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Incapacity Planning | Guardianship | Developmental Disabilities | Veteran's Benefits

## Advanced Medicaid Strategies with Special Needs Trusts - 2022

By: Travis D. Finchum

### 1) What Do We Mean by “Special Needs Trust” – refer to Appendix B (page 42) for a detailed overview of these Trusts

- a) Under Age 65 Disabled Trust (d (4) (A)) – U65 Trust
- b) Pooled Trust (d (4) (C)) – Pooled Trust
- c) Qualified Income Trust (d (4) (B) - QIT
- d) Third Party Special Needs Trust

### 2) The Resources – Appendix A

- a) Federal Statutes
- b) Federal Regulations
- c) Federal Policy – POMS, CMS Medicaid Manual
- d) State Statutes – Florida Statutes
- e) State Regulations – Florida Administrative Code
- f) State Policy – Access Florida Program Policy Manual and Memorandums

### 3) Using SNT's as Over Income Trusts

- a) Can an U65 or Pooled Trust substitute for a QIT?
  - i) What are Assets, Income and Resources?
    - (1) We traditionally think of the term “resources” to mean “assets” and “income” but that is not how the relevant Federal Statutes and Federal policy utilize these terms.
    - (2) 42 USC 1396p(d) uses the term “assets” for describing what an individual must contribute to a trust to be considered as having established it.
    - (3) 42 USC 1396p(h) defines “asset” as “all income and resources of the individual”
    - (4) The term “asset” is referenced in these same terms (income and resources) in the CMS State Medicaid Manual at 3259.6 for “trust and transfer purposes.”

- (5) Therefore a reading of d(4)(A) and (C) would translate to “containing the income and resources of an individual...”
- (6) Social Security uses the same terms, resources and income, not assets and income in the POMS.
- (7) Our DCF, or rather HRS, got the terms wrong in our ESS Manual. Chapter 1600 should more properly be called “Resources.” The CMS Medicaid Manual chapter 3262 is called Resource Assessments and Eligibility
- ii) Federal Statutes address placing “assets” and “income” into U65, Pooled and QIT’s.
  - (1) Only “income” is used for the QIT.
  - (2) “Assets” is used for U65 and Pooled Trusts.
  - (3) The Federal Regulations are silent on this issue
- iii) Federal Policy in the CMS Manual is very clear on whether income can be deposited into an U65 and Pooled Trust.
  - (1) In 3259.7 the CMS Manual states that some trusts may be created using “income, either solely or in conjunction with resources.”
  - (2) Furthermore, 3259.7 says that “when an exempt trust for a disabled individual is established using the individual’s income (i.e., income considered to be received by the individual under the rules of the SSI program), the policies set forth in subsection C for treatment of income used to create Miller trusts apply.”
- iv) The Florida Administrative Code does not explicitly address this point, but does indirectly include income along with resources when referring to the funding of all three SNT’s.
  - (1) 65A-1.702 (15)(c) states that “[f]unds transferred into a trust, *other than a trust specified in 42 U.S.C. § 1396p(d)(4)* ... shall be considered available resources or income to the individual ...” emphasis added
  - (2) 65A-1.712(3)(a) states “[t]he Department follows the policy for transfer of assets mandated by 42 U.S.C. §§ 1396p (2006) and 1396r-5 (2006), incorporated by reference. Transfer policies apply to the transfer of income and resources.”
- v) The Access Florida Program Policy Manual specifically contemplates using U65 and Pooled Trusts for over income cases.
  - (1) Approved U65 and Pooled Trusts are referred to as “Qualified Disabled Trusts.” 1640.0576.09
  - (2) The DCF worker is directed to “not count any income deposited into the trust as income to the individual when determining the individual’s eligibility.” 1640.0576.09 3.
  - (3) Furthermore the “income placed into the trust (along with countable income outside the trust)” is to be counted “when computing patient responsibility.” 1640.0576.09 7.
  - (4) The funding of a qualified disabled or pooled trust is not “a transfer of assets or income subject to imposition of a penalty period, provided the trust purchases items and services at fair market value for the sole benefit of the disabled individual...” 1640.0576.09 2.
  - (5) This same language regarding not counting the income for eligibility purposes but to count the income placed into the trust in determining patient responsibility is used for the QIT. 1840.0110
- b) Okay, so I can use an U65 Trust or Pooled Trust instead of a QIT, but why would I want to do that?

- i) First, Pooled Trusts generally have professional Trustees who understand how SNT's work. Family members are often Trustees of QIT's and U65 Trusts. Family members routinely mess up QIT's. The time and expense of training the Trustees can be prohibitive and many family members don't want to do the jobs.
- ii) But there are better reasons, especially for those Medicaid recipients on the Long Term Care Waiver Program, as opposed to the ICP.
  - (1) First, QIT's are technically limited in what the funds can be used for.
    - (a) The CMS Medicaid Manual explains the problem better than the ESS Manual.
      - (i) The transfer of assets provision applies to transfers of income into a QIT. CMS Medicaid Manual 3259.7 (C).
      - (ii) The problem is that "placing funds in a Miller [QIT] trust normally subjects the individual to the penalties provided for under the transfer of assets provisions." *Id.*
      - (iii) The way the transfer is avoided is "to the extent that the trust instrument provides that the income placed in the trust will, in turn, be paid out of the trust for medical care provided to the individual..." *Id.*
      - (iv) "When such payments are made, the individual is considered to have received fair market value for the income placed in the trust, up to the amount actually paid for medical care to the individual and to the extent that the payments purchased care at fair market value." *Id.*
      - (v) Case workers are directed to rely on the State's specified time interval for when the payment must come back out of the QIT and if the funds do not come back out for medical care within this specified time period then the excess income is subject to a transfer penalty.
      - (vi) The CMS Manual does go on to say that "fair market value for funds placed" in the QIT is considered received back by the individual for any items or services that benefit the individual. Examples given are food, clothing, mortgage payments and trustee fees. *Id.* There is no corresponding language in the ESS Manual.
    - (b) Florida does not have a specified time period in our law or policy for when funds must come back out of the QIT. The same language about being a transfer and needing to come back out of the QIT is there.
      - (i) The Access Florida Program Policy Manual states that the case worker should not apply transfer penalties "for transfers of income placed in a qualified income trust account provided the individual receives fair compensation." 1840.0110
      - (ii) Similar to the CMS Manual, the Access Florida Program Policy Manual states that deposits into a QIT "are not subject to transfer penalties provided they are paid out of the trust for medical care for the individual. When such payments are made, the individual is considered to have received fair compensation for income placed in the trust account up to the amount paid for the medical care and to the extent medical care costs are at fair market value." *Id.* Therefore it would follow that until the funds come back out (within some prescribed time period) there has been a penalizing transfer.
      - (iii) The Access Florida Program Policy Manual has no provision for receiving fair market value when the QIT pays for non-medical expenses.
      - (iv) Query the effect of paying spousal diversion payments under the Minimum Monthly Maintenance Income Allowance to the spouse at home out of the QIT.

Although a transfer to a spouse does not impose a penalty, by a strict reading of the CMS and ESS Manuals any amount paid out of a QIT to the spouse would cause that same amount that was deposited into the QIT to incur a transfer penalty. I have not heard of DCF taking this position.

- (c) Therefore, DCF could impose a penalty based on the value of any payments out of a QIT that are not exclusively for medical expenses. Incidentally, payments to a nursing home as patient responsibility is specifically treated as an allowable medical expense.
- (2) Pooled Trusts and U65 Trusts do not have these same limitations on the use of the funds.
- (a) While the POMS states that payments from an exempt trust would be income if paid directly back to the beneficiary and may be in-kind support and maintenance if used to purchase food or shelter expenses, all other disbursements are permissible. POMS 01120.200E1.c.
  - (b) State Medicaid rules do not penalize ISM as does Social Security for SSI so any payments made out of a U65 or Pooled Trust, as long as not directed to the beneficiary, are permissible, as long as the distribution benefits the beneficiary. The Access Florida Program Policy Manual direction is very broad. "Disbursements not paid to the individual are not counted as income to the individual." 1640.0576.09 4.
  - (c) The POMS requires U65 Trusts and Pooled Trusts to be held "for the sole benefit of" the disabled beneficiary. This means that nobody else benefits from the trust, except for payment for services or goods that benefit the beneficiary.
- (3) If a Medicaid applicant has any excess resources there are many strategies an Elder Law attorney will consider suggesting. If an U65 Trust or a Pooled Trust is advantageous for any of the excess resources, then you are only dealing with one trust if the beneficiary also is over the income cap and you choose one of these trusts.
- (4) But I thought you can't be over age 64 and utilize a Pooled Trust?
- (a) True, for SSI purposes, the disabled person must be under age 65.
  - (b) The federal statute places no such specific age limitation. 42 USC 1396p(d)(4)(C).
  - (c) In many states, to use a Pooled Trust for Medicaid eligibility you must be under age 65 or there is a divestment penalty upon funding the Trust.
  - (d) In Florida, as well as some other states, a beneficiary of a Pooled Trust can be of any age and not suffer a divestment penalty.
    - (i) However, there is not a specific statement of this in the ESS Manual.
    - (ii) First, the Access Florida Program Policy Manual states that Pooled Trusts can be established by individuals of any age. This doesn't really help because such a statement is consistent with Federal law; the issue is whether the funding of a Pooled Trust by someone age 65 or over causes a divestment penalty.
    - (iii) Then, indirectly, the Access Florida Program Policy Manual states that once an U65 Trust or a Pooled Trust is approved, then the funding of the trusts is not a transfer, without any reference to the age of the individual beneficiary.
    - (iv) There have been numerous CMS memos well in the past (the Denver office in February, 2009, the Chicago office in July, 2008 and the Boston office in May, 2008) clearly stating that CMS's position is that a transfer to a Pooled Trust upon reaching age 65 and thereafter causes a penalty.

- (v) Some states, for instance Wisconsin, have initiated a formal change in policy to comply with CMS memos but have reversed their positions when challenged since the federal statutory language is unclear. However Social Security does not seem to be following this for SSI recipients and there have been a number of ALJ opinions recently that clearly indicate that a penalty is not automatic.
- (vi) We could do an entire program on this issue, but currently Florida does not impose a divestment penalty for Pooled Trust contributors age 65 or over.

- iii) For a Medicaid recipient on ICP, there will be very little income that does not go to the facility as part of the patient responsibility. Therefore there may not be any income left over to pay administrative or trustee fees for a U65 or Pooled Trust. For a person on Diversion, often there is income left over each month after paying the room and board portion of an ALF or paying for care at home. A SNT gives more flexibility for the use of the funds when compared with a QIT. There are even opportunities to ensure a Trustee is paid when an ICP recipient uses an U65 or Pooled Trust to handle over income situations.
- iv) How many of you are advising your clients doing a QIT that they must submit quarterly statements to DCF? See FAC 65A-1.702 (13)(d).

c) Using a Pooled Trust for other Medicaid Programs.

- i) QIT's are limited to only certain programs – see 1840.0110, but those limitations are not listed for U65 and Pooled Trusts, See 1640.0576.09.
- ii) So, how do we know which programs the U65 and Pooled Trusts work for? Stick with me here.

(a) The State Medicaid Manual defines the programs. Unless otherwise limited, as is the case for the Pooled Trust, the policies stated under chapter 1640 applies to all of the “MSSI” programs. The section that defines the MSSI programs is 0240.0102:

SSI-Related Medicaid Programs include:

1. SSI Eligible Individuals (SSI-DA),
2. Institutional Care Program (ICP),
3. Eligible Individuals under SOBRA - Aged or Disabled (MEDS-AD),
4. Protected Medicaid (PM),
5. Medically Needy (MN),
6. Emergency Medicaid for Noncitizens (EMN),
7. Hospice,
8. Home and Community Based Services (HCBS),
9. SSI-Related Programs for Refugees (RAP),
10. Qualified Medicare Beneficiaries (QMB),
11. Working Disabled (WD),
12. Special Low Income Medicare Beneficiary (SLMB),
13. Qualifying Individuals I (QI1),and
14. Program of All Inclusive Care for the Elderly (PACE)

iii) Why are some of these programs important?

(a) QMB – Pays Medicare premiums, co-insurance and deductibles:

Part A Deductible	- Hospital	\$ 1,556.00
Part B Premiums	\$170.10 x 12	\$ 2,041.20
Part B Deductible		<u>\$ 233.00</u>
		\$ 3,830.20

Skilled Nursing days 21-100 @ \$194.50/day	\$15,560.00
Hospital days 61-90 @ \$389/day	<u>\$11,670.00</u>
	\$27,230.00

(b) SLMB and QI1 pays Medicare premiums: \$170.10/mo x 12 = \$2,041.20

(c) MEDS-AD is full community Medicaid

(d) Protected Medicaid is full community Medicaid

#### 4) SNT's for Half a Loaf Strategies

- a) The traditional "Half a Loaf" strategy has been:
  - i) Transfer 100% of the resources (after exhausting all other, better options) when otherwise eligible.
  - ii) Report the transfer when filing an application.
  - iii) Get the penalty notification from DCF (CF-ES 2264, Notice of Determination of Asset (or Income) Transfer).
  - iv) Then transfer back a portion, per ESS 1640.0620, thus "repairing" some portion of the transfer and shortening the penalty period. See also POMS [SI 01150.124](#).
  - v) When the new, shorter penalty period runs, go back into DCF and explain that there was a partial repair of the transfer, and thus a shorter penalty period than originally calculated.
  - vi) And now you are eligible.
  
- b) A twist on this strategy using a SNT is:
  - i) Transfer a portion (say half) outright thus causing a penalty – half what it would be than if you transferred it all outright
  - ii) Place the other half into an exempt SNT (U65 or Pooled Trust). This does not cause a penalty.
  - iii) Spend the funds in the SNT during the penalty period so that when the penalty runs the SNT funds are gone (or nearly gone).
  - iv) If there are still funds in the SNT at the end of the penalty period, then that's okay too, you can still use the remaining funds to enhance the quality of life of the beneficiary for the rest of his or her lifetime.
  - v) If you exhaust the funds in the SNT before the penalty period has run you can either:
    - (1) Make another deposit into the SNT which will reduce the penalty because it is a repair of the original gift.
    - (2) Or use the funds transferred outright to carry you through the penalty period (provided you protected the transferred funds).
  - vi) If you mis-calculate using the traditional strategy (you don't give back enough or you give back too much, or an unexpected expense comes up) you are making the situation even more confusing on your DCF case worker. Good luck explaining all of this to them and I hope you are billing hourly because this will take a significant amount of time to stay on top of the moving money and document.
  
- c) So why not do this?
  - i) Trusts cost money to set up and administer.
    - (1) Do you really know how much? They may be more affordable than you think.
    - (2) Is your "repaired" gift back to the Medicaid applicant earning any type of return? If not then if a Trust has any interest earned you are "making money" while you wait out the penalty.

- ii) If my beneficiary dies before the penalty period runs then I might lose the money in the SNT.
  - (1) If the beneficiary has not received any Medicaid benefits then there is no Medicaid lien.
    - (a) An U65 Trust can release all of the funds to the heirs of the beneficiary because Medicaid is owed nothing.
    - (b) A Pooled Trust can likewise release funds to heirs if Medicaid is owed nothing, but you have to get the Pooled Trust to agree to do this.
      - (i) Competition is good, negotiate with the Trustee, search around until you find someone willing to work with you.
      - (ii) Even if you can't get back 100% of the remaining funds, it still may make sense economically if the Trust is earning some rate of return for your beneficiary
  - (2) If the likelihood of your beneficiary dying while the penalty is running is very high, you probably need to use a different strategy.
  
- iii) What if the account in the SNT falls in value due to bad investments?
  - (1) This is a poor result since there would not be the same amount of funds to help cover the penalty period.
  - (2) Ask about the investments, make sure you are comfortable with how the funds will be held, especially if you are using a SNT for this limited purpose.
  - (3) In general, elders over age 65 who use Pooled Trusts are risk averse and should know that their money is protected and not subject to market volatility.

## 5) Paying Personal Services Contracts out of a SNT

- a) We know SNT's can be used for anything that benefits the beneficiary.
- b) We also know that services can be purchased without causing a divestment penalty. [POMS SI 01150.007 Transfer of Resources by Spend-Down](#), ESS 1640.0614.04 Compensation in Support or Services.
- c) A Personal Services Contract (or Support and Maintenance Agreement, collectively referred to hereinafter as "PSK") must meet the criteria of the Access Florida Program Policy Manual or there will be a transfer penalty imposed.
  - i) When a PSK is entered into prior to a Medicaid Application being filed, the PSK is submitted as part of the Application.
  - ii) DCF will scrutinize the terms of the contract as part of the application – the hourly rate, number of hours, duration of the contract, etc.
- d) A PSK paid out of a SNT will not be submitted to DCF by the Trustee, there is no such requirement.
  - i) Yes, the payment (or number of payments if spread over time) will show on the quarterly statements sent to DCF per FAC 65A-1.702(13)(d) but for some SNT's this "statement" is part of hundreds of pages of statements submitted every 3 months.
  - ii) The beneficiary is already on Medicaid and DCF does not currently have the resources to scrutinize each and every statement.
  - iii) DCF does look at these statements though because we have seen DCF question a PSK paid out of a Pooled Trust so the contract still needs to be sound by DCF's standards.
- e) Sometimes, time is of the essence in attaining Medicaid eligibility, every month costs the disabled person thousands of dollars.
  - i) Parking funds, even if just for a short time in a SNT, can save a month's eligibility.

- ii) Not only can PSK's be paid out of SNT's, but this is a way to get lump sums out of the SNT to avoid the required Medicaid Trust recovery.
- iii) Payments on a PSK can be paid out as services are rendered or in lump sums over a number of years, provided the beneficiary is alive.
- f) A Trustee of a SNT should provide a 1099 to the caregiver under a PSK so the necessary tax reporting is done.

**6) Transfers to Sole Benefit SNT's for spouses, blind or disabled children or disabled individuals under age 65.**

- a) A transfer is allowed, without incurring a penalty, under many circumstances.
  - i) By federal statute transfers are allowed to the individual's spouse or to another for the sole benefit of the individual's spouse, transfers from the individual's spouse to another for the sole benefit of the individual's spouse, or directly to, or to an U65 Trust or Pooled Trust established solely for the benefit of, the individual's child or any individual under 65 years of age who is disabled. 42 USC 1396p (c)2(B).
  - ii) The POMS allows transfers to trusts for blind or disabled children or "to a trust established for the sole benefit of an individual including himself or herself who is under age 65 and is blind or disabled." SI 01150.121 2. and 3.
    - (1) An important question is "what is the definition of sole benefit?"
    - (2) The POMS says a trust is 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." POMS SI 01120.201 F 2.
    - (3) The CMS Medicaid Manual says a trust is for the sole benefit of "a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future." Additionally, it states "[i]n order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void." 3257 B 6.
    - (4) The Access Florida Program Policy Manual says sole benefit means "no individual or entity except the spouse, the individual's disabled child, or the disabled individual under age 65 can benefit from the assets or income transferred in any way either at the time of the transfer or at any time in the future; and the spending of the funds involved for the benefit of the individual is actuarially sound based on the life expectancy of the individual involved; that is, the individual must be able to receive fair compensation or return of the benefit of the transferred asset during his lifetime." Access Florida Program Policy Manual 1640.0609.07.
- b) While these trusts are not necessarily an U65 Trust or Pooled Trust, they are still a SNT. These can be a third party SNT and if we follow the POMS then we can name another family as the residual beneficiary after the death of the disabled person.
- c) Violating the sole benefit rule is a fatal mistake that some drafters make in establishing an U65 Trust or Pooled Trust.

- i) If one of these trusts provides, under any circumstances, that someone else can benefit from the trust while the beneficiary is still alive, then the sole benefit rule is violated.
    - (1) This can happen by putting in a “self-destruct” clause that says something to the effect of: If the Trustee has reasonable cause to believe that the principal and/or income in any Trust sub-account maintained for any Beneficiary will be required to be used for the care of a Beneficiary that has been, or would otherwise be, provided by local, state, or federal government, or an agency or department thereof, the Trustee may terminate the trust and give the funds elsewhere or back to the Grantor (who often is not the beneficiary) or anywhere other than the beneficiary. This is a fatal flaw in a self settled SNT. Unfortunately this fatal language exists in some Pooled Trusts currently marketed statewide.
    - (2) This would also be a fatal drafting error for one of the sole-benefit trusts we are discussing for others.
  - ii) Arguably, under the POMS such a SNT could be drafted for one of the individuals allowed and name a residual beneficiary.
  - iii) I am unaware of DCF taking the position that such a trust must be spending the trust assets within a set time period and have actually heard of trusts drafted as a straight third party SNT with a lifetime beneficiary and family member remainder beneficiaries being accepted by DCF as an allowable transfer.
- d) A SNT established solely for the benefit of a disabled spouse may be an alternative to dissolution in some marriages. (see below)

## 7) Miscellaneous Uses of SNT's

### a) Assign Alimony and Child Support to SNT's

- i) Alimony for a person seeking Medicaid eligibility and child support for a child seeking Medicaid or for a parent seeking Medicaid eligibility is problematic.
  - (1) Alimony is unearned income to the family unit and to the individual when received. Access Florida Program Policy Manual 1840.0705 and POMS SI 00830.418 B.
  - (2) Child support is unearned income. SI 00830.420 B and C and in the Access Florida Program Policy Manual at 1840.0706.
- ii) Redirecting these payments into an U65 Trust or a Pooled Trust can help with gaining eligibility for SSI as well as Medicaid.
  - (1) The bigger issue is for SSI eligibility since there is a hard and fast income limit and the QIT is not an option for handling excess income for SSI eligibility.
    - (a) By irrevocably assigning alimony or child support to an exempt SNT, the income is disregarded for SSI eligibility purposes. SI 01120.200 F d.
    - (b) Other sources of income may be assignable as well and can be transferred to a SNT. Assigning income to any third party or to a trust that is not exempt would be a transfer and incur a penalty.
  - (2) For straight Medicaid cases (not SSI related), whether Alimony and Child Support is irrevocably assigned to a SNT addresses the issue of countable income being over the \$2,523/month income cap, but it does not affect the patient responsibility.
    - (a) Regardless of whether income is irrevocably assigned, it will need to be placed, every month, into either an U65 Trust, a Pooled Trust or a QIT, if gross income exceeds \$2,523/month.

- (b) If the stream is assigned into one of these Trusts then the beneficiary can be eligible but the amount of the patient responsibility is not affected. Access Florida Program Policy Manual 1640.0576.09 7.
- (3) There are a few situations where irrevocably assigning child support to a SNT may be helpful.
  - (a) If both parent and child are disabled and the parent needs to qualify for Medicaid then assigning the child support payments to a SNT for the sole benefit of the child would remove the funds from parent's hands and thus not affect the parent's ability to qualify for assistance.
  - (b) Additionally, we know that settling family law cases can be very contentious, particularly when child support payments are negotiated. By agreeing, as part of the court settlement, for child support payments for a disabled child to go into a SNT for the sole benefit of the disabled child, these negotiations may go smoother if the "paying party" understands that these support payments won't just go into the hands of the custodial parent. Plus, if the trustee of the SNT is not the custodial parent, so much the better.
  - (c) This accomplishes the goal of settling the case, excluding the payments for determining the child's SSI or Medicaid eligibility purposes and safeguarding the money for the disabled child.
- iii) The number of applications for SNT's in family law matters such as separation, alimony and child support are both numerous and misunderstood by the family law Bar. An entire specialty could be developed practicing Family Law and Special Needs Trusts.

**b) Irrevocable Income Only (or Intentionally Defective Grantor) Trusts – Maybe not really a SNT but a strategy nonetheless**

- i) The basic concept is that your Medicaid applicant can make a transfer of assets into an irrevocable trust and cause a 5 year waiting period.
- ii) If the trust has ANY circumstance where income or principal can be paid out to or for the benefit of the beneficiary then Medicaid will consider that portion still available to the beneficiary after the waiting period. 42 USC 1396p(d)(3)(B) and CMS Medicaid Manual 3259.6 B.
- iii) Therefore, there are limitations on how the funds can be protected and still used for the Settlor.
- iv) This subject is technical from a tax perspective and my suggestion is if you have a beneficiary with substantial means to contact a person versed in the IRC (Internal Revenue Code) to make sure you do not run afoul of tax law.

**c) MSA's inside an exempt SNT**

Remember that money set aside to protect Medicare's interest in a typical account, whether in a trust or outside, would be considered an available resource for SSI and Medicaid purposes unless it is placed in a protected SNT (an U65 Trust or Pooled Trust).

## Appendix A

### Federal Statutes - Select

#### 42 U.S.C. § 1396a

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(2)

(A) The methodology to be employed in determining income and resource eligibility for individuals under subsection (a)(10)(A)(i)(III), (a)(10)(A)(i)(IV), (a)(10)(A)(i)(VI), (a)(10)(A)(i)(VII), (a)(10)(A)(ii), (a)(10)(C)(i)(III), or (f) of this section or under section 1396d (p) of this title may be less restrictive, and shall be no more restrictive, than the methodology—

- (i) in the case of groups consisting of aged, blind, or disabled individuals, under the supplemental security income program under subchapter XVI of this chapter, or
- (ii) in the case of other groups, under the State plan most closely categorically related.

(B) For purposes of this subsection and subsection (a)(10) of this section, methodology is considered to be “no more restrictive” if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.

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#### 42 USC 1396p (c)

(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—

(A) the assets transferred were a home and title to the home was transferred to—

- (i) the spouse of such individual;
- (ii) a child of such individual who
  - (I) is under age 21, or
  - (II) (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title;
- (iii) a sibling of such individual who has an equity interest in such home and who was residing in such individual’s home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or
- (iv) a son or daughter of such individual (other than a child described in clause (ii)) who was residing in such individual’s home for a period of at least two years immediately before the date the individual becomes an institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

(B) the assets—

- (i) were transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse,
- (ii) were transferred from the individual’s spouse to another for the sole benefit of the individual’s spouse,

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c (a)(3) of this title);

(C) a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that

(i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration,

(ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, or

(iii) all assets transferred for less than fair market value have been returned to the individual; or

(D) the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary.

The procedures established under subparagraph (D) shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the personal representative of the individual. While an application for an undue hardship waiver is pending under subparagraph (D) in the case of an individual who is a resident of a nursing facility, if the application meets such criteria as the Secretary specifies, the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days.

(3) For purposes of this subsection, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

(4) A State (including a State which has elected treatment under section 1396a (f) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of an individual which results in a period of ineligibility for medical assistance under a State plan for such individual, a State shall, using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance under the State plan.

(5) In this subsection, the term "resources" has the meaning given such term in section 1382b of this title, without regard to the exclusion described in subsection (a)(1) thereof.

#### **(d) Treatment of trust amounts**

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)

(A) For purposes of this subsection, an individual shall be considered to have established a trust if **assets of the individual** were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.

- (ii) The individual's spouse.
- (iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
- (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

- (i) the purposes for which a trust is established,
- (ii) whether the trustees have or exercise any discretion under the trust,
- (iii) any restrictions on when or whether distributions may be made from the trust, or
- (iv) any restrictions on the use of distributions from the trust.

(3)

(A) In the case of a revocable trust—

- (i) the corpus of the trust shall be considered resources available to the individual,
- (ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and
- (iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c) of this section.

(B) In the case of an irrevocable trust—

- (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—
  - (I) to or for the benefit of the individual, shall be considered income of the individual, and
  - (II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c) of this section; and
- (ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed of by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c (a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, 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 subchapter.

(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 subchapter; and
- (iii) the State makes medical assistance available to individuals described in section 1396a (a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a (a)(10)(C) of this title.

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c (a)(3) of this title) that meets the following conditions:

- (i) The trust is established and managed by a non-profit 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 1382c (a)(3) of this title) 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 subchapter.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

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#### (h) Definitions

In this section, the following definitions shall apply:

(1) The term "assets", with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive because of action—

(A) by the individual or such individual's spouse,

(B) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

(C) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

(2) The term "income" has the meaning given such term in section 1382a of this title.

(3) The term "institutionalized individual" means an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in section 1396a (a)(10)(A)(ii)(VI) of this title.

(4) The term "noninstitutionalized individual" means an individual receiving any of the services specified in subsection (c)(1)(C)(ii) of this section.

(5) The term "resources" has the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

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**There are no Federal Regulations regarding the Interpretations of Trusts and their uses.**

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**Federal Policy**

**Program Operations Manual System (POMS) at:**

**<https://secure.ssa.gov/apps10/poms.nsf/chapterlist!openview&restricttocategory=05>**

**SI 01120.200 - Trusts**

**SI 01120.201 – Trusts Established on or after 1/1/00**

**SI 01120.203 – Exceptions for Trusts Established on or after 1/1/00**

**State Medicaid Manual by CMS – Centers for Medicare and Medicaid Services**

**<http://www.cms.hhs.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS021927&intNumPerPage=10>**

Function of the State Medicaid Manual (SMM).--This manual makes available to all State Medicaid agencies, in a form suitable for ready reference, informational and procedural material needed by the States to administer the Medicaid program. It is an official medium by which the Health Care Financing Administration (HCFA) issues mandatory, advisory, and optional Medicaid policies and procedures to the Medicaid State agencies.

CMS (The Center for Medicare and Medicaid Services) State Medicaid Manual incorporated Transmittal 64 from November 1994 into the manual at sections 3257-3259.

**3259. TREATMENT OF TRUSTS**

**3259.6**

B. Irrevocable Trust - Payment Can Be Made to Individual Under Terms of Trust.--In the case of an irrevocable trust, where there are any circumstances under which payment can be made to or for the benefit of the individual from all or a portion of the trust, the following rules apply to that portion:

- o Payments from income or from the corpus made to or for the benefit of the individual are treated as income to the individual;
- o Income on the corpus of the trust which could be paid to or for the benefit of the individual is treated as a resource available to the individual;
- o The portion of the corpus that could be paid to or for the benefit of the individual is treated as a resource available to the individual; and
- o Payments from income or from the corpus that are made but not to or for the benefit of the individual are treated as a transfer of assets for less than fair market value. (See §§3258ff. for treatment of transfers for less than fair market value.)

**EXAMPLE:** Use the same facts that were used in the previous example, but treat the trust as an irrevocable trust. The trustee has discretion to disburse the entire corpus of the trust and all income from the trust to anyone, including the grantor. The \$100 personal allowance and \$500 for home upkeep are income to Mr. Baker. The \$50,000 left after the gift to Mr. Baker's brother is a countable resource to Mr. Baker, since there are circumstances under which payment of this amount could be made to Mr. Baker. The \$50,000 gift to Mr. Baker's brother is treated as a transfer of assets for less than fair market value. However, the look-back period for this type of trust is only 36

months. (See §3258.4 for transfer look-back periods as they apply to trusts.) The transfer occurred outside of the look-back period. Thus, no penalty for transferring an asset for less than fair market value can be imposed.

C. Irrevocable Trust - Payments From All or Portion of Trust Cannot, Under Any Circumstances, Be Made to or for the Benefit of the Individual.--When all or a portion of the corpus or income on the corpus of a trust cannot be paid to the individual, treat all or any such portion or income as a transfer of assets for less than fair market value, per instructions in §§3258ff.

In treating these portions as a transfer of assets, the date of the transfer is considered to be:

- o The date the trust was established; or,
- o If later, the date on which payment to the individual was foreclosed.

In determining for transfer of assets purposes the value of the portion of the trust which cannot be paid to the individual, do not subtract from the value of the trust any payments made, for whatever purpose, after the date the trust was established or, if later, the date payment to the individual was foreclosed. If the trustee or the grantor adds funds to that portion of the trust after these dates, the addition of those funds is considered to be a new transfer of assets, effective on the date the funds are added to that portion of the trust.

Thus, in treating portions of a trust which cannot be paid to an individual, the value of the transferred amount is no less than its value on the date the trust is established or payment is foreclosed. When additional funds are added to this portion of the trust, those funds are treated as a new transfer of assets for less than fair market value.

When that portion of a trust which cannot be paid to an individual is treated as a transfer of assets for less than fair market value, the usual 36 month look-back period is extended to 60 months. (See §3258.4 for the look-back period for transfers of assets for less than fair market value.)

EXAMPLE: Use the same facts that are used in the examples in subsections A and B, except that the trustee is precluded by the trust from disbursing any of the corpus of the trust to or for the benefit of Mr. Baker. Again, the \$100 and \$500 (which come from income to the trust) count as income to Mr. Baker. Because none of the corpus can be disbursed to Mr. Baker, the entire value of the corpus at the time the trust was created (\$100,000 in March 1994) is treated as a transfer of assets for less than fair market value.

As with the revocable trust discussed in subsection A, the date of transfer is within the 60 month look-back period that applies to portions of trusts that cannot be disbursed to or for the individual. Thus, a transfer of assets is considered to have occurred as of March 1, 1994. The fact that \$50,000 was actually transferred out of the trust to Mr. Baker's brother does not alter the amount of the transfer upon which the penalty is based. That amount remains \$100,000, even after the gift to Mr. Baker's brother.

If, at some point after establishing the trust, Mr. Baker places an additional \$50,000 in the trust, none of which can be disbursed to him, that \$50,000 is treated as an additional transfer of assets. The penalty period that applies to that \$50,000 starts when those funds are placed in the trust, provided no penalty period from the previous transfer of \$100,000 is still running. If a previous penalty period is still in effect, the new penalty period cannot begin until the previous penalty period has expired. (See §§3258ff. for transfers of assets for less than fair market value.)

Amounts are considered transferred as of the time the trust is first established or, if later, payment to the individual is foreclosed. Each time the individual places a new amount into the trust, payment to the individual from this new portion is foreclosed. It is this later date that determines when a transfer has occurred.

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F. Placement of Excluded Assets in Trust.--Section 1917(e) [now section (h)] of the Act provides that, for trust and transfer purposes, **assets include both income and resources**. Section 1917(e) of the Act further provides that income has the meaning given the term in §1612 of the Act and resources has the meaning given that term in §1613 of the Act. The only exception is that for institutionalized individuals, the home is not an excluded resource.

Thus, transferring an excluded asset (either income or a resource, with the exception of the home of an institutionalized individual) for less than fair market value does not result in a penalty under the transfer provisions because the excluded asset is not an asset for transfer purposes. Similarly, placement of an excluded asset in a trust does not change the excluded nature of that asset; it remains excluded. As noted in the previous paragraph, the only exception is the home of an institutionalized individual. Because §1917(e) of the Act provides that the home is not an excluded resource for institutionalized individuals, placement of the home of an institutionalized individual in a trust results in the home becoming a countable resource.

G. Use of Trust vs. Transfer Rules for Assets Placed in Trust.--When a nonexcluded asset is placed in a trust, a transfer of assets for less than fair market value generally takes place. An individual placing an asset in a trust generally gives up ownership of the asset to the trust. If the individual does not receive fair compensation in return, you can impose a penalty under the transfer of assets provisions.

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### 3259.7 Exceptions to Treatment of Trusts Under Trust Provisions.--

#### B. Pooled Trusts.--

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While trusts for the disabled (as well as Miller trusts described in subsection C) are exempt from treatment under the trust rules described in §3259.6, funds entering and leaving them are not necessarily exempt from treatment under the rules of the appropriate cash assistance program. The following are rules applicable to funds entering and leaving both kinds of exempt trusts for the disabled.

1. Trusts Established with Income.--While most trusts for the disabled are created using the individual's resources, some may be created using the individual's income, either solely or in conjunction with resources. When an exempt trust for a disabled individual is established using the individual's income (i.e., income considered to be received by the individual under the rules of the SSI program), the policies set forth in subsection C for treatment of income used to create Miller trusts apply.

NOTE: The following policies assume that the income placed in the trust is the individual's own income, placed in the trust after he or she receives it. When the right to income placed in the trust actually belongs to the trust and not the individual the income does not count under SSI rules as income received by the individual.

The policies pertaining to treatment of income belonging to the individual include:

- o Not counting for eligibility purposes income before it is placed in the trust;
- o Application of transfer of assets rules (where a transfer into trust for a disabled individual is not exempt from penalty under the exceptions to the transfer of assets rules explained in §3258.10);
- o Application of post-eligibility treatment of income rules to income placed in the trust;
- o Counting as income, per cash assistance rules, funds paid out of the trust to or for the benefit of the individual (This rule applies to any payment from an exempt trust, regardless of whether the trust is established using income, resources, or both.); and
- o Spousal impoverishment provisions as they apply to exempt trusts.

For a detailed discussion of how these policies apply to income placed in an exempt trust for a disabled individual, see subsection C.

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C. Miller-Type or Qualifying Income Trusts (QIT).--

3. Application of Transfer of Assets Provisions of OBRA 1993.--The transfer of assets provisions described in §§3258ff. apply to funds placed in a Miller trust. Under the transfer of assets provisions, income is considered to be an asset. In placing income in an irrevocable trust, including a Miller trust, an individual gives up direct access to and control over that income. Thus, placement of funds, including income, in a trust can be a transfer of assets for less than fair market value. As such, placing funds in a Miller trust normally subjects the individual to the penalties provided for under the transfer of assets provisions.

However, transfer of assets penalties do not apply to income placed in a Miller trust to the extent that the trust instrument provides that the income placed in the trust will, in turn, be paid out of the trust for medical care provided to the individual, including nursing home care and care under a home and community-based waiver. When such payments are made, the individual is considered to have received fair market value for the income placed in the trust, up to the amount actually paid for medical care provided to the individual and to the extent that the payments purchased care at fair market value.

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When payments are made for the individual's medical care you must require that the payments be made at intervals specified by your State (e.g., every month or by the end of the month following the month the funds were placed in the trust). An individual cannot be considered to have received fair market value for funds placed in a trust until payments for some item or service are actually made. Thus, funds cannot be allowed to accumulate indefinitely in a Miller trust and still avoid transfer of assets penalties.

The individual is considered to have received fair market value for funds placed in a Miller trust for any other payments made from the trust which are for the benefit of the individual and which reflect fair payments for any items or services which were purchased. For example, funds placed in the trust can be used to pay the administrative fees of the trust, income tax owed by the trust, attorney's fees which the trust is obligated to pay (in proportion to whatever part of the trust benefits the individual), food or clothing for the individual, or mortgage payments for the individual's home.

When income placed in the trust exceeds the amount paid out of the trust for medical services or other items or services which benefit the individual, the excess income is subject to penalties under the transfer of assets provisions.

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**Florida Statutes - Selected**

**409.902 Designated single state agency; payment requirements; program title; release of medical records.**--The Agency for Health Care Administration is designated as the single state agency authorized to make payments for medical assistance and related services under Title XIX of the Social Security Act. These payments shall be made, subject to any limitations or directions provided for in the General Appropriations Act, only for services included in the program, shall be made only on behalf of eligible individuals, and shall be made only to qualified providers in accordance with federal requirements for Title XIX of the Social Security Act and the provisions of state law. This program of medical assistance is designated the "Medicaid program." The Department of Children and Family Services is responsible for Medicaid eligibility determinations, including, but not limited to, policy, rules, and the agreement with the Social Security Administration for Medicaid eligibility determinations for Supplemental Security Income recipients, as well as the actual

determination of eligibility. As a condition of Medicaid eligibility, subject to federal approval, the Agency for Health Care Administration and the Department of Children and Family Services shall ensure that each recipient of Medicaid consents to the release of her or his medical records to the Agency for Health Care Administration and the Medicaid Fraud Control Unit of the Department of Legal Affairs.

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**409.903 Mandatory payments for eligible persons.**--The agency shall make payments for medical assistance and related services on behalf of the following persons who the department, or the Social Security Administration by contract with the Department of Children and Family Services, determines to be eligible, subject to the income, assets, and categorical eligibility tests set forth in federal and state law. Payment on behalf of these Medicaid eligible persons is subject to the availability of moneys and any limitations established by the General Appropriations Act or chapter 216.

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(2) A person who receives payments from, who is determined eligible for, or who was eligible for but lost cash benefits from the federal program known as the Supplemental Security Income program (SSI). This category includes a low-income person age 65 or over and a low-income person under age 65 considered to be permanently and totally disabled.

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**409.919 Rules.**--The agency shall adopt any rules necessary to comply with or administer ss. 409.901-409.920 and all rules necessary to comply with federal requirements. In addition, the Department of Children and Family Services shall adopt and accept transfer of any rules necessary to carry out its responsibilities for receiving and processing Medicaid applications and determining Medicaid eligibility, and for assuring compliance with and administering ss. 409.901-409.906, as they relate to these responsibilities, and any other provisions related to responsibility for the determination of Medicaid eligibility.

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## Florida Administrative Code

### 65A-1.702 Special Provisions.

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#### (13) Trusts.

(a) The Department applies trust provisions set forth in §1902 of the Social Security Act.

(b) Funds transferred into a trust or other similar device established other than by a will prior to October 1, 1993, by the individual, a spouse, or a legal representative are available resources if the trust is revocable or if the trustee has any discretion over the distribution of the principal. Such funds are a transfer of a resource or income, if the trust is irrevocable and the trustee does not have discretion over distribution of the corpus, or if the individual is not the beneficiary. No penalty can be imposed when the transfer occurs beyond the 60 month look-back period. Any disbursements which can be made from the trust to the individual or to someone else on the individual's behalf shall be considered available income to the individual. Any language which limits the authority of a trustee to distribute funds from a trust, if such distribution would disqualify an individual from participation in government programs, including Medicaid, shall be disregarded.

(c) Funds transferred into a trust, other than a trust specified in 42 U.S.C. §1396p(d)(4), by a person or entity specified in 42 U.S.C. §1396p(d)(2) on or after October 1, 1993, shall be considered available resources or income to the individual in accordance with 42 U.S.C. §1396p(d)(3) if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual. If no disbursement can be made to the individual or to someone else on behalf of the individual, the establishment of the trust shall be considered a transfer of resources or income.

(d) The trustee of a qualified income trust, qualified disabled trust, or a pooled trust shall provide quarterly

statements to the Department which identify all deposits to and disbursements from the trust for each month during the eligibility period.

(e) Undue Hardship. A period of ineligibility shall not be imposed if the Department determines that the denial of eligibility based on counting funds in an irrevocable trust according to provisions in paragraph 65A-1.702(13)(b), F.A.C., would create an undue hardship on the individual. Undue hardship exists when application of a trust policy would deprive an individual of food, clothing, shelter or medical care such that their life or health would be endangered. This can be caused by legal restrictions or by illegal actions of a trustee. All efforts by the individual, or their legal spouse or representative, to access the resources or income must be exhausted before this exception applies.

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### **65A-1.712 SSI-Related Medicaid Resource Eligibility Criteria.**

(1) Resource Limits. If an individual's total resources are equal to or below the prescribed resource limits at any time during the month the individual is eligible on the factor of resources for that month. The resource limit is the SSI limit specified in Rule 65A-1.716, F.A.C., with the following exceptions:

(a) For MEDS-AD Demonstration Waiver an individual whose income is equal to or below 88 percent of the federal poverty level must not have resources exceeding the current Medically Needy resource limit specified in Rule 65A-1.716, F.A.C.

(b) For QMB, an individual cannot have resources exceeding the Medically Needy resource limit.

(c) For WD, an individual cannot have resources exceeding the Medically Needy resource limit.

(d) For SLMB, an individual cannot have resources exceeding the Medically Needy resource limit.

(e) For Medically Needy, an individual or couple cannot have resources exceeding the applicable Medically Needy resource level set forth in subsection 65A-1.716(3), F.A.C.

(f) For the Home and Community Based Waiver Services (HCBS) Program, an individual cannot have countable resources that exceed \$2,000. If the individual's income falls within the MEDS-AD Demonstration Waiver limit, the individual can have resources up to \$5,000.

(2) Exclusions. The Department follows SSI policy prescribed in 20 C.F.R. §416.1210 (2009) and 20 C.F.R. §416.1218 (2009), incorporated by reference, in determining what is counted as a resource with the following exceptions, as mandated by federal Medicaid policies, or additional exclusions, as adopted by the Department under 42 U.S.C. § 1396a(r)(2) (2006), incorporated by reference. SSI policy requires resources in a blocked account to be countable resources. This applies regardless of whether the individual or their representative is required to petition the court to withdraw funds for the individual's care. A blocked account is one in which state law protects an individual's funds by specifically requiring that the funds be made available for the care and maintenance of the individual.

(a) Resources of a comatose applicant (or recipient) are not considered as available when there is no known legal guardian or other individual who can access and expend the resource(s).

(b) The value of a life estate interest in real property is excluded.

(c) The cash surrender value of life insurance policies is excluded as resources if the combined face value of the policies is \$2,500 or less.

(d) The individual, and their spouse, may designate up to \$2,500 each of their resources for burial funds for any month, including the three months prior to the month of application. The designated funds may be excluded regardless of whether the exclusion is needed to allow eligibility. The \$2,500 is not reduced by the value of excluded life insurance policies or irrevocable burial contracts. The funds may be commingled in the retroactive period.

(e) One automobile is excluded, regardless of value.

(f) Property that is essential to the individual's self-support shall be excluded from resources if it is producing income available to the individual which is consistent with its fair market value. This includes real and personal property used in a trade or business; non-business income-producing property; and property used

to produce goods or services essential to an individual's daily activities. Liquid resources other than those used as part of a trade or business are not property essential to self-support. For the purpose of this section, mortgages are considered non-liquid resources, if they were entered into on or before September 30, 2004.

(g) An individual who is a beneficiary under a qualified state Long-Term Care Insurance Partnership Policy is given a resource disregard equal to the amount of the insurance benefit payments made to or on behalf of the individual for long term care services when determining if the individual's countable resources are within the program limits to qualify for Medicaid nursing home care, Home and Community Based Waiver Services Program, the Program of All Inclusive Care for the Elderly (PACE), or hospice benefits.

(3) Transfer of Resources and Income. According to 42 U.S.C. § 1396p(c) (2006), incorporated by reference, if an individual, the spouse, or their legal representative, disposes of resources or income for less than fair market value on or after the look back date, the department must presume that the disposal of resources or income was to become Medicaid eligible and impose a period of ineligibility for nursing facility care services, institutional hospice or HCBS waiver services. The Department will mail a notice to individuals who report a transfer for less than fair market value (Form CF-ES 2264, 02/2007, Notice of Determination of Assets (Or Income) Transfer, incorporated herein by reference), advising of the opportunity to rebut the presumption and of the opportunity to request and support a claim of undue hardship per subparagraph (c)5. below. If the Department determines the individual is eligible for Medicaid on all other factors of eligibility except the transfer, the individual will be approved for general Medicaid services (not long-term care services) and advised of their penalty period (Form 2358, 02/2007, Medicaid Transfer Disposition Notice, incorporated herein by reference). Transfers of resources or income made prior to (first day of month following effective date) are subject to a 36 month look back period, except in the case of a trust treated as a transfer in which case the look back period is 60 months. Transfers of resources or income made on or after (first day of month following effective date) are subject to a 60 month look back period.

(a) The Department follows the policy for transfer of assets mandated by 42 U.S.C. §§ 1396p (2006) and 1396r-5 (2006), incorporated by reference. Transfer policies apply to the transfer of income and resources.

(b) When funds are transferred to a retirement fund, including annuities, within the transfer look back period the Department must determine if the individual will receive fair market compensation in their lifetime from the fund. If fair compensation will be received in their lifetime there has been no transfer without fair compensation. If not, the establishment of the fund must be regarded as a transfer without fair compensation. Fair compensation shall be calculated based on life expectancy tables published by the Office of the Actuary of the Social Security Administration. See Rule 65A-1.716, F.A.C.

1. Individuals and their spouses must disclose their ownership interest in any annuity, including annuities that are not subject to the transfer of assets provision, and if purchased after November 1, 2007 must name the state as a remainder beneficiary (for applicants at the time of approval or for recipients at time of annual review) in the first position for no more than the total amount of medical assistance paid on behalf of the institutionalized individual or in the second position after the community spouse and/or minor or disabled child unless the spouse, child or their representative disposes of the remainder for less than fair market value.

2. A purchase of an annuity (and other transactions that change the course of an annuity payment or treatment of income or principal) made after November 1, 2007 will be considered a transfer of assets for less than fair market value unless the annuity meets all of the following criteria for applicants at the time of approval and recipients at the time of annual review: (a) the state is named as the primary beneficiary (or secondary as appropriate pursuant to subparagraph (b)1. above); (b) the annuity is irrevocable and non-assignable; (c) the annuity pays principal and interest in equal amounts during the term of the annuity, with no balloon or deferred payments; and (d) the annuity is actuarially sound based on standards published by the Office of the Chief Actuary of the Social Security Administration called the Period of Life Table as set forth in Rule 65A-1.716, F.A.C. (Life Expectancy Tables). Annuities purchased for the community spouse after November 1, 2007 must name the state as primary (or secondary) beneficiary pursuant to subparagraph (b)1. above and must be actuarially sound based on the community spouse's age and the life expectancy tables.

3. Individual Retirement Accounts (IRAs) or annuities (as described in Section 408 of the Internal Revenue Code) (2008), incorporated by reference) established by an employee or employer are not considered under the transfer of assets provision and are not required to name the state as the primary remainder beneficiary in accordance with subparagraph (b)1. above.

(c) No penalty or period of ineligibility shall be imposed against an individual for transfers described in 42 U.S.C. § 1396p(c)(2) (2006), incorporated by reference).

1. In order for the transfer or trust to be considered to be for the sole benefit of the spouse, the individual's blind or disabled child, or a disabled individual under age 65, the instrument or document must provide that: (a) no individual or entity except the spouse, the individual's disabled child, or disabled individual under age 65 can benefit from the resources transferred in any way, either at the time of the transfer or at any time in the future; and (b) the individual must be able to receive fair compensation or return of the benefit of the trust or transfer during their lifetime.

2. If the instrument or document does not allow for fair compensation or return within the lifetime of the individual (using life expectancy tables noted in paragraph (b) above), it is not considered to be established for the sole benefit of the indicated individual and any potential exemption from penalty or consideration for eligibility purposes is void.

3. A transfer penalty shall not be imposed if the transfer is a result of a court entering an order against an institutional spouse for the support of the community spouse.

4. A transfer penalty shall not be imposed if the individual provides proof that they disposed of the resource or income solely for some purpose unrelated to establishing eligibility.

5. A transfer penalty shall not be imposed if the Department determines that the denial of eligibility due to transferred resources or income would work an undue hardship on the individual. Undue hardship exists when imposing a period of ineligibility would deprive an individual of medical care such that their life or health would be endangered. Undue hardship also exists when imposing a period of ineligibility would deprive the individual of food, clothing, shelter or other necessities of life. All efforts to access the resources or income must be exhausted before this exception applies. The facility in which the institutionalized individual is residing may request an undue hardship waiver on behalf of the individual with the consent of the individual or their designated representative.

(d) Except for allowable transfers described in 42 U.S.C. § 1396p(c)(2), in all other instances the Department must presume the transfer occurred to become Medicaid eligible unless the individual can prove otherwise.

1. An individual who disposes of a resource for less than fair market value or reduces the value of a resource prior to incurring a medical or other health care related expense which was reasonably capable of being anticipated within the applicable transfer look back period shall be deemed to have made the transfer, in whole or part, in order to qualify for, or continue to qualify for, medical assistance.

2. In cases where resources are held by an individual in common with others in a joint tenancy, tenancy in common, or similar arrangement, the individual is considered to have transferred resources or a portion thereof, as applicable, when action is taken by the individual or any other person authorized to access the resources that reduces or eliminates the individual's ownership or control of such resource.

3. Promissory notes, loans and mortgages signed after November 1, 2007 will be considered transfers of assets without fair compensation to become Medicaid eligible unless the promissory notes, loans or mortgages meet all of the following criteria: (a) the repayment term is actuarially sound in accordance with the Life Expectancy Tables as referenced in paragraph (b)2.; (b) payments must be made in equal amounts during the term of the loan, with no deferral and no balloon payments being possible; and (c) debt forgiveness is not allowed. If these criteria are not met, for purposes of transfer of assets, the value of the promissory notes, loans or mortgages will be the outstanding balance due as of the date of application for long-term care services.

4. A life estate interest purchased in another individual's home after November 1, 2007 is considered a transfer of assets for less than fair market value. If the individual has not lived in the home for at least one year, the full amount of the purchase price paid for the life estate will be considered an uncompensated transfer

without considering the value of the life estate. If the individual has resided in the home for at least one continuous year, the value of the life estate will be considered compensation and will be calculated by multiplying the current market value of the property at the time of the purchase by the life estate factor that corresponds to the individual's age at the time of the purchase. The life estate tables are incorporated by reference from the Social Security Administration's online Program Operations Manual System (SI 01140.120) (04/99), incorporated by reference, as found in Appendix A-17 of the Department's online manual located at [www.dcf.state.fl.us/ess/](http://www.dcf.state.fl.us/ess/) (June 2009). Brief absences from the life estate property such as stays in a rehabilitation facility or vacations may not disrupt the client's residency in the home. The facts of each absence will be evaluated to determine if the home continued to be the individual's principal place of residence such as whether the person's mail was delivered and received there or whether they paid the property taxes.

(e) Each individual shall be given the opportunity to rebut the presumption that a resource or income was transferred for the purpose of qualifying for Medicaid. No period of ineligibility shall be imposed if the individual provides proof that they intended to dispose of the resource or income at fair market value or for other valuable consideration, or provides proof that the transfer occurred solely for a reason other than to become Medicaid eligible or if the individual's total countable resources (including the transferred resources) are below the program limits.

(f) The uncompensated value of a transferred resource is the difference between the fair market value of the transferred resource at the time of the transfer, less any outstanding loans, mortgages or other encumbrances on the resource, and the amount of compensation received at or after the time of the transfer.

(g) For transfers prior to November 1, 2007, periods of ineligibility are calculated beginning with the month in which the transfer occurred and shall be equal to the actual computed period of ineligibility, rounded down to the nearest whole number. For transfers made on or after November 1, 2007, periods of ineligibility begin with the later of the following dates: (1) the day the individual is eligible for medical assistance under the state plan and would otherwise be receiving institutional level care based on an approved application for such care but for the application of the penalty period; or (2) the first day of the month in which the individual transfers the asset; or (3) the first day following the end of an existing penalty period. The department shall not round down, or otherwise disregard, any fractional period of ineligibility of the penalty period but will calculate the period down to the day. There is no limit on the period of ineligibility. Once the penalty period is imposed, it will continue although the individual may no longer meet all factors of eligibility and may no longer qualify for Medicaid long-term care benefits.

1. Monthly periods of ineligibility due to transferred resources or income are determined by dividing the total cumulative uncompensated value of all transferred resources or income computed in accordance with paragraph 65A-1.712(3)(f), F.A.C., by the average monthly private pay nursing facility rate at the time of application as determined by the Department (refer to paragraph 65A-1.716(5)(d), F.A.C.).

a. For transfers prior to November 1, 2007, where resources or income have been transferred in amounts or frequency or both that would make the calculated penalty periods overlap, the value of all transferred resources or income is added together and divided by the average cost of private nursing home care.

b. For transfers prior to November 1, 2007, where multiple transfers are made in such a way that the penalty periods for each would not overlap, each transfer is treated as a separate event with its own penalty period.

c. For transfers after November 1, 2007, the uncompensated value of all transfers will be added together to arrive at one total value with a penalty period assigned.

2. If an institutionalized individual is ineligible for medical assistance due to a transfer of resources or income by the community spouse, and the community spouse becomes potentially eligible for ICP, HCBS, or institutional hospice services, any remaining penalty period must be apportioned between the spouses. The Department shall apportion penalty periods by dividing any new or remaining penalty periods by 2 and attribute the quotient to each spouse. Any excess months may be attributed to the spouse that caused the penalty or according to the wishes of the couple or their representative.

3. Individuals who are ineligible due solely to the uncompensated value of a transferred resource or income are ineligible for nursing home, institutional hospice or HCBS waiver services payment, but are eligible for

other Medicaid benefits.

(4) Spousal Impoverishment. The Department follows 42 U.S.C. § 1396r-5 for resource allocation and income attribution and protection when an institutionalized individual, including a hospice recipient residing in a nursing facility, has a community spouse. Spousal impoverishment policies are not applied to individuals applying for, or receiving, HCBS waiver services, except for individuals in the Long-Term Care Community Diversion Program, the Assisted Living Facility waiver or the Cystic Fibrosis waiver.

(a) When an institutionalized applicant has a community spouse all countable resources owned solely or jointly by the husband and wife are considered in determining eligibility.

(b) At the time of application only those countable resources which exceed the community spouse's resource allowance are considered available to the institutionalized spouse.

(c) The community spouse resource allowance is equal to the maximum resource allocation standard allowed under 42 U.S.C. § 1396r-5 or any court-ordered support, whichever is larger.

(d) After the institutionalized spouse is determined eligible, the Department allows deductions from the eligible spouse's income for the community spouse and other family members according to 42 U.S.C. § 1396r-5 and paragraph 65A-1.716(4)(c), F.A.C.

(e) If either spouse can verify that the community spouse resource allowance provides income that does not raise the community spouse's income to the State's minimum monthly maintenance income allowance (MMMIA), the resource allowance may be revised through the fair hearing process to an amount adequate to provide such additional income as determined by the hearing officer. Effective November 1, 2007 the hearing officers must consider all of the community spouse's income and all of the institutionalized spouse's income that could be made available to a community spouse. The hearing officers will base the revised community spouse resource allowance on the amount necessary to purchase a single premium lifetime annuity that would generate a monthly payment that would bring the spouse's income up to the MMMIA (adjusted to include any excess shelter costs). The community spouse does not have to actually purchase the annuity. The community spouse will have the opportunity to present convincing evidence to the hearing officer that a single premium lifetime annuity is not a viable method of protecting the necessary resources for the community spouse's income to be raised to the State's MMMIA. If the community spouse requests that the revised allowance not be based on the earnings of a single premium lifetime annuity, the community spouse must offer an alternative method for the hearing officer's consideration that will provide for protecting the minimum amount of assets required to raise the community spouse's income to the State's MMMIA during their lifetime.

(f) Either spouse may appeal the post-eligibility amount of the income allowance through the fair hearing process and the allowance may be adjusted by the hearing officer if the couple presents proof that exceptional circumstances resulting in significant inadequacy of the allowance to meet their needs exist. Exceptional circumstances that result in extreme financial duress include circumstances other than those taken into account in establishing maintenance standards for spouses. An example is when a community spouse incurs unavoidable expenses for medical, remedial and other support services which impact the community spouse's ability to maintain themselves in the community and in amounts that they could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources. Effective November 1, 2007, the hearing officers must consider all of the community spouse's income and all of the institutionalized spouse's income that could be made available to a community spouse. If the expense causing exceptional circumstances is a temporary expense, the increased income allowance must be adjusted to remove the expenses when no longer needed.

(g) The institutionalized spouse shall not be determined ineligible based on a community spouse's resources if all of the following conditions are found to exist:

1. The institutionalized individual is not eligible for Medicaid institutional services because of the community spouse's resources and the community spouse refuses to use the resources for the institutionalized spouse; and

2. The institutional spouse assigns to the State any rights to support from the community spouse by submitting the Assignment of Rights to Support, Form CF-ES 2504, PDF 10/2005 (incorporated by reference),

signed by the institutionalized spouse or their representative; and

3. The institutionalized spouse would be eligible if only those resources to which they have access were counted; and

4. The institutionalized spouse has no other means to pay for the nursing home care.

(5) Other Resource Policies.

(a) Individuals shall not be eligible for long-term care services after November 1, 2007, if the individual's equity interest in the individual's home exceeds \$500,000.

1. The individual's equity interest is based on the current market value of the home (including all contiguous property), minus any encumbrances such as a mortgage or other associated loans. Long-term care services include Medicaid services authorized under the Institutional Care Program, institutional hospice, home and community based waiver services and the Program of All Inclusive Care for the Elderly (PACE).

2. Paragraph (5)(a) does not apply if the individual's spouse, individual's child under age 21 or the individual's blind or disabled child (based on the federal definitions of "blindness" in 20 C.F.R. §416.981-416.986 (2009), incorporated by reference, and "disability" in 20 C.F.R. §416.905-416.906 (2009), incorporated by reference of any age are residing in the institutionalized individual's home.

3. The home equity provision may be waived when denial of long-term care services would result in demonstrated hardship to the institutionalized individual.

4. The Department will mail a notice to individuals whose home equity interest exceeds \$500,000 (Form CF-ES 2354, 02/2007, Notice of Excess Home Equity Interest, incorporated herein by reference), advising of the opportunity to have the home equity interest policy waived.

(b) An individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource, as set forth in 1917(g) of the Social Security Act (2007), which is incorporated herein by reference.

(6) Copies of the forms and materials incorporated by reference in this rule are available from the ACCESS Florida Headquarters Office at 1317 Winewood Boulevard, Tallahassee, Florida 32399-0700. Forms are also available on the Department's web site at <http://www.dcf.state.fl.us/DCFForms/Search/DCFFormSearch.aspx>.  
*Rulemaking Authority 409.919 FS. Law Implemented 409.902, 409.903, 409.904, 409.906, 409.919 FS. History—New 10-8-97, Amended 1-27-99, 4-1-03, 9-28-04, 8-10-06 (1)(a), (f), 8-10-06 (1)(f), 8-10-06 (3)(g)1., 11-1-07, 12-24-09.*

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## Program Policy Manual

### 1640.0576.01 Trusts (MSSI, SFP)

A trust is a right of property held by one party for the benefit of another. The term "trust" also includes any legal instrument or device that is similar to a trust. It does not cover trusts established by will. It can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligation.

The trustee is the individual who holds the legal title to and manages property for the benefit or use of another. The beneficiary is the individual for whose benefit the trust is created.

A trust is considered revocable if the trust can be dissolved; it is considered irrevocable if it cannot be dissolved. It is important to understand other terms used in reference to trusts:

1. Grantor (Trustor/Settlor) - Sets up the trust.
2. Trustee - Manages the trust.
3. Beneficiary - Receives benefits from the trust.
4. Corpus/Principal - Assets or income used to establish the trust.
5. Distributions/Disbursements - Money or assets paid out of the trust (either from the corpus or income produced by the corpus).

Refer to policies in 1640.0576.02 through 1640.0576.11 to determine how to consider trust funds.

### **1640.0576.02 How to Analyze Trusts (MSSI, SFP)**

How to count funds held in a trust, whether as income or assets, depends on several factors:

1. who created the trust;
2. when it was created;
3. whether the trust is revocable or irrevocable; and
4. the conditions and terms of the trust.

### **1640.0576.03 Trusts Set Up By Others (MSSI, SFP)**

For trusts that are established by someone other than the individual, the individual's spouse or representative, the trust must be evaluated according to these SSI policies:

1. If the individual does not have authority to revoke or direct use of the trust, it is not considered an asset to him. Conversely, if the individual has the authority to revoke or direct use of the trust, the corpus of the trust is considered an asset to him.
2. Cash paid directly from the trust to the individual is unearned income.
3. Disbursements made by the trustee directly to a third party are not considered income to the individual.

The above policies also apply to trusts established by a will, regardless of the relationship of the now deceased grantor to the individual.

Refer to passages 1640.0576.04 and 1640.0576.07 for information on how to treat trusts established by the individual, individual's spouse or representative.

### **1640.0576.04 Medicaid Qualifying Trusts before 10/1/93 (MSSI, SFP)**

The following policy applies only to those trusts established before 10/1/93:

A Medicaid qualifying trust is a trust or similar legal device (other than through a will) created by an individual, his spouse, or legal representative under which (a) the individual may be the beneficiary of all or part of the payments from the trust, and (b) the amount of the distribution is determined by one or more trustees who are permitted to exercise any discretion with respect to the amount to be distributed to the individual.

**Note:** The term "Medicaid qualifying trust" (MQT) must not be confused with the term "qualified income trust". The MQT refers to some trusts established prior to 10/1/93 which disqualified individuals for Medicaid, while the "qualified income trust" refers to certain income-only trusts permitted on or after 10/1/93 which allow individuals to qualify for ICP or HCBS.

If the trust meets the definition of a Medicaid qualifying trust, consider the maximum distribution that could be paid to the applicant/recipient by the trustee(s) as an available asset and income to the individual whether or not the distribution is made. These policies apply even if the trust is irrevocable, regardless of the purpose of the trust or whether or not the trustee(s) actually exercises their discretion.

If the trustee has no or limited discretion or ability to disburse funds to the individual, the amount that is unavailable must be considered a transfer of an asset without fair compensation and must be evaluated under transfer of asset policy if it was established within the applicable transfer look-back period.

### **1640.0576.05 Exceptions for Trusts before 10/1/93 (MSSI, SFP)**

The following trusts are exempt from the Medicaid qualifying trust provisions:

1. Trusts set up by a family member (other than the individual or spouse) under the State of Florida Umbrella Trust Agreement for developmentally disabled or mentally ill individuals in accordance with

Florida Administrative Code 65-19. Any money given to the beneficiary by the trustee would be considered as income.

2. "Individual trusts" when the beneficiary is a mentally retarded individual who resides in an ICF/DD, provided the trust or initial trust decree was established prior to April 7, 1986, and is solely for the benefit of that developmentally disabled or mentally ill individual.
3. Trusts established by will.

#### **1640.0576.06 Undue Hardship/Trusts Set Up before 10/1/93 (MSSI, SFP)**

If undue hardship exists, only the amount of the trust that is actually made available as income or assets is counted. Undue hardship is defined as any situation in which an individual may be forced to go without life sustaining services because the proceeds from a trust fund are not available to the individual. This may be due to legal restrictions or illegal actions by the trustee. All undue hardship decisions must be reviewed and approved by the eligibility specialist.

#### **1640.0576.07 Trusts Established On or After 10/1/93 (MSSI, SFP)**

The following policy applies to trusts established by an individual on or after 10/1/93.

An individual will be considered to have established the trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established the trust (other than by will):

1. the individual;
2. the individual's spouse;
3. a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
4. a person, including a court or administrative body, acting at the direction or upon request of the individual or individual's spouse.

If the trust was not established by one of the above individuals, refer to passage 1640.0576.03.

If the trust is **revocable**:

1. Consider the entire principal as an available asset to the individual.
2. Consider any payments which can be made as countable income to the individual.
3. Consider any other payments from the trust as assets disposed of by the individual without fair compensation.

If the trust is **irrevocable** and there are any circumstances under which payment from the trust could be made to or for the benefit of the individual:

1. Consider that portion of the principal that could be available, as an asset to the individual.
2. Consider payments from that portion of the principal which could be available as income to the individual.
3. Consider any other payment from the trust as a transfer of assets.

If the trust is **irrevocable** and no payment could be made from the trust under any circumstances:

1. Apply the transfer of assets policy to the individual's assets and income used to establish the trust. The transfer policy applies only to applicants or recipients of nursing facility services and HCBS.
2. The trust is not counted as an available asset.

The above policies apply without regard to:

1. the purpose of the trust;
2. whether the trustees have or exercise any discretion under the trust;
3. any restrictions on when or whether distributions may be made from the trust; or
4. any restrictions on the use of distributions from the trust.

For more information on transfer of assets for SSI-Related Medicaid, see passage 1640.0606.

### **1640.0576.08 Exceptions for Trusts Set Up 10/1/93 or Later (MSSI, SFP)**

The policies listed above in passage 1640.0576.07 do not apply to the following trusts:

1. Trusts established by a will (see passage 1640.0576.03).
2. Trusts for the disabled under age 65.
3. Pooled trusts for the disabled.
4. Qualified income trusts (see passage 1840.0110).

All special trusts must be forwarded to the Region or Circuit Program Office for review and Circuit Legal Counsel's written approval before the case can be approved, per guidelines in the Appendix-A-22.4, A-22.5 and A-22.6.

The following special trusts may be created on or after October 1, 1993, for disabled individuals if the trust meets the specific criteria indicated below:

**Trusts for the disabled under 65:** A trust containing the assets of a disabled individual under age 65, if:

1. it was established on or after 10/01/93; and
2. it was established for the benefit of the individual by a parent, grandparent, legal guardian or a court (cannot be established by the disabled individual himself, must be by parent, grandparent, legal guardian or court order); and
3. the trust stipulates the state will receive the balance 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.

**Pooled trusts for the disabled:** A trust containing the assets of an individual who is disabled, if:

1. it was established on or after 10/01/93;
2. the trust is established and managed by a nonprofit association;
3. a separate account is maintained for the beneficiary of the trust but, for purposes of investment and management, the trust pools the accounts;
4. the trust is established solely for the disabled individual by a parent, grandparent, legal guardian, court or the individual himself; and
5. to the extent that amounts remaining in the trust upon the individual's death are not retained by the trust, the trust pays to the state an amount equal to the total amount of medical assistance paid on behalf of the individual.

Both of the above special trusts can only be set up to benefit individuals who meet SSI disability criteria. Trusts for the disabled under 65 can be established only for individuals who are under 65. Pooled trusts for the disabled can be established for individuals of any age.

Disability must be determined for both of the above special trusts via regular policy; that is, the person must receive Social Security disability or SSI benefits or the Department must make an independent determination to show that the individual meets the disability requirement.

### **1640.0576.09 Treatment of Qualified Disabled Trusts (MSSI, SFP)**

After the trust is approved by the Circuit Legal Counsel as meeting the criteria of a qualified trust for the disabled under age 65 or a pooled trust, apply the following policies to determine the individual's eligibility for Medicaid benefits:

1. Do not consider the corpus of the exempt trust as an asset to the individual beginning with the month the assets are placed into an executed qualified disabled trust or pooled trust;
2. Do not consider the funding of a qualified disabled or pooled trust as a transfer of assets or income

subject to imposition of a penalty period, provided the trust purchases items and services at fair market value for the sole benefit of the disabled individual (refer to 1640.0609.06);

3. Do not count any income deposited into the trust as income to the individual when determining the individual's eligibility;
4. Do not consider disbursements from the trust to third parties as income to the individual;
5. Do not consider any income earned by the trust which remains in the trust as income to the individual;
6. Count any payments made directly to the individual as income to the individual;
7. Count all income placed into the trust (along with countable income outside the trust) when computing patient responsibility. Standard spousal impoverishment policies apply.

If income is deposited into the trust, the trustee must provide quarterly statements identifying the deposits (and disbursements) made to the trust for each month.

Any funds paid directly to the individual from the trust must be counted as income to the individual. Disbursements not paid to the individual are not counted as income to the individual.

Fax or send a copy of the approved qualified disabled or pooled trust to:  
ACS Recovery Services  
Post Office Box 12188  
Tallahassee, Florida 32317-2188  
Fax: (866) 443-5559

When you receive inquiries regarding the settlement of remaining funds in the trust after a recipient's death, tell them to make checks payable to Agency for Health Care Administration and send to the above address. Also advise them to clearly identify the individual by including a note with the individual's full name and social security number or Medicaid number. If there are further questions, refer callers to ACS Recovery Services (866) 357-3268.

#### **1640.0576.10 Undue Hardship/Trusts Set Up 10/1/93 or Later (MSSI, SFP)**

If undue hardship exists, only the amount of the trust that is actually made available as income or assets is counted.

Undue hardship exists when application of the trust provision would deprive an individual of food, clothing, shelter or medical care such that his life or health would be endangered. All efforts to access the assets (including assets and income) must be exhausted before this exception applies. All undue hardship decisions must be reviewed and approved by the eligibility specialist.

#### **1640.0576.11 Verification of Trusts (MSSI, SFP)**

A copy of the trust document must be reviewed carefully to determine the trustee's ability to use the principal. When appropriate, the eligibility specialist should request an official legal interpretation. All OBRA '93 special trusts (trusts for disabled under 65, pooled trusts and income trusts) must be forwarded to your Region or Circuit Program Office who will refer it to your District Legal Counsel for review and approval.

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#### **1640.0609.05 Allowable Transfers (MSSI)**

The following transfers are considered "allowable" and no period of ineligibility will be imposed:

1. Transfers by individuals who are not applying for or receiving ICP, institutionalized MEDS-AD, institutionalized Hospice, HCBS, or PACE;
  2. Transfers of assets which are excluded because they are not marketable;
  3. Transfers of life estate in property previously owned by the individual;
  4. Transfers where fair compensation is received. An example would be assets used to make a purchase for an applicant or recipient or used to pay (or repay) a valid debt equal to the fair market value of the asset. In order for the debt to be considered a valid debt, it must be a legally enforceable debt. An informal loan will be considered to be a valid debt provided it meets the criteria for a bona fide loan set forth in passage 1640.0560.01 and 1640.0560.02.
  5. A transaction in which an individual makes burial arrangements with a funeral director and places funds in a burial trust is considered a purchase.
  6. Transfers to the individual's blind or disabled child (adult or minor) or to a trust described in passage 1640.0576.08, established solely for the benefit of the individual's disabled adult child;
  7. Transfers to a trust (including a qualified trust for the disabled, as described in passage 1640.0576.08) for the sole benefit of a disabled individual under age 65;
  8. Transfers of the individual's income to a qualified income trust (see passages 1840.0110 and 1840.0111);
  9. Interspousal transfers made on or after October 1, 1989;
  10. Transfers of assets to a third party by the individual applying for nursing home care (ICP, institutionalized MEDS-AD, institutionalized Hospice) or HCBS Programs or by the individual's spouse, if the third party intends to use the funds for the sole benefit of the individual's spouse (see passage 1640.0609.06);
  11. Transfers of excluded assets other than homestead or real property excluded from countable assets due to a bona fide effort to sell; and
- Note:** Transfer of homestead property is allowable if it meets the criteria as set forth in 1640.0609.03.
12. Transfers made by the spouse of an HCBS individual of any of the spouse's individually owned assets.

#### **1640.0609.06 Definition of Disability (MSSI)**

When an allowable transfer is alleged to have been made to a disabled individual (per policy in 1640.0609.04), you must determine if the individual meets the definition of disability used by the SSI Program.

Disability must be determined according to standard procedures. That is, if the person receives Social Security disability or SSI benefits, he is considered disabled for Medicaid purposes. If he does not, the District Medical Review Team (DMRT) must make an independent determination to evaluate if the individual meets the disability criteria.

#### **1640.0609.07 Definition of "For the Sole Benefit of" (MSSI)**

In order for the transfer to be considered to be for the sole benefit of the spouse, the individual's blind or disabled child, or a disabled individual under age 65 (and not be subject to a transfer penalty), there must be a written transfer document which legally binds the parties to a specific course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer.

The transfer instrument or document must provide that:

1. no individual or entity except the spouse, the individual's disabled child, or the disabled individual under age 65 can benefit from the assets or income transferred in any way either at the time of the transfer or at any time in the future; and
2. the spending of the funds involved for the benefit of the individual is actuarially sound based on the life expectancy of the individual involved; that is, the individual must be able to receive fair compensation or return of the benefit of the transferred asset during his lifetime. (Follow instructions in 1640.0609.02 and use life expectancy tables in Appendix A-14 to determine if the person will receive fair compensation in his lifetime.)

If the transfer instrument or document does not meet these requirements, it cannot be considered a transfer for the sole benefit of the spouse, the blind or disabled child, or disabled individual and any potential exemption from penalty or consideration for eligibility purposes is void. In this case, you need to compute the uncompensated value of the transferred funds, notify the individual and give him the opportunity to rebut the presumption that the transfer was done to become Medicaid eligible.

**Note:** There are two issues to consider. An individual who transfers assets to someone else for the sole benefit may not incur a transfer penalty if the transfer meets the above two criteria. For the individual who receives the transferred asset, the asset may or may not count. Assets transferred to a third party in the form of a trust for the sole benefit of the spouse must be evaluated under trust policies. To qualify as being for the sole benefit of the spouse, the assets must be able to be paid to or for the benefit of the spouse over the spouse's lifetime. Assets transferred to a trust for the sole benefit of the spouse count as an available asset to the spouse and must be included in the couple's countable assets.

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### **1640.0613 Processing Transfer Cases (MSSI)**

Evaluate all transfers of assets or income that occur within the look-back period to determine the following if the:

1. transfer is legally binding; and
2. individual has any remaining ownership in the asset; and
3. individual received fair compensation.

If the individual would have been eligible if the asset was kept, you may assume the he did not transfer the asset(s) to become eligible. In other words, if the total countable resources, including the transferred amount, were below the program limits after considering all applicable exclusions and asset allocations at the time of transfer, no transfer penalty may be imposed.

When an asset that affects eligibility is transferred, you must determine if the individual received fair compensation for it. If the individual received fair compensation, there is no need to apply transfer policy. If the individual did not receive fair compensation, you must:

1. presume the transfer was for the purpose of becoming Medicaid eligible, and
2. determine the amount of the uncompensated value.

Explain to the individual the presumption that the transfer was for purposes of becoming Medicaid eligible and may result in a period of ineligibility. Notify the individual in writing (via the system generated transfer notice or by using CF-ES 2264, Notice of Determination of Asset (or Income) Transfer, offering the opportunity to rebut the presumption of transfer or claim an undue hardship (refer to 1640.0616 and 1640.0617 for additional information on rebuttal of presumption and undue hardship).

The Notice of Determination of Asset or Income Transfer tells the individual to contact the eligibility specialist within 15 days to discuss the transfer. If contacted by the individual, designated representative, or legal representative, use form CF-ES 2264A, Rebuttal/Undue Hardship Questionnaire, as a guide to interview the individual and record the individual's statement on the form.

Request from the individual any additional documentation (such as legal documents, financial statements, realtor agreements, relevant correspondence, statements from other individuals) needed to substantiate the individual's statements during the interview.

Evaluate the questionnaire and any supporting documentation presented for rebuttal and if necessary, undue hardship, using form CF ES 2357, Rebuttal/Undue Hardship Evaluation, and form instructions. Complete Part I (Rebuttal Evaluation) in coordination with the supervisor. If rebuttal is successful, complete the application and do not apply a penalty period.

If rebuttal is not successful, complete Part II (Undue Hardship Evaluation) and forward the evaluation form and documentary evidence to the Region or Circuit Program Office for review and signature approving or denying hardship. All undue hardship claim evaluations must be reviewed by the Region or Circuit Program Office.

The evaluation must be completed within 10 calendar days following the interview date, not considering client delay days. The Region or Circuit Program Office will communicate the decision to the eligibility specialist and return all documents. The eligibility specialist will complete the case on FLORIDA based on the outcome of the evaluation.

A period of ineligibility is not imposed if the individual successfully demonstrates the following:

1. the asset was transferred solely for reasons other than to become Medicaid eligible; or
2. the individual intended to dispose of the assets either at fair market value or in exchange for other valuable compensation; or
3. the transfers are considered allowable per policies in 1640.0609.04 and .05, 1640.0610, 1640.0611 and 1640.0612; or
4. all transferred assets were returned to the individual (see 1640.0620); or
5. imposing the period of ineligibility would place an undue hardship on the individual.

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#### **1640.0614.04 Compensation in Support or Services (MSSI)**

Compensation in the form of support and/or maintenance or services is based on:

1. the FMV,
2. the support or services at the time of asset transfer, and
3. the frequency/duration of the support or service.

In order for compensation to be considered, a statement and any related documentation must be obtained from the person(s) to whom the property was transferred to establish the FMV of the support and/or maintenance provided if:

1. the intent is for a specified period, the actual length of time the support or service is provided is used;
2. services are to be performed on an "as needed" basis, or for an interim period, the statement must include the individual's expectation as to the frequency of the services and the basis for that expectation; and
3. the support or services are to be provided for the life of the individual, using the life expectancy tables in Appendix A-14.

To establish the value of support and maintenance for the individual's life, use the following formula:

Multiply the yearly fair market value (FMV) of the support and/or maintenance times the life expectancy factor corresponding to the individual's age (as of the last birthday) at the time the asset was transferred.

Contact with an outside source in the same locality will usually be necessary to determine value. The case record must:

1. state how the value was determined; and
2. include a copy of the agreement or a statement from the person receiving the transferred asset showing the type, frequency, and duration of the support or services.

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#### **1640.0620 Adjustments to Penalty Period (MSSI)**

If all transferred assets or income are returned to the individual, the penalty period is eliminated. Eligibility must be evaluated with the returned assets included as though the individual had never transferred the asset or income. Returned assets or income must be counted as available according to standard policy when determining eligibility for retroactive months.

If the transferred asset or income is returned to the individual in part, the eligibility specialist must:

1. reduce the uncompensated value accordingly,
2. refigure the period of ineligibility,
3. evaluate the returned asset according to normal asset rules, and
4. count the returned asset as if it had been available in retroactive months.

If the individual receives additional compensation from the person who received the transferred asset or income, the eligibility specialist must:

1. document the compensation received,
2. refigure the uncompensated value and the penalty period,
3. evaluate the compensation received according to normal asset rules, and
4. count the compensation as if it had been available in the retroactive months.

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#### **1840.0110 Income Trusts (MSSI)**

The following policy applies only to the Institutionalized Care Program (ICP), institutionalized MEDS-AD, institutionalized Hospice, Home and Community Based Services (HCBS) and PACE. It does not apply to Community Hospice.

To qualify, an individual's gross income cannot exceed 300 percent of the SSI federal benefit rate (refer to Appendix A-9 for the current income standard). If an individual has income above the ICP income limit, they

may become eligible for institutional care or HCBS if they set up and fund a qualified income trust. A trust is considered a qualified income trust if:

1. it is established on or after 10/01/93 for the benefit of the individual;
2. it is irrevocable;
3. it is composed only of the individual's income (Social Security, pensions, or other income sources); and
4. the trust stipulates the state will receive the balance in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on their behalf.

The eligibility specialist must forward all income trusts to their Region or Circuit Program Office for review and submission to the District Legal Counsel (DLC) for a decision on whether the trust meets the criteria to be a qualified income trust. Refer to Appendix A-22.1, "Guidance for Reviewing Income Trusts," for instructions on processing income trust cases.

The individual (or their legally authorized representative) must deposit sufficient income into the income trust account in the month in which the income is received to reduce their countable income (the income outside the trust) to within the program income standard. The individual must make the deposit each month that eligibility is requested. This may require the individual to begin funding an executed income trust account prior to its official approval by the District Legal Counsel.

Once the District Legal Counsel returns the income trust transmittal through the Region or Circuit Program Office, the eligibility specialist must promptly process the Medicaid application, making sure proper notification of eligibility and patient responsibility is given.

If the Region or Circuit Program Office and the District Legal Counsel determine the trust is a qualified income trust:

1. do not consider the corpus of the trust an asset to the individual for any month the qualified income trust exists and eligibility is requested;
2. do not apply penalties for transfers of income placed in a qualified income trust account provided the individual receives fair compensation;
3. do not count income deposited into the trust account as income when determining if the individual's income is less than the program income standard;
4. do not consider disbursements from the trust account to third parties as income to the individual;
5. do not count income generated by the trust account which remains in the trust as income to the individual;
6. count any payments made directly to the individual as their income; and
7. count all income going into the trust (plus any not going into the trust) in determining patient responsibility, unless protection of income for the month of admission or discharge policies apply (refer to Chapter 2600).

**Note:** The amount computed for patient responsibility exceeds the provider's Medicaid rate.

The trustee of the qualified income trust must provide quarterly statements identifying the deposits made to the trust for each month.

Funds deposited into a qualified income trust are not subject to transfer penalties provided they are paid out of the trust for medical care for the individual. When such payments are made, the individual is considered to have received fair compensation for income placed in the trust account up to the amount paid for the medical care and to the extent medical care costs are at fair market value. If the individual's patient responsibility exceeds the Medicaid cost of care, the eligibility specialist must determine if fair compensation is received for income

transferred into the income trust. If necessary, the eligibility specialist must refer the case to the Region or Circuit Program Office for review and clearance.

If the individual's patient responsibility is less than the Medicaid rate, the eligibility specialist does not need to look at the disbursements (unless funds are paid to the individual, in which case the funds must be counted as their income). All income must be verified at the source, including income placed into the trust.

Fax or send a copy of the approved qualified income trust to:

ACS Recovery Services

Post Office Box 12188

Tallahassee, Florida 32317-2188

Fax: (866) 443-5559

When inquiries are received regarding the settlement of remaining funds in the trust after the individual's death, staff can advise callers to make checks payable to Florida Medicaid and send to the above address. The correspondence must clearly identify the individual by including a note with the individual's full name and Social Security number or Medicaid number.

An individual may choose to revoke an income trust at the time of their discharge from a Medicaid facility if the trust document allows them to do so. If revoked, Florida Medicaid must receive reimbursement (following above instructions) prior to any other beneficiary.

### **1840.0111 Transfer of Income (MSSI)**

The following policy applies to Institutional Care Program (ICP), institutionalized Hospice and Home Community Based Services (HCBS) and PACE. **Transfer policies apply to transfers of income as well as assets.** For example, if an individual receives an inheritance on or after 10/01/93, and transfers it in the month received, or if an individual transfers a stream of income, (i.e. income received on a regular basis, such as a pension) or the right to a stream of income, the transfer of asset provisions will apply and a possible period of ineligibility may be imposed. When a stream of income or the right to a stream of income is transferred make a determination of the total amount of income expected to be transferred during the individual's life, based on an actuarial projection of the individual's life expectancy, and calculate the penalty on the basis of the projected total income. Refer to transfer of assets policy in Chapter 1600.

**Note:** **Transfers of income into a qualified income trust are not considered transfers without fair compensation unless the trust document does not allow monthly disbursement of all funds for the benefit of the individual.**

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### **1840.0700 SUPPORT (MSSI, SFP)**

Support payments are those funds paid by a legal or non-legal parent intended for the support or maintenance of a member of the SFU. This income is included as unearned income.

Examples of support payments that are included as unearned income are:

1. voluntary and court ordered child support payments received from a legal or non-legal parent;

2. monies received to pay basic living expenses; and
3. income received for additional living expenses such as recreation and transportation.

The income is considered Child Support income to the child for whom the payment is intended.

#### **1840.0705 Alimony (MSSI, SFP)**

Alimony is court ordered payment by a spouse or former spouse to an individual. An individual's countable income cannot be reduced because the court has ordered part of that income to be paid to a spouse. Court ordered support received by the spouse is unearned income. This applies even if the individual is institutionalized.

A legal agreement or court order alone does not constitute income. The payment must actually be received.

#### **1840.0706 Child Support (MSSI, SFP)**

Child support is payment from an absent parent to a child. One third of the child support payment for a minor child is excluded; the remainder is unearned income. Child support payments for an adult disabled child are not subject to the one-third exclusion.

For ICP, Hospice, HCBS and Institutional Hospice, the full amount of child support is included as unearned income.

A legal agreement or court order alone does not constitute income. The payment must actually be received.

#### **1840.0708 Child Support Arrearages (MSSI, SFP)**

Payment of child support from an absent parent to a child is considered fulfillment of a legal obligation to support the child. Count gross income in the budgeting process for the payor even when child support payments are garnished or withheld from income.

An exception to the above policy in a deeming budget when an ineligible spouse, ineligible parent, ineligible child or eligible noncitizen makes the child support payments. In these cases, exclude actual child support payments made up to the amount of court ordered child support.

#### **1840.0709 Receipt of Child Support Arrearages (MSSI, SFP)**

Child support arrearages payments received from an absent parent by a parent on behalf of a minor child are considered income to the minor child. Child support arrearage payments received from an absent parent by a parent on behalf of an adult child and retained by the parent are not income to the adult child. Consider child support arrearage payments retained by the parent and not given to the adult child as income to the parent.

Any portion of the arrearage payments received from the absent parent by the parent and given to the adult child would be income to the adult child [would be income to the adult child] (sic) in the month given.

The one-third child support exclusion does not apply to child support arrearages received by an adult child or a minor child.

## Appendix B

### The Basics

#### 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 in charge of another person's assets.
3. A manager of a trust is a Trustee.
  - a. Trustees can be individuals or institutional (banks and trust companies).
  - 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 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 person with disabilities we need to stretch them and use them wisely. They need to last for the lifetime of the person with disabilities.
4. Assets belonging to, or left for the benefit of, a person with disabilities 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 person with disabilities 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 person with disabilities? In the case of a guardianship, a plan must be presented to the court that should outline the needs of the person with disabilities. 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 persons with disabilities.

#### C. Overview of Some Public Assistance Programs

1. Incomes

- a. **SSI – Supplemental Security Income** – Maximum income is \$841/month in 2022. This is a Federal Program administered by Social Security. You must be a person with a disability (or over age 64) and you must meet financial criteria similar to Medicaid. This program is generally for persons with disabilities 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 “in-kind” if a third party pays for food or shelter expenses on behalf of a beneficiary. Generally the person with disabilities must have less than \$2,000 in financial resources, with some assets being excluded from this calculation. 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.
2. Medical Coverage
- a. **Medicare** – Once you qualify for SSDI (or Social Security) you can get Medicare generally after 24 months. 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 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, persons with disabilities, 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.

### C. 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 person with disabilities' personal assets (as compared with other family members' assets). There are many circumstances under which a person with disabilities will have money of their own.
  - a. One source of funds is a personal injury settlement where funds are directly received by the person with disabilities, 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 person with disabilities. 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 person with disabilities 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 person with disabilities 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 person with disabilities' 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 or trust company).
    - 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 person with disabilities, 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 person with disabilities.
  - 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 Access Florida 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 Access Florida 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 person with disabilities’ parent, grandparent, guardian or by the court or by the individual himself or herself. Since the person with disabilities 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 but need to be careful with SSI.
  - 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. In most states if over age 65 then the funding is a transfer that imposes a penalty. Florida does not differentiate if the beneficiary is under or over age 65 and does not impose a penalty, but this is subject to change.
  - f. Any income deposited into Trust does not count toward eligibility for Medicaid. See Access Florida 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 \$2,523/month in 2022 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 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.

#### **D. 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 many cases by the children for 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 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 person with disabilities or their spouse.
  - f. There will be several layers of Beneficiaries such that after the death of the persons with disabilities 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.
- 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. 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.
    - 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. In the situation of a SNT, 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

- TV
  - Medical insurance
  - Telephone and cellular phone bills
  - Newspaper and magazine subscriptions
  - Furniture
  - Vacation and Travel expenses of the person with disabilities
  - 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
  - Handicap van and
  - The difference between a private and semiprivate room in an institution.
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 – The new POMS clarify the treatment of these payments from a SNT. 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.