7. • If no, go to Step 8.
7	<p>The trust meets the Medicaid pooled trust exception, however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.</p>
8	<p>The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203E.</p>

E. Procedure—Development Of Undue Hardship Waiver

The following is a summary of development instructions for undue hardship presented in a step-action format. Refer to cross-references for complete instructions

STEP	ACTION
1	<p>Is the trust irrevocable?</p> <ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.
2	<p>Does counting the trust result in excess resources?</p> <ul style="list-style-type: none"> • If yes, go to Step 3.

	<ul style="list-style-type: none"> • If no, go to Step 8.
3	<p>Does the individual allege (or information in the file indicate) that not receiving SSI would deprive him/her of food or shelter according to SI 01120.203C.1.?</p> <ul style="list-style-type: none"> • If yes, go to Step 4. • If no, go to Step 8.
4	<p>Obtain the individual's signed statement (on the DPST screen in MSSICS, or in non-MSSICS cases, on a SSA-795 faxed into NDRed) as to whether:</p> <ul style="list-style-type: none"> • Failure to receive SSI payments would deprive the individual of food or shelter; • The individual's total available funds are less than the FBR plus federally administered State supplement; • The individual agrees to report promptly any changes in income and resources; and • The individual understands that he/she may be overpaid if available funds exceed the FBR plus State supplement for any month, or other situations change. <ul style="list-style-type: none"> • Go to Step 5.
5	<p>Does the trust contain language that specifically prohibits the trustee from making disbursements for support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for support and maintenance?</p> <ul style="list-style-type: none"> • If yes, go to Step 6. • If no, go to Step 8.
6	<p>Add up all of the individual's income, both countable and excludable (see SI 01120.203C.3.a.). Do not include any SSI payments received or items that are not income per SI 00815.000 ff. If the individual is receiving ISM, include as income the ISM being charged (PMV, VTR, or actual amount, if less).</p> <p>Add up all of the individual's liquid resources, both countable and excludable (See SI 01120.203C.3.b.).</p> <p>Does the total of the income and the liquid resources equal or exceed the FBR plus federally administered State supplement, if any?</p> <ul style="list-style-type: none"> • If yes, go to Step 8. • If no, go to Step 7.
7	<p>Suspend counting of the trust as a resource for any month in which all requirements above are met (SI 01120.203C.2.).</p> <ul style="list-style-type: none"> • In MSSICS, document the findings of undue hardship and applicable months in the DROC screen. • On paper forms, document the information in the REMARKS section. See SI 01120.202C. and SI 01120.202D. for further documentation and SI 01120.203G. for follow-up instructions. STOP.
8	<p>Undue hardship does not apply. However, in some instances where income and</p>

resource are currently too high, unless the trust is revocable, undue hardship may apply in future months.
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F. Procedure—Nonprofit Associations

When a trust is alleged to be established through the actions of a nonprofit, tax-exempt organization, check regional instructions to determine if a precedent on the organization's certification under a State nonprofit statute or Internal Revenue Service (IRS) section 501(c) tax-exempt status is listed.

- If so, document the evidence on the DROC screen in MSSICS or on EVID for non-MSSICS cases.
- If a precedent has not been established, contact the organization and request a copy of its State nonprofit certification or its IRS section 501(c) tax-exempt certification. Annotate the evidence screen and forward a copy to the regional office for inclusion as a regional precedent. Do not recontact an organization if there is already a regional precedent.

G. Procedure—Follow-Up To A Finding Of Undue Hardship

1. When to Use This Procedure

Use this procedure when it is necessary to determine whether an individual who established a trust continues to be eligible for SSI based on undue hardship. Since undue hardship is a month-by-month determination, recontact the individual to redevelop undue hardship periodically.

2. Recontact Period

The recontact period may vary depending on the individual's situation. If the individual alleges, and information in the file indicates, that the individual's income and resources are not expected to change significantly and the individual is continuously eligible for SSI because of undue hardship, recontact the individual **no less than every 6 months**. If the individual's income and resources are expected to fluctuate or the file indicates a history of such fluctuation, the recontact period should be shorter, even monthly in some cases.

3. Documentation

At each recontact:

- Obtain the individual's statement either signed or recorded on a DROC that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;
- Determine whether total income and liquid resources exceeded the FBR plus State supplement for each prior month;
- If undue hardship continued for the prior period and is expected to continue in the future period, continue payment and tickle the case for the next recontact per SI 01120.203G.4.
- If undue hardship did not continue through each month, clear the **excluded amount** and **exclusion reason** entries on the **ROTH** screen for each month that undue hardship did not apply. Process the

excess resources overpayment for those months. If undue hardship stops due to a continuing change in the individual's situation, e.g., income or resources, do not tickle the file to follow up. The individual must recontact SSA and make a new allegation of undue hardship.

4. Recontact Controls

Use the Modernized Development Worksheet (MDW) to control the case for recontact when the individual is eligible for SSI based on undue hardship. Set up an MDW screen using instructions in MSOM MDW 001.001 and the following MDW inputs:

- In the **ISSUE** field: input TRUST
- In the **CATEGORY** field: input T16MISC
- In the **TICKLE** field: input the date the individual should be recontacted to redevelop undue hardship
- In the **MISC** field: input information (up to 140 characters) about the trust undue hardship issue including issues to be aware of and anything else the CR deems appropriate in the case. If additional space is needed, use **REMARKS**.

H. Procedure—Reevaluating Revocable Trusts Processed Under the Policy In Effect From 1/1/2000 Through 1/31/2001

1. Policy Change

These instructions represent a prospective policy change related to revocable Medicaid special needs trusts and Medicaid pooled trusts. The policy in effect from 1/1/2000 through 1/31/2001 provided for an exception to counting these trusts without regard to whether the trusts were resources under the general resource rules. Effective 2/1/2001, revocable Medicaid special needs trusts and Medicaid pooled trusts initially evaluated under the policy in effect 1/1/2000 through 1/31/2001 must be reevaluated under these instructions.

2. Identify Trust Cases

Identify any cases processed under the 1/1/2000 through 1/31/2001 policy.

a. Irrevocable Trusts

You do not need to do anything additional with these cases.

b. Revocable Trusts

You must reevaluate these cases prospectively from 2/1/2001 following the instructions in SI 01120.200 to determine if they meet the definition of a resource. If the trust meets the definition of a resource, it is subject to regular resource counting rules as of 2/1/2001.

c. Prior Period

You do not need to reopen any period prior to 2/1/2001 and no overpayments will result for the prior

period as a result of the policy change.

To Link to this section - Use this URL:

<http://policy.ssa.gov/poms.nsf/links/0501120203>

SI 01120.203 - Exceptions to Counting Trusts Established on or after 1/1/00 - 01/29/2010



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Special Needs Trusts Panel

Supplemental Materials

“Top 15 Tips for Estate Planners When Planning For Special Needs”

**Co-Authored by
Katherine N. Barr, Richard E. Davis
and Kristen M. Lewis**

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TOP 15 TIPS FOR ESTATE PLANNERS WHEN PLANNING

for SPECIAL NEEDS

By Katherine N. Barr, Richard E. Davis,
and Kristen M. Lewis

The world of special needs planning has come of age. Once considered a narrow specialty that rarely demanded much of a traditional estate planner's time, understanding how to protect the eligibility of a client's child with a disability for publicly available programs, including health care, is now essential. A topic once reserved for continuing legal education programs involving Medicaid planning for the elderly, the hottest topic today at many estate planning CLEs concerns special needs trusts (SNTs) and special needs planning.

Readers should recall the primary differences between "first-party" SNTs and "third-party" SNTs, as outlined in recent *Probate & Property* articles on the subject. "First-party" SNTs are authorized by 42 U.S.C. § 1396p(d) (4)(A) and (C), related Social Security Administration rules and regulations (known as "POMS," that is, Program Operations Manual System), occasional parallel state statutes, and provisions of state Medicaid manuals. These SNTs are funded with assets owned by the SNT beneficiary, or to which the beneficiary is legally entitled, and must be established by specified settlors, that is, the beneficiary's legal guardian/conservator; the beneficiary's parent or grandparent, either (1) via a "seed trust" initially funded with nominal assets provided by the parent or grandparent or (2) under independent legal authority over the beneficiary's assets other

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than a power of attorney; or a court or other entity. A first-party SNT must be irrevocable and for the sole benefit of a beneficiary under age 65 who is "disabled" within the meaning of 42 U.S.C. § 1382c(a)(3)(A) of the Social Security Act when the SNT is established and funded. On the death of the beneficiary, any assets then remaining in a first-party SNT are subject to a "payback" in favor of all state Medicaid agencies that have provided medical assistance to the beneficiary during his lifetime equal to the total amount of such benefits, even if the payback exhausts the remaining assets of the SNT. In contrast, "third-party" SNTs are funded with assets that do not belong to the beneficiary. Third-party SNTs are not subject to any of the foregoing restrictions and limitations other than that the beneficiary must not be able to revoke or terminate the SNT, nor have the legal authority to direct the use of the SNT assets for his support and maintenance.

First-party and third-party SNTs that are fully compliant with relevant federal and state law, and properly administered by the trustee, will not disqualify the SNT beneficiary from receiving any means-tested government benefits, such as Medicaid and Supplemental Security Income (SSI), for which the beneficiary would otherwise be eligible as a result of his disabilities. Government benefit entitlements based on a person's employment record (for example, Medicare and Social Security Disability Income (SSDI)) are similarly unaffected by SNTs. (See chart on page 40 for a brief comparison of means-tested and employment-based government benefits.)

The list below represents some of the most frequently encountered issues in advising clients who wish to secure the future of a beneficiary with a disability. For ease of reference, the balance of this article often refers to the beneficiary of the SNT as a "child," but the beneficiary may certainly be any person whom the client may wish to benefit under his estate plan.

1. Don't disinherit the child with special needs.

Parents should establish a third-party

created and funded SNT for the child's benefit. This should be a purely discretionary trust with precatory supplemental needs language. No Internal Revenue Code (IRC) § 2041 or any other support standard should be included. This approach is highly recommended to avoid disqualifying the child from receiving means-tested government benefits, such as Medicaid and Supplemental Security Income (SSI). This type of SNT may be established as a stand-alone document (the authors' preferred approach) or as part of a parent's or other relative's will. Please note that if a spouse has the disability, federal regulations specify that the spouse without a disability must establish the SNT under a will. An SNT established for a spouse under a living trust will not be effective.

The other four options available for a beneficiary with special needs are *not* recommended. These include (1) distributing assets outright to the child with special needs (the assets may disqualify the child from eligibility for Medicaid and SSI); (2) disinheriting the special needs beneficiary (the beneficiary will have no "safety net" if government benefits are subsequently reduced or eliminated); (3) leaving property to another family member with the "understanding" that the property will be used for the child (this arrangement is not legally enforceable and the recipient's creditors, such as a potential ex-spouse, may be able to seize the assets); and (4) ignoring the situation and doing postmortem planning with a self-settled first-party SNT for the child (a Medicaid payback provision will be required in the SNT). Keep in mind the self-settled approach, however, for estate administration situations in which proper special needs planning was not done and the child with a disability will otherwise lose SSI or Medicaid.

2. Carefully consider the division of assets among the children.

Also consider the allocation of administrative expenses and taxes among the shares of the beneficiaries of the estate and/or trust(s). If parents have created a stand-alone, third-party SNT during their lives, or if they have a

testamentary SNT, include a tax apportionment provision in the parents' estate plan and indicate whether or not federal or state estate taxes attributable to the inclusion of the SNT in the estate of the deceased parent should be charged against the SNT.

Often parents will prefer to shift a larger portion of the assets to the share of the child with special needs. Depending on the ages of the other children, common apportionment percentages for a family with one child with special needs and two "typical" children include 50/25/25 and 40/30/30. Other options include an equal division of the assets, while supplementing the share of the child with special needs with a second-to-die life insurance policy paid directly to the SNT. In the situation in which the child with a disability is well-provided for through a first-party SNT established as part of a personal injury settlement, the shares of the typical children may be the largest.

3. Understand the differences among Medicare, Medicaid, Supplemental Security Income (SSI), and Social Security Disability Income (SSDI).

It is possible for a special needs child to receive benefits from all four programs. Each of these public benefits has different eligibility rules and different sets of covered services. SSDI and Medicare are not based on financial need, and SSI and Medicaid have strict financial requirements. Understanding the eligibility requirements of the particular programs for which the child presently qualifies, or is likely to qualify for in the future, is critical for the estate planner to make effective recommendations.

For an individual with a significant work history before the disability, with sufficient sources of health insurance through Medicare and other supplemental means, an SNT may not be appropriate. By contrast, a child in a Medicaid facility who becomes a beneficiary of a standard support trust may lose his or her housing if the support trust is not legally reformed into a first-party SNT. It is easy to confuse the government programs because the

names sound very similar. And do not assume the parents of the child will understand the eligibility differences or can even name the programs for which the child presently qualifies. Always ask to see current documentation from Social Security, Medicare, and Medicaid to verify. Fortunately, several new legal treatises discuss the differences among these programs for just these purposes. By purchasing several of these and subscribing to special needs planning newsletters and e-mail listservs of attorneys practicing in this area, the intricacies of federal and state benefits eligibility regulations will begin to make sense.

4. Choose the trustee of the SNT carefully.

The trustee will be given sole and absolute discretion to make distributions. Family members are generally a poor choice, unless they work with a professional or corporate co-trustee. The

trustee should (1) understand and respond to the needs of the special needs child; (2) have a thorough knowledge of government benefit programs and the effect that trust distributions will have on the child's government benefits; (3) be honest and reliable; (4) possess financial acumen; (5) have no conflict of interest (that is, should not serve alone and be a current or remainder beneficiary); and (6) not cause the loss of section 8 housing eligibility (a family member serving alone as trustee often results in the loss of section 8).

5. Parents should prepare a letter of intent to assist the trustee of the SNT.

The letter of intent serves as a blueprint that provides valuable information concerning the daily life and health care concerns of the child with special needs. This is especially important when a new caregiver has to step in to manage

the child's day-to-day activities. The letter of intent also describes the child's unique likes, dislikes, needs, preferences, and other important information concerning the child—all of which is helpful to the trustee and the child's caregiver. Several SNT administration treatises, as well as special needs organizations and life insurance companies, provide sample letter of intent forms that provide a starting point for the many parents who want to do this.

6. Include contingent special needs provisions in clients' estate planning documents.

These contingent provisions should deal with the possibility of a future beneficiary having special needs or a disability that is unknown when the document is prepared. The will or trust should include a provision that permits the fiduciary to establish a third-party SNT and to fund it with property that would otherwise be paid outright or to

a support trust for the (now) disabled beneficiary. A possible alternative is to give the trustee the power to appoint (that is, decant) the trust assets to another trust that will preserve the beneficiary's eligibility for means-tested government benefits. Because the effectiveness of such state law provisions varies, this language should be carefully considered. Some special needs planning attorneys include a contingent special needs trust as part of a facility of payment provision.

7. Include special language in a parent's revocable living trust.

This language should permit the trustee to make discretionary, nonsupport distributions to or for the benefit of a child with special needs during a parent's own period of incapacity. On the parent's death, the share of the child with special needs would be distributed to a third-party

Overview of Social Security's Kingdom of Benefits			
Entitlements Based on Work History (not subject to financial limits)			
Monthly Cash Payments	SSDI	MEDICARE	Health Care Coverage Benefits
	Social Security Disability. Amount received based on work record. Available also to spouse, minor children, and adult disabled children.	Major medical. No prescription coverage. No long-term care after 1st 100 days.	
	SSI	MEDICAID	
	Maximum payment of: \$674 per month as of 1/1/09 through 12/31/10. Eligibility for SSI in 36 states automatically makes a person eligible for Medicaid, housing assistance, and so on.	Much more comprehensive than Medicare. Covers most medical costs including prescriptions and long-term residential care, but not dental or eye care.	
Means-Tested Benefits (Work history not required, but very strict limits on income and resources)			

created and funded SNT. The following is sample language to consider, along with the applicable state Medicaid regulations, in drafting a provision of this type:

During any period that I am incapacitated or incompetent, if a child of mine has a disability and is receiving Medicaid, SSI, or other government benefits (or would otherwise be eligible for such benefits), the Trustee may, in its sole, absolute, and uncontrolled discretion, distribute to or apply for the benefit of my child with a disability such amounts of the trust's income and principal as the Trustee shall determine. The Trustee shall have the absolute right to refuse to make any distribution to or for the benefit of my child with a disability, and neither the child nor any representative of the child shall have the right to demand any such distribution from the Trustee. Such distributions by the Trustee shall supplement (and not supplant) such government benefits received by my child. In no event shall my child or his or her spouse serve as a trustee, nor shall the Trustee delegate any of Trustee's powers to my child or his or her spouse.

8. Include special language in a parent's general durable power of attorney.

This language should permit the agent to make discretionary, nonsupport distributions to or for the benefit of a child with special needs and to establish an SNT for the benefit of the child. Consider the following sample language:

If a child of mine has a disability and is receiving Medicaid, SSI, or other government benefits (or would otherwise be eligible for such benefits), my Agent shall have the power to pay to or apply for the benefit of my child such amounts as my Agent, in my Agent's sole, absolute, and uncontrolled discretion, may from time to time determine desirable for my child's use and benefit. My Agent shall have the absolute right to refuse to make any payment to or for the benefit of my child, and neither my child nor any representative of my child shall have the right to

demand any such distribution from my Agent. Payments by my Agent shall supplement (and not supplant) government benefits received by my child. In addition, my Agent may establish and fund with my assets an inter-vivos third-party discretionary nonsupport special needs trust with spendthrift provisions for the benefit of my child with a disability during his or her lifetime, and upon such child's death, the trust residue shall be distributed consistent with my [describe the particular estate planning document].

9. Parents should review all of their assets and beneficiary designations.

It is important to make sure no funds or resources pass directly to the child with special needs and that all of his or her share of inherited property passes directly to the SNT. If assets pass outright to the child with special needs, SSI, Medicaid, and other means-tested government benefits could be lost. Assets to review for beneficiary designations include (1) IRA, 401(k), and other retirement benefits; (2) life insurance; (3) employer-provided death benefits, including life insurance, final paycheck and vacation pay, and so on; (4) accidental death and travel insurance benefits provided through credit cards when a person purchases a plane ticket, and so on, using that credit card; (5) annuities; (6) savings bonds; (7) any other non-probate property of the parents such as payable-on-death, transfer-on-death, or joint-with-right-of-survivorship accounts; (8) Uniform Transfers to Minors Act accounts; and (9) state homestead laws, if applicable. For example, Florida law, in certain circumstances, gives a vested remainder interest in homestead property.

10. Consider life insurance as a funding method for the SNT.

A cash value building, second-to-die policy that pays on the death of both parents is often very affordable and may be one of the most cost-effective and least expensive ways to ensure that a child with special needs benefits from an amply funded SNT. But, if the life

insurance is owned by an irrevocable life insurance trust (ILIT) that includes SNT provisions for a child with a disability, make sure that the child does not have a *Crummey* withdrawal right over premium payments or gifts made to the ILIT during periods when he or she is receiving means-tested public benefits. The existence of the withdrawal right, whether exercised or not, may be viewed by Social Security or a state Medicaid agency as an asset of the beneficiary. Instead, consider including the child's siblings as *Crummey* beneficiaries, and as remainder beneficiaries and contingent or secondary income beneficiaries (to the extent that all current income is not applied by the trustee for the benefit of the child with a disability).

11. Retirement plan assets may not work well.

IRAs, 401(k)s, and 403(b)s, among others, are probably the most inefficient method of funding an SNT. Nevertheless, if retirement benefits must be paid to the SNT, do not include a conduit trust payment provision, as the required minimum annual distribution that would flow outright to the child with special needs would negatively affect his means-tested public benefits. Instead, make sure that the retirement benefits can be *accumulated* inside the SNT, and limit the age of the SNT's oldest possible beneficiary, which must be an individual. To assure a stretch payout, avoid the temptation to include powers of appointment for older beneficiaries or charities or other nondesignated beneficiaries. Care also should be taken to avoid the punitive five-year payout rule, if possible. See Sebastian V. Grassi Jr. & Nancy H. Welber, *Estate Planning with Retirement Benefits for a Special Needs Child, Part 1—Understanding Retirement Plan Distribution Rules*, Prob. & Prop., July / August 2009, at 28.

12. Coordinate other relatives' estate planning documents with the parents' third-party SNT.

Fortunately, a parent's stand-alone, third-party created and funded SNT can be structured to receive lifetime

gifts, as well as inheritances from grandparents and other relatives or friends for the benefit of the child with special needs. This avoids other family members' having to prepare a separate SNT. A letter from the estate planning attorney to the clients after the documents are in place can provide interested family members with the precise verbiage to reference the stand-alone SNT. A provision like the following could be added to the relative's estate planning documents:

Special Provisions Concerning Distribution of Property to a Relative with a Disability. If any property would otherwise be distributable to my granddaughter, whose name is Jane Doe, my fiduciary shall not distribute the property to my granddaughter (or to her guardian or conservator), but shall instead distribute the property to the then acting trustee of The Jane Doe Third-Party Special Needs Trust dated December 1, 2009, to be held, administered, and distributed in accordance with the terms of such trust.

13. Don't forget the estate plan of a child with a disability and of any unmarried sibling of the child.

Consider using a first-party, self-settled SNT for the assets of the child with a disability when means-tested benefits like SSI and Medicaid must be preserved but the assets of the child exceed the eligibility resource limit. The first-party SNT must be carefully prepared under 42 U.S.C. § 1396p(d)(4)(A) or (C) and the SSI Resource provisions of Social Security's Program Operations Manual System (POMS) found at www.ssa.gov/app510/poms.nsf/aboutpoms. Also consider a general durable power of attorney and a health care directive for the child if he or she has the requisite capacity to execute them. Once the child with special needs becomes an adult, a parent's right to know, monitor, advocate, and intercede in the child's affairs may be limited or prohibited without the child's consent, a court order (such as a guardianship), or a power of attorney. The power of attorney of a competent child with a disability should authorize the agent to take the action necessary to

join a special needs pooled account trust or to transfer assets to a first-party self-settled SNT.

Consider an advance directive for health care with HIPAA authorization. The HIPAA privacy rules can have horrendous implications for the medical care of an *adult* special needs child if he or she becomes unable to give informed consent or to knowingly participate in his or her own medical treatment. If the special needs child is mentally competent, prepare a health care power of attorney that includes HIPAA release information and names each parent as a "personal representative" under the HIPAA rules so that a parent can legally request and receive confidential medical information. If the special needs child is mentally incompetent, it is often necessary to establish a guardianship for purposes of making his or her medical treatment decisions.

Each unmarried adult sibling of a special needs child should execute an estate plan, because the child with special needs would likely be an heir of the sibling and could receive an outright inheritance from the sibling's estate if the sibling died without a will.

14. What if the parent requires or may soon need nursing home Medicaid?

In preparing an estate plan for parents of a child with a disability, when Medicaid eligibility for the parents could conceivably be necessary, consider having the parents execute special limited powers of attorney authorizing the agent under their powers of attorney, or the trustees of their living trusts, to create and fund a "sole benefit" trust for the child. In an important provision of OBRA'93, a parent seeking his own Medicaid eligibility may be able to avoid the transfer of asset penalty by transferring assets to (1) his disabled child, (2) a trust "solely for the benefit of" the (parent's) disabled child, regardless of the child's age, or (3) a trust for the sole benefit of any other disabled beneficiary under 65, regardless of the relationship to the settlor.

This important exception to the transfer of resources penalty is found at 42 U.S.C. § 1396p(c)(2)(B)(iii) and (iv). The ability to take advantage of this

exception has become more important for both parent and child in light of the asset transfer penalty set forth in the Deficit Reduction Act of 2005. Be advised, however, that virtually all (c)(2)(B)(iii) sole benefit trusts will be evaluated by the applicable state's Medicaid agency and subject to close scrutiny. This area is not for beginners. In fact, only one of the authors regularly uses this technique. Similarly, it is helpful for the parent to execute a limited power of attorney expressly authorizing the agent to create and fund a (c)(2)(B)(iv) trust.

15. Obtain a court order directing that child support be paid to a self-settled, first-party SNT.

If the parents of the child with a disability are divorcing, be sure the court enters an order directing that the child's support be paid to a first-party, self-settled SNT, so that means-tested government benefits continue at full rates instead of being offset by the child support amount. Divorce attorneys do not always know how child support payments made directly to a custodial parent interact with means-tested government benefit programs like SSI and Medicaid, or that these unintended consequences can be avoided with a few careful steps. The solution is for the divorce decree to order the noncustodial parent to make payments of a set amount to the custodial parent as trustee of a carefully drafted, self-settled SNT for the sole benefit of that child. Alternatively, an irrevocable assignment by the custodial parent of the child support to the trustee of a trust of this type may also work. Payments ordered to be made in this manner do not displace SSI, greatly benefiting both parents and the child.

Although these tips are not a comprehensive list of all planning considerations, they may suggest ways to improve planning for clients trying to secure the future of a family member challenged by special needs. Take advantage of the increasingly frequent opportunities to learn the nuances of this new "hot" practice area. Your clients will love you for it. ■