Special Needs Lawyers, PA

901 Chestnut Street, Suite C
Clearwater, Florida 33756

Phone: (727) 443-7898
Fax: (727) 631-0970

SpecialNeedsLawyers.com

Travis D. Finchum, Esq.
Board Certified in Elder Law

Linda R. Chamberlain, Esq.
Board Certified in Elder Law

Charles F. Robinson, Esq.
Elder Law Attorney

Kole J. Long, Esq.
Board Certified in Elder Law

Special Needs Trusts | Elder Law | Long Term Care Planning | Medicaid | Probate | Wills & Trusts
Incapacity Planning | Guardian Advocacy | Developmental Disabilities

Special Needs Trust Update - 2024

The law, and therefore utility, of Special Needs Trusts continues to evolve. The basic concepts of a Special Needs Trust (SNT) still apply:

1. We have a **person** who is **vulnerable** or **disabled** in some manner, and
2. There are **assets** that are or could be attributable to this vulnerable person, and
3. The vulnerable person may need to qualify now or possibly in the future for a **public assistance program** that has financial limitations, and/or
4. The vulnerable person is **not capable of managing** the funds.

Note that a beneficiary of a SNT does not have to be on a means-tested public assistance program to be the beneficiary of a SNT. There may still be many other reasons we don't want the individual to handle the funds at issue. Maybe they are vulnerable and subject to exploitation or undue influence. Maybe they are really bad at managing money. Maybe there is just a good chance they may need benefits in the future.

The source of the funds is critical. This will determine *what type of SNT* is likely needed. If the funds are already owned by the beneficiary (or can't legally be headed off) then the trust is a "first party SNT" and thus subject to specific federal law and policy.

If the funds belong to anyone other than the beneficiary (or his or her spouse), this would be a third-party SNT and different laws apply. There is much more flexibility with third party SNT's and if at all possible we want funds to go into this type of SNT. There are occasions when the initial thought is the funds will need to be in a first party SNT but through modification, reformation or just plain "creative lawyering" a third party SNT can be used.

There are not a lot of changes to the **third party** SNT laws: if the beneficiary 1. cannot terminate the trust and get at the corpus and 2. has no authority to direct the use of the trust, the assets of the third party SNT is not a resource for means-tested public assistance programs. It is also likely that these funds would be protected from the creditors of the beneficiary, provided the SNT has a valid spendthrift clause, which is also helpful.

Changes regarding first party SNT's are slowly occurring, not necessarily in the underlying law, but in the interpretation and application of the laws covering these SNT's. Courts (both state and federal), particularly Social Security courts, have ruled the Social Security Administration (and in other cases State Medicaid Agencies) has been "mis-interpreting" the federal law for over thirty years.

The Social Security Administration (SSA) has had the long-standing position that if an individual uses a Pooled SNT (a SNT established under 42 USC 1396p(d)(4)(C)) for a person over the age of 64 then immediately a transfer penalty was to be incurred. There were even CMS (Center for Medicaid and Medicaid Services) memos that reminded states to impose a penalty because the beneficiary received "nothing in return" for the funding of the Pooled Trust.

Since 2021, multiple SSA Administrative Law Judges (ALJ) have agreed that the Administration has been wrongly applying the transfer penalty. Rather, the correct interpretation is that no penalty at all should be applied (a California ALJ ruled) or at a minimum, the proponent should be able to rebut the presumption that nothing of value has been received because the trust funds would be used during their lifetimes (several Virginia ALJ's). In the cases decided out of the main SSA Office in Virginia, a written plan to show how the funds would be used during the lifetime of the beneficiary was sufficient to overcome the transfer presumption. This would be in the form of a "spending plan." In the California case, the fact that the beneficiary "received" a sole-benefit Pooled SNT in return for "transfer" was considered enough to overcome the transfer for less than value.

This new application of the 1993 SNT laws by SSA renders State application of a transfer penalty difficult for the states to justify. In states such as Florida where Medicaid rules cannot be more restrictive than Federal SSI policy, automatic penalties (or outright prohibitions) for transfers into a Pooled Trust by those age 65 or older can now be rebutted with the road-map given to us by these SSA judges. At most, a spending plan showing there is plan to exhaust the funds within the actuarial life expectancy of the beneficiary, should be sufficient to overcome any transfer penalty.

Attached are:

A - 1. Minnesota Supreme Court *Pfoser* case from January, 2021 finding that the State of Minnesota cannot have a transfer penalty per se for an individual over the age of 64 using a Pooled Trust,

B - 2. Kansas Medicaid Program Policy Memo dated February, 2022 changing Kansas policy to allow a Medicaid applicant to rebut the presumption that a penalty is imposed if the individual can show they are getting value back,

C - 3. A May 2021 Social Security ALJ opinion from Virginia,

D - 4. A June 2021 California ALJ opinion stating that receiving a Pooled SNT is fair market value and

E - 5. A November 2021 Virginia ALJ opinion.

A. What is a Trust?

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

B. Why A Special Needs Trust?

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

C. Overview of Some Public Assistance Programs

1. Incomes

a. **SSI - Supplemental Security Income** - Maximum income is $914/month in 2023 ($943/month in 2024). This is a Federal Program administered by Social Security. You must be disabled or age 65+ and you must meet financial criteria similar to Medicaid. This program is generally for disabled individuals, if under age 65, who have not worked enough to qualify for Social Security Disability Insurance payments. It is designed to pay for food and shelter and your income cannot exceed resource limitations. Income for a beneficiary can be earned from working, unearned income like a check for retirement or disability or a distribution from a trust or gift from a friend or income can be "in-kind" if a third party pays for food or shelter expenses on behalf of a beneficiary. Food is slated to be removed from this list, so hopefully soon only shelter expenses will be considered in the "in-kind" list. Generally, the disabled person must have less than $2,000 in financial resources, with some assets being excluded from this calculation (such as a house a car and personal effects). Also, Social Security imposes penalties, or waiting periods, if a person gifts or transfers assets in order to qualify for SSI. We need to understand permissible transfers, in particular as they pertain to trusts. If a disabled individual gets an SSI check each month then they are eligible for full *Medicaid* medical coverage in Florida. https://www.ssa.gov/benefits/ssi/

b. **SSDI - Social Security Disability Insurance -** This is a benefit of working and paying into the system. This is also strictly a Federal Program. There are no financial requirements for this program, only that you paid enough credits (sometimes referred to as "quarters") into the system based on the age you became disabled. This pays a monthly income to you if you become disabled prior to your retirement age and can't continue to work. This is similar to the program that retirees draw on when they reach retirement age. This program is tied to *Medicare* and after receiving SSDI for 24 months a disabled individual gets Medicare coverage. A Special Needs Trust is **NOT** needed for this program because it has no financial resource limitations. https://www.socialsecurity.gov/disabilityssi/

c. **DAC - Disabled Adult Child Benefits also called Childhood Disability Benefits-** An unmarried, disabled adult over age 18, whose disability occurred prior to age 22 can draw on a parent's work history if one of three events occurs: 1. A parent dies, 2. A parent retires and applies for Social Security, or 3. A parent becomes disabled and starts receiving Social Security Disability Insurance payments. The amount for the son or daughter can be capped by maximum family allowances, but generally if the parent is still living and drawing a Social Security Check the DAC benefit is 50% of the parent's amount and if the parent has died the DAC benefit is 75% of what the parent would have been entitled to receive. There are a few other requirements but if the son or daughter qualifies for this program, after 24 months he or she will be eligible for *Medicare*. https://www.socialsecurity.gov/pubs/EN-05-10026.pdf

2. Medical Coverage

a. **Medicare** - Once you qualify for SSDI or DAC you can get Medicare generally after 24 months. If you have enough work credits you get Medicare at age 65. This is strictly a Federal Program. Medicare provides some medical coverage including hospitalization and doctor visits. There are no financial requirements for this program but income can impact the premiums for Part B. A Special Needs Trust is **NOT** needed for this program. https://www.cms.gov/newsroom/fact-sheets/2024-medicare-parts-b-premiums-and-deductibles?apcid=0063b4a3acf9c7406348c100

b. **Medicaid** - This is a combination Federal and State Program administered at the State level. This program has financial limitations similar to SSI. You must be disabled (but don't necessarily need a formal determination by Social Security). In Florida, you can get this program by either qualifying for and receiving SSI or by applying directly through your state Medicaid Agency (in Florida eligibility for this program is determined by the Department of Children and Families). There are many forms of Medicaid programs and will vary from state to state. There are Medicaid Programs for children, adults, disabled, frail and elderly. These programs can provide such services as basic medical coverage, hospitalization, doctor visits, prescriptions or long term care expenses. Some long term care services can be provided at home or in an institutional setting such as an assisted living facility or nursing home. This program has asset limitations of generally around $2,000 with some assets being exempt, similar to the SSI rules. All States are required by federal law to impose penalty or waiting periods for individuals who transfer or gift resources in order to qualify for Medicaid. How States impose these penalties can vary somewhat and we should understand how some trusts are excluded from this transfer penalty. https://www.myflfamilies.com/service-programs/access/medicaid/

D. Self-Settled Trusts

1. These Trusts are Irrevocable when established, which means once they are established they cannot be changed. However, under Florida's new Trust Code there are ways to modify irrevocable trusts if necessary. See Florida Statutes 736.04113 and 736.04115 (2022).

2. These Trusts are established with the disabled person's personal assets (as compared with other family members' assets). There are many circumstances under which a disabled person will have money of their own.
   a. One source of funds is a personal injury settlement where funds are directly received by the disabled person, or their guardian.
   b. Another source of funds is an inheritance, which ideally should have been addressed originally by the family member through the use of a third party SNT. Unfortunately, sometimes a well-intentioned relative may not understand the problems they can cause by leaving assets directly to a disabled person. This happens frequently when an unexpected death occurs and there has been no estate planning or a lack of coordination with the finances and the legal estate plan.

c. In other situations, a disabled person may earn income through wages or a salary. They may have worked their entire adult life and then suddenly became disabled or been disabled since birth but still with the ability to work. Depending on the particular government program the disabled person is receiving, earned income will likely jeopardize eligibility. For individuals only on Medicaid, income deposited into this type of SNT can assist with maintaining eligibility.

3. These trusts are **exceptions** to the transfer penalties imposed in the SSI and Medicaid rules. So, transfers of assets to these types of trusts DO NOT impose waiting periods for SSI and Medicaid.

4. Ideally these trusts should be exhausted during the lifetime of the Beneficiary to enhance their quality of life.

5. **Under Age 65 Disabled Trust ((d)(4)(A))** - 42 USC 1396p (d)(4)(A) -

   a. Must be less than 65 years of age when funded initially. The beneficiary may age past 65 and the trust is still exempted although you can't continue to contribute assets to this trust after age 65.

   b. It can be established by the disabled beneficiary directly, his or her parent, grandparent, guardian or by the court.

   c. The Grantor chooses the Trustee which may be another family member or a professional (such as a bank, trust company or non-profit corporation).

      1. Additional concern should be given to ensure that there will be a Trustee for the lifetime of the beneficiary.
      2. There should be a succession of Trustees named if individuals are named. There can be difficulty with finding a Trustee (individual or corporate) experienced with administering a SNT.
      3. Family members may be more familiar with the needs of a disabled person, but may not be experienced with managing money or a trust.
      4. Corporate Trustees may be more capable of administering these trusts, but costs can be a factor unless there is a substantial fund to manage. Also corporate trustees are not providing the "hands-on" care and will likely not know the disabled person.

   d. How can funds be used? For anything the beneficiary needs but need to be careful with SSI rules regarding payments for food or shelter expenses, discussed later.

   e. Assets deposited into this Trust are exempt and the funding event is not a transfer. See Florida ESS Manual 1640.0576.09.

   f. Any income deposited into this Trust does not count toward eligibility (in the month deposit is made) for Medicaid. See Florida ESS Manual 1640.0576.09.

   g. Any distributions paid to third parties are not counted as income, unless for food and shelter and the beneficiary is on SSI.

   h. Any funds remaining on death must first **pay back** the State for medical benefits received (through Medicaid). There is no pay-back to federal agencies (Social Security, Medicare or Supplemental Security Income).

   i. This is a single trust created for each beneficiary. Although there is a "pay back" provision, there will also be other individual beneficiaries to receive any remaining funds after paying back the Medicaid program for

the State of Florida. These "individual beneficiaries" need to be identifiable when the Trust is established.

6. **Pooled Trust ((d)(4)(C))**- 42 USC 1396p (d)(4)(C)

a. These Trusts must be established by a non-profit organization. There is one trust with multiple beneficiaries.

b. Since the Trust is already in existence, a beneficiary "joins" the Trust, usually through a contractual arrangement called a Joinder Agreement. This contract can be signed by the disabled person's parent, grandparent, guardian or by the court or by the individual himself or herself. Since the disabled person can sign personally their agent or representative is generally permitted to sign through a power of attorney.

c. The benefits of this trust over the (d)(4)(A) trust are that there is already a Trustee involved who should be familiar with administering these trusts and there is generally a money manager who handles the investments. Oftentimes these trusts do not have minimum fees to administer the accounts, thus making these trusts more cost effective, particularly for smaller accounts.

   1. Since the Trustee is already designated you can check out the background and experience of the Trustee and ask questions.
   2. You can also investigate the background of the investment advisor and the track record of the investments of the Trust. You have the right to ask these questions and you should be satisfied with the answers you receive. Use "BrokerCheck" at www.finra.org to check the background of the financial advisor.
   3. Sometimes the initial fees, or up-front costs, can be substantial (several thousand dollars), others charge nominal set-up fees. The costs should be considerably less than setting up your own trust from scratch.

d. How can funds be used? For anything that benefits the individual, but again you need to be careful with SSI recipients when spending for food and shelter.

e. The Beneficiary can be any age, however, assets deposited into Trust are exempt and the funding event is not a transfer if the Beneficiary is under age 65. Florida presently does not differentiate if the beneficiary is under or over age 65 and does not impose a penalty. Since 2021, there are several Social Security Administrative Law Judge opinions that indicate that a person over the age of 64 can utilize a Pooled Trust for a person on SSI, without an automatic penalty.

f. Any income deposited into Trust does not count toward eligibility for Medicaid. See Florida ESS Manual 1640.0576.09

g. Any distributions paid to third parties are not counted as income, with the same limitations as the Under Age 65 Trust ((d)(4)(A) Trust).

h. Any funds remaining on death are retained by the Pooled Trust or they must pay back the Medicaid agency for medical services provided.

   1. This means that these trusts are not inheritance vehicles (similar to the (d)(4)(A) trusts).
   2. Because these trusts must be established by a non-profit organization, these "retained funds" are generally moved to the

non-profit for its purposes or are retained in the Pooled Trust to assist other beneficiaries, either new or existing.
3. A properly utilized Pooled Trust will generally not have large amounts in the beneficiary's account on death.

7. Qualified Income Trust ((d)(4)(B)) - 42 USC 1396p (d)(4)(B)
   a. Only used to handle excess income over the Income Cap of $2,829/month in 2024 for Medicaid long term care programs.
   b. This does not work for SSI eligibility.
   c. This Trust is used commonly for the frail elderly in qualifying for nursing home Medicaid programs and rarely for the developmentally disabled.

8. Here is the exact, entire language of the federal laws governing these 3 types of SNT's under 42 USC 1396p (d)(4):

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

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

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

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

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

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

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

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

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

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the

State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title.

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

1. Trust by Spouse - Can only be set up in Will -Qualifying Special Needs Trust (FL STAT 732.2025(8) and 732.2045(1)(g))
2. Trust by any other Person -- These are generally referred to as Third Party Special Needs Trusts
    a. These trusts may be set up by parents for children or in some cases by the children for the parents' benefit and do not consist of the beneficiary's personal assets.
    b. This type of SNT can be established as a separate, stand-alone irrevocable trust, under a person's will, or within another trust such as a typical revocable living trust.
    c. If the SNT is Irrevocable (or at least cannot be changed or directed by the beneficiary) the trust assets are not considered in determining eligibility for most public assistance programs.
    d. Distributions to a 3rd party are permitted. A more detailed list of permissible uses follows later in this outline.
    e. Anyone can be appointed as the Trustee except the disabled person or their spouse.
    f. There will be several layers of Beneficiaries such that after the death of the disabled Beneficiary there will be other Beneficiaries named to receive any remaining funds of the trust. Since this could be very distant into the future greater care needs to be taken in the drafting of these provisions.
    g. This is not a "pay-back" type of SNT. There is no Medicaid lien and no payments are required to go back to Medicaid upon the death of the primary beneficiary.

F. Distributions from All Special Needs Trusts.

1. Handling of Distributions is crucial in preserving public benefits. Improper distributions can cause the loss of public benefits to the beneficiary of a SNT.
2. Distributions made from the Trust will be considered in 1 of 3 categories.
    a. First is **Direct Income** to the beneficiary. **SI 01120.201 I 1. a.** Direct Income reduces SSI benefits on a dollar for dollar basis until SSI goes away entirely. Direct Income must be reported for Medicaid eligibility and can affect eligibility. Direct Income includes cash payments and anything that could be easily converted to cash. (This may be hard to accomplish, as many things are convertible to cash.) Also under the new POMS, Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of

receipt. Social Security has changed their policy and will now allow a Trust to reimburse a third party for items purchased for a beneficiary on SSI.

b. The second category is "**In-Kind Income Support and Maintenance.**" This category is defined as food or shelter received as a result of disbursements from the trust by the trustee to a third party in the form of in-kind support and maintenance and are valued under the presumed maximum value rule. **This category only applies to people on SSI and not for individuals getting Social Security Retirement, SSDI or DAC.** Generally, in SNT's, the Trustee often purchases items for the beneficiary. Many times, it is appropriate to make In Kind Support and Maintenance payments and therefore for the beneficiary to have a reduction in benefits. This is due to the fact that the SSI monthly payment may be inadequate to provide the appropriate level of food and shelter for the beneficiary. Thus, as long as the SSI payment is maintained, although at a reduced level, Medicaid eligibility is maintained. (A beneficiary may only receive $1 of SSI a month and still be totally eligible for Medicaid benefits.)

c. The third category is defined as Not Income or as Distributions to Third Parties. In its Program Operations Manual System (POMS), the Social Security Administration states that disbursements from the trust that are not cash to the individual or are third party payments that do not result in the receipt of support and maintenance are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc. Thus, disbursements made by the trustee directly to a third party are not considered income to the individual. Since these distributions do not result in any reduction of SSI benefits, they are the most desirable types of distributions for a Trustee to make.

3. Types of distributions not considered food or shelter might include:

- Services of a Geriatric Care Manager
- Legal services
- Professional Guardian services
- Non-refundable airline tickets
- Stereo system and computers
- TV
- Medical insurance
- Telephone and cellular phone bills
- Furniture
- Vacation and Travel expenses of the disabled person
- Movies
- Tax payments
- Medical treatment for which public funds are not available such as alternative health procedures or alternative medications
- Memberships in clubs such as recreational clubs

- Subscriptions to magazines, newspapers and book clubs
- Adapted vehicles like a van and
- The difference between a private and semiprivate room in an institution.
- REMEMBER if the beneficiary is not on SSI you can also pay for food and shelter expenses.

4. Overall, distributions should be made in such a manner that they are not considered to be income to the beneficiary for public benefits purposes. The Trustee may not provide cash to the beneficiary with the hope that the beneficiary will use the money to buy certain items or use the money for certain purposes such as those listed above. Any cash paid directly to the beneficiary will be counted as income. If the Trustee provides In-Kind Support and Maintenance that is food or shelter, then SSI benefits may be reduced.

5. Trustees of Special Needs Trusts must be familiar with Deeming of Income and Resources and with In-Kind Support and Maintenance. The Deeming law for SSI is found at 20 C.F.R. §416.1160 et. seq. and in the POMS at: https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=05013

   In-Kind Support and Maintenance Law for SSI is found at 20 C.F.R. §416.1130-1157 and in the POMS at **SI 00835: Living Arrangements and In-Kind Support and Maintenance:** https://secure.ssa.gov/apps10/poms.nsf/lnx/0500835000!opendocument

6. A SNT Trustee generally should NOT:
   - Pay cash to the beneficiary;
   - Pay cash to family of the beneficiary under the age of eighteen;
   - Make payments of rent, mortgage, real-estate taxes, homeowners' insurance, utilities, food and shelter (this will be counted as income) without knowing exactly how such payments might affect SSI eligibility;
   - Buy or give groceries to the beneficiary without knowing exactly how such payments might affect SSI eligibility; and

7. The Trustee should be careful not to make distributions to a beneficiary that would be considered income to the beneficiary and thus reduce or eliminate public benefits. Traditional trust standards for distributions requiring income or principal distributions do not serve the basic purposes of a SNT. Overly broad Trustee discretion jeopardizes the beneficiary's eligibility for public benefits. A highly restrictive distribution standard may be even worse by denying the beneficiary many of the goods and services that would benefit the beneficiary's quality of life.

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

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

"The A, B, C's and 1, 2, 3's of S N T's"

(Special Needs Trusts)

Travis D. Finchum, Board Certified Elder Law Attorney - Travis@SpecialNeedsLawyers.com
www.specialneedslawyers.com www.guardiantrusts.org

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

1. The first category of SNT's consists of assets of the beneficiary (from lifetime earnings, an inheritance, gift or personal injury award). These are "**1st** party SNT's." These are commonly called "self-settled" SNT's. These SNT's are creatures of a 1993 Federal law and found at 42 U.S.C. 1396p, subsections (d)(4)(A), (d)(4)(B) and (d)(4)(C).
2. The second category of SNT's are Trusts established by a spouse, for the benefit of his or her spouse, **within a will** and therefore only upon death. These are called Qualifying SNT's. These SNT's are set forth in Florida law at FLA STAT 732.2025(8)
3. The third category of SNT's consists of assets of others (not the beneficiary or his or her spouse) set aside for a disabled person, either during life or upon death of the person setting up the Trust. These are called "**3rd** party" SNT's.

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

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

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

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

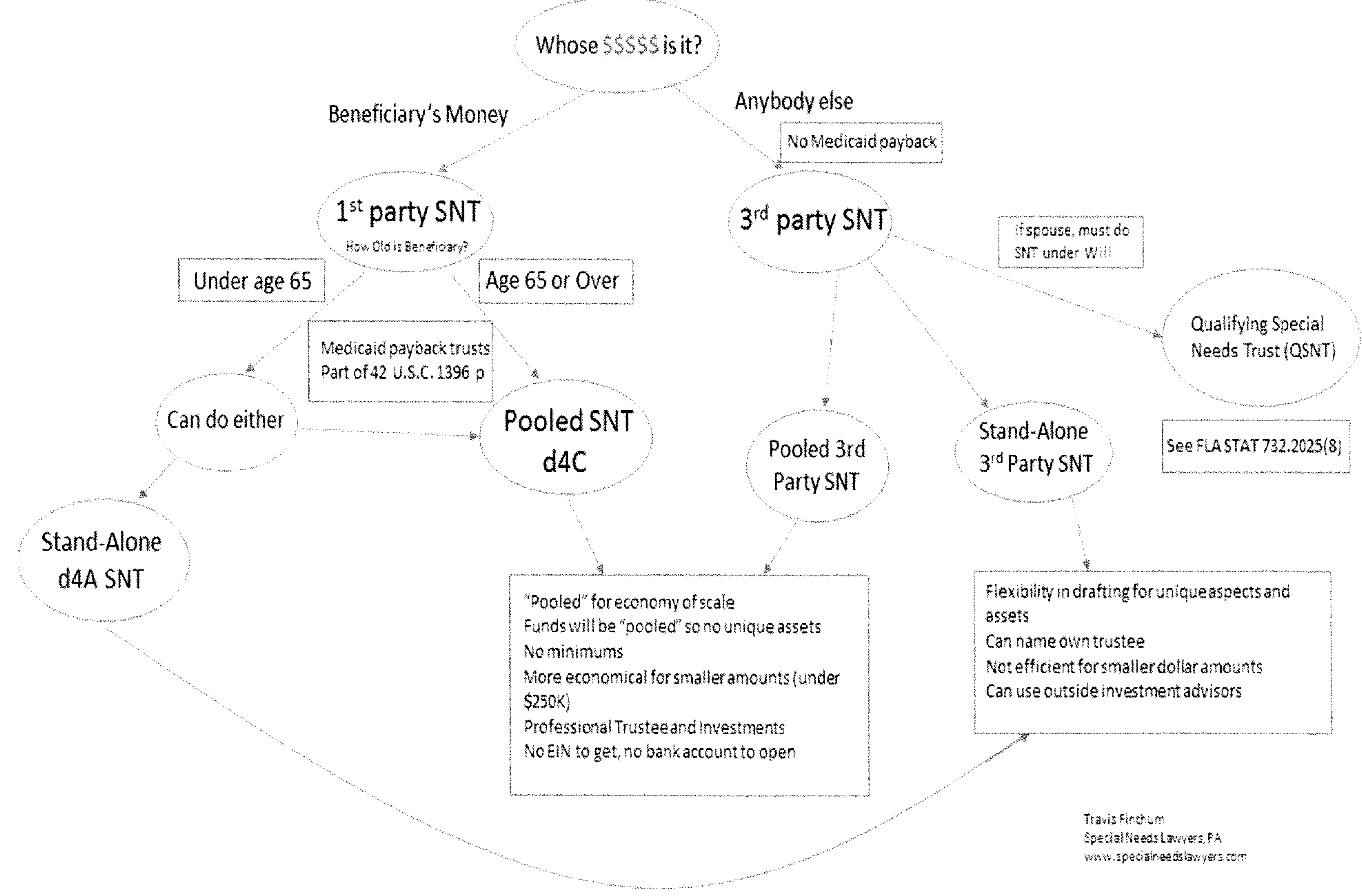
You don't need to be an expert on SNT's, but you should be able to identify when they can help. If you have an elderly or disabled individual with medical bills that are out of control and has little or insufficient medical coverage you should think of a SNT. If you know someone who faces long term care,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

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

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

FIRST PARTY SNT with beneficiary's funds	May be from a personal injury award, an unplanned inheritance or just a lifetime of saving.	**d4A** – Must be under age 65, Medicaid payback on death, works for SSI and Medicaid, works for income and assets.	**d4B** – Qualified Income Trust, only income deposited, only works for some Medicaid programs, not SSI.	**d4C** – Pooled Trust, works for all ages for Medicaid but under age 65 for SSI (maybe), works for income and assets for Medicaid.
THIRD PARTY SNT with the funds of others	Spouse can set up a trust under their will (must die), no Medicaid payback	Anybody other than the beneficiary or spouse can set up a stand-alone SNT, establish one upon death within a will or in a trust or participate in an existing pooled SNT. No Medicaid payback upon the death of the primary beneficiary; can go to others.		

The Guardian Trust administers both First and Third Party Pooled Special Needs Trusts.
www.Guardiantrusts.org


SNT (Special Needs Trust) Analysis
Whose $$$$$ is it?
Beneficiary's Money
Anybody else
No Medicaid payback
1st party SNT
How Old is Beneficiary?
3rd party SNT
If spouse, must do SNT under Will
Under age 65
Age 65 or Over
Medicaid payback trusts Part of 42 U.S.C. 1396 p
Qualifying Special Needs Trust (QSNT)
Can do either
Pooled SNT d4C
Pooled 3rd Party SNT
Stand-Alone 3rd Party SNT
See FLA STAT 732.2025(8)
Stand-Alone d4A SNT
"Pooled" for economy of scale
Funds will be "pooled" so no unique assets
No minimums
More economical for smaller amounts (under $250K)
Professional Trustee and Investments
No EIN to get, no bank account to open
Flexibility in drafting for unique aspects and assets
Can name own trustee
Not efficient for smaller dollar amounts
Can use outside investment advisors
Travis Finchum
Special Needs Lawyers, PA
www.specialneedslawyers.com

ABLE Accounts - What You Need to Know

ABLE United is Florida's ABLE program and opened for business on July 1, 2016. www.ableunited.com Florida's ABLE program is administered under the Prepaid College Board. The ABLE law is in §529A of the Internal Revenue Code.

The Achieving a Better Life Experience (ABLE) Act allows individuals with disabilities and their family and friends to deposit funds into and thus maintain funds in an ABLE account while maintaining government benefits.

ABLE accounts (not "Trusts") can be very helpful and a powerful tool for certain individuals with disabilities. To use an ABLE account the disability has to have occurred prior to age 26, so the eligible candidates will be limited. If a person can qualify, ABLE United allows for the account to be opened online in about 15 minutes at their website. Contributions will initially be limited to a total of $18,000 per year (in 2024) and adjusts with the annual gift tax exclusion.

An individual can have up to $100,000 in their ABLE account before the account starts counting for SSI (Supplemental Security Income). For Medicaid they can have up to $418,000 (Florida's limit for 529 Educational Savings Plans). The ABLE account grows tax free provided the funds are used for qualified disability expenses. Florida Medicaid has a lien on Florida ABLE accounts upon the death of an ABLE beneficiary, similar to a Special Needs Trust.

Qualified Disability Expenses include:
Education, housing, transportation, employment training and support, assistive technology and related services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for ABLE account oversight and monitoring, funeral and burial, and basic living expenses, and anything added by Secretary of the Treasury

Recent changes to ABLE law include the ability to rolls 529 plans into ABLE accounts, contribute earnings into ABLE accounts up to a set amount per year, on top of $18,000 and eliminating direct claims on ABLE accounts for Medicaid recovery, but rather rolling the remaining funds to the probate estate of the beneficiary.

STATE OF MINNESOTA

IN SUPREME COURT

A19-0853

Court of Appeals

Chutich, J.
Took no part, Anderson, J.

Robert Pfoser, as special administrator of the Estate of David Pfoser,

Respondent,

vs.

Filed: January 20, 2021
Office of Appellate Courts

Jodi Harpstead, Commissioner Minnesota Department of Human Services,

Appellant,

and

Dakota County Human Services,

Respondent Below.

Laurie A. Hanson, Long, Reher, Hanson & Price, P.A., Minneapolis, Minnesota, for respondent.

Keith Ellison, Attorney General, Michael N. Leonard, Assistant Attorney General, Saint Paul, Minnesota, for appellant.

Margaret M. Grathwol, Chestnut Cambronne PA, Minneapolis, Minnesota, for amicus curiae Minnesota Chapter of the National Academy of Elder Law Attorneys.

Ron M. Landsman, Landsman Law Group, Rockville, Maryland, for amicus curiae National Academy of Elder Law Attorneys.

Brenna M. Galvin, Maser, Amundson & Boggio, P.A., Richfield, Minnesota; and

David L. Shaltz, Chalgian & Tripp Law Offices, East Lansing, Michigan, for amicus curiae Special Needs Alliance.

SYLLABUS

A disabled recipient of Medical Assistance for Long-Term Care benefits who is age 65 or older is not subject to a penalty for transferring assets into a pooled special-needs trust when he made a satisfactory showing that he intended to receive "valuable consideration" under Minnesota Statutes section 256B.0595, subdivision 4(a)(4) (2020).

Affirmed.

OPINION

CHUTICH, Justice.

This case requires us to decide whether the Commissioner of the Minnesota Department of Human Services correctly imposed a transfer penalty on David Pfoser, a disabled Medicaid recipient who resided in a long-term care facility, after he transferred, at age 65, partial proceeds from the sale of a house into a pooled special-needs trust. State and federal law impose a penalty on recipients of Medical Assistance for Long-Term Care benefits if they transfer assets for less than fair market value. Minn. Stat. § 256B.0595 (2020); 42 U.S.C. § 1396p(c)(1)(A). But no penalty may be imposed if the recipient makes a satisfactory showing that he "intended to dispose of the assets either at fair market value or for other valuable consideration." Minn. Stat. § 256B.0595, subd. 4(a)(4); *accord* 42 U.S.C. § 1396p(c)(2)(C)(i). The district court reversed the transfer penalty, ruling that Pfoser received adequate compensation. The court of appeals affirmed the district court,

concluding that the Commissioner's decision was legally erroneous, arbitrary and capricious, and unsupported by substantial evidence. Because we conclude that Pfoser made a satisfactory showing that he intended to receive valuable consideration for his transfer of assets, we now affirm the decision of the court of appeals.

FACTS

David Pfoser had Parkinson's disease and other mental and physical disabilities.[1] Following an injury in 2014, Pfoser moved into a long-term care facility and applied for Medical Assistance for Long-Term Care benefits, which is part of Minnesota's Medicaid program. Fiduciary Services of Minnesota, Inc., served as Pfoser's guardian and conservator.[2]

In 2016, Pfoser's siblings sold the home that Pfoser had been living in, which had been their parents' home, when it was clear that he would not be able to return there. Pfoser's share of the proceeds was $28,010.

In 2017, Pfoser petitioned the district court to transfer the proceeds into a pooled special-needs trust operated by the non-profit Lutheran Social Service of Minnesota (Lutheran Social Service). A pooled special-needs trust is a trust funded by the assets of disabled beneficiaries, with individual sub-accounts, to pay for Medicaid-ineligible goods and services that will improve the quality of the beneficiaries' lives. *Ctr. for Special Needs*

---

1 Pfoser died while his appeal was pending in the court of appeals. The appeal proceeded with Pfoser's brother, Robert Pfoser, named as special administrator of the estate.

2 For simplicity, the acts of Fiduciary Services of Minnesota on behalf of Pfoser are referred to as the acts of Pfoser.

Tr. Admin., Inc. v. Olson, 676 F.3d 688, 695 (8th Cir. 2012). "Pooled special needs trusts allow disabled individuals with relatively small amounts of money to pool their resources for investment and management purposes." *Me. Pooled Disability Tr. v. Hamilton*, 927 F.3d 52, 54 (1st Cir. 2019).

The district court granted Pfoser's petition for permission to transfer the funds. Pfoser and Lutheran Social Service executed two agreements, a joinder agreement to enroll Pfoser in the trust, and a standard pooled trust agreement (Trust Agreement) that contained additional terms and conditions. Pfoser agreed to transfer $28,010 into a sub-account of the trust to be administered solely for his benefit according to the terms of the Trust Agreement, subject to a $1,000 enrollment fee and certain other management fees owed to Lutheran Social Service.

The Trust Agreement named Lutheran Social Service as trustee and required that trust assets be "managed, invested, and disbursed to promote the comfort and well-being of each Beneficiary." All disbursements from the trust were limited to the "sole and absolute discretion" of Lutheran Social Service as trustee to make distributions as "necessary or advisable to provide for the supplemental care or supplemental needs of the beneficiary." Such needs could include medical, dental, and diagnostic work; supplemental nursing care; and expenditures for travel or a personal care attendant, which are not covered by Medicaid.

In the Trust Agreement, Pfoser acknowledged that he had no "further interest, rights in, or control over" the funds and that Lutheran Social Service had no obligation to support him. The trust was irrevocable. Notably, the Trust Agreement also provided that up to 90

percent of any funds remaining in the sub-account at the time of Pfoser's death must be paid to the State to reimburse the Medical Assistance program for the costs paid on behalf of Pfoser. Lutheran Social Service would retain the other 10 percent in a charitable trust for the benefit of indigent pooled trust beneficiaries who had exhausted the funds in their sub-accounts. By enrolling in the trust, Pfoser would be eligible to receive benefits from the charitable trust if he exhausted the funds in his sub-account.

In accordance with the agreements, Pfoser transferred the funds, which were credited to his sub-account. He was 65 years old at the time of the transfer.

Two months later, Dakota County Human Services (Dakota County) notified Pfoser that it was investigating whether the establishment of his trust sub-account may have been an improper transfer under the statutes governing Medical Assistance for Long-Term Care. Under those statutes, a recipient "may not give away, sell, or dispose of" any asset for less than fair market value. Minn. Stat. § 256B.0595, subd. 1(a); *accord* 42 U.S.C. § 1396p(c)(1)(A). But no penalty may be imposed if the recipient makes a satisfactory showing that he "intended to dispose of the assets either at fair market value or for other valuable consideration." Minn. Stat. § 256B.0595, subd. 4(a)(4); *accord* 42 U.S.C. § 1396p(c)(2)(C)(i). Dakota County ultimately concluded that Pfoser improperly transferred assets. It assessed a transfer penalty of 3.94 months of ineligibility for Medical Assistance for Long-Term Care benefits.

Pfoser appealed the penalty, and a hearing was held before a human services judge. Pfoser claimed that he had received fair market value for the transfer in the form of future goods and services that the trust would provide. In support of his position, Pfoser submitted

copies of the joinder agreement and Trust Agreement. He also submitted an affidavit by the director of the pooled trusts operated by Lutheran Social Service, which included an assessment of the fair market value of Pfoser's sub-account.

In her affidavit, the director stated that Lutheran Social Service operates two pooled trusts containing about 420 sub-accounts. The sub-accounts of the trust in which Pfoser participated are for clients who are disabled as defined by the Social Security Administration. Although the trust is discretionary, the director attested that Lutheran Social Service views its discretion to be limited by contractual and fiduciary obligations to pay for items or services for beneficiaries "as long as the expenditure promotes the comfort and well-being of the beneficiaries." According to the director, denying a reasonable request would be in bad faith and a breach of contract.

The fair-market-value assessment of Pfoser's sub-account estimated that his sub-account would be depleted in less than 2 years. This assessment reflected specific one-time expenditures for expensive items like an adaptive recliner, equipment for his wheelchair, and restorative dental work, which are not covered by Medicaid. It also budgeted for annual expenses like STEM activity boxes,[3] over-the-counter medications not covered by Medical Assistance, wheelchair cushions, household goods and personal expenses, and fees for guardian services. The assessment also calculated Pfoser's life expectancy at 14.86 years.

[3] STEM boxes contain activities in Science, Technology, Engineering and Math that are designed to address Pfoser's symptoms of Parkinson's disease by encouraging him to engage his brain and use his motor skills.

Dakota County did not present any evidence in response to Pfoser's expected expenditures and fair-market-value assessment. At the hearing, the county financial worker assigned to Pfoser's case testified that, according to the policy of the Minnesota Department of Human Services, "the addition to a pool[ed] trust by a beneficiary . . . after the beneficiary . . . reaches age 65 is evaluated as an uncompensated transfer." She also testified, "And that's where I stopped with my calculation," after determining that Pfoser was age 65 at the time of the transfer.

The human services judge found in favor of Dakota County. Because Pfoser had transferred the cash into an irrevocable trust from which any distributions were discretionary, the judge concluded that no "reasonable seller/buyer or objective observer" would consider this exchange to be a transfer for fair market value. Accordingly, the judge found that Pfoser did not receive "adequate compensation or fair market value" at the time the transfer was made. The judge also found that there was insufficient evidence of Pfoser's intent to receive fair market value under an existing penalty exception. The judge therefore recommended that the Commissioner of the Department of Human Services affirm the penalty. The Commissioner adopted the recommendation without change.

Pfoser appealed the agency decision to the district court. The district court reversed, concluding that Pfoser received "adequate compensation" in the form of his vested equitable interest in the trust assets.

The Commissioner appealed, and the court of appeals affirmed the district court's decision. *Pfoser v. Harpstead*, 939 N.W.2d 298 (Minn. App. 2020). The court of appeals

determined that the Commissioner's decision was "legally erroneous, arbitrary and capricious, and unsupported by substantial evidence." *Id.* at 320.

We granted the Commissioner's petition for review.

ANALYSIS

The issue before us is whether the Commissioner properly imposed a 3.94 month penalty based on her findings that Pfoser did not receive adequate compensation or fair market value when he transferred $28,010 into the pooled special-needs trust and that a penalty exception did not apply.[4]

Judicial review of a decision by the Commissioner of Human Services is authorized by Minnesota Statutes section 256.045 (2020). We may reverse or modify an agency decision if the decision is affected by an error of law, is arbitrary and capricious, or is unsupported by substantial evidence. Minn. Stat. § 14.69 (2020). Whether substantial evidence exists is a question of law. *See In re Restorff*, 932 N.W.2d 12, 18 (Minn. 2019).

---

4 Because Pfoser died while his case was pending in the court of appeals, a preliminary question of mootness must be addressed. Although neither party has argued that the appeal is moot, mootness is a jurisdictional issue that we may raise on our own. *In re Schmalz*, 945 N.W.2d 46, 49 n.3 (Minn. 2020) (explaining that "the existence of a justiciable controversy is essential" to the exercise of the court's jurisdiction).

Generally, "[a]n appeal should be dismissed as moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). But we may decide a case when an issue, although technically moot, is functionally justiciable and presents an important question of statewide significance. *In re Guardianship of Tschumy*, 853 N.W.2d 728, 738 (Minn. 2014). The issue here is functionally justiciable because the record is fully developed, the issue involves a matter of statutory interpretation, and the issue has been adequately briefed. *See Schmalz*, 945 N.W.2d at 49 n.3. The question has statewide significance because it affects disabled persons age 65 or older who wish to transfer assets into a pooled special-needs trust without incurring a penalty.

We determine "whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record." *Minn. Power & Light Co. v. Minn. Pub. Utils. Comm'n*, 342 N.W.2d 324, 330 (Minn. 1983). We examine "the agency's decision independently and need not accord any deference to the lower courts' review." *Estate of Atkinson v. Minn. Dep't of Hum. Servs.*, 564 N.W.2d 209, 213 (Minn. 1997).

A.

This appeal concerns the consequences of Pfoser's transfer of funds into the pooled special-needs trust in determining his financial eligibility for Medicaid benefits. We begin with an overview of the Medicaid program and the asset-transfer rules. Medicaid is "a cooperative federal-state program." *In re Schmalz*, 945 N.W.2d 46, 50 (Minn. 2020). Known as Medical Assistance in Minnesota, the program "is designed to provide medical assistance to individuals whose income and resources are not sufficient to meet the costs of their necessary care and services." *Estate of Atkinson*, 564 N.W.2d at 210; *see* Minn. Stat. §§ 256B.01–.85 (2020). The Minnesota Department of Human Services (the Department) provides support for long-term care through the Medical Assistance for Long-Term Care program. *See* Minn. Stat. §§ 256B.056 (governing eligibility for Medical Assistance, including long-term care benefits), .0595 (governing transfers of assets by recipients of long-term care benefits), .0625, subd. 2 (providing coverage for skilled and intermediate nursing care services).

Persons qualify for Medical Assistance if they are blind, disabled, or age 65 or older. Minn. Stat. § 256B.055, subd. 7. Because Medicaid is intended to be the payor of last

resort, *In re Estate of Barg*, 752 N.W.2d 52, 58 (Minn. 2008), persons must be financially eligible for Medical Assistance by having available assets valued below a statutory threshold amount. Minn. Stat. § 256B.056, subd. 3(a); 42 U.S.C. § 1396a(a)(17). Subject to certain exceptions, "a person must not own individually more than $3,000 in assets." Minn. Stat. § 256B.056, subd. 3(a).

Minnesota's Medicaid program must comply with federal law. *See* 42 U.S.C. §§ 1396–1396t. Failure to comply may result in a reduction in or loss of federal funds. 42 U.S.C. § 1396c; *In re Estate of Turner*, 391 N.W.2d 767, 769 (Minn. 1986). At issue here are the rules governing the transfer of assets into pooled special-needs trusts by recipients of Medical Assistance for Long-Term Care benefits. *See* Minn. Stat. § 256B.0595; 42 U.S.C. § 1396p.

A disabled person of any age can establish an account in a pooled special-needs trust. *See* Minn. Stat. § 256B.056, subd. 3b(c) (defining a pooled trust in accordance with 42 U.S.C. § 1396p(d)(4)(C)). A beneficiary's interest in a pooled trust is not considered an available asset for determining Medical Assistance eligibility if certain requirements are met. Minn. Stat. § 256B.056, subd. 3b(d); 42 U.S.C. § 1396p(d)(4)(C). One requirement in Minnesota is that the trust contain a repayment obligation entitling the Department to any assets "remaining in the beneficiary's trust account" upon the beneficiary's death "up to the amount of medical assistance benefits paid on behalf of the beneficiary." Minn. Stat. § 256B.056, subd. 3b(d); *accord* 42 U.S.C. § 1396p(d)(4)(C). There is no dispute that the trust established by Lutheran Social Service meets the requirements of the statutes.

Although the assets *in* an exempt trust are not considered available for determining whether a person is eligible for benefits, transfers *into* the trust may be penalized with a period of ineligibility for benefits. Minn. Stat. § 256B.0595, subd. 1(j). A person residing in a long-term care facility may not "give away, sell, or dispose of" assets "for less than fair market value" when done "for the purpose of establishing or maintaining medical assistance eligibility." Minn. Stat. § 256B.0595, subd. 1(a); *accord* 42 U.S.C. § 1396p(c)(1)(A). A person who transfers assets for less than fair market value is generally subject to a period of ineligibility for Medical Assistance benefits. Minn. Stat. § 256B.0595, subd. 2(a); 42 U.S.C. § 1396p(c)(1)(A). This sanction is known as a "transfer penalty."

Several exceptions to the transfer penalty exist and preclude application of any penalty. For example, transfers into pooled special-needs trusts for the benefit of a disabled person *under* age 65 are automatically exempt from a transfer penalty. Minn. Stat. § 256B.0595, subd. 4(a)(6); *accord* 42 U.S.C. § 1396p(c)(2)(B)(iv). But a transfer for the benefit of a disabled person *age 65 or older* is not exempt, unless another exception applies.

As relevant here, a person of any age, including those age 65 or older, can avoid a transfer penalty if the person makes a "satisfactory showing" that the person "intended to dispose of the assets either at fair market value or for other valuable consideration" (the intent exception).[5] Minn. Stat. § 256B.0595, subd. 4(a)(4); *accord* 42 U.S.C. § 1396p(c)(2)(C)(i). Because Pfoser was 65 years old when he transferred $28,010 into

[5] Because other transfer exceptions exist in the statute, we call this exception the "intent exception."

the trust, he is subject to a transfer penalty unless he makes one of two showings: that he *actually* received fair market value for the transfer, or that he *intended* to receive fair market value or other valuable consideration under the intent exception.[6] *See* Minn. Stat. § 256B.0595, subds. 1(a), 4(a)(4).

B.

To determine whether Pfoser met the intent exception, we consider the meaning of "valuable consideration" under Minnesota Statutes section 256B.0595, subdivision 4(a)(4).[7] The statute does not define "valuable consideration." The court of appeals

---

[6] Amici curiae National Academy of Elder Law Attorneys and its corresponding Minnesota Chapter argue that the rules governing the transfer of assets in the federal statute do not apply to pooled special-needs trusts because the federal statute contains separate provisions that specifically address the treatment of trusts. *Compare* 42 U.S.C. § 1396p(c) (addressing certain transfers of assets), *with* 42 U.S.C. § 1396p(d) (addressing the treatment of trust amounts). Although the argument of the amici raises serious questions about how the federal statute should be interpreted, *see Cox v. Iowa Dep't of Hum. Servs.*, 920 N.W.2d 545, 560–63 (Iowa 2018) (Appel, J., dissenting), we typically do not reach issues raised only by amici, *Kline v. Berg Drywall, Inc.*, 685 N.W.2d 12, 23 n.9 (Minn. 2004). Furthermore, the Minnesota statute expressly states that the transfer rules apply to transfers into pooled trusts. Minn. Stat. § 256B.0595, subd. 1(j).

[7] We first address a preliminary question of forfeiture. Although her petition for review did not explicitly raise a forfeiture issue, the Commissioner now contends that Pfoser never argued in his agency appeal that he intended to receive "valuable consideration," and so forfeited the argument.

Pfoser did not specifically contend in his agency appeal that he received valuable consideration, but the Commissioner determined that Pfoser failed to prove that he had received "adequate compensation or fair market value." "Valuable consideration" is closely related to "adequate compensation." The statute does not use the term "adequate compensation"; it uses "fair market value or other valuable consideration." Minn. Stat. § 256B.0595, subd. 4(a)(4). Notably, the Commissioner's own policy manual uses the term "adequate compensation" rather than fair market value or valuable consideration. *See* Minn. Dep't of Hum. Servs., *Minnesota Health Care Programs Eligibility Policy Manual* § 2.4.1.3.4 (Jan. 1, 2019) (stating that a transfer beneficiary over age 64 must "provide

applied the definition in the *State Medicaid Manual* and held that Pfoser satisfied it. *Pfoser v. Harpstead*, 939 N.W.2d at 314, 318; *see* Ctrs. for Medicare & Medicaid Servs., *State Medicaid Manual* § 3258.1.A.2 (defining valuable consideration as "some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset"). The Commissioner argues that valuable consideration unambiguously means something of equivalent cash value to the transferred asset, or alternatively, that this court should defer to agency interpretations, including the *State Medicaid Manual*. Pfoser responds that the transfer was adequately compensated under any standard.

We review matters of statutory interpretation de novo. *In re Schmalz*, 945 N.W.2d 46, 49 n.3 (Minn. 2020). The goal of statutory interpretation is to effectuate the intent of the Legislature. Minn. Stat. § 645.16 (2020).

The first step is to determine whether the language of the statute is ambiguous. *Olson v. Lesch*, 943 N.W.2d 648, 656–57 (Minn. 2020). "A statute is unambiguous if it has only one reasonable interpretation." *In re Welfare of Children of J.D.T.*, 946 N.W.2d 321, 327 (Minn. 2020). When interpreting a statute, we read "words and phrases . . . according to rules of grammar and according to their common and approved usage." Minn.

---

proof that adequate compensation was received"). Finally, Pfoser's position is that all three standards are essentially the same.

Because the relevant legal standards are closely related, the underlying facts are not in dispute, and the parties have had an opportunity to fully brief the issue, we address the valuable-consideration standard on the merits. *See State v. Hill*, 871 N.W.2d 900, 905 n.4 (Minn. 2015) (reaching an argument not raised below when the question involved a purely legal issue, the State had briefed the issue, and consideration of the issue did not prejudice the State).

Stat. § 645.08(1) (2020). When a statute does not define a term, we may look to lay dictionary definitions and, where appropriate, to legal definitions to determine the plain meaning of the term. *See Getz v. Peace*, 934 N.W.2d 347, 354–55 (Minn. 2018) (considering both lay and legal definitions when a phrase frequently appeared as a legal phrase in statutes).

We also read "[m]ultiple parts of a statute . . . together so as to ascertain whether the statute is ambiguous." *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013). "Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

We have stated that " 'valuable consideration, in the sense of the law, may consist either of some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' " *Ketterer v. Indep. Sch. Dist. No. 1*, 79 N.W.2d 428, 436 (Minn. 1956) (quoting 44 *Words and Phrases, Valuable Consideration* 25). Technical and lay dictionaries offer similarly broad definitions. *See Valuable Consideration*, ***Black's Law Dictionary*** (11th ed. 2019) ("[C]onsideration that either confers a pecuniarily measurable benefit on one party or imposes a pecuniarily measurable detriment on the other."); *Valuable Consideration*, *Webster's Third International Dictionary Unabridged* 2530 (2002) ("An equivalent or compensation having value that is given for something (as money, marriage, services) acquired or promised and that may consist either in some right, interest, profit, or benefit accruing to one party or some responsibility, forbearance, detriment, or loss exercised by or falling upon the other party . . . .").

The Commissioner's position that the benefit received must be equal to the value of the transferred asset is not reasonable in context. The statute allows for a showing under either the fair-market-value standard "or" the valuable-consideration standard. Minn. Stat. § 256.0595, subd. 4(a)(4); *see A.A.A. v. Minn. Dep't of Hum. Servs.*, 832 N.W.2d 816, 829 (Minn. 2013) ("[W]hen the disjunctive 'or' is used, only one of the listed factual situations needs to be present in order for the provisions to be satisfied."). These standards cannot be the same because the statute distinguishes fair market value from "other" valuable consideration.

The Commissioner distinguishes fair market value from other valuable consideration in section 256.0595, subdivision 4(a)(4), based on the *form* of the compensation. She equates fair market value to cash and valuable consideration to something other than cash but of "equivalent market value." This premise is incorrect because fair market value and valuable consideration can take the same form. For instance, like valuable consideration, which may consist of "some right, interest, profit, or benefit," *see Ketterer*, 79 N.W.2d at 436, fair market value need not be money. Dictionaries define fair market value in relation to "price." *See, e.g.*, *Fair Market Value*, *Black's Law Dictionary* (11th ed. 2019) ("The price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction . . . ."); *Fair Market Value*, *The American Heritage Dictionary* 635 (5th ed. 2011) ("The price, as of a commodity or service, at which both buyers and sellers agree to do business.").

"Price," in turn, can mean money or other goods. *See Price*, *Black's Law Dictionary* (11th ed. 2019) ("The amount of money or other consideration asked for or given in

exchange for something else; the cost at which something is bought or sold."); *Price*, *The American Heritage Dictionary* 1397 (5th ed. 2011) ("The amount as of money or goods, asked for or given in exchange for something else."). Fair market value and valuable consideration can therefore each take the form of goods and services. Consequently, the *form* of compensation—cash versus non-cash—cannot be the critical distinction.[8]

We conclude instead that the relevant distinction is the *measure* of compensation: "valuable consideration" under section 256.0595, subdivision 4(a)(4), is compensation that is *approximately* equal to the value of the transferred asset, but may be something less than fair market value. Interpreting valuable consideration to mean something *equal* to fair market value eliminates this distinction and makes the valuable-consideration standard meaningless. This we cannot do. *See Amaral*, 598 N.W.2d at 384 ("[N]o word, phrase, or sentence should be deemed superfluous . . . .").

In context, then, "valuable consideration" under section 256.0595, subdivision 4(a)(4), unambiguously means compensation that is approximately equal to the value of the transferred asset. This interpretation reflects that valuable consideration is distinct from, and a less stringent standard than, fair market value. It also preserves the force of the fair-market-value requirement by requiring a penalty when an asset is transferred for

---

[8] The Commissioner cites several federal statutes to support her position that fair market value essentially means cash. *See, e.g.*, 11 U.S.C. § 101 ("The term 'debt relief agency' means any person who provides any bankruptcy assistance to an assisted person in return for the payment of *money or other valuable consideration* . . . ." (emphasis added)). Notably, in all of her examples, Congress chose to use the term "money," not "fair market value," to contrast with "other valuable consideration." Accordingly, these examples do not restrict the broader meaning of fair market value cited above.

something of substantially less value. *See* Minn. Stat. § 256B.0595, subd. 1(a) (prohibiting transfers for less than fair market value); 42 U.S.C. § 1396p(c)(1)(A).

The Commissioner would add another element to the plain meaning of "valuable consideration" in section 256.0595, subdivision 4(a)(4). She asserts that valuable consideration includes only assets that are themselves countable for purposes of determining Medical Assistance eligibility. Otherwise, she argues, an "asymmetry" occurs if persons can exchange a countable asset for a non-countable asset while avoiding a penalty and maintaining eligibility for their benefits. Even so, the statute contradicts the Commissioner's position. The statute does not require the compensation received to be itself a countable asset. *See* Minn. Stat. § 256B.0595, subd. 1(c) (applying no penalty to certain payments for personal services).

Accordingly, under the intent exception to the asset-transfer rules, Minn. Stat. § 256.0595, subd. 4(a)(4), we hold that "valuable consideration" means compensation that is approximately equal to the fair market value of the transferred asset.[9]

C.

Having defined "valuable consideration" under Minnesota Statutes section 256B.0595, subdivision 4(a)(4), we now determine whether Pfoser met his burden of showing that he intended to transfer the funds into the pooled special-needs trust for

---

9 Because we arrive at our interpretation from the plain meaning of the statute, we do not consider the definition in the *State Medicaid Manual* or other agency statements. *See Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 73 (Minn. 2012) ("If the words are free of all ambiguity, we apply the statutory language."); *Schwanke v. Minn. Dep't of Admin.*, 851 N.W.2d 591, 594 n.1 (Minn. 2014) (stating that "we owe no deference to an agency's interpretation of an unambiguous statute").

valuable consideration. The court of appeals held that the Commissioner made three legal errors in imposing a transfer penalty: failing to consider whether Pfoser received valuable consideration before, during, or after the transfer; stating her belief that no "reasonable seller/buyer or objective observer" would consider Pfoser's exchange to be adequately compensated; and relying too heavily on the discretionary and irrevocable features of the trust. *Pfoser v. Harpstead*, 939 N.W.2d at 315–18. The court of appeals also concluded that the Commissioner's decision was arbitrary and capricious and unsupported by substantial evidence as a whole. *Id.* at 316, 318. The Commissioner argues that Pfoser's transfer was not adequately compensated because his equitable interest in the pooled special-needs trust is not equal to $28,010 in unrestricted cash. She also contends that future goods and services should not be considered when determining the value of Pfoser's interest and that exempting Pfoser's transfer thwarts the purpose and structure of the Medicaid Act.

We note first that the Commissioner erred legally by requiring Pfoser to offer "*convincing evidence* of intent to receive fair market value." (Emphasis added.) The convincing-evidence standard applies when a person transferring assets seeks to show that the transfer was not "for the purpose of establishing or maintaining medical assistance eligibility." Minn. Stat. § 256B.0595, subd. 1(a). It does not apply to the intent exception in Minn. Stat. § 256B.0595, subd. 4(a)(4). Under the intent exception, Pfoser needed only to make a "satisfactory showing" that he "intended to dispose of the assets" for "valuable consideration." *Id.* That standard requires a lesser showing than a convincing-evidence standard. Accordingly, Pfoser needed to make a satisfactory showing that he intended to

receive compensation that is approximately equal to the $28,010 that he transferred into the trust.

The evidence shows that Pfoser intended to receive approximately $28,010 in the form of his equitable interest in the pooled special-needs trust. Pfoser's sub-account was credited with $28,010, subject to enrollment and management fees, and he became entitled to the professional investment and management of his trust assets. The record also shows that Lutheran Social Service carefully designed a plan to use the funds in Pfoser's trust sub-account (1) solely for his benefit, (2) on necessary and specific goods and services that would not be covered by Medical Assistance but were designed to meet his needs as a resident of a long-term care facility with Parkinson's disease, and (3) over a period of 2 years, well within Pfoser's life expectancy of almost 15 years. Moreover, the record contains no evidence that contests the value of the goods and services that Pfoser intended and expected to receive. Consequently, Pfoser was likely to receive the approximate value of the funds deposited into his sub-account.

The Commissioner cites various authorities to show that transfers into a pooled special-needs trust are not for fair market value. For example, the *State Medicaid Manual* states that, when a person transfers a non-excluded asset into a trust, a "transfer of assets for less than fair market value generally takes place" because "[a]n individual placing an asset in a trust generally gives up ownership of the asset to the trust." Ctrs. for Medicare & Medicaid Servs., *State Medicaid Manual* § 3259.6.G. Similarly, the Commissioner's own agency policy manual states that a transfer into a pooled trust after a disabled person turns 65 is "evaluated as an uncompensated transfer," unless the disabled person can

"provide proof that adequate compensation was received." Minn. Dep't of Hum. Servs., *Minnesota Health Care Programs Eligibility Policy Manual* § 2.4.1.3.4. In addition, the Commissioner cites cases from other states that upheld penalties on similar transfers into trusts because the courts determined that the equitable interests were not equal to the fair market value of unrestricted cash. *See Cox v. Iowa Dep't of Hum. Servs.*, 920 N.W.2d 545 (Ia. 2018); *In re Pooled Advocate Tr.*, 813 N.W.2d 130 (S.D. 2012).

These authorities are not determinative because they apply the fair-market-value standard rather than the valuable-consideration standard, which we conclude is less stringent.[10] Further, the agency statements establish only a *presumption* that a transfer into a pooled trust is not for fair market value—a presumption that a disabled person may rebut with evidence. Given Pfoser's showing, if we were to accept the Commissioner's position

---

10 The cases cited by the Commissioner are legally and factually distinguishable. In the Iowa case, an elderly couple transferred $575,000 into two pooled special-needs trust accounts but, unlike Pfoser, did not provide an affidavit from the trustee stating when, or for what purpose, the funds were likely to be used. *Cox v. Iowa Dep't of Hum. Servs.*, 920 N.W.2d 545, 548 (Ia. 2018). The Iowa Supreme Court held that the transfer was for less than fair market value because, among other factors, "[t]he value of readily available assets is greater than the value of assets that are restricted in a trust for future use." *Id.* at 559. Although the court referenced the intent exception and the valuable-consideration standard, it did not specifically analyze whether the transfer was exempt under that standard. *Id.* at 557, 559.

In the South Dakota case, an elderly couple transferred $115,000 into a pooled special-needs trust. *In re Pooled Advocate Tr.*, 813 N.W.2d 130, 136 (S.D. 2012). The South Dakota Supreme Court concluded that the beneficiaries did not receive fair market value because the trustee had sole discretion over disbursement of the funds and because the beneficiaries had identified "no items or services purchased for them by the trust" that would demonstrate that their interest had "tangible" and "intrinsic" value. *Id.* at 147. The court did not consider whether the couple was exempt from a transfer penalty under the valuable-consideration standard.

that Pfoser had not met his burden, it is unclear whether a disabled person age 65 or over could ever rebut the presumption.

The Commissioner also contends that the value of future goods and services should not be considered because Pfoser did not have a "binding agreement" that allowed him to enforce specific distributions. She asserts that the court of appeals erred by requiring her to consider evidence of "valuable consideration received by the recipient before, during, and after transferring assets to the pooled trust." *Pfoser v. Harpstead*, 939 N.W.2d at 313.

Although the Commissioner is correct that Pfoser could not enforce specific distributions because the trust was discretionary and irrevocable, Pfoser's equitable interest was still legally enforceable under principles of trust law. Under the Minnesota Trust Code, a trustee has a duty to administer a trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries." Minn. Stat. § 501C.0801 (2020). The express purpose of the Lutheran Social Service trust was to provide for the "supplemental care and special needs" of the disabled beneficiary, and the Trust Agreement required that the funds "be managed, invested, and disbursed" to provide for Pfoser's supplemental needs. Lutheran Social Service therefore had fiduciary (and contract) obligations to manage the trust to provide for Pfoser's supplemental needs. In addition, Pfoser could enforce his interest through equitable remedies, such as suing to compel Lutheran Social Service to perform its duties, to enjoin it from breaching its duties, or to replace it as trustee. *See* Restatement (Second) of Trusts § 199 (Am. Law Inst. 1959). Consequently, Pfoser had a legally enforceable interest.

Further, the court of appeals did not err in requiring the Commissioner to consider evidence of valuable consideration that Pfoser would receive in the future because the goods and services that Pfoser expected to receive were based on a legally enforceable agreement that existed at the time of the transfer. *Pfoser v. Harpstead*, 939 N.W.2d at 313. Under the statute, a transfer is not penalized merely because the transferor will not receive the full benefit of the compensation until a later point. *See* Minn. Stat. § 256B.0595, subd. 1(f), (h) (exempting the purchase of annuities, promissory notes, and loans, if certain requirements are met); *accord* 42 U.S.C. § 1396p(c)(1)(F), (G), (I). We therefore reject the Commissioner's position that a valuation of Pfoser's interest in the pooled special-needs trust could not consider goods and services that Pfoser anticipated receiving in the near future under the Trust Agreement.

Finally, the Commissioner contends that exempting Pfoser's transfer "subverts the purpose" of the Medicaid Act by permitting him to preserve assets for his own use and providing a "roadmap" for others to follow. She also claims that exempting Pfoser's transfer under the intent exception nullifies the automatic exemption for transfers into a trust established for a beneficiary under age 65. *See* Minn. Stat. § 256B.0595, subd. 4(a)(6); 42 U.S.C. § 1396p(c)(2)(B)(iv).

We acknowledge that Medicaid is intended to be the payor of last resort. *In re Estate of Barg*, 752 N.W.2d 52, 58 (Minn. 2008). Similarly, "[i]t is the public policy of this state that individuals use all available resources to pay for the cost of long-term care services . . . before turning to Minnesota health care program funds, and that trust instruments should not be permitted to shield available resources of an individual." Minn. Stat. § 501C.1206

(2020). But even if we agreed with the Commissioner that exempting Pfoser's transfer would hinder the legislative purpose, we "will not disregard a statute's clear language to pursue the spirit of the law." *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007).

In any case, we think that the Commissioner's fears are overstated. Pooled special-needs trusts are unlikely to be used to hide great wealth while creating eligibility for Medical Assistance because of the inherent limitations of these trusts: pooled special-needs trusts are available only to disabled persons, Minn. Stat. § 256B.056, subd. 3b(c); the person must give up control of the funds, *id.*; and any unused funds will revert to the State, Minn. Stat. § 256B.056, subd. 3b(d). As a result, those who are likely to benefit through the use of pooled special-needs trusts are those who, like Pfoser, are disabled and have only modest assets that they wish to use for basic care not covered by Medical Assistance. *See Lewis v. Alexander*, 685 F.3d 325, 333 (3d Cir. 2012) (stating that the expenses provided by a special-needs trust are things like "books, television, Internet, travel, and even such necessities as clothing and toiletries," which "would rarely be considered extravagant").

In addition, pooled special-needs trusts do not allow disabled persons to divert and preserve assets for their heirs. *Cf. Miller v. Ibarra*, 746 F. Supp. 19, 34 (D. Colo. 1990) (explaining that Congress tightened the asset-counting rules for trusts in 1986 to "prevent wealthy individuals, otherwise ineligible for Medicaid benefits, from making themselves eligible by creating irrevocable trusts in order to preserve assets for their heirs"); *Lewis*, 685 F.3d at 333 ("Individuals have gained access to taxpayer-funded healthcare while

retaining the benefit of their wealth and the ability to pass that wealth to their heirs. Congress understandably viewed this as an abuse . . . ."). All pooled special-needs trusts, including the trust operated by Lutheran Social Service, must contain a pay-back provision requiring any funds remaining in a sub-account after the beneficiary's death to be used to repay the State for the Medical Assistance benefits received by the beneficiary. Minn. Stat. § 256B.056, subd. 3b(d); *accord* 42 U.S.C. § 1396p(d)(4)(C)(iv).

Lastly, exempting Pfoser's transfer of funds into the pooled special-needs trust does not nullify the automatic exception in Minnesota Statutes section 256B.0595, subdivision 4(a)(6), which exempts "transfers . . . into a trust established for the sole benefit of an individual who is under 65 years of age who is disabled as defined by the Supplemental Security Income program." *Accord* 42 U.S.C. § 1396p(c)(2)(B)(iv). The automatic exception in subdivision 4(a)(6) is just that—automatic. Exempting a disabled person age 65 or older upon a satisfactory showing of the required intent in no way nullifies the benefit of the automatic exception for disabled persons who are under age 65 and need not make an additional showing.

In sum, we conclude that Pfoser has demonstrated that his equitable interest in the pooled special-needs trust was approximately equal to the value of the $28,010 transferred into the trust sub-account. Accordingly, we hold that Pfoser made a satisfactory showing that he intended to receive valuable consideration and was not subject to a transfer penalty. *See* Minn. Stat. § 256B.0595, subd. 4(a)(4); 42 U.S.C. § 1396p(c)(2)(C)(i). We therefore

conclude that substantial evidence does not support the Commissioner's decision to uphold the penalty.[11]

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

ANDERSON, J., took no part in the consideration or decision of this case.

---

[11] Because we resolve this case under the valuable-consideration standard, we do not consider whether Pfoser intended to receive, or actually received, fair market value. *See* Minn. Stat. § 256B.0595, subd. 4(a)(4) (allowing a showing of the intent to receive fair market value "or" other valuable consideration); *accord* 42 U.S.C. § 1396p(c)(2)(C)(i).

Policy Memo	
KDHE-DHCF POLICY NO: 2022-02-01	**From: Erin Kelley, Senior Manager**
Date: February 07, 2022	**Medical KEESM Reference(s): 5621(2), 5721(9), 5722(1), 5722(2), and 5723.2**
RE: Transfer to an Exempt Pooled Disability Payback Trust After Age 64	**Program(s): LTC Programs**

This memo sets forth instructions for implementation of policy changes concerning the application of an inappropriate transfer penalty when funding an exempt pooled disability payback trust after age 64. The Medical KEESM manual will be updated with the next scheduled revision.

I. BACKGROUND

A properly structured irrevocable pooled disability payback trust is exempt as a resource for eligibility purposes. See Medical KEESM 5621(2). By policy, the trust may be created and funded by a grantor/beneficiary of any age and still qualify for exempt status. However, any assets transferred to the trust after age 64 are subject to an inappropriate transfer penalty for long-term care coverage purposes. See Medical KEESM 5722(1). While the trust itself may be an exempt resource, funding of the trust at age 65 or older may still be subject to a disqualifying penalty period for long term care coverage.

In general, an inappropriate transfer penalty may be negated by showing that the transfer was made either for adequate consideration or with the intent to receive adequate consideration. See Medical KEESM 5721(9) and 5723.2 respectively. These provisions have previously not been routinely applied to transfers to pooled trusts after age 64. Such transfers were generally simply penalized as inappropriate since adequate consideration was deemed to have not been received. However, recent judicial decisions have prompted a revisit of existing policy.

B 1

II. Policy

Effective with the issuance of this memo, a potentially otherwise disqualifying inappropriate transfer penalty imposed due to funding of an exempt pooled disability payback trust after age 64 may be negated by a satisfactory showing that the trust grantor/beneficiary received, or intended to receive, adequate consideration for the transferred assets. To negate/rebut the agency assumption that the transfer was uncompensated, the applicant/recipient must thoroughly demonstrate either of the following:

A. Actuarially Sound

Evidence must be presented that the value of all assets transferred to the trust after age 64 will be used for the benefit of the trust beneficiary within his/her life expectancy. In other words, the transfer must be actuarially sound. Life expectancy shall be established according to the T-4 Life Expectancy Table in the Medical KEESM Appendix based on the **beneficiary's age at the time of the transfer(s). If the applicant/recipient fails to provide** documentation that the transfer(s) is/are actuarially sound in this manner, the transfer(s) in full is/are considered an inappropriate transfer subject to penalty.

Example 1: An 85-year old woman with a life expectancy of 6.91 years transfers $20,000 to a pooled trust with the stated intent to use the funds to pay the difference between the cost of a shared vs private room in the nursing home once she qualifies for Medicaid coverage. Since the difference in the shared vs private room rate for the facility she is residing is a $500 per month, the funds she transferred to the trust are anticipated to be fully expended on her behalf in 40 months, which is well within her agency-established life expectancy. Therefore, the transfer is considered actuarially sound with adequate consideration to be received in her lifetime in return for the transfer, and no inappropriate transfer penalty would be applied.

Example 2: A 75-year old man with a life expectancy of 11.8 years transfers $10,000 to a pooled trust with the stated intent to use the funds for non-covered out-of-pocket medical expenses. The grantor/beneficiary provides verification that these expenses have averaged about $1,000/year over the last several years. Since it is anticipated that the transferred funds will be fully expended on his behalf in the next 10 years, which is within his agency-established life expectancy, the transfer is considered actuarially sound. No inappropriate transfer penalty would be applied.

Example 3: A 73-year old man with a life expectancy of 12.33 years transfers $12,000 to a pooled trust with the stated intent to use the funds for non-covered out-of-pocket medical expenses. The grantor/beneficiary provides verification that these expenses have averaged $500/year over the last several years. Since it is not anticipated that the transferred funds will be fully expended on his behalf in the next 12.33 years, which is within his agency-established life expectancy, the transfer is not considered actuarially

sound. This transfer would be considered an inappropriate transfer subject to a transfer of property penalty.

Note: In example 3, because the transfer did not intend to receive adequate consideration at the time of the transfer, the entire $12,000 is subject to the transfer of property penalty.

B. Intent

The applicant/recipient must demonstrate that when the trust was funded, there was an intent to receive adequate consideration. Evidence must be presented that based on the non-covered medical needs of the grantor/beneficiary at the time the pooled trust was funded after age 64, the funds were anticipated to be fully expended within his/her life expectancy. Should unforeseen circumstances change after funding of the trust which subsequently makes expenditure of all transferred funds unlikely or impossible within his/her life expectancy, adequate consideration is still considered to have been received if the original demonstrated intent would have been actuarially sound.

Note that a simple affidavit, without other compelling documentation, indicating the grantor/beneficiary intended to fully use the funds for a stated purpose within his/her life expectancy does not constitute sufficient evidence for purposes of this policy. In general, to be compelling, the evidence presented must be documented rather than attested.

Example 4: Same 85-year old woman as in Example 1 above. If she unexpectedly transitions from the nursing home to HCBS after 6 months, she will have $17,000 remaining in the trust that will likely not be expended on her behalf within her remaining lifetime. But, since her original intent was to fully spend the funds within her life expectancy, she will not be penalized due to an unanticipated change in circumstances. No transfer penalty would be applied.

However, if it had been known at the time of the funding that the nursing home stay was indeed only temporary and not permanent, then the transition to HCBS could be foreseen, negating any claim that the intent was to make the transfer actuarially sound. In that instance, a transfer penalty would be appropriate.

Example 5: A 65-year old man with a life expectancy of 17.81 years transfers $15,000 to a pooled trust with the stated intent to use the funds to travel out-of-state to visit his younger brother once a year. The documented cost of the annual excursion is approximately $1,500. It is anticipated the funds will be fully expended in 10 years. After 3 years, his brother unexpectedly passes away. He applies for long term care coverage at age 69 with $10,500 remaining in the trust account, which will likely never be expended within his lifetime. Since the intent at the time of funding was to expend all the funds within his life expectancy, the transfer is considered actuarially sound. He will not be penalized for the unanticipated change in circumstances. No transfer penalty would be applied.

Example 6: An 81-year old woman with a life expectancy of 9.04 years transfers $5,500 to a pooled trust. Upon review, the worker finds that there is no stated intent for how the funds would be used, other than the joinder agreement stating these monies are excess resources. As the funds were transferred to a pooled trust after she turned 65-years old, the entire $5,500 is considered an inappropriate transfer subject to a transfer of property penalty.

Note: When multiple transfers to the trust occur after age 64, each transfer is evaluated separately based on the date of the transfer and how the funds are/were intended to be used. This may result in some transfers being considered actuarially sound, or intended to be actuarially sound, while others are penalized as an inappropriate transfer. When multiple transfers are to be penalized, see Medical KEESM 5724.3.

III. PROCESS

The process for eligibility staff has not changed. All trusts, including pooled disability payback trusts (i.e. ARCare Trust, Midwest Special Needs Trust, and Northview Developmental Disabilities Trust), along with all supporting documentation, shall continue to be sent to KDHE Eligibility Policy for review. See Medical KEESM 5600. KDHE Eligibility Policy will determine the availability of the trust as a resource and whether an inappropriate transfer has occurred. If additional information is needed, eligibility staff may be directed to request the information from the applicant/recipient and forward to KDHE Eligibility Policy upon receipt for further review.

IV. QUESTIONS

For questions or concerns related to this document, please contact the KDHE Medical Policy Staff at KDHE.MedicaidEligibilityPolicy@ks.gov.

Erin Kelley	Senior Manager
Amanda Corneliusen	Family Medical Program Manager
Jessica Pearson	Elderly & Disabled Program Manager
Sara Reese	Elderly & Disabled Program Manager
Shawna Pilkington	Family Medical Program Manager

Questions regarding any KEES issues are directed to the KEES Help Desk at KEES.HelpDesk@ks.gov.

SOCIAL SECURITY ADMINISTRATION
Office of Hearings Operations

DECISION

IN THE CASE OF	DISPUTE OF
[redacted] (Claimant)	Eligibility
[redacted] (Social Security Number)	

JURISDICTION AND PROCEDURAL HISTORY

The claimant is an individual who began receiving Supplemental Security Income (SSI) benefits on August 2, 1995. On January 15, 2021, the Social Security Administration issued a notice stating that the claimant was ineligible for SSI benefits beginning March 2019. The field office determined that the claimant was ineligible for benefits because of joint accounts at Wells Fargo and transfer of assets into a WisPACT Trust. The field office determined that the claimant was ineligible in December 2018 and beginning March 2019 onward. (3B).

On January 25, 2021, the claimant filed a request for reconsideration, disputing the determination of ineligibility of benefits. Upon reconsideration dated January 26, 2021, the agency affirmed its determination. Thereafter, the claimant filed a written request for hearing on February 10, 2021 (20 CFR 416.1429 *et seq*).

Later communications and documents from the field office show that issues with joint accounts at Wells Fargo and associated overpayments for the period of ineligibility had been resolved. Ineligibility and overpayments due to being on joint accounts at Wells Fargo were removed from the claimant's record. The field office further determined that the claimant's trust was not a resource, but that she was subject to a period of ineligibility for funds transferred to the trust after the age of 65 per SI 01120.203D1. (4E).

On October 19, 2021, the undersigned held a telephone hearing (20 CFR 416.1436(c)) due to the extraordinary circumstance presented by the Coronavirus Disease 2019 (COVID-19) Pandemic. All participants attended the hearing by telephone. The claimant is represented by Amanda Pirt Meyer, an attorney.

ISSUE

The issue is whether the claimant received income within the meaning of section 1612 of the Social Security Act (Act), or resources under section 1613 of the Act, that would result in a reduction of, or ineligibility for SSI benefits under section 1611 of the Act.

See Next Page

After careful consideration of all the evidence of record, the undersigned concludes that the claimant's resources does not cause a reduction of, or ineligibility for, SSI benefits from January 1, 2021 to November 16, 2021.

APPLICABLE LAW

An individual is eligible for SSI benefits if he or she is an aged, blind, or disabled person who meets certain residency and citizenship requirements, and who has limited income and resources (20 CFR 416.202, 416.1100, 416.1205). If you live with your spouse, or are a child living with your parents, or someone living with an essential person or sponsor, we deem to you the income and resources of your spouse, parent, or essential person/sponsor.

If your countable income and/or resources do not exceed the applicable limits, they have no effect on your eligibility for SSI (20 CFR 416.202). However, the amount of your countable income reduces the amount of your SSI benefits (20 CFR 416.1100). We generally do not count the first $20 of income received in a month (20 CFR 416.1112, 416.1124). We also do not count the first $65 of earnings and one-half of earnings over $65 received in a month (20 CFR 416.1112). There is a dollar for dollar reduction for monthly countable unearned income (20 CFR 416.1123). If countable resources exceed the limits, you are not eligible for any payment (20 CFR 416.202, 416.1100, 416.1205).

Income is defined as any item an individual receives in cash or in-kind that can be used to meet his or her needs for food or shelter (20 CFR 416.1102). There are different types of income, earned and unearned, and we have rules for counting each. Earned income consists of wages; net earnings from self-employment; refunds of Federal income taxes and advance payments by employers made in accordance with the earned income credit provisions of the Internal Revenue Code; payments for services performed in a sheltered workshop or work activities center; and certain royalties and honoraria (20 CFR 416.1110 through 416.1112). Types of unearned income include in-kind support and maintenance; annuities, pensions, and other periodic payments; alimony and support payments; dividends, interest, and certain royalties; rents; and death benefits (20 CFR 416.1104, and 416.1120 through 416.1124). Certain types of income, both earned and unearned, are not counted in our calculation of total income (20 CFR 416.1112 and 416.1124). However, in some situations we must consider the income of certain people with whom you live as available to you, and part of your income (20 CFR 416.1104 and 416.1160 *et seq.*)

Generally, the more income you have the less your benefit will be (20 CFR 416.1100). The amount of your monthly SSI payment will be computed by reducing the benefit rate by the amount of countable income (20 CFR 416.420). In evaluating your SSI eligibility and benefit amount, we count income on a monthly basis (20 CFR 416.1100, 416.1111, and 416.1123).

Resources are cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance, with the exception of the exclusions outlined in 20 CFR, Part 416, Subpart L. Resources may include items such as stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts, and similar items (20 CFR 416.1201).

See Next Page

However, certain types of items are not counted as resources, including the home, if it is your primary residence (20 CFR 416.1212); household goods and personal effects (20 CFR 416.1216); and an automobile, if used for transportation (20 CFR 416.1218), among other exclusions (*See, generally*, 20 CFR, Part 416, Subpart L).

As of January 1, 1989, the statutory limit for resources is $2,000 for an individual, and $3,000 for an individual with an eligible spouse (20 CFR 416.1205). Resource eligibility is a determination made as of the first moment of each calendar month and is applicable for the entire month. Subsequent changes have no effect until the following month's resources determination. Thus, resources eligibility (or ineligibility) exists for an entire month at a time (20 CFR 416.1207).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant became eligible to receive SSI benefits on August 2, 1995.

2. The field office determination that the claimant is not ineligible and subject to overpayments due to joint accounts at Wells Fargo is correct and upheld.

The claimant provided sufficient documentation to rebut ownership of the Wells Fargo account. (11D, 1E-3E). The undersigned agrees with the determination of the Field Office that the claimant is not ineligible or subject to overpayments due to these accounts. (4E).

3. During the period of December 2018 and beginning March 2019 onward the claimant's resources did not make her ineligible for SSI benefits (20 CFR 416.202, 416.1100, and 416.1205).

The claimant is not subject to a period of ineligibility for funding her trust after the age of 65. The field office correctly determined that the claimant's trust was not a countable resource. 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. 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, per POMS SI 01120.203:

- 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 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.

The claimant's trust documents show that the above listed criteria are met. (1D, 2D, 9E).

See Next Page

The field office erroneously determined that the claimant was subject to a period of ineligibility, relying on POMS SI 01120.203D.1, which provides that a pooled trust can be an exception to a countable resource, but transfer of a resource into a trust for an individual over age 65 may result in a transfer penalty. It is important to note that this POMS does not automatically provide for a transfer penalty for an individual over the age of 65, although this appears to be the manner in which it was implemented by the field office. The field office erroneously failed to consider whether the claimant received fair market value for the resources that she transferred to her WisPACT Trust.

POMS SI 01150.001 and 01150.003 provide that when there is transfer of an asset, development and a determination must be made as to whether the claimant received fair market value. If fair market value was not received, a period of ineligibility may apply. POMS SI 01150.003 specifically provides that if the individual received fair market value for the transferred resource, the period of ineligibility does not apply.

The claimant received fair market value for the assets that she transferred. The field office was under the erroneous impression that the claimant sold her home. In fact, she sold a parcel of farmland that was a portion of the land on which her home is located. The claimant clarified that in June 2019, she sold the parcel of property for $185,000 for the purpose of replacing her vehicle, making repairs to her property, and other similar actions for her health and maintenance. The remaining bulk of the sale funds of $126,000 was placed into the WisPACT trust in June 2019. (1D). The claimant received fair market value for her parcel of land and funded her trust. She continues to receive fair market value for the funds placed in the trust. The claimant's trust records show that she had approximately 14,85 years of estimated life at the time she invested in the trust. This averages to approximately $8,484 a year in compensation. The claimant's financial records show that she uses approximately that amount yearly. (3D-5D, 8D). The trust pays for a variety of her expenses and also provides the service of managing her money. These factors all evidence the claimant has and is receiving fair market value for the transfer of her assets.

The claimant's resources during her period of eligibility did not affect her SSI benefits from December 2018 and beginning March 2019 onward. (20 CFR 416.410, 416.412, and 416.1205).

See Next Page

DECISION

Based on the hearing request regarding the determination that the claimant had resources that effect the eligibility for or amount of SSI benefits, the undersigned finds that the claimant's resources did not subject her SSI benefits to a reduction in December 2018 and beginning March 2019 onward, pursuant to section 1611 of the Social Security Act, and she was not overpaid.

/s/ *Sandra R. DiMaggio Wallis*
Sandra R. DiMaggio Wallis
Administrative Law Judge

November 24, 2021
Date

*0606CIPA1014906*NOTAFP X1:CIPAFP ODARS.R21119.PS1K 0000000000000000000CP02021111921494001032?3

SOCIAL SECURITY ADMINISTRATION
Office of Hearings Operations

DECISION

IN THE CASE OF	**DISPUTE OF**
Sarah A. ______ (Claimant)	Eligibility

X XX - XX - XXXX
(Social Security Number)

JURISDICTION AND PRQCEDURAL HISTORY

The claimant is an individual who began receiving Supplemental Security Income (SSI) benefits beginning November 2007. Exhibit 2D. On January 9, 2019, the Social Security Administration issued the claimant a notice stating that she was ineligible for SSI benefits from December 2017 through February 2020 due to receiving an inheritance and then transferring that resource at less than fair market value. Exhibit 9D/1.

On January 28, 2019, the claimant filed a request for reconsideration, disputing the determination of ineligibility of benefits. Exhibit 12D. Upon reconsideration dated April 4, 2019, the agency affirmed its initial determination. Exhibit 15D. Thereafter, the claimant filed a written request for hearing on April 22, 2019 (20 CFR 416.1429 *et seq).* Exhibit 17D.

The claimant appeared and testified at a hearing held on December 12, 2019, in San Diego, CA. The claimant is represented by Vicki L. Vaughan, an attorney.

ISSUE

The issue is whether the claimant received income within the meaning of section 1612 of the Social Security Act (Act), or resources under section 1613 of the Act, that would result in a reduction of, or ineligibility for SSI benefits under section 1611 of the Act.

After careful consideration of all the evidence of record, the undersigned concludes that the claimant's resources does not cause a reduction of, or ineligibility for, SSI benefits from January 2018 through February 2020.

APPLICABLE_LAW

An individual is eligible for SSI benefits if he or she is an aged, blind, or disabled person who meets certain residency and citizenship requirements, and who has limited income and resources (20 CFR 416.202, 416.1100, 416.1205). If you live with your spouse, or are a child living with your parents, or someone living with an essential person or sponsor, we deem to you the income and resources of your spouse, parent, or essential person/sponsor.

See Next Page

If your countable income and/or resources do not exceed the applicable limits, they have no effect on your eligibility for SSI (20 CFR 416.202). However, the amount of your countable income reduces the amount of your SSI benefits (20 CFR 416.1100). We generally do not count the first $20 of income received in a month (20 CFR 416.1112, 416.1124). We also do not count the first $65 of earnings and one-half of earnings over $65 received in a month (20 CFR 416.1112). There is a dollar for dollar reduction for monthly countable unearned income (20 CFR 416.1123). If countable resources exceed the limits, you are not eligible for any payment (20 CFR 416.202, 416.1100, 416.1205).

Income is defined as any item an individual receives in cash or in-kind that can be used to meet his or her needs for food or shelter (20 CFR 416.1102). There are different types of income, earned and unearned, and we have rules for counting each. Earned income consists of wages; net earnings from self-employment; refunds of Federal income taxes and advance payments by employers made in accordance with the earned income credit provisions of the Internal Revenue Code; payments for services performed in a sheltered workshop or work activities center; and certain royalties and honoraria (20 CFR 416.1110 through 416.1112). Types of unearned income include in-kind support and maintenance; annuities, pensions, and other periodic payments; alimony and support payments; dividends, interest, and certain royalties; rents; and death benefits (20 CFR 416.1104, and 416.1120 through 416.1124). Certain types of income, both earned and unearned, are not counted in our calculation of total income (20 CFR 416.1112 and 416.1124). However, in some situations we must consider the income of certain people with whom you live as available to you, and part of your income (20 CFR 416.1104 and 416.1160 *et seq.)*

Generally, the more income you have the less your benefit will be (20 CFR 416.1100). The amount of your monthly SSI payment will be computed by reducing the benefit rate by the amount of countable income (20 CFR 416.420). In evaluating your SSI eligibility and benefit amount, we count income on a monthly basis (20 CFR 416.1100, 416.1111, and 416.1123).

Resources are cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance, with the exception of the exclusions outlined in 20 CFR, Part 416, Subpart L. Resources may include items such as stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts, and similar items (20 CFR 416.1201).
However, certain types of items are not counted as resources, including the home, if it is your primary residence (20 CFR 416.1212\ household goods and personal effects (20 CFR 416.1216); and an automobile, if used for transportation (20 CFR 416.1218), among other exclusions *(See, generally,* 20 CFR, Part 416, Subpart L).

As of January 1, 1989, the statutory limit for resources is $2,000 for an individual, and $3,000 for an individual with an eligible spouse (20 CFR 416.1205). Resource eligibility is a determination made as of the first moment of each calendar month and is applicable for the entire month. Subsequent changes have no effect until the following month's resources determination. Thus, resources eligibility (or ineligibility) exists for an entire month at a time (20 CFR 416.1207).

See Next Page

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant became eligible to receive SSI benefits beginning November 7, 2007 (Exhibit 2D/2).

2. During the period of eligibility, the claimant had countable resources.

3. During the period of January 2018 through February 2020, the claimant's resources did not ma e her ineligible for SSI benefits (20 CFR 416.202, 416.1100, and 416.1205).

On January 9, 2019, the Social Security Administration notified the claimant that she was not eligible for SSI benefits for the period of December 2017 through February 2020 due to receiving an inheritance and then transferring that resource at less than market value. Exhibit 9D/1. The claimant received a pension in the amount of $47,544.00 (Exhibit 5D/5) and the agency notified the claimant that the pension made her ineligible for SSI benefits due to excess income for the month of December 2017. Exhibit 9D/1. The agency further notified the claimant that during the same month (December 2017), the claimant transferred resources of $22,633.30 in cash to her Special Needs Trust Foundation (SNTF) Pooled Trust. Id.

The agency explained that while the trust is not countable as a resource, a transfer of resources to a trust for an individual age 65 or over might result in a transfer penalty. The agency stated that an exception for a period of ineligibility for transfers of resources to a trust only applies if the individual is under the age of 65. The agency stated that in December 2017, the claimant was over the age of 65, and she did not meet any other exceptions to the ineligibility period for transferring a resource at less than fair market value. The agency determined that based on the amount and date of money received and then transferred to the trust in the amount of $22,633.30, the claimant was not eligible for SSI from December 2017 through February 2020. Exhibit
9D/1-2.

In a Notice of Reconsideration dated April 4, 2019, the agency affirmed its *prior* determination of ineligibility but indicated a different ineligibility period from January 20I 8 through February 2020. The agency stated that the claimant gave away a retirement fund or sold it for less than it was worth in December 2017, thus causing the special needs trust to be a countable resource.
Exhibit I5D/1. The agency stated that a person who gives away a resource or sells it for less than it is worth might be ineligible for *SST* for up to 36 months. Id.

Upon appeal, the claimant asserted that the placement of her retirement funds into a special needs trust was not a transfer for less than it is worth. The claimant indicated that the funds were to be used for purchases of goods and services for her benefit only; therefore, they have the exact same value as prior to putting them into the trust. Exhibit 17D.

The claimant has argued that she transferred the pension balance of $22,633.30 into the Sarah A. _ Special Needs Trust with the Special Needs Trust Foundation of San Diego. Exhibit SD/3. She asserts that the trust meets all of the requirements of a Pooled Special Needs Trust under 42 U.S.C. I396p(d)(4)(C). For example, the Special Needs Trust Foundation of San

See Next Page

Diego is a not for profit association, which established and manages the trust; the account is established solely for the benefit of the claimant; and the appropriate payback provisions are provided in the trust. Id.

The documentary evidence the claimant submitted included a copy of a Du Pont retirement plan payment dated November 30, 2017, to the payee Sarah A.________ in the amount of $47,544.00. Exhibit 5D/5. The claimant submitted a Wells Fargo Bank check No. 1389 from Sarah, dated December 21, 2017, with a pay to the order of "Sarah Sarah A.________ Special Need Trust" in the amount of$22,633.30. Exhibit 4D/2. A submitted copy of a bank statement indicated that the check amount was withdrawn from the claimant's Wells Fargo bank account on January 10, 2018. Exhibit 4D/4. The claimant has also submitted the relevant pooled special needs trust joinder agreement signed and dated October 18, 2017, by the beneficiary and November 17, 2017, by the trustee. Exhibit 30D/8.

On January 31, 2018, the claimant's representative sent the Social Security Administration field office in Oceanside, California, a certified mail reporting of a one-month spend down on behalf of the claimant for the month of December 2017. Exhibit 5D/2. The notice indicated that the claimant received $47,544.00 from a pension that was dispersed in December 2017 and she spent down the funds by purchasing an automobile and automobile insurance. In addition, the reporting indicated a balance of $22,633.30, which was deposited into a Pooled Special Needs Trust as authorized under 42 U.S.C. 1396p(d)(4)(C). Id.

In a letter dated May 22, *2018*, from the Special Needs Trust Foundation of San Diego, the not for profit organization verified that they received a check on December 27, 2017, payable to the Sarah.________ Special Needs Trust in the amount of $22,633.30. Exhibit 8D/2. A bank account for the Trust was established and the check was deposited into the account on January 10, 2018. Id. The organization provided documentary evidence of the check and bank statement verifying the deposit. Exhibit 80/3.

Upon reviewing the applicable law, the Social Security Act at Section 1917 (d)(4)(A) and (C) (42 USC Section 1396p(d)(4)(A) and (C)) provides for two exceptions to the general rule of counting trusts as income and resources.

The first exception under Section 1917 (d)(4)(A) applies for trusts created for an individual under the age of 65 and disabled. The claimant was age 68 when the trust was created and this section would therefore result in the trust being counted as income and resources since the claimant does not qualify under this provision. The undersigned notes that the agency discussion of its rationale in an internal case analysis focused on this exception, providing that since the claimant was not under the age of 65; her trust was a countable resource. Exhibit 24F/57.

However, the agency did not adequately evaluate the other exception under Section 1917 and agency policy SI 01150.121-.125. Exhibit 24F/5-7. The second exception under 1917(d)(4)(C) indicates that "pooled trusts" are not considered a resource if the trust contains the assets of an individual who is disabled and meets the following conditions: (i) The trust is established and managed by a nonprofit association; (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these

See Next Page

accounts; (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled ... by such individuals; and (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained in the trust by the trust, the trust pays the State from such remaining amounts of medical assistance.

Upon careful review of the documentary evidence in the record, including the claimant's trust agreement with the Special Needs Trust Foundation of San Diego (Exhibit 30D), the undersigned is satisfied that all of the statutory requirements of Section 1917(d)(4)(C) described above have been met. The applicable legal provision does not provide for an age limit of being under the age of 65, so this is not a valid basis for exclusion contrary to the agency provided rationale. The undersigned concurs with the claimant's argument that the trust at issue is managed by a non-profit association; a separate account is maintained for each beneficiary; the trust was established by the claimant, solely for the benefit of the claimant, who is disabled; and the required Medi- Cal pay-back language is included in the special needs trust. Exhibits 27D/4, 29D/5, 30D. Therefore, the undersigned finds that the claimant was within the law when she established her pooled special needs trust at the age of 68.

Upon careful reviewing of the record and the applicable law, the undersigned further finds that the claimant's transferred pension funds satisfied the requirements for a pooled special needs trust and qualified her for an exception as a countable resource under section 191 7(D)(4)(C). The undersigned also concurs with the claimant's argument that the placement of her retirement funds into a valid special needs trust was not a transfer for less than fair market value and that the agency improperly imposed a transfer penalty. Exhibit 290/5. The basis for the agency's transfer penalty determination was that the claimant gave away a retirement fund or sold it for less than it was worth in December 2017. Exhibit 15D/l . The agency stated that a person who gives away a resource or sells it for less than it is worth might be ineligible for SSI for up to 36 months. Id. However, the agency provided no proof or evidence that the claimant gave away a resource or sold it for less than it was worth, and they provided no rationale for how they came to such a conclusion. Id. The claimant has indicated that the special needs trust funds were to be used for purchases of goods and services for her benefit only and; therefore, they have the exact same value as prior to putting them into the trust. Exhibit 17D.

The undersigned finds that the documentary evidence in the record supports the claimant's position. The undersigned concurs with the claimant's arguments in the representative brief on this issue that the agency improperly imposed a transfer penalty. Exhibit 29D/5-15. The funding of the special needs trust did not constitute a disposition of assets for less than fair market value. The claimant has retained beneficial ownership of the assets for her benefit only via the pooled special needs trust she created. The claimant has received fair market value for the placement of the funds into her special needs trust, as the value of the assets remained unchanged as indicated in the bank account records. In addition, the claimant will have received valuable consideration for the placement of funds into her special needs trust within her life expectancy and the submitted balance sheets support as much. Exhibit 29D/50-52. The record clearly demonstrates that the claimant transferred the remaining balance of her pension funds after purchase of an automobile and insurance into a valid pooled special needs trust that is for her benefit only. The pooled special needs trust satisfied the statutory requirements and qualified as an exception under the law. Moreover, the undersigned finds no evidence that the pension transfer into the

See Next Page

pooled special needs trust was at less than fair market value causing it to be a countable resource. Accordingly, the undersigned reverses the agency determination of an imposed transfer penalty of a period of SSI ineligibility.

The claimant's resources during her period of eligibility did not affect her SSI benefits from January 2018 through February 2020 (20 CFR 416.410, 416.412, and 416.1205). Accordingly, the agency shall reinstate the claimant's SSI benefits retroactively to the appropriate date(s) of ineligibility with no overpayment due.

DECISION

Based on the hearing request regarding the determination that the claimant had resources that effect the eligibility for or amount of SSI benefits, the undersigned finds that the claimant's resources did not subject her SSI benefits to a reduction from January 2018 through February 2020, pursuant to section 1611 of the Social Security Act.

/s/ Andrew Verne
Andrew Verne
Administrative Law Judge

June 16, 2021
Date

SOCIAL SECURITY ADMINISTRATION
Office of Hearings Operations

DECISION

IN THE CASE OF	DISPUTE OF
[redacted] (Claimant)	Overpayment
[redacted] (Social Security Number)	

JURISDICTION AND PROCEDURAL HISTORY

The claimant is an individual who began receiving Supplemental Security Income (SSI) benefits on June 4, 1992. On September 10, 2019, December 12, 2019, and February 13, 2020, the Social Security Administration issued notices informing the claimant that she was overpaid Title XVI benefits due to income and/or resources (Exhibits 1B, 12B, and 16B). The February 13, 2020 notice stated that she was overpaid in the amount of $10,002.00 from December 1, 2018 to December 1, 2019 (Exhibit 16B). On December 16, 2019, the claimant filed her initial request for reconsideration, disputing the facts and the amount of the overpayment (Exhibit 13B). An additional request was made January 13, 2020 (Exhibit 2B). The claimant's reconsideration requests were denied on February 5, 2020 with a finding of ineligibility due to resources in the amount of $70,000 (Exhibit 3B). Thereafter, the claimant filed requests for hearing on April 10, 2020 and April 25, 2020 (Exhibits 4B-6B) (20 CFR 416.1429 *et seq.*).

The evidence of record supports a fully favorable decision; therefore, no hearing has been held (20 CFR 416.1448(a)). The claimant is represented by Elliott Andalman, Esq.

ISSUES

The issue is whether the claimant has been overpaid benefits under section 1631(b)(1)(A) of the Social Security Act (Act). An overpayment includes a payment of more than the amount due for any period administered by the Social Security Administration (20 CFR 416.537(a)).

After careful consideration of all the evidence, I find that the claimant was not overpaid.

APPLICABLE LAW

Under the authority of Title XVI of the Social Security Act, where the claimant has been overpaid benefits, the Social Security Administration will seek adjustment or recovery of benefits (20 CFR 416.535, 416.560, and 416.570). I must consider all available evidence related to the overpayment (20 CFR 416.582).

See Next Page

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, I make the following findings:

1. The claimant placed $70,000 into a sub-trust account with First Maryland Disability Trust in November 2018.

The record establishes the claimant's receipt of approximately $70,000 from a distant relative of her late husband. The claimant's representative payee contacted an attorney upon learning of the inheritance and the attorney was retained to assist in establishing a sub-trust account with First Maryland Disability Trust in order to manage the funds in light of the claimant's disability status. The sub-trust account was established on November 19, 2018 with an initial funding of $70,000. Proceeds from the cashing-in of a life insurance policy were also reportedly later deposited (Exhibits 19B and 6D).

2. The First Maryland Disability Trust is a pooled trust established under Section 1917(D)(4)(C) of The Act and it is not a countable resource.

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. 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, as per POMS SI 01120.203:

- 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 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.

The First Maryland Disability Trust is a pooled trust with a Master Trust Agreement dated September 2, 2008 (with amendments April 29, 2009, March 5, 2010, and November 2, 2010). It was restated on December 21, 2015 (Exhibits 19B and 5D). The First Maryland Trust's IRS section 501(c) tax-exempt certification dated June 1, 2006 shows that the trust is considered established and managed by a nonprofit association for applying the pooled-trust exception. The trust maintains separate accounts for its disabled beneficiaries, the claimant's irrevocable sub-account was established by her own actions (with the assistance of her representative payee), and the trust includes the appropriate disposition language (Exhibit 5D). These findings are also consistent with the affidavit provided by its Executive Director (Exhibit 19B/14-17) and the statement made by the Trust Administrator (Exhibit 5D/2).

See Next Page

As such, I find the First Maryland Disability Trust is a pooled trust that meets all of the requirements for the Medicaid exception to apply for SSI purposes; therefore, any assets held in this arrangement are not considered a countable resource for SSI purposes.

3. The claimant was an individual age 65 or over at the time of the transfer of funds.

Although the First Maryland Disability Trust is a pooled trust that meets all of the requirements and the assets are not considered a countable resource for SSI purposes, the transfer of resources into a trust for an individual age 65 or over may result in a transfer penalty. Specifically, if the trust is not countable as a resource, money or property transferred by the individual into the trust is a transfer of resources that is subject to the period of ineligibility for transferring a resource at less than fair market value (POMS SI 01120.203 and SI 01150.121).

The claimant's date of birth is October 3, 1946; therefore, she was 72 at the time she transferred funds and established her sub-account in the First Maryland Disability Trust (Exhibit 5D).

4. The claimant receives fair market value for the resources transferred.

If a claimant (or spouse, if any) transfers a resource for less than fair market value on or after December 14, 1999, the claimant may be subject to a period of ineligibility for SSI not to exceed 36 months. If the claimant received fair market value for the transferred resource, the period of ineligibility does not apply (POMS SI 01150.005 and SI 01150.110; 42 USC 1382b).

Fair market value is the current market value of a resource at the time the resource transfers, while the current market value of a resource is the going price that it can be reasonably expected to sell for on the open market in the geographic area involved. Compensation is the cash or other valuable consideration provided in exchange for the resource. Compensation can include real or personal property the individual received in exchange for the resource. Compensation also may include in-kind support and maintenance or services to be provided to the individual because of the transfer (POMS SI 01150.005B). A transferor receives compensation when he or she receives something of value pursuant to a legally binding agreement (*e.g.*, a contract, a bill of sale, a deed) that was in effect at the time of transfer. The transferor may actually receive the compensation before, at, or after the actual time of transfer (POMS SI 01150.005C).

The claimant's First Maryland Disability Trust sub-account is irrevocable and agrees to provide services for the life of the claimant (with caveats as per the agreement). As such, the value of that portion of the compensation is based on the yearly value of the services and the estimated years of life remaining per the life expectancy table developed by the SSA's Office of the Chief Actuary (POMS SI 01150.005D). As the claimant was 72 at the time of transfer, there was an estimated 14.06 years of life remaining (POMS SI 01150.005F).

The claimant's counsel has provided affidavits and/or statements from experts, the claimant's representative payee/health care advocate, the trust's Executive Director, and a social worker from an eldercare consulting firm in support of their argument. These statements detail the array of services and benefits the claimant has received, receives on an ongoing basis, or will receive in the future as needed, including financial investment and budget management services, non-

See Next Page

covered medical care (such as dental treatment, additional therapies, massage treatment, and home nursing aides), pet care items, personal care items, home utilities, the management of her personal items while in long-term care (such as packing/storage/cleaning of her apartment), and legal fees for guardianship or similar proceedings. The statements also include references to the trust's value in the form of "peace of mind" (due to financial protections, reduced risk, availability of retained charitable funds, if needed, etc.) (Exhibit 19B). An investment advisor further provided a detailed analysis on the "sum of the calculable and more speculative valuable consideration components" received by the claimant and opined that she would actually receive greater than the amount she transferred (Exhibit 19B/33).

In addition to the services and benefits mentioned above, the claimant's trust has purchased tangible comfort items and necessities, including furniture, a walker, a stationary exercise wheel, a transport chair, shoes, clothing, and linens, which are presumed to have been purchased at fair market value (Exhibit 19B).

I find sufficient evidence to support the claimant's receipt of fair market value for the transferred resource in the form of tangible goods, as well as the services and benefits provided previously, currently, and in the future. As such, the period of ineligibility does not apply.

5. The claimant is not subject to a period of ineligibility.

As the claimant received fair market value for the transferred resource, the period of ineligibility does not apply (POMS SI 01150.005 and SI 01150.110; 42 USC 1382b).

6. The claimant was eligible for benefits in the amount of $10,002 during the period December 1, 2018 to December 1, 2019, (20 CFR 416.537(a)).

7. The claimant is not liable for $10,002.00 during the period December 1, 2018 to December 1, 2019 (20 CFR 416.535(a), 416.560, and 416.570).

See Next Page

DECISION

Based on the hearing request regarding the overpayment. the claimant is not liable for the amount of $10,002.00 pursuant to section 1631(b)(1)(A) of the Social Security Act.

The component of the Social Security Administration responsible for administration of the overpayment, will advise the claimant regarding any adjustment of benefits or underpayments associated with the overpayment.

/s/ *Mark Hockensmith*

Mark Hockensmith
Administrative Law Judge

May 4, 2021
Date