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Special Needs Trusts | Elder Law | Long Term Care Planning | Medicaid | Probate | Wills & Trusts  
Incapacity Planning | Guardianship | Developmental Disabilities | Veteran's Benefits

## “The A, B, C’s and 1, 2, 3’s of S N T’s” (Special Needs Trusts)

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Special Needs Trusts (SNT’s) come in several varieties. The primary purpose of all SNT’s is to hold assets for a beneficiary while exempting the contents of the SNT for programs like Medicaid, Supplemental Security Income (SSI), food assistance and some other public benefits. There are d4**A**, d4**B** and d4**C** Special Needs Trusts and there are 1<sup>st</sup> Party SNT’s and 3<sup>rd</sup> Party SNT’s...so we only left out the “2.”

1. The first category of SNT’s consists of assets of the beneficiary (from lifetime earnings, an inheritance, gift or personal injury award). These are “1<sup>st</sup> party SNT’s.” These are commonly called “self-settled” SNT’s.
2. The second category of SNT’s are Trusts established by a spouse, for the benefit of his or her spouse, within a will and therefore only upon death. These are called Qualifying SNT’s.
3. The third category of SNT’s consists of assets of others (not the beneficiary or his or her spouse) set aside for a disabled person, either during life or upon death of the person setting up the Trust. These are called “3<sup>rd</sup> party” SNT’s.

Special Needs Trusts can help individuals with a disability of any age. SNT’s can help them qualify for programs to assist with **medical** and **long term care** expenses as well as possibly get a **monthly income stream** from Social Security, even when the individual may have never worked.

SNT’s are very powerful planning tools and are complex to establish and administer. There are many ways to mess up these trusts including: 1) having an improperly drafted document (faulty language used by the drafter) or 2) the trustee administers the trust improperly (making distributions or disbursements not permitted under the terms of the document or paying for things that adversely affect the beneficiary’s eligibility for programs).

Even well intentioned trustees can make mistakes in administration of a SNT and then there are the trustees that do not have good intentions. Preserving the limited funds for an individual with a disability is critical. Selection of a qualified trustee is imperative and you should hesitate before putting a family member in charge of one of these trusts.

Often times we can correct defective SNT's, when the drafter didn't get it right. Sometimes we have to go to court and convince the judge to allow the changes. When a SNT is defective some benefits may have been awarded incorrectly and the government may seek to recover the program funds expended on the beneficiary improperly. This can get very expensive for the beneficiary in lost future-benefits and for the drafting attorney in the form of malpractice.

You don't need to be an expert on SNT's, but you should be able to identify when they can help. If you have someone with medical bills that are out of control and has little or insufficient medical coverage you should think of a SNT. If you know someone who faces long term care, either in an institutional setting or out in the community, you should think of a SNT.

SNT's are tools. They will work well for some individuals with a disability and possibly not for others. An Elder Law Attorney or Special Needs Lawyer can consider all of the tools and determine whether a SNT should be part of the solution to protect resources and to supplement public assistance programs.

Here is your cheat-sheet on the types of SNT's.

<p><b>FIRST PARTY</b> SNT with beneficiary's funds</p>	<p><b>d4A</b> – Under age 65, Medicaid payback, works for SSI and Medicaid, works for income and assets</p>	<p><b>d4B</b> – Qualified Income Trust, only income deposited, only works for some Medicaid programs, not SSI</p>	<p><b>d4C</b> – Pooled Trust, works for all ages for Medicaid but under age 65 for SSI, works for income and assets</p>
<p><b>THIRD PARTY</b> SNT with the funds of others</p>	<p>Spouse can set up a trust under their will (must die), no Medicaid payback</p>	<p>Anybody other than the beneficiary or spouse can set up a stand-alone SNT, establish one upon death in a will or in a trust or participate in an existing SNT. No Medicaid payback upon the death of the primary beneficiary, can go to others.</p>	

The Guardian Trusts administers both First and Third Party Special Needs Trusts. An individual can shelter excess assets in most First Party SNT's as well as deposit excess monthly income above the current \$2,250 (in 2018) to get eligibility for Florida's Medicaid Long Term Care Programs.

[www.GuardianTrusts.org](http://www.GuardianTrusts.org) - 800.669.2499  
[www.SpecialNeedsLawyers.com](http://www.SpecialNeedsLawyers.com) – 727.443.7898

## A. What is a Trust?

1. A Trust is a relationship regarding property (not necessarily real estate) where a person has a fiduciary obligation to deal with the property for the benefit of another person.
2. Basically a Trust is a fancy word for a relationship where one person is legally in charge of another person's assets.
3. A manager of a trust is a Trustee.
  - a. Trustees can be individuals or institutions (banks, trust companies or non-profit organizations).
  - b. There will likely be Successor Trustees which will step in if something happens to the first Trustee.
4. The Trustee manages the trust for the benefit of the Beneficiary.
  - a. Typically there are multiple levels of Beneficiaries.
  - b. There can be more than one current Beneficiary and other Beneficiaries to receive the funds upon some event occurring, such as the death of the current Beneficiary.
5. A trust is established by a Settlor or Grantor.
6. So the 3 basic parties in all trusts are: Settlor, Trustee and Beneficiary.
7. Trusts can be Revocable (changeable) or Irrevocable.
8. Special Needs Trusts (or sometimes referred to as Supplemental Needs Trusts) must be Irrevocable.

## B. Why A Special Needs Trust?

1. Persons with disabilities have needs other than basic medical care.
2. Many individuals with disabilities cannot get or afford private health insurance and cannot work in order to be able to draw Social Security Disability Insurance benefits.
3. If there are financial resources available to help the disabled person we need to stretch them and use them wisely. They need to last for the lifetime of the disabled person.
4. Assets belonging to, or left for the benefit of, a disabled person could easily be exhausted on basic medical essentials therefore leaving no funds for other necessities of life such as housing, food, clothing, transportation, entertainment and non-essential medical care.
5. A properly drafted Special Needs Trust (SNT) can allow a disabled person to qualify for some Public Assistance Programs. These programs can provide income streams or basic medical coverage thus allowing for a "reserve" fund for all of life's other necessities and niceties.
6. But how do we know the needs of a disabled person? In the case of a guardianship, a plan must be presented to the court that should outline the needs of the disabled person. In the absence of a guardianship plan I always recommend a professional care plan prepared by a geriatric care manager. Recommendations of these trained professionals can be incorporated into the SNT and add that extra touch that could make a world of difference to the disabled beneficiary.

## C. Overview of Some Public Assistance Programs

### 1. Incomes

- a. **SSI - Supplemental Security Income** - Maximum income is \$750/month in 2018. This is a Federal Program administered by Social Security. You must be disabled or age 65+ and you must meet financial criteria similar to Medicaid. This program is generally for disabled individuals who have not worked enough to qualify for Social Security Disability Insurance payments. It is designed to pay for food and shelter and your income cannot exceed resource limitations. Income for a beneficiary can be earned from working, unearned income like a check for retirement or disability or a distribution from a trust or gift from a friend or income can be "in-kind" if a third party pays for food or shelter expenses on behalf of a beneficiary. Generally, the disabled person must have less than \$2,000 in financial resources, with some assets being excluded from this calculation (such as a house a car and personal effects). Also, Social Security imposes penalties, or waiting periods, if a person gifts or transfers assets in order to qualify for SSI. We need to understand permissible transfers, in particular as they pertain to trusts.
- b. **SSDI - Social Security Disability Insurance** - This is a benefit of working and paying into the system. This is also strictly a Federal Program. There are no financial requirements for this program, only that you paid enough credits into the system based on the age you became disabled. This pays a monthly income if you become disabled. This is similar to the program that retirees draw on when they reach retirement age. A Special Needs Trust is **NOT** needed for this program.
- c. **DAC - Disabled Adult Child Benefits also called Childhood Disability Benefits**- An unmarried, disabled adult over age 18, whose disability occurred prior to age 22 can draw on a parent's work history if one of three events occurs: 1. A parent dies, 2. A parent retires and applies for Social Security, or 3. A parent becomes disabled and starts receiving Social Security Disability Insurance payments. The amount the son or daughter can be capped by maximum family allowances, but generally if the parent is still living and drawing a Social Security Check the DAC benefit is 50% of the parent's amount and if the parent has died the DAC benefit is 75% of what the parent would have been entitled to receive.

### 2. Medical Coverage

- a. **Medicare** - Once you qualify for SSDI or DAC you can get Medicare generally after 24 months. If you have enough work credits you get Medicare at age 65. This is strictly a Federal Program. This provides some medical coverage including hospitalization and doctor visits. There are no financial requirements for this program. A Special Needs Trust is **NOT** needed for this program.
- b. **Medicaid** - This is a combination Federal and State Program administered at the State level. This program has financial limitations similar to SSI. You must be disabled (but don't necessarily need a formal determination by Social Security).

In Florida, you can get this program by either qualifying for and receiving SSI or by applying directly through your state Medicaid Agency (in Florida eligibility for this program is determined by the Department of Children and Families). There are many forms of Medicaid programs and will vary from state to state. There are Medicaid Programs for children, adults, disabled, frail and elderly. These programs can provide such services as basic medical coverage, hospitalization, doctor visits, prescriptions or long term care expenses. Some long term care services can be provided at home or in an institutional setting such as an assisted living facility or nursing home. This program has asset limitations of generally around \$2,000 with some assets being exempt, similar to the SSI rules. All States are required by federal law to impose penalty or waiting periods for individuals who transfer or gift resources in order to qualify for Medicaid. How States impose these penalties can vary somewhat and we should understand how some trusts are excluded from this transfer penalty.

#### D. Self-Settled Trusts

1. These Trusts are Irrevocable when established, which means once they are established they cannot be changed. However, under Florida's new Trust Code there are ways to modify irrevocable trusts if necessary. See Florida Statutes 736.04113 and 736.04115 (2016).
2. These Trusts are established with the disabled person's personal assets (as compared with other family members' assets). There are many circumstances under which a disabled person will have money of their own.
  - a. One source of funds is a personal injury settlement where funds are directly received by the disabled person, or their guardian.
  - b. Another source of funds is an inheritance, which ideally should have been addressed originally by the family member through the use of a third party SNT. Unfortunately, sometimes a well-intentioned relative may not understand the problems they can cause by leaving assets directly to a disabled person. This happens frequently when an unexpected death occurs and there has been no estate planning or a lack of coordination with the finances and the legal estate plan.
  - c. In other situations, a disabled person may earn income through wages or a salary. They may have worked their entire adult life and then suddenly became disabled or been disabled since birth but still with the ability to work. Depending on the particular government program the disabled person is receiving, earned income will likely jeopardize eligibility. For individuals only on Medicaid, income deposited into this type of SNT can assist with maintaining eligibility.
3. These trusts are **exceptions** to the transfer penalties imposed in the SSI and Medicaid rules. So, transfers of assets to these types of trusts DO NOT impose waiting periods for SSI and Medicaid.
4. Ideally these trusts should be exhausted during the lifetime of the Beneficiary to enhance their quality of life.
5. **Under 65 Disabled Trust ((d)(4)(A)) - 42 USC 1396 p (d)(4)(A) -**
  - a. Must be less than 65 years of age when funded initially. The beneficiary may age past 65 and the trust is still exempted although you can't continue to contribute assets to this trust after age 65.

- b. It can be established by the disabled beneficiary directly, his or her parent, grandparent, guardian or by the court.
  - c. The Grantor chooses the Trustee which may be another family member or a professional (such as a bank, trust company or non-profit corporation).
    - 1. Additional concern should be given to ensure that there will be a Trustee for the lifetime of the beneficiary.
    - 2. There should be a succession of Trustees named if individuals are named. There can be difficulty with finding a Trustee (individual or corporate) experienced with administering a SNT.
    - 3. Family members may be more familiar with the needs of a disabled person, but may not be experienced with managing money or a trust.
    - 4. Corporate Trustees may be more capable of administering these trusts, but costs can be a factor unless there is a substantial fund to manage. Also corporate trustees are not providing the "hands-on" care and will likely not know the disabled person.
  - d. How can funds be used? For anything but need to be careful with SSI rules regarding payments for food or shelter expenses, discussed later.
  - e. Assets deposited into this Trust are exempt and the funding event is not a transfer. See Florida ESS Manual 1640.0576.09.
  - f. Any income deposited into this Trust does not count toward eligibility (in the month deposit is made) for Medicaid. See Florida ESS Manual 1640.0576.09.
  - g. Any distributions paid to third parties are not counted as income, unless for food and shelter and the beneficiary is on SSI.
  - h. Any funds remaining on death must first **pay back** the State for medical benefits received (through Medicaid). There is no pay-back to federal agencies (Social Security, Medicare or Supplemental Security Income).
  - i. This is a single trust created for each beneficiary. Although there is a "pay back" provision, there will also be other individual beneficiaries to receive any remaining funds after paying back the Medicaid program for the State of Florida. These "individual beneficiaries" need to be identifiable when the Trust is established.
6. **Pooled Trust ((d)(4)(C))- 42 USC 1396 p (d)(4)(C)**
- a. These Trusts must be established by a non-profit organization. There is one trust with multiple beneficiaries.
  - b. Since the Trust is already in existence, a beneficiary "joins" the Trust, usually through a contractual arrangement called a Joinder Agreement. This contract can be signed by the disabled person's parent, grandparent, guardian or by the court or by the individual himself or herself. Since the disabled person can sign personally their agent or representative is generally permitted to sign through a power of attorney.
  - c. The benefits of this trust over the (d) (4) (A) trust are that there is already a Trustee involved who should be familiar with administering these trusts and there is generally a money manager who handles the investments. Oftentimes these trusts do not have minimum fees to

administer the accounts, thus making these trusts more cost effective, particularly for smaller accounts.

1. Since the Trustee is already designated you can check out the background and experience of the Trustee and ask questions.
  2. You can also investigate the background of the investment advisor and the track record of the investments of the Trust. You have the right to ask these questions and you should be satisfied with the answers you receive. Use "BrokerCheck" at [www.finra.org](http://www.finra.org) to check the background of the financial advisor.
  3. Sometimes the initial fees, or up-front costs, can be substantial (several thousand dollars), others charge nominal set-up fees. The costs should be considerably less than setting up your own trust from scratch.
- d. How can funds be used? For anything that benefits the individual, but again you need to be careful with SSI recipients when spending for food and shelter.
  - e. The Beneficiary can be any age, however, assets deposited into Trust are exempt and the funding event is not a transfer if the Beneficiary is under age 65. Florida presently does not differentiate if the beneficiary is under or over age 65 and does not impose a penalty.
  - f. Any income deposited into Trust does not count toward eligibility for Medicaid. See Florida ESS Manual 1640.0576.09
  - g. Any distributions paid to third parties are not counted as income, with the same limitations as the Under 65 Trust ((d) (4) (A) Trust).
  - h. Any funds remaining on death are retained by the Pooled Trust or they must pay back the Medicaid agency for medical services provided.
    1. This means that these trusts are not inheritance vehicles (similar to the (d) (4) (A) trusts).
    2. Because these trusts must be established by a non-profit organization, these "retained funds" are generally moved to the non-profit for its purposes or are retained in the Pooled Trust to assist other beneficiaries, either new or existing.
    3. A properly utilized Pooled Trust will generally not have large amounts in the beneficiary's account on death.
7. Qualified Income Trust ((d)(4)(B)) - 42 USC 1396 p (d)(4)(B)
- a. Only used to handle excess income over the Income Cap of \$2,205/month in 2017 for Medicaid long term care programs.
  - b. This does not work for SSI eligibility.
  - c. This Trust is used commonly for the frail elderly in qualifying for nursing home Medicaid programs and rarely for the developmentally disabled.
8. Here is the exact, entire language of the federal laws governing these 3 types of SNT's under 42 USC 1396 p (d) (4):

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section [1614\(a\)\(3\)](#)) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title.

(B) A trust established in a State for the benefit of an individual if—

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title, and

(iii) the State makes medical assistance available to individuals described in section [1902\(a\)\(10\)\(A\)\(ii\)\(V\)](#), but does not make such assistance available to individuals for nursing facility services under section [1902\(a\)\(10\)\(C\)](#).

(C) A trust containing the assets of an individual who is disabled (as defined in section [1614\(a\)\(3\)](#)) that meets the following conditions:

(i) The trust is established and managed by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section [1614\(a\)\(3\)](#)) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

E. Trusts Set up By Others - these are the majority of the Special Needs Trusts.

1. Trust by Spouse - Can only be set up in Will -Qualifying Special Needs Trust (FL STAT 732.2025(8) and 732.2045(1)(g))

2. Trust by any other Person -- These are generally referred to as Third Party Special Needs Trusts

a. These trusts may be set up by parents for children or in some cases by the children for the parents' benefit and do not consist of the beneficiary's personal assets.

b. This type of SNT can be established as a separate, stand-alone irrevocable trust, under a person's will, or within another trust such as a typical revocable living trust.

c. If the SNT is Irrevocable (or at least cannot be changed or directed by the beneficiary) the trust assets are not considered in determining eligibility for most public assistance programs.

d. Distributions to a 3<sup>rd</sup> party are permitted. A more detailed list of permissible uses follows later in this outline.



- e. Anyone can be appointed as the Trustee except the disabled person or their spouse.
- f. There will be several layers of Beneficiaries such that after the death of the disabled Beneficiary there will be other Beneficiaries named to receive any remaining funds of the trust. Since this could be very distant into the future greater care needs to be taken in the drafting of these provisions.
- g. This is not a “pay-back” type of SNT. There is no Medicaid lien and no payments are required to go back to Medicaid upon the death of the primary beneficiary.

F. Distributions from All Special Needs Trusts.

1. Handling of Distributions is crucial in preserving public benefits. Improper distributions can cause the loss of public benefits to the beneficiary of a SNT.
2. Distributions made from the Trust will be considered in 1 of 3 categories.
  - a. First is **Direct Income** to the beneficiary. **SI 01120.201 I 1. a.** Direct Income reduces SSI benefits on a dollar for dollar basis until SSI goes away entirely. Direct Income must be reported for Medicaid eligibility and can affect eligibility. Direct Income includes cash payments and anything that could be easily converted to cash. (This may be hard to accomplish, as many things are convertible to cash.) Also under the new POMS, 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. Very recently, (in February of 2013), Social Security has changed their policy and will now allow a Trust to reimburse a third party for items purchased for a beneficiary on SSI.
  - b. The second category is “**In-Kind Income Support and Maintenance.**” This category is defined as food or shelter received as a result of disbursements from the trust by the trustee to a third party in the form of in-kind support and maintenance and are valued under the presumed maximum value rule. **This category only applies to people on SSI and not for individuals getting Social Security Retirement, SSDI or DAC.** Generally, in SNT’s, the Trustee often purchases items for the beneficiary. Many times, it is appropriate to make In Kind Support and Maintenance payments and therefore for the beneficiary to have a reduction in benefits. This is due to the fact that the SSI monthly payment may be inadequate to provide the appropriate level of food and shelter for the beneficiary. Thus, as long as the SSI payment is maintained, although at a reduced level, Medicaid eligibility is maintained. (A beneficiary may only receive \$1 of SSI a month and still be totally eligible for Medicaid benefits.)
  - c. The third category is defined as Not Income or as Distributions to Third Parties. In its Program Operations Manual System (POMS), the Social Security Administration states that 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. Thus, disbursements made by the trustee directly to a third party are not considered income to the individual. Since these distributions do not result in any reduction of SSI benefits, they are the most desirable types of distributions for a Trustee to make.

3. Types of distributions not considered food or shelter might include:
  - Services of a Geriatric Care Manager
  - Legal services
  - Professional Guardian services
  - Non-refundable airline tickets
  - Stereo system and computers
  - TV
  - Medical insurance
  - Telephone and cellular phone bills
  - Furniture
  - Vacation and Travel expenses of the disabled person
  - Movies
  - Tax payments
  - Medical treatment for which public funds are not available such as alternative health procedures or alternative medications
  - Memberships in clubs such as recreational clubs
  - Subscriptions to magazines, newspapers and book clubs
  - Adapted vehicles like a van and
  - The difference between a private and semiprivate room in an institution.
  - REMEMBER if the beneficiary is not on SSI you can also pay for food and shelter expenses.
  
4. Overall, distributions should be made in such a manner that they are not considered to be income to the beneficiary for public benefits purposes. The Trustee may not provide cash to the beneficiary with the hope that the beneficiary will use the money to buy certain items or use the money for certain purposes such as those listed above. Any cash paid directly to the beneficiary will be counted as income. If the Trustee provides In-Kind Support and Maintenance that is food or shelter, then SSI benefits may be reduced.
  
5. Trustees of Special Needs Trusts must be familiar with Deeming of Income and Resources and with In-Kind Support and Maintenance.

The Deeming law for SSI is found at 20 C.F.R. §416.1160 et. seq. and in the POMS at:

<https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=05013>

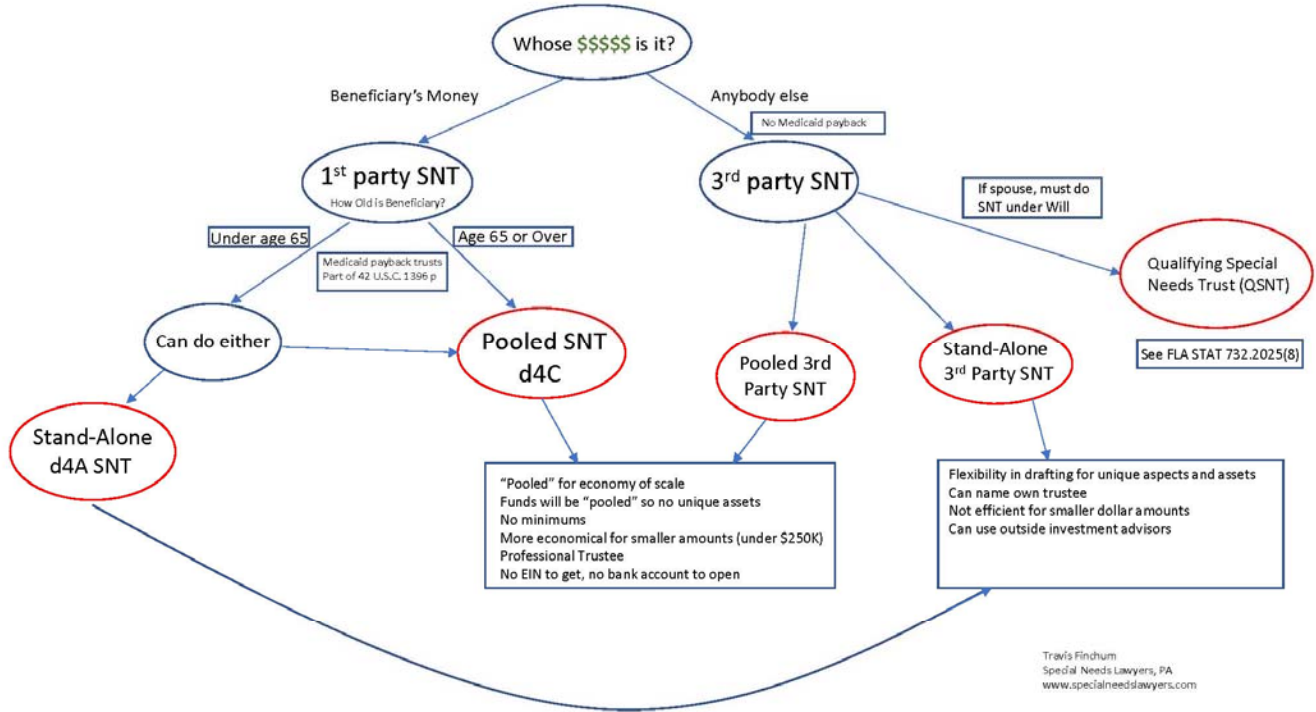
In-Kind Support and Maintenance Law for SSI is found at 20 C.F.R. §416.1130-1157 and in the POMS at SI 00835: **Living Arrangements and In-Kind Support and Maintenance**:

<https://secure.ssa.gov/apps10/poms.nsf/lnx/0500835000!opendocument>

6. A Trustee generally should NOT:
  - Pay cash to the beneficiary;
  - Pay cash to family of the beneficiary under the age of eighteen;
  - Make payments of rent, mortgage, real-estate taxes, homeowners' insurance, utilities, food, clothing, and shelter (this will be counted as income) without knowing exactly how such payments might affect SSI eligibility;
  - Buy or give groceries to the beneficiary without knowing exactly how such payments might affect SSI eligibility; and
  
7. The Trustee should be careful not to make distributions to a beneficiary that would be considered income to the beneficiary and thus reduce or eliminate public benefits. Traditional trust standards for distributions requiring income or principal distributions do not serve the basic purposes of a SNT. Overly broad Trustee discretion jeopardizes the beneficiary's eligibility for public benefits. A highly restrictive distribution standard may be even worse by denying the beneficiary many of the goods and services that would benefit the beneficiary's quality of life.
  
8. Credit Card Payments and Gift Cards -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.

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.

## SNT (Special Needs Trust) Analysis



## **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**

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

### **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 or 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 or 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 or 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 or herself trustee of his or 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 or 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 or 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 or 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 or 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 or 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 himself 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 himself 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 or her and making disbursements on his or 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 or 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 or 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 or 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 or 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 or 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 or 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 or 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 or 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 or 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](#)).

#### **d. Reimbursements to a third party**

Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income.

Existing income and resource rules apply to items a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of in-kind support and maintenance (ISM).

## **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 or 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 or 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 and 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/trustee, is income for SSI purposes **unless** the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust/trustee 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.

## **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 or her own support and maintenance;
- individual has unrestricted access to the trust principal;
- trust provides for payments to the individual or on his or 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 in the Trust page in MSSICS; see MSOM INTRANETSSI 013.005 for more information on what trust information to record. 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/trustee;
- 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 Non-Disability Repository for Evidentiary Documents (NDRed), or record any development electronically in EVID.

## **5. Medicaid Trust and 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 Trust (RTRS) page. For more information on the MSSICS Trust page, see MSOM INTRANETSSI 013.005. 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. Post-eligibility 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 or she set up a trust or suggest that you think a trust would be beneficial to him or 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](#)
- Excluded Resources – [SI 01110.210](#)

- MSOM INTRANETSSI 013.005 Trust



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

## 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.

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.](#), see [SI 01120.200](#).

## 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 of 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) (For income exclusions in the Act, see [SI 00830.099](#) and [SI 00820.500](#));
- resources excluded under section 1613 of the Act (For resource exclusions that are found in the Act, see [SI 01130.050](#));
- 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:
  - a. the individual or individual's spouse;
  - b. a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse; or

- c. 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.](#) in this section).
- 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 for 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](#) in this section) 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](#))

**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](#).

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. (For development, see [SI 01120.200](#).) 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](#) through [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. (For a definition of an asset, see [SI 01120.201B.2](#) in this section).

### b. Examples of trusts

- 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](#) in this section), which he or 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 [SI 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 or trustee, per [SI 01120.201J.1.d](#) in this section. 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/trustee.

### 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](#) in this section). 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.

(For additional income instructions, see [SI 01120.201J](#) in this section).

## **D. Policy on the treatment of trusts**

## 1. Revocable trusts

### a. General rule for 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](#) in this section) are considered a transfer of resources. (For transfer of resource provisions, see [SI 01150.100](#)).

### 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. (For policy on purchases for the benefit of the individual and titling of property, See [SI 01120.201F.1](#) in this section).

## 2. Irrevocable trusts

### a. General rule for 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](#) in this section), 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](#) in this section

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.](#) in this section. 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](#) in this section and [SI 01150.100](#).
- If a trust contains \$50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100<sup>th</sup> 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](#) (see also [SI 01120.201E](#) in this section). 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 or her behalf, e.g., guardian or legal representative.

### **b. Payments on behalf of or for the benefit of an individual**

See [SI 01120.201F.1.](#) in this section. Also, for more instructions on disbursements from trusts, see [SI 01120.201I](#) in this section.

## **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 or her excluded home to a trust and the trust is a countable resource, the home is still subject to exclusion under [SI 01130.100](#). (For a discussion of ownership of a home by a trust and the effect of payment of home expenses by the trust, see [SI 01120.200F](#)).

## **5. Trust rules versus transfer rules for assets in a trust**



When an individual transfers assets to a trust, he or 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 for 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.

(For instructions related to transfers of resources, see [SI 01150.100](#)).

#### **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. (For more information on the transfer penalty, see [SI 01150.100](#)).

## **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](#) in this section, 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.

(For instructions related to transfers of resources, See [SI 01150.100](#)).

**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 or on behalf of or for the sole benefit of an individual**

### **1. Trust established for the benefit of or 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**

### **a. General rule regarding 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.

Except as provided in [SI 01120.201F.2.b.](#) in this section and [SI 01120.201F.2.c.](#) in this section, 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.

### **b. Exceptions to the sole benefit rule for third party payments**

Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:

- Payments to a third party that result in the receipt of goods or services by the trust beneficiary;
- Payment of third party travel expenses which are necessary in order for the trust beneficiary to obtain medical treatment; and
- Payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long-term care facility (e.g., group homes and assisted living facilities) or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement. The travel must be for the purpose of ensuring the safety and/or medical well-being of the individual.

**NOTE:** If you have questions about whether a disbursement is permissible, please request assistance from your regional office.

### **c. Exceptions to the sole benefit rule for administrative expenses**

The trust may also 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:** You should not routinely question the reasonableness of a trustee's compensation. However, you should consider the factors above to determine if there is a reason to question the reasonableness of the fees or compensation.

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

If a trust previously determined to be exempt from resource counting under section 1917(d)(4)(A) or (C) contains a third party travel expense provision(s) that must be amended in order to conform with the third party travel expense provisions in [SI 01120.201F.2.b.](#), it must be amended within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains a third party travel expense provision(s) that must be amended in order to continue qualifying for the exception under Section 1917(d)(4)(A) or Section 1917(d)(4)(C).

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

**NOTE:** Each previously excepted trust is permitted only one 90-day amendment period to conform with the third party travel expense provisions in [SI 01120.201F.2.b.](#) in this section.

## **G. Policy for a 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 for 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](#) through [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 or 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](#) in this section).

## **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. (For a definition of burial spaces and applicable policy, see [SI 01130.400](#)).
- Burial funds may be excluded up to \$1,500 each for an individual and spouse. (For applicable instructions, see [SI 01130.409](#) through [SI 01130.425](#)).

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

## **I. Policy for 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. (For instructions pertaining to the PMV rule, see [SI 00835.300](#), and for rules pertaining to a home, see [SI 01120.200F](#)).

## **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 or 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 or 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](#)).

## **f. Reimbursements to a third party**

Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income. In addition, reimbursements from the trust to pay a credit card belonging to a third party for purchases made for the trust beneficiary are not income.

Existing income and resource rules apply to items a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of in-kind support and maintenance (ISM).

## **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. (For instructions pertaining to conversion of resources from one form to another, see [SI 01110.100](#) and for treatment of earnings or additions when the trust principal is a resource, see [SI 01120.201J.2.](#) and [SI 01120.201J.3.](#) in this section).

### **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 or 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](#)) 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.

(For a definition of “to or for the benefit of”, see [SI 01120.201F.1.](#) in this section).

## **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 for earnings and 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.](#) in this section.

### **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; 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 01120.201J.1.c.](#) in this section for what is not assignable), that is assigned to a trust or trustee, 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 (For exclusion of interest income, see [SI 00830.500](#)).

### **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 or 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 (for exclusion of interest income, see [SI 00830.500](#)).

#### 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.](#) in this section). 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**

- [SI 01120.200](#) Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
- [SI 01150.100](#) Transfer of Resources for Less Than Fair Market Value
- [SI 01120.202](#) Development and Documentation of Trusts Established on or after 1/1/00
- [SI 01120.203](#) Exceptions to Counting Trusts Established on or after 1/1/00

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

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

### 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 for exception to counting Medicaid trusts**

### **1. Special needs trusts established under Section 1917(d)(4)(A) of the Act**

#### **a. General rules for 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](#). Other than trust provisions for payments described in [SI 01120.201F.2.b.](#) and [SI 01120.201F.2.c.](#), 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 under the policy described in [SI 01120.201F.2.b.](#); however, such payments should be evaluated under [SI 01120.200E](#) through [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 or 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 or her own assets has legal authority over his own assets to establish a trust. He or she only needs legal authority over his child's assets if he or she 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 or 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 rules for 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. (For development, see [SI 01120.203F](#)).

## 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. (For a definition of sole benefit, see [SI 01120.201F.2](#)). Other than the payments described in [SI 01120.201F.2.b.](#) and [SI 01120.201F.2.c.](#), this exception does not apply if the trust account:

- provides a benefit to any other individual or entity 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 or 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**

Upon the death of the trust beneficiary, 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**

Upon the death of the trust beneficiary, 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.](#) in this section 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 through 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](#) in this section.

**NOTE:** The undue hardship waiver in [SI 01120.203C](#) in this section 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 for waiver for undue hardship**

### **1. Definitions**

#### **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 or 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 or her of food or shelter; and
- the trust specifically prohibits disbursements or prohibits the trustee from exercising his or 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 or 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](#)).

**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. (For a definition of liquid resources, see [SI 01110.300](#)).
- All liquid resources excluded under the Act as of the first moment of the month(s) for which undue hardship is at issue. (For a list of resource exclusions under the Act, see [SI 01130.050](#)).

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](#)).

## **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 for 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	<p>Does the trust contain the assets of an individual who was under age 65 when the trust was established? (<a href="#">SI 01120.203B.1.b.</a> in this section).</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 2</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Does the trust contain the assets of a disabled individual? (<a href="#">SI 011203B.1.d.</a>)</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 3</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Is the disabled individual the sole beneficiary of the trust? (<a href="#">SI 01120.203B.1.e.</a>)</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 4</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
4	<p>Did a parent, grandparent, legal guardian or a court establish the trust? (<a href="#">SI 01120.203B.1.f.</a> in this section).</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 5</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
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 <a href="#">SI 01120.203B.1.h.</a> in this section?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 6</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
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 <a href="#">SI 01120.203B.1.c.</a> in this section.</p> <p>Go to <b>Step 7</b> for treatment of assets placed in trust prior to age 65.</p> <p>Go to <b>Step 8</b> for treatment of assets placed in trust after attaining age 65.</p>
7	<p>Evaluate the trust under <a href="#">SI 01120.200D.1.a.</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 <a href="#">SI 01120.203B.2.</a> applies.</p>
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## 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 <a href="#">SI 01120.203B.2.b.</a> in this section) .</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 2</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Was the pooled trust established and maintained by a nonprofit association? (See <a href="#">SI 01120.203B.2.a.</a>, <a href="#">SI 01120.203B.2.c.</a> and development instructions in <a href="#">SI 01120.203F</a> in this section).</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 3</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (<a href="#">SI 01120.203B.2.d.</a> in this section).</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 4</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
4	<p>Is the disabled individual the sole beneficiary of the trust account? (<a href="#">SI 01120.203B.2.e.</a> in this section).</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 5</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
5	<p>Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (<a href="#">SI 01120.203B.2.a.</a> and <a href="#">SI 01120.203B.2.f.</a> in this section).</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 6</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>

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 <a href="#">SI 01120.203B.2.g.</a> in this section?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 7</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
7	<p>The trust meets the Medicaid pooled trust exception, however, the trust still should be evaluated under <a href="#">SI 01120.200D.1.a.</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 <a href="#">SI 01120.203E</a> in this section.</p>

## E. Procedure for 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"> <li>• If <b>yes</b>, go to <b>Step 2</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Does counting the trust result in excess resources?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 3</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Does the individual allege (or information in the file indicate) that not receiving SSI would deprive him or her of food or shelter according to <a href="#">SI 01120.203C.1.</a> in this section?</p> <ul style="list-style-type: none"> <li>• If <b>yes</b>, go to <b>Step 4</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
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"> <li>• Failure to receive SSI payments would deprive the individual of food or shelter;</li> <li>• The individual's total available funds are less than the FBR plus federally administered State supplement;</li> </ul>



	<ul style="list-style-type: none"> <li>• The individual agrees to report promptly any changes in income and resources; and</li> <li>• The individual understands that he or she may be overpaid if available funds exceed the FBR plus State supplement for any month, or other situations change.</li> <li>• Go to <b>Step 5</b>.</li> </ul>
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"> <li>• If <b>yes</b>, go to <b>Step 6</b>.</li> <li>• If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
6	<p>Add up all of the individual's income, both countable and excludable (see <a href="#">SI 01120.203C.3.a</a> in this section). Do not include any SSI payments received or items that are not income per <a href="#">SI 00815.000</a>. 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 <a href="#">SI 01120.203C.3.b</a> in this section).</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"> <li>• If <b>yes</b>, go to <b>Step 8</b>.</li> <li>• If <b>no</b>, go to <b>Step 7</b>.</li> </ul>
7	<p>Suspend counting of the trust as a resource for any month in which all requirements above are met (<a href="#">SI 01120.203C.2</a> in this section).</p> <ul style="list-style-type: none"> <li>• In MSSICS, document the findings of undue hardship and applicable months in the <b>DROC</b> screen.</li> <li>• On paper forms, document the information in the <b>REMARKS</b> section. For further documentation, see <a href="#">SI 01120.202C</a> and <a href="#">SI 01120.202D</a> and for follow-up instructions, see <a href="#">SI 01120.203G</a> in this section. <b>STOP</b>.</li> </ul>
8	<p>Undue hardship does not apply. However, in some instances where income and resource are currently too high, unless the trust is revocable, undue hardship may apply in future months.</p>

## F. Procedure for nonprofit associations

When a trust is alleged to be established through the actions of a nonprofit, or a tax-exempt organization, follow policy and procedure for verifying tax-exempt status of organizations found at [SI 01130.689E](#) "Gifts to children with life-threatening conditions."

## **G. Procedure for 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 six 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](#). in this section.
- 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 for 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.

# SI 01120.227 Null and Void Clauses in Trust Documents

**Citations:** Social Security Act (Act) as amended, Sections [1613\(e\)](#) ,[1917\(d\)\(4\)\(A\)](#) and [\(C\)](#) (42 U.S.C. §§ [1382b\(e\)](#) ,[1396p\(d\)\(4\)\(A\)](#) and [\(C\)](#)) .

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

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

A trust that is either newly formed or not previously excepted from resource counting must meet all of the criteria set forth in [SI 01120.199](#) through [SI 01120.203](#) and [SI 01120.225](#) through [SI 01120.227](#) to be excepted under section 1917(d)(4)(A) or (C). Do not except such a trust from resource counting unless the trust meets all of these requirements.

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

A trust that we previously determined to be excepted from resource counting under section 1917(d)(4)(A) or (C) continues to be excepted from resource counting, provided the trust is amended to conform with the requirements of this section within 90 days. That 90-day period begins on the day we inform the recipient or representative payee that the trust contains provisions that must be amended in order to continue qualifying for the exception under section 1917(d)(4)(A) or (C). Do not count a previously excepted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of this section after the expiration of the 90-day amendment period, begin counting the trust under normal resource counting rules.

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

## B. Background on “null and void” or “savings” clauses in trust documents

State law determines the necessary elements of a legally valid trust. Commonly, trust documents contain “null and void” or “savings” clauses (hereafter “null and void”). These null and void clauses operate to cure defects in a trust and preserve the remaining provisions. They prevent the trust from being determined invalid by removing the offending sections from consideration.

## C. 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 obtaining the advice of legal counsel. Therefore, the following instructions may be sufficient only to recognize that an issue is present that you should refer to the regional office (RO) for possible referral to the Regional Chief Counsel. When in doubt, discuss the issue with the RO staff. You can resolve many issues by phone.

## **D. Policy on SSI treatment of null and void clauses in trust documents**

For SSI resource counting purposes, a null and void clause does **not** cure an otherwise defective trust instrument. When reviewing a trust containing a null and void clause:

- Consider all of the provisions set forth in the trust document to determine whether the trust is a countable resource. For SSI purposes, a null and void clause cannot nullify provisions that would otherwise make the trust a countable resource.
- Null and void clauses cannot overcome missing or conflicting trust provisions.

### **1. Treatment of null and void clauses in trusts excepted under Section 1917(d)(4)(A) or (C)**

To be excepted from resource counting under the provisions of section 1917(d)(4)(A) or (C) of the Act, the trust must meet all of the criteria set forth in [SI 01120.199](#) through [SI 01120.203](#) and [SI 01120.225](#), without regard to the presence of a null and void clause. Trust provisions that fail to meet any of the required criteria must be amended or removed in order to except the trust from resource counting.

### **2. Treatment of null and void clauses in all other trusts**

To not be considered a countable resource, a trust that does not purport to meet the criteria in section 1917(d)(4)(A) or (C) of the Act and that is formed after 01/01/00 must be considered under the criteria in [SI 01120.201](#), without regard to the presence of a null and void clause. Trust provisions that fail to meet the criteria in [SI 01120.201](#) must be amended or removed, in order not to count the trust as a resource.

## **E. Examples**

**EXAMPLE 1:** The field office receives a special needs trust document to assess. During their review of the trust, the field office discovers that the Medicaid payback provision does not provide for payment to any State except for the State in which the individual currently lives. The field office notes the trust includes a null and void clause and the trustee assures the field office staff that the author of the trust, the family attorney, said that would be sufficient to have it approved. The field office notifies the trustee that, due to the incomplete Medicaid payback provision, the trust is not excludable, as written.

**EXAMPLE 2:** The field office receives a trust document that meets all of the requirements for exception for a section 1917 (d)(4)(A) trust. This trust also contains a null and void clause. The field office approves the trust because, even though the trust includes a null and void clause, the clause has no relevance. The trust meets the test of exception without relying on the null and void clause.