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## Drafting Strategies for Special Needs Trusts

By: **Travis D. Finchum**, *Board Certified Elder Law Attorney*

Disabled beneficiaries have needs other than basic medical care. With government programs changing almost monthly, drafting for flexibility is the only alternative. The primary concern in drafting dispositive provisions for Special Needs Trusts ("SNT") must be the present and future needs of the beneficiary. A properly drafted SNT should enhance the quality of life of the beneficiary; otherwise he or she is no better off with the SNT and in some instances, may be worse off. Recall, there are first party SNT's (a SNT with the money of the beneficiary) and third party SNT's (a SNT with money of someone other than the beneficiary or his or her spouse). The type of SNT will steer the trust requirements.

While overly broad language may cause public benefits to be denied, placing too many restrictions may prevent the assets from being used for a legal and justifiable need. The dispositive provisions of the SNT can be tailored to the particular needs of the disabled person, but be careful about adding in too much description. More than the "necessary" language just gives fodder to a government employee who may be looking for a way to deny a SNT.

But how do we know the needs of a disabled person? In the case of a guardianship, a plan must be presented to the court that should outline the needs of the disabled person. In the absence of a guardianship plan I always recommend a professional care plan prepared by a geriatric care manager. Recommendations of these trained professionals can be incorporated into the SNT (or be an ancillary document considered along with the SNT) and add that extra touch that could make a world of difference to the disabled beneficiary.

### General Drafting Considerations

One of the PRIME DIRECTIVES should be the less the better. The reason for this is that a Social Security claims representative will be looking for a few key words or phrases. So will the DCF case worker and legal counsel. Remember the government official initially reviewing the SNT will not

necessarily be an expert on trusts and may not see a SNT very often. The nice thing is that they tell us what they will be looking for in reviewing a SNT. Everything else in the Trust document will not help the trust be approved, but could only be used to deny the viability of the trust. Having said this, we can't worry exclusively about what Social Security will say because we have a beneficiary to protect. So, we must have a little more language in our SNT than Social Security thinks.

A clear statement of the intent of the SNT should be included in the document. This can help with construction issues in the event of attack by a government agency. Although Social Security has determined that such a clause can no longer "save" a defective trust, it doesn't hurt to have one in.

In drafting a SNT, in addition to many of the typical trust provisions that trusts have: declarations/recitals, statements regarding revocability, simultaneous death provisions, designations of trustees, resignation by trustees, trustee's investment/management powers, situs provisions, perpetuity provisions, general definitions, etc., the most critical aspect of the Special Needs Trust is the dispositive provision. The dispositive pertains to both during the lifetime of the disabled beneficiary and upon their death.

Some drafters choose to insert a "self-destruct clause" in case the SNT is determined to disqualify the disabled beneficiary for public benefits. We should realize that such self-destruct clauses can do more harm to the beneficiary than help. If the SNT has been ultimately determined to disqualify the beneficiary from public assistance, then it is possible that the self destructing of the trust and disposing of the assets to someone other than the disabled person will cause a disqualification period due to a transfer of assets. Then, depending on who receives the SNT proceeds, the disabled person could be disqualified for benefits and may be unable to reach the former resources of the SNT. Also these self destruct clauses can cause the SNT to be invalid from the beginning because there may thus be instances where someone other than the beneficiary can benefit from the trust during the lifetime of the beneficiary and this violates the sole-benefit rule (particularly for self-settled SNT's).

The drafter may want to consider including a "Trustee Advisory Committee" or "Trust Protector" to be able to remove an inept trustee. The disabled beneficiary cannot be involved with the removal or control over the Trustee. The Grantor of a third party trust may want to prepare detailed instructions (outside of the trust) to the Trustee regarding how the Grantor wishes the resources of the SNT to be used.

Distributions should rarely, if ever, be distributed directly to a beneficiary. Generally, distributions from any SNT should be to the provider of goods or services for the disabled individual. Distributions may be made for food, clothing or shelter, with the understanding that this could affect the amount of public benefits that will be received, particularly for those beneficiaries on Supplemental Security Income (SSI). This can also protect the beneficiary in the event they are not entitled to public benefits in the future due to non-economic reasons.

A distinction should be made between a SNT created by third parties (individuals other than the beneficiary or their spouse) and those SNTs that contain the assets of the disabled beneficiary, called first part SNT's. SNTs established by *third parties* **need not** have Medicaid "pay back" provisions to the State upon the death of the beneficiary. Assets remaining in a SNT established by a disabled beneficiary, or "*self settled*" SNTs, **must pay back** the State any benefits paid on behalf of the beneficiary by the State public assistance program (Medicaid).

Most attorneys would advise trustees of pay back SNTs to distribute liberally for the lifetime beneficiary and plan to have little if any remaining assets. Pay back trusts should include language directing any resources left after paying back the State should revert to other beneficiaries. Since third party SNTs

can benefit other individuals, the trustee of these trusts should consider the future needs of the remainder beneficiaries, particularly if the controlling instrument so directs.

## **Before Drafting a SNT**

Before drafting any type of SNT the drafting attorney should know the answers to all of the questions raised on the “Guidelines for Reviewing Trusts for the Disabled” which is followed by the Department of Children and Families (DCF), as those questions pertain to the proposed trust. The drafter should also be very familiar with sections **1640.0576.01** through **1640.0576.11** of the ESS Program Policy Manual dealing with the treatment of trusts by the DCF.

Florida Medicaid Policy regarding **Third Party SNT** is found at [1604.0576.03](#).

### **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.

There is no State of Florida DCF Checklist for this type of trust, so this section of manual above sets out the criteria considered. If the Medicaid recipient did not establish or fund a trust and cannot revoke or direct the use of a trust, it is not considered an asset. That's pretty simple.

The drafter must also be familiar with the review process followed by Social Security in the Program Operations Manual System (POMS) in sections 01120.200 through 01120.203

<https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=05011>

Social Security Policy for **Third Party SNT's** is found at [SI 01120.200](#) in section D. 2.

## **2. Trusts which are not resources**

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

The revocability of a trust and the ability to direct the use of the trust principal depend on the terms of the trust agreement and on State (or Tribal) law. If a trust is irrevocable by its terms and under State law, and the trust beneficiary cannot control or direct use of the trust assets for the trust beneficiary's support and maintenance, the trust **is not** a resource.

So the same criteria applies: ***Lack of authority to revoke or terminate the trust or to direct the use of the trust for the beneficiary's support and maintenance exempts the trust as resource for SSI purposes.***

### **Dispositive Provisions for Third Party Trusts**

Third party SNT's are the most flexible. They are not required to be sole-benefit trusts like first party SNT's and they actually can be revocable as long as the beneficiary cannot direct or change the terms of the trust.

In drafting dispositive provisions, we should be mindful of the present beneficiary as well as the residual beneficiary who will receive the "left-overs" when the disabled beneficiary dies. Even with pay back trusts, The Social Security Administration requires that trusts for beneficiaries on Supplemental Security Income (SSI) have a clearly defined residual beneficiary, after pay back to the State. The residual beneficiary may be individuals or an entity, but not left open ended with "to be determined later" language. Many drafters have fallen into this trap by attempting to maintain a general power appointment, limited power of appointment or trying to leave the residue to presently undetermined heirs (like "my heirs at law at the time of my death").

Sample Dispositive Language for a third party SNT:

- i) During the lifetime of **\*Full Name\*** (\*First Name\*), the Trustee shall invest and reinvest the assets of the Trust and shall collect the income from all of the assets. It is my primary concern that this Trust continue in existence as a supplemental (and emergency) fund for \*First Name\*, throughout \*his/her\* life. If this trust were to be invaded by creditors, subjected to any liens or encumbrances, or cause public benefits to be denied or terminated, it is likely that the trust corpus would be depleted prior to \*First Name\*'s death. In this event, there would be no coverage for emergencies or supplementation for basic needs. The following trust provisions should be interpreted in light of these concerns and my stated intent.
- ii) \*First Name\* shall have the right to reside upon any real property placed in this Trust as \*his/her\* permanent residence during \*his/her\* life, it being the intent of this provision to possess the requisite beneficial interest and possessory right in and to such real property to comply with Florida Statutes, Section 196.041, such that said beneficial interest and possessory right constitutes in all respects "equitable title to real estate" as that term is used in Section 6, Article VII of the Constitution of the State of Florida.
- iii) The Trustee will pay to or apply for the benefit of \*First Name\* for \*his/her\* lifetime, such amounts from the income and principal, up to the whole thereof, as the Trustee in the Trustee's absolute, complete and unfettered discretion may from time to time deem necessary or advisable, and any income not distributed shall be added to principal.

- iv) In making distributions to \*First Name\*, the Trustee shall take into consideration the applicable resource and income limitations of any public assistance programs for which \*First Name\* is eligible. In carrying out the provisions of this article, the Trustee \*shall/need not\* be mindful of the probable future needs of the remaindermen of this trust.
- v) No part of the principal of the trust created herein should be used to supplant or replace public assistance benefits of any county, state, federal or other governmental agency which has a legal responsibility to serve persons who are incapacitated or institutionalized, unless the impact of such use has been fully examined and the Trustee has independently determined that the loss in benefit will be outweighed by the benefit of using trust funds. For purposes of determining \*First Name\*'s Medicaid eligibility, no part of the principal or undistributed income of the trust estate shall be considered available to \*First Name\*. In the event the Trustee is requested to release principal or income of the trust to or on behalf of \*First Name\* to pay for equipment, medication, or services which Medicaid is authorized to provide (were it not for the existence of this trust), or in the event the Trustee is requested to petition the court or any other administrative agency for the release of trust principal or income for this purpose, the Trustee is authorized to deny such request and is authorized in Trustee's discretion to take whatever administrative or judicial steps may be necessary to continue the Medicaid eligibility of \*First Name\*, including obtaining instructions from a court of competent jurisdiction ruling that the trust corpus is not available to \*First Name\* for Medicaid eligibility purposes. Any expenses of the Trustee in this regard, including reasonable attorney's fees, shall be a proper charge to the trust estate. All references in this instrument to "Medicaid" shall include any other state's Medicaid program equivalent.
- vi) No interest in the principal or income of this trust shall be anticipated, assigned or encumbered, or shall be subject to any creditor's claim or to legal process, prior to its actual receipt by \*First Name\*. Furthermore, because this trust is to be conserved and maintained for \*First Name\* throughout \*his/her\* life, no part of the corpus thereof, neither principal nor undistributed income, shall be construed as part of \*First Name\*'s "estate" or be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential care, by any public entity, office, department or agency of the State of Florida, or any other state, or the United States, or any other governmental agency.
- vii) This trust is not a resource to \*First Name\*. It is not available to \*First Name\* except in the Trustee's discretion, and then only to the extent that other resources are not available to provide for \*First Name\*. Under no circumstance can \*First Name\* compel a distribution from the trust for any purpose. The Trustee's discretion in making non-support disbursements as provided for in this instrument is final as to all interested parties, even if the Trustee elects to make no disbursements at all. Further, the Trustee may be arbitrary and unreasonable. The Trustee's sole and independent judgment, rather than any other party's determination, is intended to be the criterion by which disbursements are made. No court or any other person shall substitute it or their judgment for the decision or decisions made by the Trustee.
- viii) During the administration of this Trust, any Trustee may pay, transfer, or assign income or principal in any one or more of the following ways: (1) to the guardian of the person or of the property of \*First Name\* during the incapacity of \*First Name\*; (2) to a person serving as agent under a durable power of attorney, a

- health care surrogate acting under a designation of health care surrogate; or, (3) by expending such income or principal directly to a provider of goods or services for the support, maintenance, health care, recreation, welfare or protection of the legal rights of \*First Name\*, including any property interest of \*First Name\*.
- ix) This trust shall cease and terminate upon the death of **\*First Name\*** and thereupon the Trustee shall distribute and deliver all of the principal and undistributed income to \*Bene\*.
  - x) Upon the death of \*First Name\* the Trustee may pay any death taxes regarding assets passing in accordance with these trust provisions or otherwise, and all expenses of \*First Name\*'s funeral, and expenses related to administration and distribution of the trust estate if, in the Trustee's discretion, other satisfactory provisions have not been made for the payment of such expenses. The Trustee shall make no payments for expenses incurred prior to \*First Name\*'s death if the Trustee shall determine in Trustee's discretion that payment therefor is the obligation of any county, state, federal, or other governmental agency which has a legal responsibility to serve persons with disabilities which are the same or similar to the impairment(s) of \*First Name\* herein.
  - xi) All public assistance benefits of any Beneficiary of any trust provided for in this trust shall not be commingled with other trust assets but shall be separately held by the Trustee. Nothing in this provision shall be construed to require the addition to the trust estate of public assistance benefits received by or on behalf of any Beneficiary herein.
  - xii) This instrument and the dispositions hereunder shall be construed and regulated and their validity and effect shall be determined by the laws of Florida.
  - xiii) To the extent that any such requirements can be legally waived, no Trustee shall ever be required to give any bond as Trustee, to qualify before, or be appointed by any Court, or to obtain the order of approval of any Court in the exercise of any power of discretion hereunder, although any Trustee may do so at said Trustee's discretion. Any Trustee is relieved from any requirements as to routine Court accountings that may now or hereafter be required by the statutes in force in any jurisdiction, although said Trustee is not precluded from obtaining judicial approval of such accountings.

### **Qualifying Special Needs Trust (QSNT)**

Generally, a SNT created by a spouse is treated the same as if the disabled beneficiary had established the SNT. An exception for SNTs created by a spouse exists when the SNT is **established under a Last Will and Testament**. In such a case, the SNT need not be a pay back trust. Other beneficiaries such as children, grandchildren or other family members may receive the remainder of the SNT when the disabled beneficiary dies. In fact the Florida Legislature has enacted legislation that specifically authorizes a person to leave assets in a SNT in a manner that will permit their disabled spouse to maintain public assistance benefits and qualify for Florida's Elective Share. The Elective Share is a statutory right a surviving spouse has to take 30% of their deceased spouse's elective estate. Failure to take the Elective Share can result in disqualification from public benefits, though it does not appear this has ever been a real concern in Florida.

The SNT that satisfies the Elective Share is defined in Florida Statute 732.2035(8):

(8) "Qualifying special needs trust" or "supplemental needs trust" means a trust established for an ill or disabled surviving spouse with court approval before or after a decedent's death, if, commencing on the decedent's death:

(a) The income and principal are distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are ineligible family trustees. For purposes of this paragraph, ineligible family trustees include the decedent's grandparents and any descendants of the decedent's grandparents who are not also descendants of the surviving spouse; and

(b) During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

The requirement for court approval shall not apply if the aggregate value of all property in all qualifying special needs trusts for the spouse is less than \$100,000. For purposes of this subsection, value is determined on the "applicable valuation date" as defined in s. 732.2095(1)(a).

The relevant portion of the ESS Manual that allows for trusts established under a will to be excluded is [1640.0576.05](#):

**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.

The POMS discusses this exemption in SI 01120.201 C. 2. a. (as well as several other sections):

## 2. Applicability

### a. Trusts to which this provision applies

Except as provided in [SI 01120.203A](#), this section applies to trusts "established with the assets of an individual." A trust is considered to have been established with the assets of an individual if any assets of the individual (or spouse), regardless of how little, were transferred into the trust other than by a will. For the definition of an asset, see [SI 01120.201B.1](#) in this section.

So SNT's established by will are treated like third party SNT's and do not require a Medicaid payback to the State and should always have remainder beneficiaries.

## Self Settled Special Needs Trusts

As a general rule, any trust established by the disabled individual (or their spouse) will count as a resource. Certainly a revocable trust is a countable resource, but there are a few irrevocable trusts that are available. There are primarily three self settled Special Needs Trusts that are exceptions to the general rule stating that if the disabled individual establishes the SNT then it counts as a resource. The actual federal legislation on self settled SNTs is sparse. The controlling federal law was enacted in the Omnibus Budget Reconciliation Act of 1993, OBRA 1993, and is codified at 42 U.S.C. § 1396p(d)(4). The SNTs are: 1. the Under Age 65 Disabled Trust (known as a “(d)(4)(A) trust”), 2. a Qualified Income Trust (known as a “(d)(4)(B) trust”), and 3. a Pooled Trust (known as a “(d)(4)(C) trust”). 42 U.S.C. § 1396p(d) deals specifically with the treatment of Trusts and states that if the assets of the disabled individual were used to form all or part of the corpus of the trust the trust counts against the disabled individual for qualification for government benefits. The relevant federal law carves out **three exceptions** and reads as follows:

- (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 the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this 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.

The Social Security Administration’s Program Operations Manual System (POMS) is the reference guide for the Social Security worker analyzing an applicant’s situation. Section SI [01150.121](#) carves out the treatment of transfers to various types of trusts for qualification for SSI. These trusts are discussed in detail in [SI 01120.203](#). You must study this POM very closely if you are going to draft any of these trusts. This POM is reproduced at the end of this outline.



## **The (d)(4)(A) – Self-Settled SNT**

This Trust is an exception to rule that a disabled individual cannot set up a trust with his or her own funds and then be able to qualify for SSI or Medicaid benefits. As the Statute indicates, the beneficiary must be under the age of 65 when the trust is established and funded. The trust can only be established by certain individuals: The beneficiary's parent or grandparent, the beneficiary's legal guardian, or by a court. The trust must be for the disabled beneficiary's sole benefit. Finally, there must be a State Medicaid pay-back provision upon the beneficiary's death. These requirements are explained in detail in [SI 01120.203](#). We will take each of these requirements and break them out.

### **Age 65 limitation**

The trust must be established for the benefit of a disabled individual under age 65. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65. Additions to this trust after age 65 are generally not allowed except in the case of interest, dividends or other earnings of the trust or if the trust contains the irrevocable assignment of the right to receive payments from an annuity or support payments made when the trust beneficiary was less than 65 years of age, annuity or support payments paid to a special needs trust are treated the same as payments made before the individual attained age 65 and do not disqualify the trust from the special needs trust exception.

### **Established by the individual, a parent, grandparent, guardian or court**

The individual beneficiary can now establish one of these trusts personally. Actions of a parent or grandparent are not generally where problems arise. We know that a guardian in Florida must attain court permission to establish a trust for a ward, per Fla. Stat. [§744.441](#). The biggest problem in this area seems to be when the court is establishing such a trust. In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. **Approval of a trust by a court is not sufficient.** Therefore, if you choose to use the court to establish a d4A SNT fashion your Order stating that the Court "Orders the Creation of the Trust." Then you can have the Court Order some third person to physically sign or execute the trust document.

### **For the Sole Benefit of the disabled person**

The trust may benefit no one but that individual, whether at the time the trust is established or at any time for the remainder of the beneficiary's life. Social Security has relaxed some of their language in this regard and state that the trust must be for the primary benefit of the beneficiary. This still is not very clear and does conflict with other sections that still state sole benefit. Any provision that provides benefits to other individuals or entities during the disabled beneficiary's lifetime, or that allows for termination of the trust prior to the beneficiary's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual), will result in disqualification for the special needs trust exception. This means that if the trust has language allowing it to terminate during the lifetime of the beneficiary it must comply with Social Security's policy on early terminations found in [SI 10020.199](#).

## State Medicaid Payback Provision

This has become a very tricky issue. The trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in [SI 01120.203B.10](#). Other allowable expenses include: taxes due from the trust and reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. Expenses that are NOT ALLOWED include funeral expenses, outstanding guardian's fees and the attorney fees of the guardian, general creditors, personal income taxes of the beneficiary and payments to heirs or beneficiaries of the deceased trust beneficiary.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust. DO NOT limit your payback to the State of Florida only, even if your beneficiary has never and never will step outside of the State of Florida.

These requirements for a d4A are set out in the Federal Policy for the SSI Program. There is a checklist the Social Security worker is directed to use that is found at SI 10020.203 I. 2.

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See <a href="#">SI 01120.203B.2</a> . in this section.)  •If <b>yes</b> , go to <b>Step 2</b> . •If <b>no</b> , go to <b>Step 9</b> .
2	Does the trust contain the assets of a disabled individual? (See <a href="#">SI 01120.203B.4</a> . in this section.)  •If <b>yes</b> , go to <b>Step 3</b> . •If <b>no</b> , go to <b>Step 9</b> .
3	Is the disabled individual the sole beneficiary of the trust? (See <a href="#">SI 01120.203B.6</a> . in this section.)  •If <b>yes</b> , go to <b>Step 4</b> . •If <b>no</b> , go to <b>Step 9</b> .
4	Did the individual, a parent, a grandparent, a legal guardian, or a court establish the trust? (See <a href="#">SI 01120.203BC.2</a> . in this section.)  •If <b>yes</b> , go to <b>Step 5</b> .

STEP	ACTION
	<ul style="list-style-type: none"> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
5	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in <a href="#">SI 01120.203B</a>.10. in this section?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 6</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
6	<p>Verify if the trust contains any early termination provisions as described in <a href="#">SI 01120.199</a>. If the trust does not contain any early termination provisions, go to <b>Step 7</b>.</p> <p>If the trust contains any early termination provisions, does it meet the early termination criteria in <a href="#">SI 01120.199F</a> that would make early termination acceptable?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 7</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
7	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in <a href="#">SI 01120.203B</a>.3. in this section.</p> <p>Go to <b>Step 8</b> for treatment of assets placed in trust prior to age 65.</p> <p>Go to <b>Step 9</b> for treatment of assets placed in trust after attaining age 65.</p>
8	<p>Evaluate the trust under <a href="#">SI 01120.200D.1.a</a> to determine if it is a countable resource.</p>
9	<p>The trust (or portion thereof) does not meet the requirements for the special needs trust exception.</p> <p>Consider if the pooled trust exception in <a href="#">SI 01120.203D</a> in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under <a href="#">SI 01120.203K</a> in this section.</p>

Florida's DCF has a similar checklist, so make sure you know which one each agency will be using. The DCF checklist is found in Appendix 22 to the ESS Program Policy Manual. The guidelines are found in [Appendix A-22.3](#) The checklist used is in [Appendix A-22.4](#).

DATE: _____ FLORIDA CASE #: _____ RE: <b>TRUSTS FOR THE DISABLED</b> TO: District _____ Legal Counsel THRU: Region _____ or Circuit _____ (ACCESS) FROM: Unit _____, ESS Name: _____	DATE: _____  AFTER DLC REVIEW, RETURN TO REGION OR CIRCUIT PROGRAM OFFICE (ACCESS)
1. Name of Individual:  _____ First M.I. Last  ___ Under age 65 ___ Disabled per SSA criteria	The written legal opinion of District Legal Counsel shown in this memorandum is subject to the "OBRA 93 Medicaid Trust Opinion Statement." This opinion is furnished solely to advise Department staff of legal issues related to certain trusts in connection with an individual's application for or receipt of benefits under the Medicaid Program in Florida. It may not be relied upon by any other person(s) without the prior written consent of the District Legal Counsel.
2. Name, address and telephone number of attorney or other individual who prepared the trust:  _____ _____ _____  The trust was established by: ___ Individual (on or after 12/13/16) ___ Parent ___ Grandparent ___ Individual's legal guardian (Attach documentation) ___ Court or administrative body with legal authority to act on behalf of the individual (Attach documentation)  ___ yes ___ no	1. District Legal Counsel:  ___ Concur ___ Do not concur
3. The trust is comprised of: ___ The individual's income (and accumulated income) ___ Assets (Specify) _____ _____ _____	2. District Legal Counsel:  ___ Concur ___ Do not concur
4. Is the trust for the sole benefit of the individual?  ___ yes ___ no	3. District Legal Counsel:  ___ Concur ___ Do not concur
5. Is the trust irrevocable?  ___ yes ___ no	4. District Legal Counsel:  ___ Concur ___ Do not concur
6. Will the state receive all of the funds remaining in the trust at the time of the individual's death (up to the amount of Medicaid benefits paid on behalf of the individual)?  ___ yes ___ no	5. District Legal Counsel:  ___ Concur ___ Do not concur  _____ District Legal Counsel Signature Date

September 2018

**Appendix A-22.4**

### **What Must be in your SNT (d4A)**

1. A Settlor or Grantor that is allowable – Individual, Parent, Grandparent, Guardian or Court
2. Statement the trust is irrevocable
3. A disabled beneficiary
4. Statement that the trust is for the sole benefit of the disabled beneficiary
5. Statement that the trust contains only the assets of the disabled beneficiary
6. A required Medicaid payback to all states

### **What Should Be in your d4A SNT**

1. Ability to amend SNT if there is a problem or change in the law (not by beneficiary)
2. Trustee powers to administer the trust according to Florida (or any state) law
3. A defined remainder beneficiary after Medicaid payback
4. A provision for “seeding” the trust with some money – other states may require this
5. Ability to pay for food and shelter, in the trustee’s sole discretion
6. Ability to pay for medical insurance or medical expenses
7. Ability to fund an ABLE account, if beneficiary qualifies

### **What Should not be in your SNT**

1. An early termination clause providing for how to terminate the trust during the lifetime of the beneficiary
2. Mandatory payments of income or principal including an ascertainable standard like HEMS
3. Ability of beneficiary to remove the trustee
4. A prohibition from paying for food and shelter – this limits the SNT’s flexibility

### **What Must Not be in your d4A SNT**

1. Payback only Florida Medicaid

2. Ability of beneficiary to direct payments from trust
3. Ability of beneficiary to terminate the trust
4. Beneficiary named as trustee
5. Ability to use any funds in trust for any person's benefit other than the beneficiary, during the beneficiary's lifetime (sole benefit issue)

### **The Qualified Income Trust (QIT) – (d)(4)(B) SNT**

The Federal law carves out the law for this type of trust but it does not work for Federal programs, only state Medicaid programs. Only about a dozen states have an income limit for its state long-term care Medicaid programs. Florida is one of those states.

The QIT only works to qualify individuals for the State's long term care and institutional Medicaid programs and the waivers based on those programs. The relevant section of the State Medicaid manual is 1840.0110:

#### **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 Circuit Legal Counsel 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 Circuit Legal Counsel.

Once the Circuit 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 Circuit 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.

Using Form CF-ES 2356, Third Party Recovery Transmittal, fax or send a copy of the approved qualified income trust to the AHCA Third Party Liability vendor.

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 AHCA Third Party Liability vendor (refer to Form CF-ES 2536 for the mailing 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.

The federal law is silent on who can establish a QIT, but Florida has decided to still limit the individuals who can establish one. [Appendix 22.1](#) to the Program Policy Manual provides the guidelines Florida uses to review QIT's:

## **GUIDELINES FOR REVIEWING INCOME TRUSTS**

### **STEP 1: Was the trust executed on or after 10/1/93 (signed and dated)? (ES)**

Cite: 42 USC 1396p (d)

Background: Medicaid income trusts are considered "trusts for the primary purpose of paying debts" and therefore do not have to be executed with the formalities of a will. Effective January 1, 1997, two witnesses are no longer required to sign the trust.

\*\*If YES, go to Step 2.

\*\*If the document is not signed and dated, there is no trust. The eligibility specialist (ES) will return the document to the individual or his representative, advise him of the problem and proceed with the eligibility determination as with any other case.

\*\*If the trust was signed and dated prior to 10/1/93, the eligibility specialist must follow pre-October 1993 trust policy in Chapter 1600.

**STEP 2: If the monthly amount of income designated to go into the trust is subtracted from (excluded) the individual's gross income, is the individual's remaining income (outside the trust) below the institutional care income limit? (The eligibility specialist must verify how much income is designated to go into the trust account each month.)**

Cite: 42 CFR 435.236 and 435.1005; and subsection 409.904 (3), Florida Statutes.

Background: The trust language does not have to indicate a specific amount of income will go into the trust account monthly; however, documentation must confirm that adequate funds are placed into the account each month to reduce the individual's available income outside the account to within the Institutional Care Program limits.

Policy: Income cannot be excluded until it is placed into the trust. The individual is not eligible on the factor of income until his countable income (income outside the trust) is below the institutional care income limit. Trusts cannot be funded retroactively.

\*\*If YES, go to Step 3.

\*\*If NO, the eligibility specialist advises the individual or his representative of the problem and enrolls the individual in the Medically Needy Program (provided all other requirements are met) as he is ineligible for Medicaid institutional care services based on excess income. **Appendix A-22.1**

**STEP 3: Is the trust comprised of the individual's income only?**  
**(ES)**

Cite: 42 USC 1396 p (d) (4) (B) (i)

\*\*If YES, go to Step 4.

\*\*If the trust is comprised of the individual's income and assets, it is not a qualified income trust.

The eligibility specialist will treat the trust in accordance with the policy in Chapter 1600. The income would count in determining eligibility.

\*\*If the trust is comprised of the individual's income and the assets or income of someone else, it is not a qualified income trust. The individual's income would count in determining Medicaid eligibility.

**STEP 4: Who created the trust and what was their authority?**  
**(ES/DLC)**

Cite: 42 USC 1396 p (d) (2) (A)

\*\*If the income trust was **established by an attorney** licensed to practice in the state in which it was set up, go to Step 5. We will assume that the attorney's participation in the trust's creation means that the party executing the trust did so with proper authority and that, if executed, it is a valid trust. The eligibility specialist will provide the DLC with the name and phone number of the attorney.

\*\*If the income trust was **not set up by an attorney** licensed to practice in the state, the eligibility specialist must provide the DLC with the name of the person who created the trust and the individual's authority (copies of the power of attorney or guardianship documents, if applicable, must be forwarded to the DLC along with the trust). No power of attorney is required if trust was executed by a spouse.

\*\*If the trust was **executed by one of the following persons in (a) through (d)** below, go to Step 5:

(a) the individual;

(b) the individual's spouse;

(c) 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

(d) a person, including a court or administrative body acting at the direction or upon the request of the individual or the individual's spouse.



**\*\*If someone other than the above listed persons** executed the trust, the Region or Circuit Program Office responsible for Medicaid eligibility, in conjunction with the District Legal Counsel and ACCESS Headquarters, will review the trust to determine the appropriate action to follow.

**STEP 5: Is the trust revocable?** (This must be determined by the District Legal Counsel.)  
**(DLC)**

Cite: 42 CFR 435.236 (formerly 435.231) and 20 CFR 416.1100, et seq.

Background: The trust can be considered an irrevocable trust if there is provision for amendment, providing provision for amendment does not include power to revoke.

**\*\*If the trust is revocable, the eligibility specialist will follow the policy in Chapter 1640 to determine how to count the trust as an asset and how to count the disbursements.**

**\*\*If the trust is irrevocable, go to Step 6.**

**STEP 6: What is the purpose and content of the trust?**  
**(DLC)**

Cite: 42 USC 1396p (d) (4) (B)

- (a) Is it composed only of the individual's income (and accumulated income in the trust)? and
- (b) Will the state receive all amounts remaining in the trust upon the individual's death, up to the total amount paid out by Medicaid for the individual? and
- (c) Was the trust established for the benefit of the individual?

**\*\*If the trust meets all criteria listed in (a) through (c), go to Step 7.**

**\*\*If the trust does not meet all of the criteria in (a), (b) and (c), the eligibility specialist must treat it according to policies in Chapter 1600 for irrevocable trusts.**

Policy: The trust does not have to indicate "State of Florida" as the beneficiary. Since the same income trust may be used in other states, it is better that trust use the generic "state" to indicate entity with beneficiary rights.

**STEP 7: Complete and sign the income trust review form submitted to you by the eligibility specialist. Attach the trust and applicable documents to the response and route back to the eligibility specialist via the appropriate Region or Circuit Program Office staff.**  
**(DLC)**

**\*\*If a special written opinion is needed for a trust that is not covered by the standardized form, the DLC will use the special legal opinion form.**

**STEP 8: Prior to approval, if the individual's computed patient responsibility will exceed the Medicaid cost of care rate, the eligibility specialist must follow policy in Chapter 1840 to examine the purpose of the trust and whether or not the individual will receive fair compensation for funds transferred into the trust. (If necessary, the eligibility specialist can request the Region or Circuit Program Office review the case.)**  
**(ES)**

The DCF checklist for the QIT is found at [http://www.dcf.state.fl.us/programs/access/docs/esspolicymanual/a\\_22\\_5.pdf](http://www.dcf.state.fl.us/programs/access/docs/esspolicymanual/a_22_5.pdf)

DATE: _____ RE: <b>INCOME TRUSTS</b> TO: District _____ Legal Counsel THRU: Region _____ or Circuit _____ (ACCESS) FROM: Unit _____, ES Name: _____	DATE: _____ After DLC review, return to ACCESS Region or Circuit Program Office.
1. Name of Individual: _____ First                  M.I.                  Last	The written legal opinion of District Legal Counsel shown in this memorandum is subject to the "OBRA 93 Medicaid Trust Opinion Statement." This opinion is furnished solely to advise Department staff of legal issues related to certain trusts in connection with an individual's application for or receipt of benefits under the Medicaid Program in Florida. It may not be relied upon by any other person(s) without the prior written consent of the District Legal Counsel.
2. Name, address and telephone number of attorney or other individual who prepared the trust:  The trust was executed by: <input type="checkbox"/> Individual <input type="checkbox"/> Individual's spouse* <input type="checkbox"/> A person, including court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse. Specify and attach copy of documentation: _____ <input type="checkbox"/> Individual's legal representative. Specify and attach copy of documentation: _____ *No power of attorney is needed if executed by spouse.	<b>District Legal Counsel:</b> 2. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
3. The trust is comprised of: <input type="checkbox"/> The individual's income (and accumulated income) only <input type="checkbox"/> Other (specify): _____	3. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
4. Is the trust irrevocable? <input type="checkbox"/> yes <input type="checkbox"/> no	4. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
5. Will the state receive all of the funds remaining in the trust at the time of the individual's death (up to the amount of Medicaid benefits paid on behalf of the individual)? <input type="checkbox"/> yes <input type="checkbox"/> no	5. <input type="checkbox"/> Concur <input type="checkbox"/> Do not concur
	_____ <b>District Legal Counsel Signature                      Date</b>

Appendix A-22.5

In summary, the QIT only works for the Medicaid programs that have a current \$2,349 (in the year 2020) monthly income limit, any income deposited into a QIT is not considered in determining eligibility for the program but is considered in determining patient responsibility. It DOES NOT WORK for gaining SSI eligibility or any of the other state Medicaid programs (MEDS-AD, Medically Needy, QMB, etc.)

## The (d)(4)(C) - Pooled Trust

The best thing to know about drafting tips for Pooled Trusts is that you don't need to draft them. You do need to know how to review them and determine if they violate the federal law before you recommend one to a client. OBRA 1993 allows a third party in the form of a not-for-profit organization, as defined in accordance with 501(c)(3) of the Internal Revenue Code, to manage a self settled special needs trust in the form of a Pooled Trust. The Pooled Trust is an exception to the OBRA '93 rule that trusts will be considered as assets regardless of whether they are revocable or irrevocable, regardless of the purpose for which they are established, and regardless of whether or not the trustees have discretion. Medicaid and Supplemental Security Income (SSI) provide a basic level of support for food, shelter, and medical care. A Pooled Trust can fill the "gap" between basic support and the needs and comfort of a beneficiary and supplement the basic support.

In a Pooled Trust, the income and assets of a number of disabled persons may be managed by a not-for-profit association. The SSI definition of disability is used. Separate sub-accounts are maintained for each beneficiary. Upon the death of a beneficiary, the funds remaining in that beneficiary's account are retained by the trust if the Pooled Trust agreement so provides. An advantage of the Pooled Trust is that the corpus of the trust is not considered an available resource. A pooled trust is like a community trust that already would exist and would not have to be created each time a new beneficiary is added. The pooled trust requires only a joinder agreement, or some other contractual form, for new beneficiaries to participate in the pooled trust.

The term "joinder agreement" seems to have been originated by Elder Law attorney Kent Olsen out of Colorado who was one of the first individuals to present on the Pooled Trust concept at the 1994 NAELA national program, which was the first NAELA program after the passage of OBRA 1993. Some of the materials and information imparted by Mr. Olsen at that meeting was preliminary and unfortunately is still being replicated by individuals drafting pooled trusts today. Kent readily admits that some of his initial thoughts about pooled trusts have not panned out and he has made many modifications to his thinking and any pooled trusts he drafts today. A problem is that his basic model has been replicated by almost every commercial pooled trust since and has caused denials because of clarifications, modifications and changes to Social Security policy since the adoption of OBRA 93.

For Florida Medicaid and for SSI, if the beneficiary is under the age of 65, there is no look back or transfer penalty period when a Pooled Trust is established. For Florida's Long Term Care Medicaid, if the beneficiary is age 65 or over **Florida does not apply a transfer penalty as a result of funding a pooled trust at this time.** If the person is age 65 or over and on SSI, Social Security does impose a transfer penalty equal to 1 month for every \$914 transferred (per the 2023 Federal Benefit Rate, or maximum monthly SSI check) up to a maximum of 36 months, or 3 years.

Pooled Trusts must: be established and managed by a non-profit association, a separate account must be maintained for each beneficiary of the trust solely for the benefit of individuals who are disabled by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court and then 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 by Medicaid. We will take these separately.

### **Established and managed by a non-profit association**

The pooled trust must be established through the actions of a non-profit association. A non-profit association is an organization established and certified under a State non-profit statute. The non-profit does not need to be a tax-exempt organization.

### **A separate account must be maintained for each beneficiary of the trust**

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

### **Solely for the benefit of individuals who are disabled**

You may notice this is worded differently than the d4A that says “for the sole benefit of” the disabled individual. Social Security has basically stated that they treat both trusts similarly. Therefore this provision is the same as stated above for the d4A.

### **Established by the individual, a parent, grandparent, guardian or court**

Like for the d4A the individual beneficiary can establish a Pooled Trust account personally. Like in d4A’s, actions of a parent or grandparent are not generally where problems arise. We know that a guardian in Florida must attain court permission to establish a trust for a ward, per Fla. Stat. [§744.441](#). The biggest problems in this area seems to be when the court is establishing such a trust or an agent is acting for beneficiary, as in a Power of Attorney. In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. **Approval of a trust by a court is not sufficient.** Therefore, if you choose to use the court to establish a Pooled Trust fashion your Order stating that the Court “Orders the Creation of the Trust.” Then you can have the Court Order some third person to physically sign or execute the trust document. The other problem we see is because the individual beneficiary can establish one of these trusts personally then his or her legal representative (Agent under a Durable Power of Attorney) can as well. A third party establishing a trust account on behalf of another individual with that individual's assets must have legal authority to act with regard to the assets of the individual. Therefore we must ensure that our Powers of Attorney documents have the requisite enumerated powers. We know that our Florida Statute requires specific enumeration for the establishment of a trust. [Fla. Stat. 702.2202](#). Please make sure you put in the specific authority to create pooled trust (as well as all other forms of SNT’s like an Income Trust) in your Power of Attorney document.

### **What happens when a beneficiary of a Pooled Trust dies**

Here is where it gets a bit confusing. The federal law does not require a Medicaid payback upon the death of a Pooled Trust beneficiary. It does if the trust does not retain the funds left over: 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 by Medicaid. So, if the trust retains the funds there is no required payback. Then the questions come: What if there is enough funds to pay back the Medicaid lien, then what? What does the trust do with funds that are retained? Can a court require the Medicaid payback? Can a court limit what can be retained?

Some of these questions have been litigated; particularly what a State legally can require regarding remaining funds in a pooled trust. In 2012 the U.S. Third Circuit Court of Appeals ruled in [Lewis v. Alexander](#) that the Commonwealth of Pennsylvania's statute requiring 50% of the remaining Pooled Trust account to automatically be paid to the Commonwealth upon the death of the beneficiary violated the Supremacy Clause of the Constitution because the federal law is clear. Most of these other questions do not have a single answer. The federal courts have given no additional guidance to these answers. Social Security appeared to be adopting policy that was going to direct very specifically what would happen with retained funds in a Pooled Trust and then backed off and adopted nothing.

The checklist used by Social Security for Pooled Trusts is found at [SI 01120.203 I. 3.](#)

STEP	ACTION
1	<p>Does the trust account contain the assets of a disabled individual? (See <a href="#">SI 01120.203D.2.</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 2</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Is the pooled trust established and managed by a nonprofit association? (See <a href="#">SI 01120.203D.1.</a>, <a href="#">SI 01120.203D.3.</a>, and development instructions in <a href="#">SI 01120.203J</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 3</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Does the trust pool the funds yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (See <a href="#">SI 01120.203D.4.</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 4</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
4	<p>Is the disabled individual the sole beneficiary of the trust account? (See <a href="#">SI 01120.203D.5.</a> in this section.)</p>

STEP	ACTION
	<ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 5</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
5	<p>Did the individual, (a) parent(s), (a) grandparent(s), (a) legal guardian(s), or a court establish the trust account? (See <a href="#">SI 01120.203D.1.</a> and <a href="#">SI 01120.203D.6.</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 6</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
6	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in <a href="#">SI 01120.203D.8.</a> in this section?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 7</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
7	<p>The trust meets the Medicaid pooled trust exception; however, the trust still should be evaluated under <a href="#">SI 01120.200D.1.a.</a> to determine if it is a countable resource.</p>
8	<p>The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under <a href="#">SI 01120.203K.</a> in this section.</p>

The Florida Medicaid checklist on reviewing Pooled Trusts is found in [Appendix 22.6](#) of the ESS Manual.

<p>DATE: _____ RE: POOLED TRUSTS FOR DISABLED TO: District _____ Legal Counsel THRU: Region _____ or Circuit _____ (ACCESS) FROM: Unit _____, ES Name: _____</p>	<p>DATE: _____ AFTER DLC REVIEW, RETURN TO REGION OR CIRCUIT PROGRAM OFFICE (ACCESS)</p>
<p>1. Name of disabled individual:</p> <p>_____</p> <p>    First                        M.I.                        Last</p>	<p>The written legal opinion of District Legal Counsel shown in this memorandum is subject to the "OBRA 93 Medicaid Trust Opinion Statement." This opinion is furnished solely to advise Department staff of legal issues related to certain trusts in connection with an individual's application for or receipt of benefits under the Medicaid Program in Florida. It may not be relied upon by any other person(s) without the prior written consent of the District Legal Counsel.</p>
<p>2. Name, address and telephone number of <b>non-profit association</b> that established the pooled trust:</p> <p>_____</p> <p>_____</p> <p>_____</p>	<p><b>District Legal Counsel:</b></p> <p>2. _____ Concur (non-profit status)           _____ Do not concur</p> <p style="text-align: right;">Review: Master Declaration of Trust</p>
<p>3. The account in the trust was established by the</p> <p>___ Individual                          ___ Individual's parent ___ Individual's guardian            ___ Individual's grandparent ___ Court</p>	<p>3. _____ Concur           _____ Do not concur</p> <p style="text-align: right;">Review: Pooled Trust Joinder Agreement</p>
<p>4. Will the individual's assets be maintained in a separate account, although the funds are pooled for investment and management?</p> <p>          ___yes     ___no</p>	<p>4. _____ Concur           _____ Do not concur</p> <p style="text-align: right;">Review: Pooled Trust Joinder Agreement               Master Declaration of Trust</p>
<p>5. Does the trust account contain the assets and/or income of only the disabled individual?</p> <p>          ___yes     ___no</p>	<p>5. _____ Concur           _____ Do not concur</p> <p style="text-align: right;">Review: Pooled Trust Joinder Agreement</p>
<p>6. Was the account established solely for the benefit of the disabled individual?</p> <p>          ___yes     ___no</p>	<p>6. _____ Concur           _____ Do not concur</p> <p style="text-align: right;">Review: Pooled Trust Joinder Agreement</p>
<p>7. Are both the trust and the document establishing the individual's account irrevocable?</p> <p>          ___yes     ___no</p>	<p>7. _____ Concur           _____ Do not concur</p> <p style="text-align: right;">Review: Pooled Trust Joinder Agreement               Master Declaration of Trust</p>
<p>8. Will the state receive all of the funds not retained by the trust and remaining in the trust at the time of the individual's death (up to the amount of Medicaid benefits paid on behalf of the individual)?</p> <p>          ___yes     ___no</p>	<p>8. _____ Concur           _____ Do not concur</p> <p style="text-align: right;">Review: Pooled Trust Joinder Agreement               Master Declaration of Trust</p> <p>_____ <b>District Legal Counsel Signature</b>                          <b>Date</b></p>

August 2001

Appendix A-22.6

Social Security has also established Regional Trust Teams to review SNT's. A number of years back Social Security published a Trust Training Fact Guide for its field workers. The Guide received some criticism and can't be found on Social Security's website anymore it can be found on some other sites. The Guide does give a good overview of these types of trusts with an emphasis on what Social Security is looking for. The Guide is reproduced at the end of the outline.

### **Distributions from SNT's**

Distributions are crucial in preserving public benefits. Improper distributions can cause the loss of public benefits to the beneficiary of a SNT. For SSI purposes, disbursements from the SNT will be considered one of 3 categories: Direct income, Not Income or In-Kind Support.

First is Direct Income to the beneficiary. Direct Income reduces SSI benefits on a dollar for dollar basis. 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.)

The second category is defined as Not Income or as Distributions to Third Parties. In its Program Operations Manual, the Social Security Administration states that disbursements from the trust by the trustee to a third party that results in an individual receiving items that are not food or shelter are not income. 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, particularly for a person on SSI.

The third 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. These distributions can be in the form of in-kind support and maintenance and are valued under the presumed maximum value rule. If the in-kind payments are for food or shelter, then SSI has presumed maximum value (PMV) rules, to calculate how much will be deemed as income and thus reduce the individual's SSI benefits. In the situation of a SNT, the Trustee gives the beneficiary something other than money. Many times it is appropriate to make In Kind Support and Maintenance payments and 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 Florida Medicaid benefits.)

Distributions that **are considered food and shelter** are listed in POM [SI 00835.465](#) Section D:

#### D. Policy — what are household costs

##### **1. List of applicable items**

When computing household operating expenses for inside ISM or the CMV of household costs for outside ISM, the following **10** items are the **only** ones used in the applicable computations:

- Food (**\*\*NOTE\*\* At the time of this presentation Social Security has plans to eliminate Food from this list therefore there would be no reduction for ISM of Food, only Shelter**)
- Mortgage (including property insurance **required** by the mortgage holder)
- Real property taxes (less any tax rebate/credit)
- Rent



- Heating fuel
- Gas (Natural Gas and Propane), not gas for a vehicle
- Electricity
- Water
- Sewer
- Garbage removal

**NOTE:** Condominium fees in themselves are not household costs. However, condominium fees may include charges which are household costs (e.g., garbage removal). To the extent that such charges are identifiable, use them in the computation of inside and outside ISM.

A Few types of distributions not considered food or shelter include:

- Non-refundable airline tickets;
- Stereo system;
- TV;
- Medical insurance;
- Telephone and cellular phone bills;
- Newspaper and magazine subscriptions;
- Furniture;
- Services of a care manger;
- Vacation and Travel expenses of the disabled person;
- Movies;
- Tax payments;
- Medical treatment for which public funds are not available such as alternative health procedures or alternative medications;
- Memberships in clubs such as recreational clubs;
- Handicap vans;
- The difference between a private and semiprivate room in an institution;
- Attorney fees and
- Guardian's fees.

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. Depending on the household in which the individual resides, the benefit may either be reduced by one-third or by the presumed market value of the good or services. If the beneficiary resides in another person's household, meaning the beneficiary has no life estate or ownership interest in the household, then the amount of In Kind Support is reduced by one-third. If the beneficiary does not live in another person's household, then the presumed market value of the benefit is used. A beneficiary can show that the actual value is less than the presumed value of a good. If the actual value exceeds the presumed value, then the benefit is only reduced by the presumed market value.

For a SNT, a Trustee should generally 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 or shelter (this will be counted as income) without knowing exactly how such payments might affect SSI eligibility; and
- Buy or give groceries to the beneficiary without knowing exactly how such payments might affect SSI eligibility.

## **Tax Strategies**

Since the disabled beneficiary of a SNT should not receive direct distributions from the SNT, the question arises as to how to tax these trusts. Generally third party trusts would have a separate tax identification number at the time it is being used for a disabled beneficiary. Often times a third party may incorporate the SNT for a family member in their existing Revocable Living Trust. Unless the Grantor is a spouse, this is a perfectly acceptable manner to create a SNT. During the lifetime of the Grantor often their Social Security Number is used for the Revocable Trust, but after the Grantor's death a new tax ID number must be assigned by the IRS. Generally, Self-settled SNT's (d4A and d4C) are Grantor trusts for income tax purposes.

Sometimes time is of the essence in establishing a SNT. Tax identification numbers (EIN) can be acquired on-line from the IRS website for trusts and estates.

Due to the compressed income tax rates for complex trusts, there can be significant income tax savings by having a SNT treated as a Grantor Trust for income tax purposes. The self settled trusts can be structured as Grantor Trusts. The rules governing the taxation of Grantor trusts are found in the Internal Revenue Code in sections 671 to 678. In general, the Grantor of a trust is treated as the owner of the trust if: (1) The Grantor retains a reversionary interest in either the corpus or the income that exceeds 5 percent of the value, (2) The Grantor retains the power to control the beneficial enjoyment of the trust corpus or trust income without the consent of an adverse party, (3) The Grantor retains certain administrative powers over the trust, (4) The Grantor retains the power to revoke the trust, or (5) The income of the trust can be used for the Grantor's benefit.

Since third party SNTs, by definition, are established by a Grantor other than the disabled individual, Grantor Trust rules generally do not apply after the death of the Grantor, but can if funded during the Grantor's life, rather than after death. In most cases, after the death of the Grantor, a third party SNT will file a separate income tax return and pay its own income taxes. The Trustee should be mindful of the taxation of the particular investments that make up the SNT as well as the distribution needs for the disabled beneficiary. Investments should be altered to minimize unnecessary taxation and to provide the greatest benefit to the beneficiary.

Generally estate taxation will not be an issue with a SNT. A self settled SNT will have the pay back provision so remaining funds will go to the State. If there are assets remaining in the self settled SNT there is a possibility that assets passing to heirs would be included in the disabled beneficiary's taxable estate if the establishment of the SNT were not a completed gift for gift tax purposes.

A properly drafted third party SNT will avoid inclusion in the disabled beneficiary's taxable estate. Since the third party SNT heads off assets prior to receipt by the disabled beneficiary, the basic rules that allow the SNT to be an excluded asset for public benefit consideration would also generally keep the SNT from being included in the beneficiary's taxable estate.

# SI 01120.203 Exceptions to Counting Trusts Established on or after January 1, 2000

## A. Introduction To Medicaid Trust Exceptions

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

The type of trust under review dictates the development and evaluation of the Medicaid trust exceptions.

There are two types of Medicaid trusts to consider:

1. Special Needs Trusts; and
2. Pooled Trusts.

### **CAUTION:**

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

## B. Policy For Special Needs Trusts Established Under Section 1917(D)(4)(A) Of The Act Before December 13, 2016

### **1. General rules for special needs trusts established prior to December 13, 2016**

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

- contains the assets of an individual who is **under age 65** and is **disabled**;
- is **established for the benefit of such individual through the actions of a parent, grandparent, legal guardian, or court**; and

- provides that the **State(s) will receive all amounts remaining** in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State(s) Medicaid plan(s).

#### **NOTE:**

Although this exception is commonly referred to as the special needs trust exception, the exception applies to any trust that meets the above requirements, even if it is not titled a special needs trust.

#### **CAUTION:**

A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in [SI 01120.200](#) to determine if it is a countable resource. If the trust meets the definition of a resource (see [SI 01110.100B.1.](#)), it will be subject to regular resource-counting rules.

## **2. Under age 65**

To qualify for the special needs trust exception, the trust must be established for the benefit of a disabled individual under age 65. For special needs trusts, an individual attains age 65 on the anniversary date of his or her birth. The special needs trust exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

## **3. Additions to trust after age 65**

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

Additions or augmentations do not include interest, dividends, or other earnings of the trust or any portion of the trust meeting the special needs trust exception. If the beneficiary's right to receive payments from an annuity, support payments, or Survivor Benefit Plan (SBP) payments (see [SI 01120.201J.1.e.](#)), is irrevocably assigned to the trust, and such assignment is made when the trust beneficiary was less than 65 years of age, treat the payments paid to a special needs trust the same as payments made before the individual attained age 65. Do not disqualify the trust from the special needs trust exception.

## **4. Disabled**

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act as of the date on which the trust's resource status could affect the individual's SSI eligibility.

In cases where you need to develop for disability, obtain a disability determination from the disability determination services (DDS). Develop disability as of the date on which the trust's resource status could affect SSI eligibility. Given the first-of-the-month (FOM) rule for making resource determinations ([SI 01110.600](#)), develop for a potential onset date (POD) as of the **first of the month** in which the individual could be eligible for SSI, following this procedure:

#### a. Sending the case to the DDS

- Use the SSA-3367 to notify DDS of the SSI POD. See [DI 25501.220](#) and [DI 11005.045](#).
  - Show an SSI POD equal to the **first of the month** of the SSI application date (protective filing date or application receipt date if no protective filing exists).
  - Select POD reason as 'Other'. Explanation: "SSI Trust resource involved. POD represents first of the month in which the individual could be eligible for SSI. See [SI 01120.203B.4](#)."
- If a current Title II medical allowance exists, follow instructions in [DI 11011.001](#). The DDS has jurisdiction for all potential collateral estoppel claims.
- On the Trust page in the SSI Claims path (MS 08113.005) do **not** show any value in the 'Excluded Amount(s)' column. Leave this blank.
- Hold the case in H80 payment status pending the DDS determination.

#### b. DDS Determination Received

- If disability onset is the **first of the month** in which the individual could be eligible for SSI, the trust meets the disability requirement for exception; or
- If disability onset is **NOT** the **first of the month** in which the individual could be eligible for SSI, the trust will not meet the disability requirement for exception until the month following the disability onset date given the FOM rules for making resource determinations in [SI 01110.600](#).
- Use the DDS determination for proper completion of the 'Excluded Amounts(s)' column on the Trust page in the SSI Claims path (MS 08113.005)
- Process the case to pay or denial.

#### c. Transfer of Resource Provisions and Trust Provisions

- For resource transfers to a trust, consider whether a period of ineligibility applies for transferring a resource for less than fair market value – see [SI 01150.110](#). Consider also whether one of the exceptions for transfers to a trust applies in [SI 01150.121](#).
- Generally, a period of ineligibility does not apply to transfers to a trust that is a countable resource ([SI 01150.121A.1](#)). This is to avoid both counting the trust as a resource and imposing a transfer of resources penalty for the same transaction. Per [SI 01120.201D.5](#), the trust instructions take precedence over the transfer instructions.
- For transfers to a trust occurring within the look-back period ([SI 01150.110C](#)), we may have to develop disability as of the date on which the resource transfer occurred in order to determine whether a period of ineligibility – or an exception to the penalty – applies to the transfer.

## d. Examples

- Mark, a special needs trust beneficiary whose trust was established in 2015, applies for SSI Aged benefits on June 15, 2019. Even though disability is not a requirement for SSI Aged benefits, we must develop disability as of June 1, 2019, when the trust's resource status could affect Mark's SSI eligibility.
- Sally has a special needs trust that was established in 2010 when she was 10 years old. At the time, she was not eligible for SSI Child benefits because of her deeming parents' income and resources. However, she applies for SSI Adult benefits with a protective filing date of April 15, 2018. We must develop disability as of April 1, 2018. The 2010 trust establishment date is not relevant because the trust did not present as a resource issue until the month it could affect Sally's eligibility for SSI (April 2018).

## 5. Definition of established

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

## 6. Established for the benefit of the individual

Under the special needs trust exception, the trust must be established and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual, as described in [SI 01120.201F.2](#). Other than trust provisions for payments described in [SI 01120.201F.3](#) and [SI 01120.201F.4](#), any provisions will result in disqualification from the special needs trust exception if they:

- provide benefits to other individuals or entities during the disabled individual's lifetime, or
- allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual). For more information on early termination provisions and trusts, see [SI 01120.199](#).

Payments to third parties for goods and services provided to the trust beneficiary are allowed under the policy described in [SI 01120.201F.3.a](#); however, such payments should be evaluated under [SI 01120.200E](#), [SI 01120.200F](#), and [SI 01120.201I](#) to determine whether the payments may be income to the individual.

### NOTE:

A third party can be a family member, non-family member, or an entity. Do not differentiate between third parties; anyone other than the trust beneficiary (or spouse, guardian, or representative payee) is a third party.

## 7. Who established the trust

The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself. (Remember that this instruction applies specifically to special needs trusts established under section 1917(d)(4)(A) before December 13, 2016.) To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of:

- the disabled individual's parent(s);
- the disabled individual's grandparent(s);
- the disabled individual's legal guardian(s); or
- a court.

In the case of a legally competent, disabled adult, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money or, if State law allows, an empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or a second individual with legal authority (for example, a power of attorney) may transfer the disabled individual's assets into the trust. To determine if the second individual had legal authority, see [SI 01120.203B.9](#) in this section.

## 8. Court-established trusts

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order for the exception in section 1917(d)(4)(A) of the Act to apply. The special needs trust exception can be met when a court approves a petition and establishes a trust by court order, as long as the creation of the trust has not been completed before the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust. An individual is permitted to petition a court for the present establishment of a trust or may use an agent to do so. The court order establishes the trust, not the individual's petition. Petitioning a court to establish a trust is not establishment by an individual.

### NOTE:

An individual may petition the court with a draft document of a trust as long as it is **unsigned** and not legally binding.

### a. Example of a court ordering the establishment of a trust

John is a legally competent adult who inherited \$250,000 in January 2015, and is an SSI recipient. His sister, Justine, petitioned the court to create and order the funding of the John Special Needs Trust. Justine also provided the court with an unsigned draft of the trust document. A month later, the court

approved the petition and issued an order requiring the creation and funding of the trust. This trust meets the requirement in [SI 01120.203B.8](#) in this section. The fact that the trust beneficiary is a competent adult and could have established the trust himself, is not a factor in the resource determination.

#### **b. Example of a court-established trust**

Henry wins a lawsuit in the amount of \$50,000. As part of the settlement, the judge orders the creation of a trust in order for Henry to receive the \$50,000. As a direct result of this court order, a trust was created with Henry's settlement money. The trust document lists the \$50,000 as the initial principal amount in Schedule A of the trust. This trust meets the requirement for exclusion in [SI 01120.203B.8](#) in this section.

#### **c. Example of a court-approved trust**

Jane is ineligible for SSI benefits because she has a self-established special needs trust that does not meet the requirements for exception in [SI 01120.203](#) in this section. Jane petitioned the court to establish an amended trust and to make the order retroactive, so that her original trust would become exempt from resource counting from the time of its creation. The court approved the petition and issued a **nunc pro tunc** order stating that the court established the trust as of the date on which Jane had previously established the trust herself. The court did not establish a new trust; it merely approved a modification of a previously existing trust. The amended trust does not meet the requirement for exclusion in [SI 01120.203B.8](#) in this section.

#### **d. Example of a court-approved trust**

Dan is the beneficiary of a special needs trust. His sister petitioned the court to establish the Dan's Special Needs Trust and submitted to the court along with the petition Dan's special needs trust that had already been signed and funded. Although the court order states that it approves and establishes the trust, the court simply approved the existence of the already established special needs trust. This trust does not meet the requirement in [SI 01120.203B.8](#) in this section. For an example of an unsigned and unfunded trust, see [SI 01120.201B.8.a](#).

### **9. Legal authority and trusts**

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

#### **NOTE:**

If you question the validity of a trust, please consult with your Regional Trust Lead (RTL) or get a Regional Chief Counsel (RCC) Opinion.



For example, John is establishing a seed trust for his adult child with his own assets, and John has legal authority over his own assets to establish the trust. John would need legal authority over his child's assets only if he actually takes action with the child's assets, for example, by transferring them into a previously established trust.

A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. However, a trust established under a POA for the trust beneficiary will result in a trust that we consider to be established through the actions of the disabled individual himself or herself because the POA merely establishes an agency relationship. A POA for the trust beneficiary may be used as the legal authority to transfer assets of the beneficiary into the trust, including, for example, a previously established seed trust.

## **10. State Medicaid reimbursement requirement**

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

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback also cannot be limited to any particular period of time; for example, payback cannot be limited to the period after establishment of the trust. If the trust does not have sufficient funds upon the beneficiary's death to reimburse in full each State that provided medical assistance, the trust may reimburse the States on a pro-rata or proportional basis.

### **NOTE:**

Merely labeling the trust as a **Medicaid payback trust**, an **OBRA 1993 payback trust**, a trust **established in accordance with 42 U.S.C. § 1396p**, or a (MQT) is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements described above. An oral trust cannot meet this requirement.

## **C. Policy For Special Needs Trusts Established Under Section 1917(D)(4)(A) Of The Act On Or After December 13, 2016**

### **1. General rules for special needs trusts established on or after December 13, 2016**

On December 13, 2016, the President signed into law the 21st Century Cures Act (Public Law 114-255). Section 5007 of this Act allows individuals to establish their own special needs trusts and qualify for the exception to resource counting under Section 1917(d)(4)(A) of the Social Security Act.

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

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

**NOTE:**

Although this exception is commonly referred to as the **special needs** trust exception, the exception applies to any trust meeting the above requirements, even if it is not titled as a special needs trust.

**CAUTION:**

A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in [SI 01120.200](#), to determine if it is a countable resource. If the trust meets the definition of a resource (see [SI 01110.100B.1.](#)), it will be subject to regular resource-counting rules.

## **2. Who established the trust**

The special needs trust exception applies to a trust established through the actions of:

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

### **a. Power of attorney**

We consider a trust established under power of attorney (POA) for the disabled individual to be established through the actions of the disabled individual because the POA establishes an agency relationship. For additional information on a POA, see [SI 01120.203C.3](#) in this section.

### **b. Use of a seed trust**

If the legally competent, disabled adult does not establish the trust, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money or, if State law allows, an empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or another individual with legal authority (such as a power of attorney) may transfer the individual's assets into the trust. To determine if the individual had legal authority, see [SI 01120.203C.9.](#) in this section.

**NOTE:**

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

### **3. Legal authority and trusts**

The person or entity establishing the trust with the assets of the legally competent, disabled individual or transferring the assets of the individual into the trust must have legal authority to act with respect to the assets of the individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust under state law.

#### **NOTE:**

If you question the validity of a trust, please consult with your Regional Trust Lead (RTL) or get a Regional Chief Counsel (RCC) Opinion.

For example, John, who is establishing with his own assets a seed trust for his adult child, has legal authority over his own assets to establish the trust. He needs legal authority over his child's assets only if he actually takes action with the child's assets, for instance by transferring them into a previously established trust.

A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. A trust established under a POA for the disabled individual will result in a trust that we consider to be established through the actions of the disabled individual himself or herself because the POA establishes an agency relationship. A third party can use the POA for the trust beneficiary as the legal authority to establish a trust or to transfer assets of the beneficiary into the trust, as long as the POA provides the proper authority to do so.

### **4. Additional requirements for a trust established on or after December 13, 2016**

Except as noted in [SI 01120.203C.1.](#) through [SI 01120.203C.3.](#) in this section, the requirements for an exempt special needs trust remain the same as those for a trust established prior to December 13, 2016. For additional requirements and guidance, see [SI 01120.203B.2.](#) through [SI 01120.203B.6.](#), [SI 01120.203B.8.](#), and [SI 01120.203B.10.](#) in this section.

## **D. Policy For Pooled Trusts Established Under Section 1917(D)(4)(C) Of The Act**

### **1. General rules for pooled trusts**

A pooled trust contains the assets of many different individuals, each held in separate trust accounts and established through the actions of individuals for separate beneficiaries. By analogy, the pooled trust is like a bank that holds the assets of individual account holders. A pooled trust is established and managed by a non-profit organization. The pooled trust instruments usually consist of an overarching “master trust” and a joinder agreement that contains provisions specific to the individual beneficiary.

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

The resource-counting provisions of section 1613(e) of the Act do not apply to a trust containing the **assets of a disabled individual** that meets the following conditions:

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

**NOTE:**

There is no age restriction for this exception. However, a transfer of resources into a trust for an individual age 65 or over may result in a transfer penalty (see [SI 01150.121](#)).

**NOTE:**

A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of 1613(e) must still be evaluated under the instructions in [SI 01120.200](#), to determine if it is a countable resource.

## **2. Disabled**

To qualify for the pooled trust exception, the individual whose assets were used to establish the trust account must be disabled for SSI purposes under section 1614(a)(3) of the Act as of the date on which the trust account's resource status could affect the individual's SSI eligibility. This also includes individuals age 65 and older.

In cases where you need to develop for disability, obtain a disability determination from the DDS following procedure in [SI 01120.203B.4](#) in this section.

### 3. Nonprofit association

The pooled trust must be established and maintained by the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute. For development of nonprofit associations, see [SI 01120.203J](#) in this section. For more information on pooled trust management provisions, see [SI 01120.225](#).

### 4. Separate account

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

### 5. Established for the sole benefit of the individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (For a definition of sole benefit, see [SI 01120.201F.1](#).) Other than the payments described in [SI 01120.201F.3](#) and [SI 01120.201F.4](#), this exception does not apply if the trust account:

- provides a benefit to any other individual or entity during the disabled individual's lifetime; or
- allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity. For more information on early termination provisions and trusts, see [SI 01120.199](#).

#### NOTE:

In general, we do not limit master trusts to allow only sub-accounts that are established by parties listed in section 1917(d)(4)(C)(iii) of the Act. As pooled trusts can have SSI and non-SSI beneficiaries, we would not count a trust solely because the master trust agreement permitted a non-SSI trust to be established by someone other than those listed in section 1917(d)(4)(C)(iii).

#### NOTE:

### 6. Who established the trust account

In order to qualify for the pooled trust exception, the trust **account** must have been established through the actions of:

- the disabled individual himself or herself;
- the disabled individual's parent(s);
- the disabled individual's grandparent(s);
- the disabled individual's legal guardian(s); or
- a court.

A legally competent, disabled adult who is establishing or adding to a trust account with his or her own assets has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of a disabled individual with that individual's assets must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of a disabled individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust under state law. If there is a question regarding authority, consult your precedents or regional chief counsel.

A power of attorney (POA) is legal authority to act with respect to the assets of an individual. A pooled trust account may be established under POA given by the individual, a parent, or a grandparent.

**NOTE:**

A representative payee must have legal authority to establish a trust or transfer funds into a trust for the disabled individual. If a representative payee attempts to establish a trust account with the assets of a disabled individual without the legal right or authority to act with respect to the assets of that individual, this will generally result in an invalid trust under state law.

## **7. Court-established trusts**

In the case of a trust account established through the actions of a court, the creation of the trust account must be required by a court order for the exception in section 1917(d)(4)(C) of the Act to apply. That is, the pooled trust exception can be met when courts approve petitions and establish trust accounts by court order, so long as the execution of the trust account joinder agreement and funding of the trust have not been completed before the order is issued by the court. Court approval of an already executed pooled trust account joinder agreement is not sufficient for the trust account to qualify for the exception. The court must specifically either establish the trust account or order the establishment of the trust account.

### **a. Example of a court ordering establishment of a trust account**

John is a legally competent adult who inherited \$250,000 and is an SSI recipient. His sister, Justine, petitioned the court to create and order the funding of an account in the Chesapeake Pooled Trust. Justine also provided the court with an unsigned draft of the trust document. A month later the court approved the petition and issued an order requiring the creation and funding of the trust account. This trust account meets the requirement in [SI 01120.203D.6](#) in this section. The fact that the trust beneficiary is a competent adult and could have established the trust account himself, is not a factor in the resource determination.

### **b. Example of a court-established trust account**

Mary, a legally incompetent SSI recipient, wins a lawsuit in the amount of \$50,000. As part of the settlement, the judge orders the creation of a pooled trust account in order for Mary to receive the \$50,000. As a direct result of this court order, a pooled trust account was created with Mary's

settlement money. The pooled trust records and documentation of the initial deposit list the \$50,000 as the initial principal amount. This trust account meets the requirement in [SI 01120.203D.6](#) in this section.

### **c. Example of a court-approved trust account**

Jane is ineligible for SSI benefits because she has a self-established pooled trust account that does not meet the requirements for exception in [SI 01120.203D](#) stating the pooled trust has to be established and managed by a nonprofit association. A for-profit association is managing Jane's pooled trust. The pooled trust changed management to a nonprofit association to satisfy the requirement. Jane petitioned the court to establish an amended trust account joinder agreement and to make the order retroactive, so that her original trust account would become exempt from resource counting from the time of its creation. The court approved the petition and issued a **nunc pro tunc** order stating that the court established the trust account as of the date on which Jane had previously established the trust account herself. The amended trust account joinder agreement does not meet the requirement in [SI 01120.203D.6](#) in this section. The court did not establish a new trust account; it merely approved a modification of a previously existing trust account joinder agreement.

#### **NOTE:**

Please forward all **nunc pro tunc** orders to your Regional Office for additional review and final determination.

## **8. State Medicaid reimbursement provision**

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in [SI 01120.203E](#) in this section.

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

If the trust does not have sufficient funds upon the beneficiary's death to reimburse in full each State that provided medical assistance, the trust may reimburse the States on a pro-rata or proportional basis.

#### **NOTE:**

Merely labeling the trust as a **Medicaid payback trust, an OBRA 1993 payback trust, a trust established in accordance with 42 U.S.C. § 1396p**, or an **MQT** is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements described above. An oral trust cannot meet this requirement.

## **E. Allowable And Prohibited Expenses For Special Needs And Pooled Trusts Established Under Section 1917(D)(4)(A) And (C) Of The Act**

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

### **1. Allowable administrative expenses**

Upon the death of the trust beneficiary, the trust may pay the following types of administrative expenses from the trust prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

### **2. Prohibited expenses and payments**

Upon the death of the trust beneficiary, the following are examples of some of the types of expenses and payments not permitted prior to reimbursement of the State(s) for medical assistance:

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

#### **NOTE:**

For the purpose of prohibiting payments prior to reimbursement of the State(s) for medical assistance, a pooled trust is not considered a residual or remainder beneficiary. Remember that a pooled trust has the right to retain funds upon the death of the beneficiary.

### **3. Applicability**



This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement.

## F. Income Trusts Established Under Section 1917(D)(4)(B) Of The Act

Income trusts, sometimes called *Miller* trusts (named after a court case), established under section 1917(d)(4)(B) of the Act are **not** considered exceptions to trust rules for SSI purposes. However, some States may exclude these trusts from counting as a resource for Medicaid purposes. This type of trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust).

## G. Policy For Waiver For Undue Hardship

### 1. Definitions

#### a. Undue hardship

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

- failure to receive SSI payments would deprive the individual of food or shelter; **and**
- the individual's available funds do not equal or exceed the Federal benefit rate (FBR) plus any federally administered State supplement.

#### **NOTE:**

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

#### b. Loss of shelter

For purposes of undue-hardship waiver in the context of section 1613(e) of the Act, an individual would be deprived of shelter if:

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

### 2. Application of the undue hardship waiver

#### a. Applicability

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

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

**NOTE:**

If the trust is revocable by the individual, the requirements for undue hardship cannot be met because the individual can access the trust funds for his or her support and maintenance.

**b. Suspension of resource counting**

An irrevocable trust is not counted as a resource in any month for which counting the trust would cause undue hardship.

**c. Resource counting resumes**

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

**3. Available funds**

In determining the individual's available funds, we include:

**a. Income**

Income includes the following:

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

Do not include SSI payments received or items that are not income, per [SI 00815.000](#).

**NOTE:**

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

**b. Resources**

Resources include the following:

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

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

Do not include non-liquid resources or assets determined not to be a resource, per [SI 01120.000.](#)

#### 4. Example

Frank filed for SSI in 3/2017 as an aged individual. In 2/2017, he received an insurance settlement from an accident that was placed in an irrevocable trust. After determining that he met the other requirements for undue hardship (including a prohibition on the trustee from disbursing any funds for Franks' support and maintenance), the claims specialist (CS) determined Franks' available funds. He receives \$450 in title II benefits per month. His only liquid resource is a bank account that has \$500 in it. The total of \$950 in available funds (\$450 in title II benefits and \$500 in the bank account) means that undue hardship does not apply in 3/2017, because that amount exceeds the FBR of \$735. (His State has no federally administered State supplement.)

Frank comes back into the office in 6/2017. He presents evidence that he has spent down the \$500 in his bank account on living expenses in the past three months. As of 6/2017, he has no liquid resources, and his income total of \$450 is below the FBR. Frank meets the undue hardship test for 6/2017 (which is his E02 month). The trust does not count as his resource in that month. If his situation does not change, he qualifies for an SSI payment in 7/2017.

## H. Procedure For Follow-Up To A Finding Of Undue Hardship

### 1. When to use this procedure

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

### 2. Recontact period

The recontact period may vary depending on the individual's situation. If the individual alleges, and information in the file indicates, that the individual's income and resources are not expected to change significantly, and the individual is continuously eligible for SSI because of undue hardship, recontact the individual **no less than every six months**. If the individual's income and resources are

expected to fluctuate, or the file indicates a history of such fluctuation, the recontact period should be shorter, even monthly in some cases.

### 3. Documentation

At each recontact:

- Obtain on a DROC the individual's statement, either signed or recorded, that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;
- Determine whether total income and liquid resources exceeded the FBR plus any State supplement for each prior month;
- If undue hardship continued for the prior period and is expected to continue in the future period, continue payment and tickle the case for the next recontact, per [SI 01120.203H.4.](#) in this section; and
- If undue hardship did not continue through each month, clear the **excluded amount** and **exclusion reason** entries on the **ROTH** screen for each month that undue hardship did not apply. Process the excess resources overpayment for those months. If undue hardship stops due to a continuing change in the individual's situation, such as income or resources, do not tickle the file to follow up. The individual must recontact SSA and make a new allegation of undue hardship.

### 4. Recontact controls

For SSI Claims System cases, use the DWO1 and establish a tickle to control the case for recontact when the individual is eligible for SSI based on undue hardship. (Use the Modernized Development Worksheet (MDW) for non-SSI Claims System cases.) If MDW is applicable, set up an MDW screen using instructions in MSOM MDW 001.001 and the following MDW inputs:

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

## I. Procedure For Developing Exceptions To Resource Counting

### 1. Special needs trusts under section 1917(d)(4)(A) of the Act before December 13, 2016

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

STEP	ACTION
1	<p>Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See <a href="#">SI 01120.203B.2.</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 2</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
2	<p>Does the trust contain the assets of a disabled individual? (See <a href="#">SI 01120.203B.4.</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 3</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
3	<p>Is the disabled individual the sole beneficiary of the trust? (See <a href="#">SI 01120.203B.6.</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 4</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
4	<p>Did a parent, grandparent, legal guardian, or court establish the trust? (See <a href="#">SI 01120.203B.7.</a> in this section.)</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 5</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
5	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in <a href="#">SI 01120.203B.10.</a> in this section?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 6</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
6	<p>Verify if the trust contains any early termination provisions as described within <a href="#">SI 01120.199.</a> If the trust does not contain any early termination provisions, go to Step 7.</p> <p>If the trust contains any early termination provisions, does it meet the early termination criteria in <a href="#">SI 01120.199F</a> that would make early termination acceptable?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 7</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
7	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in <a href="#">SI 01120.203B.3.</a> in this section.</p> <p>Go to <b>Step 8</b> for treatment of assets placed in trust prior to age 65.</p> <p>Go to <b>Step 9</b> for treatment of assets placed in trust after attaining age 65.</p>

STEP	ACTION
8	Evaluate the trust under <a href="#">SI 01120.200D.1.a.</a> to determine if it is a countable resource.
9	The trust (or portion thereof) does not meet the requirements for the special needs trust exception.  Consider if the pooled trust exception in <a href="#">SI 01120.203D</a> in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under <a href="#">SI 01120.203K</a> in this section.

## 2. Special needs trusts under Section 1917(d)(4)(A) of the Act on or after December 13, 2016

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See <a href="#">SI 01120.203B.2.</a> in this section.)  •If <b>yes</b> , go to <b>Step 2</b> . •If <b>no</b> , go to <b>Step 9</b> .
2	Does the trust contain the assets of a disabled individual? (See <a href="#">SI 01120.203B.4.</a> in this section.)  •If <b>yes</b> , go to <b>Step 3</b> . •If <b>no</b> , go to <b>Step 9</b> .
3	Is the disabled individual the sole beneficiary of the trust? (See <a href="#">SI 01120.203B.6.</a> in this section.)  •If <b>yes</b> , go to <b>Step 4</b> . •If <b>no</b> , go to <b>Step 9</b> .
4	Did the individual, a parent, a grandparent, a legal guardian, or a court establish the trust? (See <a href="#">SI 01120.203BC.2.</a> in this section.)  •If <b>yes</b> , go to <b>Step 5</b> . •If <b>no</b> , go to <b>Step 9</b> .
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in <a href="#">SI 01120.203B.10.</a> in this section?  •If <b>yes</b> , go to <b>Step 6</b> . •If <b>no</b> , go to <b>Step 9</b> .

STEP	ACTION
6	<p>Verify if the trust contains any early termination provisions as described in <a href="#">SI 01120.199</a>. If the trust does not contain any early termination provisions, go to <b>Step 7</b>.</p> <p>If the trust contains any early termination provisions, does it meet the early termination criteria in <a href="#">SI 01120.199F</a> that would make early termination acceptable?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 7</b>.</li> <li>•If <b>no</b>, go to <b>Step 9</b>.</li> </ul>
7	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in <a href="#">SI 01120.203B.3</a> in this section.</p> <p>Go to <b>Step 8</b> for treatment of assets placed in trust prior to age 65.</p> <p>Go to <b>Step 9</b> for treatment of assets placed in trust after attaining age 65.</p>
8	<p>Evaluate the trust under <a href="#">SI 01120.200D.1.a</a> to determine if it is a countable resource.</p>
9	<p>The trust (or portion thereof) does not meet the requirements for the special needs trust exception.</p> <p>Consider if the pooled trust exception in <a href="#">SI 01120.203D</a> in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under <a href="#">SI 01120.203K</a> in this section.</p>

### 3. Pooled trusts established under Section 1917(d)(4)(C) of the Act

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

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

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

## J. Procedure To Verify Nonprofit Associations When Evaluating Pooled Trusts

When a trust is alleged to be established through the actions of a nonprofit or a tax-exempt organization, consult the pooled trust precedent in SSITMS. If none exists, follow policy and



procedure for verifying the tax-exempt status of organizations found at [SI 01130.689E](#). "Gifts to children with life-threatening conditions."

## K. Procedure For Development Of Undue Hardship Waiver

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

STEP	ACTION
1	<p>Is the trust irrevocable?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 2</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
2	<p>Would counting the trust result in excess resources?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 3</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
3	<p>Does the individual allege, or information in the file indicate, that not receiving SSI would deprive the individual of food or shelter according to <a href="#">SI 01120.203G</a> in this section?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 4</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
4	<p>Obtain the individual's signed statement (on the DPST screen in the SSI Claims System or, in non-SSI Claims System cases, on a SSA-795 faxed into NDRed) as to whether:</p> <ul style="list-style-type: none"> <li>•Failure to receive SSI payments would deprive the individual of food or shelter;</li> <li>•The individual's total available funds are less than the FBR plus any federally administered State supplement;</li> <li>•The individual agrees to report promptly any changes in income and resources; and</li> <li>•The individual understands that he or she may be overpaid if, for any month, available funds exceed the FBR plus any State supplement or if other situations change.</li> </ul> <p>•Go to <b>Step 5</b>.</p>
5	<p>Does the trust contain language that specifically prohibits the trustee from making disbursements for the individual's support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for the individual's support and maintenance?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 6</b>.</li> <li>•If <b>no</b>, go to <b>Step 8</b>.</li> </ul>
6	<p>Add up all of the individual's income, both countable and excludable (see <a href="#">SI 01120.203G.3.a</a> in this section). Do not include any SSI payments received or items that are not income, per <a href="#">SI 00815.000</a>. If the individual is receiving ISM, include as income the ISM being charged (the PMV, VTR, or actual amount, if less).</p>

STEP	ACTION
	<p>Add up all of the individual's liquid resources, both countable and excludable (see <a href="#">SI 01120.203G.3.b.</a> in this section).</p> <p>Does the total of the income and the liquid resources equal or exceed the FBR plus any federally administered State supplement?</p> <ul style="list-style-type: none"> <li>•If <b>yes</b>, go to <b>Step 8</b>.</li> <li>•If <b>no</b>, go to <b>Step 7</b>.</li> </ul>
7	<p>Suspend counting of the trust as a resource for any month in which all requirements above are met (see <a href="#">SI 01120.203G.2.</a> in this section).</p> <ul style="list-style-type: none"> <li>•In the SSI Claims System, document the findings of undue hardship and applicable months on the <b>DROC</b> screen.</li> <li>•On paper forms, document the information in the <b>REMARKS</b> section. For further documentation, see <a href="#">SI 01120.202D</a> and <a href="#">SI 01120.202E</a>; and for follow-up instructions, see <a href="#">SI 01120.203H</a> in this section. <b>STOP</b>.</li> </ul>
8	<p>Undue hardship does not apply. However, in some instances where income and resources are currently too high, unless the trust is revocable, undue hardship may apply in future months.</p>

To Link to this section - Use this URL:  
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