Plenary Session:

General Elder Law and Special Needs Update

Presented By:
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2018 Summer Meeting Update

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12 NYCRR § 142-2.1(b) amended on 10/25/17, 1/24/18, 4/25/18

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Jimenez v. Concepts of Independence, 2018 N.Y. Misc. LEXIS 544, *16-17, 2018 NY Slip Op 30257(U) (Sup. Ct. New York County 2018).

Matter of Wellner v Jablonka, 2018 N.Y. App. Div. LEXIS 2656, 2018 NY Slip Op 02701, (3d Dep't 2018).

Matter of Buttiglieri (Ferrel J.B.) 2018 NY App Div LEXIS 648, 2018 NY Slip Op 00738, (4th Dep't 2018)

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I

115TH CONGRESS
1ST SESSION

H. R. 1896

To amend the Internal Revenue Code of 1986 to allow individuals with disabilities to save additional amounts in their ABLE accounts above the current annual maximum contribution if they work and earn income.

IN THE HOUSE OF REPRESENTATIVES

APRIL 4, 2017

Mrs. MCMORRIS RODGERS (for herself, Mr. SESSIONS, Mr. CÁRDENAS, Mr. SMITH of New Jersey, and Mr. LANGEVIN) introduced the following bill; which was referred to the Committee on Ways and Means

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A BILL

To amend the Internal Revenue Code of 1986 to allow individuals with disabilities to save additional amounts in their ABLE accounts above the current annual maximum contribution if they work and earn income.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "ABLE to Work Act of 2017".

SEC. 2. INCREASED CONTRIBUTIONS TO ABLE ACCOUNTS FROM COMPENSATION OF INDIVIDUALS WITH DISABILITIES.

(a) IN GENERAL.—Section 529A(b)(2)(B) of the Internal Revenue Code of 1986 is amended to read as follows:

"(B) except in the case of contributions under subsection (c)(1)(C), if such contribution to an ABLE account would result in aggregate contributions from all contributors to the ABLE account for the taxable year exceeding the sum of—

"(i) the amount in effect under section 2503(b) for the calendar year in which the taxable year begins, plus

"(ii) in the case of a designated beneficiary described in paragraph (7), the lesser of—

"(I) compensation (as defined by section 219(f)(1)) includible in the designated beneficiary's gross income for the taxable year, or

"(II) an amount equal to the poverty line for a one-person household, as determined for the calendar

year preceding the calendar year in which the taxable year begins.".

(b) ELIGIBLE DESIGNATED BENEFICIARY.—Section 529A(b) of such Code is amended by adding at the end the following:

"(7) SPECIAL RULES RELATED TO CONTRIBUTION LIMIT.—For purposes of paragraph (2)(B)—

"(A) DESIGNATED BENEFICIARY.—A designated beneficiary described in this paragraph is an employee (including an employee within the meaning of section 401(c)) with respect to whom—

"(i) no contribution is made for the taxable year to a defined contribution plan (within the meaning of section 414(i)) with respect to which the requirements of section 401(a) or 403(a) are met,

"(ii) no contribution is made for the taxable year to an annuity contract described in section 403(b), and

"(iii) no contribution is made for the taxable year to an eligible deferred compensation plan described in section 457(b).

"(B) POVERTY LINE.—The term 'poverty line' has the meaning given such term by sec-

tion 673 of the Community Services Block Grant Act (42 U.S.C. 9902).".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

SEC. 3. ALLOWANCE OF SAVER'S CREDIT FOR ABLE CONTRIBUTIONS BY ACCOUNT HOLDER.

(a) IN GENERAL.—Section 25B(d)(1) of the Internal Revenue Code of 1986 is amended by striking "and" at the end of subparagraph (B)(ii), by striking the period at the end of subparagraph (C) and inserting ", and", and by inserting at the end the following:

"(D) the amount of contributions by such individual to the ABLE account (within the meaning of section 529A) of which such individual is the designated beneficiary.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

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115TH CONGRESS
1ST SESSION

H. R. 1897

To amend the Internal Revenue Code of 1986 to allow rollovers from 529 programs to ABLE accounts.

IN THE HOUSE OF REPRESENTATIVES

APRIL 4, 2017

Mrs. MCMORRIS RODGERS (for herself, Mr. SESSIONS, Mr. CÁRDENAS, Mr. SMITH of New Jersey, and Mr. LANGEVIN) introduced the following bill; which was referred to the Committee on Ways and Means

---

A BILL

To amend the Internal Revenue Code of 1986 to allow rollovers from 529 programs to ABLE accounts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "ABLE Financial Planning Act".

SEC. 2. ROLLOVERS TO ABLE PROGRAMS FROM 529 PROGRAMS.

(a) IN GENERAL.—Clause (i) of section 529(c)(3)(C) of the Internal Revenue Code of 1986 is amended by striking "or" at the end of subclause (I), by striking the period

at the end of subclause (II) and inserting ", or", and by adding at the end the following:

"(III) to an ABLE account (as defined in section 529A(e)(6)) of the designated beneficiary or a member of the family of the designated beneficiary.

Subclause (III) shall not apply to so much of a distribution which, when added to all other contributions made to the ABLE account for the taxable year, exceeds the limitation under section 529A(b)(2)(B).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions after the date of the enactment of this Act.

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Social Security

POMS Recent Change

Identification Number:	**SI 01120 TN 51**
Intended Audience:	See Transmittal Sheet
Originating Office:	ORDP OISP
Title:	**Identifying Resources**
Type:	POMS Transmittals
Program:	**Title XVI (SSI)**
Link To Reference:	

PROGRAM OPERATIONS MANUAL SYSTEM
Part 05 - Supplemental Security Income
Chapter 011 - Resources
Subchapter 20 - Identifying Resources
Transmittal No. 51, 04/2017

Audience

FO/TSC: CS, CS TXVI, DRT, FR, OA, OS, RR, CSR, TA, CTE, TSC-CSR

Originating Component

OISP

Effective Date

April 30, 2018

Background

This transmittal provides instructions on how to determine and document the resource status of third-party trusts or trusts established prior to January 01, 2000 for Supplemental Security Income (SSI) eligibility purposes. It also incorporates the "Regional Centralization of SSI Trust Reviews" review process described in SI 01120.202, Development and Documentation of Trusts Established on or after January 01, 2000. As part of the trust review process, the Regional Trust Review Team (RTRT) reviews all trust resource determinations for trusts not previously evaluated or amended trusts before adjudication of any initial claim or posteligibility event.

Summary of Changes

SI 01120.200 Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section

1613(e) of the Social Security Act

We updated section headings, revised passive voice statements, and revised cross reference format throughout the instructions to meet POMS transmittal guidelines.
Additionally, we made the following changes:

- **Subsection A,** added Indian Gaming Regulatory Act (IGRA) trusts under trusts that contain assets of third parties;
- **Subsection B,** added definitions for IGRA, pooled and special needs trusts;
- **Subsection G,** clarified the following:
    1. SSI payments are non-assignable by law and SSI payments do not count as income for SSI purposes.
    2. We consider assignment of payments by court orders to be irrevocable.
- **Subsection L,** added instructions for Claims Specialists, trust reviewers, and regional trust leads related to the trust review process; and
- **Subsection N,** reorganized relevant references.

SI 01120.200 Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act

A. Introduction To Trusts

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

1. Applicability of policy instructions

Generally, these instructions apply to trusts not subject to the trust provisions in Section 1613(e) of the Social Security Act, which we evaluate using instructions in SI 01120.201 through SI 01120.204. However, trusts that meet the requirements of SI 01120.203 must also meet the requirements of this section. Use these instructions to evaluate the following types of trusts:

a. Trusts established prior to January 01, 2000 that contain assets of the individual

This includes trusts established before January 01, 2000 that contain assets of the individual, any of which were transferred before January 01, 2000.

If the trust was established prior to January 01, 2000, but no assets of the individual were transferred to the trust prior to January 01, 2000, see SI 01120.201.

b. Trusts that contain assets of third parties

This includes trusts that are:

- established before January 01, 2000 that contain assets of third parties;
- established on or after January 01, 2000 that contain only assets of third parties, or the portion of a commingled trust attributable to assets of third parties; and
- Indian Gaming Regulatory Act (IGRA) trusts established by the Indian tribes that meet the criteria in SI 01120.195F.

NOTE: Trusts established on or after January 01, 2000 that contain assets of a Supplemental Security Income (SSI) applicant, recipient, or spouse (or the portion of a commingled trust attributable to assets of an SSI applicant, recipient, or spouse) must be evaluated under SI 01120.201 through SI 01120.204.

c. Other trusts not subject to Section 1613(e) of the Social Security Act

Trusts established on or after January 01, 2000 to which the instructions in SI 01120.201 through SI 01120.204 do not apply. When it is determined that a special needs trust or a pooled trust exception is met, the trust must still be evaluated under the rules of SI 01120.200.

NOTE: The instructions in those sections generally will refer you back to this section, where applicable.

2. Case processing alert

Trusts are often complex legal arrangements involving State law, Tribal law, and legal principles whose evaluation may require input from agency counsel. Therefore, these instructions may only be sufficient for you to recognize that an issue is present that needs referral to your regional office (RO) for possible referral to the Regional Chief Counsel (RCC). When in doubt, submit your question or issue via vHelp.

B. Glossary Of Terms

This glossary is intended for general reference and does not override or replace applicable State law with respect to matters such as establishment, operation, and termination.

1. Discretionary trust

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

2. Fiduciary duty

A **fiduciary duty** is the obligation of the trustee in dealing with the trust property and income. The trustee holds the property, with due care, solely for the benefit of the trust beneficiary. The trustee owes duties of good faith and loyalty to exercise reasonable care and skill, to preserve the trust property and make it productive, and to account for it. A trustee is a fiduciary but generally is not an agent of the trust beneficiary.

3. Grantor (settlor or trustor)

A **grantor (sometimes** also called a **settlor** or **trustor**) is the person who provides property to the trust principal (or corpus). The grantor must be the owner of, or have legal right to the property, or be otherwise qualified to transfer the property into the trust. A person may be a grantor even if an agent or another person, legally empowered to act on the first person's behalf (a legal guardian, representative payee for Title II or XVI benefits, person acting under a power of attorney, or conservator), establishes the trust with funds or property that belong to the first person. The person funding the trust is the grantor, even in situations where the trust agreement refers to a person legally empowered to act on the first person's behalf as the grantor. Where more than one person provides property to the trust, there may be multiple grantors. The terms grantor, trustor, and settlor are sometimes interchangeable.

4. Grantor trust (first-party or self-funded trust)

A **grantor trust** (also called a **first-party trust** or **self-funded trust**)is a trust in which the grantor of the trust is also the sole beneficiary of the trust. For information on who may be a grantor, see SI 01120.200B.3. in this section. State law on grantor trusts varies. Consult with your regional office, if necessary.

5. Indian Gaming Regulatory Act (IGRA) trust

An **IGRA trust** is a trust that an Indian tribe establishes under IGRA, regulations promulgated by the BIA, and the tribe's BIA-approved revenue allocation plan. The tribe establishes the trust to receive and invest per capita payments for its members, some of whom are minors or legally incompetent adults, pending distribution of the trust assets to those members after they attain the age of majority or cease to be legally incompetent.

6. Inter vivos trust (living trust)

An **inter vivos trust** (also called a **living trust**) is a trust established during the lifetime of the grantor.

7. Mandatory trust

A **mandatory trust** is a trust that requires the trustee to pay trust earnings or principal to or for the benefit of the trust beneficiary at certain times. The trust may require disbursement of a specified percentage or dollar amount of the trust earnings, or it may obligate the trustee to spend income and principal, as necessary, to provide a specified standard of care. The trustee has no discretion as to the amount of the payment or party receiving distribution.

8. Medicaid trust or Medicaid qualifying trust

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

9. Pooled trust

A **pooled trust** is a trust that is established and managed by an organization and that contains and pools the assets of multiple individuals in separate accounts for investment and management purposes. This section contains information on reviewing third party pooled trusts. For information on pooled trusts in which the individual account is funded with the beneficiary's own assets, see SI 01120.203.

10. Residual beneficiary (contingent beneficiary or remainderman)

A **residual beneficiary** (also called a **contingent beneficiary** or **remainderman**) is not a current beneficiary of a trust, but he or she will receive the residual benefit of the trust contingent upon the occurrence of a specific event, such as the death of the primary beneficiary.

11. Revoke

The grantor of a trust may have the power or authority to **revoke** (reclaim or take back) the assets deposited in the trust. If the individual at issue (an applicant, recipient, or deemor) is the grantor of the trust, the trust is usually a resource to that individual if he or she can revoke the trust and reclaim the trust assets. For the definition of a deemor, see SI 01310.127.

However, if a third party is the grantor of the trust, and the individual at issue (an applicant, recipient, or deemor) is the beneficiary of the trust, the trust is not a resource to the beneficiary merely because the trust is revocable by the grantor. In a third party trust situation, the focus should

be on whether the individual at issue (applicant, recipient, or deemor) can terminate the trust and obtain the assets for himself or herself.

12. Special or supplemental needs trust

A **special needs trust**, also known as a **supplemental needs trust**, may be set up to provide for a disabled individual's extra and supplemental needs other than food, shelter, and health care expenses that may be covered by public assistance benefits that the trust beneficiary may be eligible to receive under various programs. For more information on special needs trusts containing the assets of the individual, see SI 01120.203.

13. Spendthrift clause or spendthrift trust

A **spendthrift clause** or **spendthrift trust** generally prohibits both involuntary and voluntary transfers of the trust beneficiary's interest in the trust income or principal. This means that the trust beneficiary's creditors must wait until the trust pays out money to the trust beneficiary before they can attempt to claim it to satisfy debts.

It also means that, for example, if the trust beneficiary is entitled to $100 a month from the trust, the beneficiary cannot sell his or her right to receive the monthly payments to a third party for a lump sum. In other words, a valid spendthrift clause would make the value of the trust beneficiary's right to receive payments not countable as a resource.

However, not all States recognize spendthrift trusts, and States that do recognize spendthrift trusts often do not allow a grantor to establish a spendthrift trust for the grantor's own benefit. In those States that do not recognize spendthrift trusts (whether at all or because the trust is a grantor trust), we would count the value of the trust beneficiary's right to receive monthly payments as a resource because it may be sold for a lump sum.

We do not require trusts to include a spendthrift clause. If the trust provides for mandatory periodic payments to the beneficiary, then the trust may need a spendthrift clause for the trust not to count as a resource.

14. Terminate

In some instances, a trustee or beneficiary of a third party trust can **terminate** (or end) a trust and obtain the assets for himself or herself. For more information on Termination as it relates to self-settled trusts, see SI 01120.201B.6.

15. Testamentary trust

A **testamentary trust** is a trust that is established under the terms of a will and that is effective only upon the death of the individual who created the will (the testator). Sometimes third party inter vivos trusts (trusts created during the lifetime of the grantor) serve as wills. A trust into which

property is transferred under the terms of a will, and during the life (inter vivos) of the testator, is not a testamentary trust for the purposes of this section because it is not effective only upon the testator's death, even if the will transfers additional property into the trust upon the testator's death. When evaluating testamentary trusts, field offices should obtain and review a copy of the last will and testament.

16. Third-party trust

A **third-party trust** is a trust established with the assets of someone other than the trust beneficiary (or his or her spouse). For example, a grandparent can establish a third party trust using his or her assets, with a grandchild as the trust beneficiary. Be alert for situations where a trust is allegedly established with the assets of a third party but in reality is created with the trust beneficiary's property. In such cases, the trust is a grantor trust, not a third party trust.

17. Totten trust (bank account trust)

A **Totten trust** (also called a **bank account trust**) is a tentative trust in which a grantor makes himself or herself trustee of his or her own funds for the benefit of another. Typically, the grantor deposits funds in a savings account and indicates, either by the account titling or by filing a writing with the bank, that the grantor is trustee of the account for another person. The trustee can revoke a Totten trust at any time. Should the trustee die without revoking the trust, ownership of the principal passes to the trust beneficiary. Totten trusts are valid in most jurisdictions, but other jurisdictions have held them invalid because they are too tentative. In particular, they generally lack formal requirements and do not state a trust intent or purpose.

18. Trust

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

19. Trust beneficiary

A **trust beneficiary** is a person for whose benefit a trust exists. A trust beneficiary does not hold legal title to trust property but has an equitable ownership interest in it. As an equitable owner, the trust beneficiary has certain rights that a court can enforce, because the trust exists for his or her benefit. The beneficiary receives the benefits of the trust, while the trustee holds the title and duties. A beneficiary has certain rights relative to the trust, such as to enforce mandatory provisions of the trust, to demand an accounting, and to sue to remove the trustee. The trustee owes certain duties, such as loyalty and attention, to the beneficiary.

20. Trust earnings (income)

Trust earnings (also called **trust income**) are amounts earned by the trust principal. They may take such forms as interest, dividends, royalties, and rents. These amounts are unearned income to any person legally able to use them for personal support and maintenance. If the trust beneficiary has no right to receive or demand the earnings, trust income is not countable to him or her.

21. Trust principal (corpus)

The **trust principal** (also called the **corpus** of the trust) is the property placed in the trust, which the trustee holds subject to the rights of the beneficiary. It includes any earnings on the trust.

22. Trustee

A **trustee** is a person or entity that holds legal title to property in trust for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for the trustee's own benefit. The trustee owes a fiduciary duty to the beneficiary.

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

1. Accounts that are not trusts

Although titled as trusts, some types of accounts and "trust-like" instruments are not trusts, and generally we should not evaluate them under these instructions for SSI purposes.

a. Conservatorship accounts

A conservatorship account generally is established by a court and administered by a court-appointed conservator for the benefit of an individual. A conservatorship account differs from a trust in that the "beneficiary" of the conservatorship account retains legal ownership of all of the account assets, although in some cases the assets may not be available for support and maintenance. For instructions pertaining to conservatorship accounts, see SI 01140.215.

b. Patient trust accounts

Many nursing homes, institutions, and government social services agencies maintain so-called "patient trust accounts" for individuals to provide them with toiletries, candy, and sundries. Although titled as trust accounts, they are not. For example, the individual might legally own the money in the account, while a social services agency holds the money for the individual and disburses it as necessary for the individual's benefit. For more information on transactions involving agents, see:

- GN 00603.020 Collective Savings and Checking Accounts
- SI 00810.120 Income Determinations Involving Agents
- SI 01120.020 Transactions Involving Agents

c. Achieving a Better Life Experience (ABLE) accounts

An ABLE account is a type of tax-advantaged account that an eligible individual can use to save funds for his or her disability-related expenses. The eligible individual, who is also the designated beneficiary of the ABLE account, must be blind or disabled by a condition that began before the individual's 26th birthday. A State (or a State agency or an instrumentality of a State) can establish an ABLE program. An eligible individual can open an ABLE account through the ABLE program in any State, if the State permits it. ABLE accounts are not trusts, and you should not evaluate them under trust instructions. For more information on ABLE accounts, see SI 01130.740.

2. "In trust for" financial accounts

These accounts may or may not be trusts depending on the circumstances in the individual case. Representative payee accounts and Totten accounts are the most common examples.

a. Representative payee accounts

One of the most common types of "in trust for" accounts is the representative payee account. A representative payee account is not a trust. However, its title may misleadingly suggest that the representative payee is the legal owner of the account principal. If a representative payee deposits current or conserved benefits in an account, the titling of the account should reflect the beneficiary's ownership interest in the account. For instructions pertaining to transactions or determinations involving agents, see SI 01120.020 and SI 00810.120. For instructions pertaining to the titling of accounts established by representative payees, see GN 00603.010.

b. Totten trusts

A **Totten trust** is a revocable trust created by the depositing of money, usually in a savings account at a bank, in the depositor's name as trustee for another. (It may have the phrase "in trust for" in the title.) The typical Totten trust is a kind of "pay on death" account. That is, the depositor names a beneficiary who inherits the funds in the account upon the depositor's death.

D. Policy For Trusts As Resources

1. Trusts that are resources

a. When trusts are resources

Trust principal is a resource for SSI purposes if a trust beneficiary (applicant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his or her food or shelter needs. The trust principal is also a resource for SSI purposes if the trust beneficiary can direct the use of the trust principal for his or her support and maintenance under the terms of the trust. For the definition of revoke, see SI 01120.200.B.11. in this section.

Additionally, if the trust beneficiary can sell his or her beneficial interest in the trust, that interest is a resource. For example, if the trust provides for payment of $100 per month to the trust beneficiary for spending money, and the trust does not have a valid spendthrift clause, then the trust beneficiary may be able to sell the right to future payments for a lump-sum settlement. The present value of the future payments counts as a resource. For more information on spendthrift clauses, see SI 01120.200B.13. in this section.

b. Authority to revoke or terminate trust or use assets

1. **Grantor**

   In some cases, the grantor has the authority to revoke a trust. Even if the grantor does not specifically retain the power to revoke a trust, a trust may be revocable in certain situations. For information on grantor trusts, see SI 01120.200B.4. and SI 01120.200D.3. in this section.

   Additionally, State law may contain presumptions as to the revocability of trusts. If the trust principal reverts to the grantor upon revocation and he or she can use it for support and maintenance, then the principal **is** a resource to the grantor.

   Additionally, State law may contain presumptions as to the revocability of trusts. If the trust principal reverts to the grantor upon revocation and he or she can use it for support and maintenance, then the principal is a resource to the grantor.

2. **Trust beneficiary**

   A trust beneficiary generally does not have the power to terminate a trust. However, in some instances, the trust beneficiary may have the authority to terminate the trust and gain access to the trust assets or direct the use of the trust principal. Specific trust provisions may allow the trust beneficiary to act on his or her own or to order actions by the trustee. The trust beneficiary's ability to use the trust principal for support and maintenance, together with his or her equitable ownership in the trust principal, makes the trust principal a resource to the trust beneficiary.

   The trust beneficiary's right to mandatory periodic payments may be a resource equal to the present value of the anticipated payments, unless a valid spendthrift clause or other provision prohibits transfer or sale of the beneficiary's interest in such anticipated payments. For more information on spendthrift clauses, see SI 01120.200B.13. in this section.

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

3. **Trustee**

   Occasionally, a trustee may have the legal authority to terminate a trust. However, the trust generally is not a resource to the trustee unless he or she becomes the owner of the trust principal upon termination. The trustee is a third party. Although the trustee has access to the

trust principal for the benefit of the trust beneficiary, this does not mean that the trust principal is the trustee's resource. If the trustee has the legal authority to withdraw the trust principal and use it for his or her own support and maintenance, the amount of the trust principal that he or she can withdraw and use is the trustee's resource for SSI purposes.

NOTE: We are not responsible for developing or reporting claims or allegations of trustee misuse of trust funds. We will get involved only if the individual or entity allegedly misusing the funds is also the representative payee. For misuse of SSI funds, see GN 00604.001.

4. **Totten trust**

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

2. Trusts that are not resources

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

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

3. Revocability of grantor trusts

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

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

When a grantor names heirs, next of kin, or similar individuals to receive the assets remaining in the trust upon the grantor's death, assume that they are residual beneficiaries, absent regional instructions to the contrary. In such a case, the trust generally is irrevocable, subject to the NOTE.

When a trust is established for a beneficiary who is a minor, or if a court has ordered the establishment of a trust for an incompetent beneficiary, assume absent regional instructions and subject to the NOTE, that it is acceptable for "the estate of the beneficiary" to be named as the residual beneficiary without causing the trust to be considered revocable.

A trust may state that it is a "Grantor Trust" for tax purposes. Such a designation does not necessarily mean that it is a countable resource for SSI purposes. You must still develop the trust under these instructions to determine resource status for SSI eligibility purposes.

NOTE: The policies regarding grantor trusts may or may not apply in your particular State. Field offices should consult regional Program Operations Manual System (POMS) instructions or your regional office program staff if in doubt.

E. Policy For Disbursements From Trusts

1. Trust principal is not a resource

If the trust principal is not a resource, disbursements from the trust may be income to the SSI applicant or recipient, depending on the nature of the disbursements. Regular rules to determine when income is available apply. For general income rules, see SI 00810.005.

a. Disbursements that are income

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

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

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

For receipt of certain noncash items, see SI 00815.550. For a list of resource exclusions, see SI 01110.210.

b. Disbursements that result in receipt of in-kind support and maintenance

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

c. Disbursements that are not income

Generally, disbursements from the trust to a third party are not income to the trust beneficiary, unless otherwise stated in SI 01120.200E.1.a. and SI 01120.200E.1.b. in this section. Disbursements that do not count as income may include those made for educational expenses, therapy, transportation, professional fees, medical services not covered by Medicaid, phone bills, recreation, and entertainment. This list is illustrative and does not limit the types of distributions that a trust may permit. For bills paid by a third party, see SI 00815.400.

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

example, if a trust purchases a computer for the trust beneficiary, the computer is not income, since we would exclude the computer from resources as a household good in the following month. For resource treatment of household goods, personal effects, and other personal property, see SI 01130.430. For receipt of certain non-cash items, see SI 00815.550. For a list of resource exclusions, see SI 01110.210.

d. Reimbursements to a third party

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

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

2. Trust principal is a resource

a. Disbursements to or for the benefit of the trust beneficiary

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

b. Disbursements not to or for the benefit of the trust beneficiary

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

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

F. Policy For Home Ownership And Purchase Of A Home By A Trust

1. Home as a resource

If the trust is a resource to the individual, the property at issue is subject to exclusion as a home under SI 01130.100. Even though the trust holds legal title to the property, the individual, as trust beneficiary, still has an (equitable) ownership interest in it. Therefore, the property's possibly being excluded as a home under SI 01130.100 likely will depend on whether the property serves as the individual's principal place of residence.

If the trust is not a resource to the individual, then the property also is not a resource to the individual, regardless of whether the property serves as the individual's principal place of residence (that is, regardless of possible exclusion as a home under SI 01130.100), because the property is part of the trust principal that is not a resource to the individual.

2. Rent-free shelter

An eligible individual does not receive ISM in the form of rent-free shelter while living in a home in which he or she has an ownership interest. Accordingly, an individual with an "equitable ownership interest in the trust principal" does not receive rent-free shelter (see SI 01120.200F.1. in this section).

3. Receipt of income from a home purchase

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

Even if the trust beneficiary has an ownership interest in the home that he or she resides in, and is not receiving ISM in the form of rent-free shelter (because shelter is rent-free when no household member has any ownership interest in, or rental liability for, the residence, see SI 00835.370B.1.). The purchase of the home or payment of the monthly mortgage by the trust is a disbursement from the trust to a third party that results in the receipt of ISM in the form of shelter (see SI 01120.200E.1.b. in this section).

a. Outright purchase of a home

If the trust, whose principal is not a resource, purchases the home outright and the trust beneficiary lives in the home in the month of purchase, the home is income in the form of ISM, and reduces the trust beneficiary's payment no more than the PMV **in the month of purchase only,** regardless of the value of the home (see SI 01120.200E.1.b. in this section).

b. Purchase by mortgage or similar agreement

If the trust, whose principal is not a resource, purchases the home with a mortgage and the trust beneficiary lives in the home in the month of purchase, the home would be ISM in the month of purchase. Each of the subsequent monthly mortgage payments results in the receipt of income in

the form of ISM to the trust beneficiary living in the house, each valued at no more than the PMV (see SI 01120.200E.1.b. in this section).

c. Additional household expenses

If the trust pays for other shelter or household operating expenses, these payments are income in the form of ISM in the month of the trust beneficiary's use. For computations of ISM from outside the household, see SI 00835.350. For countable shelter expenses, see SI 00835.465D.

If the trust pays for repairs, maintenance, improvements, or renovations to the home, such as renovations to the bathroom to make it handicapped accessible, installation of a wheelchair ramp or assistive devices, or replacement of a roof, the trust beneficiary does not receive income. Disbursements from the trust for improvements increase the value of the resource and, unlike household operating expenses, do not provide ISM. For computations of ISM from outside the household, see SI 01120.200E.1.c. in this section.

G. Policy For Earnings And Additions To Trusts

1. Trust principal is not a resource

a. Trust earnings

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

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

b. Additions to principal

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

c. Payments not assignable by law

Certain payments are non-assignable by law; therefore, are income to the individual entitled or eligible to receive the payments under regular SSI income rules, unless an exclusion applies. Although a trust may be structured such that it appears that non-assignable payments are made directly into the trust, non-assignable payments may not be made directly into a trust, to avoid income counting or for any other reason.

Important examples of non-assignable payments include:

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

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

d. Assignment of income

A legally assignable payment that is assigned to a trust or trustee is income for SSI purposes, to the individual entitled or eligible to receive the payment, **unless** the assignment is irrevocable. We consider assignment of payment by court orders to be irrevocable. For example, child support or alimony payments paid directly to a trust or trustee because of a court order are considered irrevocably assigned and thus not income. Also, U.S. Military Survivor Benefit Plan (SBP) payments assigned to a special needs trust are not income because the assignment of an SPB annuity is irrevocable. For more information on SPB annuities, see SI 01120.201J.1.e.

If the assignment is revocable, the payment is income to the individual legally entitled or eligible to receive it, unless an SSI income exclusion applies. For **non-assignable payments**, see SI 01120.200G.1.c. in this section.

2. Trust principal is a resource

a. Trust earnings

Trust earnings are income to the individual for whom the trust principal is a resource, unless the terms of the trust make the earnings the property of another. For when to count income, see SI 00810.030.

b. Additions to principal

Additions to principal may be income or conversion of a resource, depending on the source of the funds. If a third party deposits funds into the trust, the funds are income to the trust beneficiary. If the trust beneficiary transfers funds into the trust from an account that he or she owns, the funds are not income but a converted resource.

H. Policy For Medicaid Trusts And Medicaid Qualifying Trusts

1. Medicaid Trusts

a. General

Medicaid trusts are trusts that are established by an individual (by a means other than a will) on or after August 11, 1993 and that are made up, in whole or in part, of assets of that individual. We consider a trust as established by an individual if it was established by:

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

Medicaid trusts may contain terms such as "OBRA 1993 pay-back trust" or "trust established in accordance with 42 USC 1396" or may be mislabeled as an "MQT." Medicaid trusts must be evaluated under SI 01120.201 to determine whether they are a resource for SSI purposes.

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

b. State reimbursement provisions

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

2. Medicaid Qualifying Trusts (MQT)

An MQT is a trust or similar legal device established prior to October 1, 1993, other than by a will, under which the grantor (or spouse of the grantor) may be the beneficiary of all or part of the trust. The amount in the MQT considered available as a resource to the individual for Medicaid purposes, is the maximum amount that may be distributed under the terms of the trust to the individual by the trustee. This **Medicaid-only** provision has no effect on the income and resource determination for SSI purposes. MQTs must be evaluated under SI 01120.200 to determine whether they are a resource for SSI purposes.

NOTE: The last date to establish an MQT was September 30, 1993. Congress repealed section 1902(k) of the Social Security Act on October 01, 1993.

I. Policy For Representative Payees And Trusts

If a representative payee funds a trust with an underpayment or conserved funds, see GN 00602.075 for additional rules that may apply. Additionally, representative payees may not deposit dedicated account funds in a trust.

J. Procedure For Development And Documentation Of Trusts

1. Written trust

a. Review the trust document

Obtain a copy of the trust document (the original trust document is not required) and related documents and review the document to determine whether the:

- individual (applicant, recipient, or deemor) is the grantor, trustee, or trust beneficiary;
- trust was established on or after January 01, 2000;
- trust was funded with assets of the individual or third parties or both;
- trust is revocable or can be terminated and, if so, whether the individual has authority to revoke or terminate the trust and to use the principal for his or her own support and maintenance;
- individual has access to the trust principal;
- trust provides for or permits payments for the benefit of the individual, to the individual or on the individual's behalf;
- trust principal generates income (earnings) and, if so, whether the individual has the right to any of that income;
- trust provides for mandatory periodic payments and, if so, whether the trust contains a spendthrift clause that is valid under State law and prohibits the voluntary and involuntary alienation of any interest of the trust beneficiary in the trust payments; and
- trust is receiving payments from another source.

b. Which instructions apply when determining the resource status and income treatment of a trust

Depending on the trust's date of establishment and whose funds the trust principal contains, follow these instructions to determine the resource status and income treatment of the trust:

If the trust was established...	and contains...	follow instructions in:
on or after January 01, 2000,	any assets of the individual,	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225 and SI 01120.227

If the trust was established...	and contains...	follow instructions in:
	only assets of third parties,	SI 01120.200
before January 01, 2000,	assets of the individual transferred before January 01, 2000,	SI 01120.200
	any assets of the individual transferred on or after January 01, 2000,	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225, and SI 01120.227
	only assets of third parties,	SI 01120.200

NOTE: If the trust beneficiary adds his or her own assets to an existing third-party trust, on or after January 01, 2000, redevelop the trust under the instructions in SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225, and SI 01120.227. For more information on mixed trusts, see SI 01120.200A.1.b and SI 01120.201I.3.

c. Consult regional instructions

Consult any regional instructions that pertain to trusts to see if there are State or Tribal laws to consider on such issues as revocability or irrevocability and grantor trusts.

d. Referring a trust issue to the regional office

If there are any unresolved issues that prevent you from determining the resource status of a trust, or there are issues for which you believe you need a legal opinion, follow your regional instructions or consult with your regional office (RO) program staff via vHelp. The RO staff can resolve many issues via vHelp. If necessary, the RO staff will seek guidance from the central office (CO) or the RCC. Do **not** contact or refer materials to the RCC directly.

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

2. Oral trusts

a. State recognizes as binding

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

- record all relevant information;

- obtain from all parties signed statements describing the arrangement; and
- unless regional instructions specify otherwise, refer the case, through the Assistant Regional Commissioner, Management and Operations Support (ARC, MOS), to the RCC.

b. State does not recognize as binding

If the State does not recognize oral trusts as binding (see regional instructions), determine whether an agency relationship (a person acting as an agent of the individual) exists and develop under regular resource-counting rules or transfer of resources rules, as applicable. For transactions involving agents, see SI 01120.020.

3. Determining the nature and value of trust property (written or oral trust)

To determine whether the trust is a resource, apply the policies in SI 01120.200D in this section and in any applicable regional instructions.

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

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

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

4. Documentation for trust evidence

Record all information used in determining whether the trust is a resource or generates income on the Trust (RTRS) page in the SSI Claims System. For more information on what trust information to record, see MS INTRANETSSI 013.005. Record your rationales, summary of supporting documentation, and conclusions on the Report of Contact (DROC) (and subsequently lock the DROC) or the Evidence (EVID) screen. When a certified electronic folder (EF) exists, fax the following into Section D (Non-Disability Development) of the Electronic Disability Collect System (EDCS):

- a copy of the trust document (original not required), along with trust attachments, amendments (if any), and exhibits;
- copies of any signed agreements between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned to the trust or trustee;
- records of payments from the trust, as necessary; and
- any other pertinent documents, such as court orders, and the Form SSA-5002 (Report of Contact) that indicates the trust resource determination.

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

For more information on trust documentation and development, see the trust review process in SI 01120.200L in this section.

NOTE: The SSI applicant or recipient as trust beneficiary generally has the right to request an accounting from the trustee to provide information about trust disbursements.

5. Medicaid trust and Medicaid qualifying trust determination

For information regarding Medicaid trusts and MQTs and the procedure to follow, consult SI 01730.048.

6. Systems input for trusts

Make the appropriate entries on the SSI Claims System Trust (RTRS) page. For more information on the SSI Claims System Trust page, see MS INTRANETSSI 013.005. You may also make a CG field entry (RE06 or RE07) per SM 01301.820. In non-SSI Claims System cases or where otherwise warranted, use Remarks (see MS MSSICS 023.003).

K. Posteligibility Changes In Trust Resource Status

If due to a change in policy, a policy clarification, or the reopening of a prior erroneous determination, a trust that was previously determined not to be a resource is determined to be a resource (or vice-versa), apply the following rules.

1. New trusts and trusts that have not previously been determined not to be a resource

A trust that either is newly created or has not previously been determined not to be a resource must meet the criteria set forth in SI 01120.200D.2. in this section for SSA to determine that it is not a resource. Do not determine that such a trust is not a resource unless the trust meets these criteria.

For a trust that was previously established but is newly discovered, reopen the prior resource determination back to the trust establishment date, subject to the rules of administrative finality (applying the shorter of the two periods). For more information on SSI administrative finality, see SI 04070.001.

A trust must have been previously determined not to be a resource in order for the 90-day amendment period to apply. If a 90-day amendment period is not applicable, then any future amendments to the trust will take effect the month following the month of amendment.

For overpayment waiver rules, see SI 02260.001.

2. Trusts that were previously determined not to be a resource under SI 01120.200

A trust that was previously determined not to be a resource under SI 01120.200 shall continue not to be a resource, provided that the trust is amended to conform with the policy requirements within 90 days. That 90-day period begins on the day SSA informs the individual or representative payee that the trust contains provisions that would require amendment in order to continue not to count as a resource under SI 01120.200.

a. New situations

Effective 04/27/18, if due to a change in policy, a policy clarification, or reopening of a prior erroneous determination, a trust that was previously determined not to be a resource under SI 01120.200 is now determined to be a resource, offer a 90-day amendment period.

b. During the 90-day period

Diary the case for follow-up in 90 days. If a trust was not previously counted as a resource, do not count the trust as a resource and do not impose an overpayment pending possible amendment within the 90-day period.

c. Good cause extension

We permit each trust that was not previously determined to be a resource only one 90-day amendment period. However, you may grant a request for an extension to the 90-day amendment period for good cause, if the individual requests it and provides evidence that the disqualifying issue cannot be resolved within the 90-day period: for example, if a court must amend the trust and there is a wait to get on the court docket. Document on the DROC screen the decision to grant the extension, the time allowed, and the reason. Diary the case for follow-up. Field office staff have discretion to provide a reasonable time period for a good cause extension depending on the situation.

d. End of the 90-day amendment period

If the trust is amended to be policy-compliant within the 90-day period (plus any extension), the trust continues not to be a resource for SSI purposes.

If the trust still fails to meet the policy requirements after expiration of the 90-day amendment period (plus any extension), count the trust as a resource beginning with the later of (1) the date when the policy change or clarification first applies to the trust or (2) the earliest date as of which the prior determination or decision is reopened and revised.

NOTE: All trust determinations made at the end of the 90-day amendment period are subject to the rules of administrative finality.

3. Reopening trust determinations

The field office may receive a request by any party to the determination, including SSA, questioning the correctness of the trust determination. The request to reopen a determination must be in writing and within the applicable time limit (see SI 04070.015. Reopening SSI Determinations).

L. Trust Review Process

Claims Specialists evaluate all trusts **that need a resource determination** (such as a new or amended trust) in all initial claims (IC) and posteligibility (PE) events. For PE events, do not reevaluate trusts that already have a resource determination, unless there is:

- an amendment to the trust,
- a change of or clarification in policy that affects the resource determination,
- a request for reopening, or
- a situation where you become aware of a prior erroneous determination. For resource status changes in PE events, see SI 01120.200K in this section.

To ensure accurate and consistent trust resource determinations:

- Claims Specialists submit their trust resource determinations and any related documentation to the Regional Trust Review Team (RTRT) for review using the Supplemental Security Income Trust Monitoring System (SSITMS) website.
- The RTRT review all trust determinations and provide a decision and any feedback to the Claims Specialists via the SSITMS website.

Claims Specialists and RTRT members can use this SSITMS (http://oestweb.ba.ad.ssa.gov/SSITM/)) link to access the website. For instructions on using the SSITMS website, visit the user guide located under the Help link on the SSITMS website.

NOTE: It is important to remember that trust determinations are subject to the rules of administrative finality. For more information on administrative finality, see SI 04070.040.

The following steps describe the trust review process for the Claims Specialists and RTRT members.

1. Claims Specialist actions

For all IC and PE cases where an applicant, recipient, or deemor alleges an interest in a trust that needs a resource determination, determine whether the trust is a countable resource. To make the trust resource determination, follow trust policy in SI 01120.200D in this section.

After making a trust resource determination:

a. Document the determination along with any references and rationale used in the decision-making process:

   - For SSI Claims System cases, use the Report of Contact (DROC) screen; and

- For non-SSI Claims System cases, use a Form SSA-5002 (Report of Contact) and fax it into the electronic folder (EF) or Non-Disability Repository for Evidentiary Document (NDRED).

b. Fax the initial trust resource determination, trust document, and any pertinent information into the appropriate EF.

Then follow these trust review process steps:

a. Submitting trust determinations for RTRT review

Follow these procedures:

- Access the SSITMS website and select the "Add New" tab. Add the applicant's or recipient's name, representative payee's name (if any), social security number, and all other relevant trust information;
- Select the appropriate type of trust in SSITMS (third party trust, special needs trust, etc.); and
- Submit the trust resource determination for RTRT review.

b. Reviewing the RTRT responses

SSITMS sends an email notification after the RTRT or regional trust lead (RTL) reviews the trust and makes a decision. To view the RTRT's response:

- Access SSITMS and select the case from the Summary page listing or use the link in the email to access the case, and
- Click on the "Details/Update" tab.

The Results field will show that the RTRT member either agreed or disagreed with the trust resource determination. When the Claims Specialist is ready to process the case, change the trust status to "FO Effectuated" using the Edit function.

NOTE: Select "FO Effectuated" only after completing all case development. Changing the Trust Status to "FO Effectuated" **locks** the case in SSITMS. Only the Remarks field will be accessible for additional comments.

c. Reevaluations of trust determinations

To request a reevaluation of a trust resource determination, access SSITMS and:

- change the Trust Status to "Referred to RTL" using the Edit function; and
- provide the rationale, a summary of supporting documentation, and appropriate references in SSITMS Remarks and select "Submit."

The RTL will select the case for review and determine if the central office (CO) or the Office of the General Counsel (OGC) needs to review the case. The RTL will respond to the request via the SSITMS

website, and SSITMS will send an email notification when the RTL completes the reevaluation process.

d. Appeals of trust determinations

When the applicant or recipient appeals the trust resource determination, the RTL must review the Claims Specialist's reconsideration decision. To request a review of the trust reconsideration determination, access SSITMS and:

- select "Recon Pending" from the Recon Trust Status dropdown using the Edit function; and
- provide pertinent information about the reason for the appeal in Claims Specialist remarks and select "Submit."

NOTE: Do not enter RO Recon Trust Determination in SSITMS Claims Specialist remarks. SSITMS will send an email notification when the RTL completes the FO reconsideration review. Do not load a recon into SSITMS until you have made a trust recon determination.

NOTE: Goldberg-Kelly payments may apply during trust reconsiderations only when the SSI recipient is already in pay.

e. RTRT return cases for further FO development

When the RTRT require additional information from the FO, they will return the case for further development. SSITMS will send to the FO mailbox an email notification about the further development requested. To view the RTRT's request, access SSITMS and:

- select the case from the Summary page listings or use the link in the email to access the case; and
- click on the "Details/Update" tab.

View the request for additional information in the Remarks field. After completing the development requested, update the Trust Status to "FO Development Completed" using the Edit button and submit.

2. Trust Reviewer (TR) actions

TRs review the Claims Specialist's trust resource determination along with any pertinent documentation in the SSI Claims System and the Claims File User Interface (CFUI). When TRs receive a trust resource determination for review in SSITMS, they select the case with "Pending" trust status from the SSITMS summary listing and:

- review the trust and associated information;
- provide feedback in the Remarks field in SSITMS;
- document the concurrence decision in a DROC screen or SSA-5002;

- indicate "agree" or "disagree" with the Claims Specialist's trust resource determination in Results;
- change the trust status to "Review Completed" after making a decision on the trust resource determination; and
- submit the response to the Claims Specialist.

Additionally, TRs refer:

- trusts back to the Claims Specialist when the case needs further development; and
- trusts established outside their region to the RTL. The RTL will refer the trust to the appropriate region.

3. Regional Trust Lead (RTL) actions

Regional Trust Leads (RTL) review trust resource determinations for all new or not previously evaluated pooled trusts, IGRA trusts, reevaluations, and appeals. When needed, RTLs request guidance from CO or the RCC and refer trusts to other regions for their input or decision. RTLs also refer trusts back to the FO when the case needs further development. Additionally, RTLs monitor the SSITMS website and add pooled trust precedents to the SSITMS SharePoint Repository for Precedents. For the pooled trust review process, see SI 01120.202C. For information on IGRA trusts, see SI 01120.195.

Follow these steps for the trust review process:

a. Reviewing trust resource determinations

Select the case from the SSITMS Summary listing page or by using the link in the email notification, and:

- click the "Details/Update" tab;
- review information provided by the Claims Specialist technician;
- determine if consultation with CO or the RCC is necessary;
- provide the review results in the Remarks field;
- update Trust Status to "Completed by RTL"; and
- indicate "agree" or "disagree" with the Claims Specialist's determination in Results and click "Submit."

b. Email notifications for reevaluation requests

RTLs will receive an email notification whenever a trust resource determination needs reevaluation. To view the reevaluation request, access the case from the SSITMS Summary page listing.

c. Reevaluate trust resource determinations

To reevaluate the trust resource determination, follow steps listed in SI 01120.200L.3.a. in this section. The specialist who submitted the case and the specialist's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to Trust for Reevaluation."

d. Appeal requests

SSITMS sends the RTL an email notification when he or she needs to review an FO determination on a trust reconsideration. To view appeal requests, access the case from the SSITMS Summary page listing or from the link in the email notification. To review the reconsideration determination, follow steps listed in SI 01120.200L.3.a. in this section. To address the appeal request, follow steps listed in SI 01120.200L.3.a. in this section. The specialist who submitted the case and the specialist's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to SSI Trust Recon for Review."

M. Procedure For Discussing SSI Trust Policy With The Public

1. What to discuss

When you discuss SSI trust policy with a member of the public, follow this guidance:

a. Do not advise an applicant, recipient, deemor, representative payee, legal guardian, or any other party on how to invest funds or hold property in trust. Remember that you are not permitted to provide legal or financial advice.

   Never recommend to an individual that he or she set up a trust or suggest that you think that a trust would be beneficial to him or her. Be aware that a trust may allow eligibility for SSI but not eligibility for Medicaid. Suggest that the individual check with the State Medicaid office.

b. Explain how trusts may affect SSI eligibility and payment amount in general terms or in terms specific to a particular trust arrangement. In the latter case, examine the trust document or a draft of the proposed trust provisions, as necessary. You can identify problematic provisions in the document and refer the individual to the POMS section related to the issue. Do not advocate specific changes to a trust.

c. Remember that an individual's ability to access and use the trust principal depends on the terms of the trust document and on State or Tribal law. The State or Tribal trust laws may be complex. Discuss the individual's documents with your regional office if you are unable to make a determination.

2. Use "SSI Spotlight" on trusts

Consider giving the individual a copy of the "SSI Spotlight" on trusts. You can get a copy of the **Spotlight on trusts** online: (http://www.socialsecurity.gov/ssi/spotlights/spot-trusts.htm).

N. Examples Of Trusts

The following examples are illustrative of situations that you may encounter. You should not rely solely on the analysis given in the examples in making determinations in a specific case, as State (or Tribal) laws vary and the language of individual trust documents may warrant different results from those given in the example. You can refer to regional instructions, if any, and consult your regional office, as necessary. You should also be aware of the possible implications the trust may have for Medicaid eligibility. For instructions on trusts and Medicaid, see SI 01730.048.

1. Trust principal is a resource

a. Example of a trust that is a countable resource

- **Situation**

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

- **Analysis**

Since the grantor may revoke the trust at any time, the trust is a resource to the grantor. In this situation, the child is the grantor and the trust is her resource. This is the case because the actions of the mother, as legal guardian, are taken as an agent for the child. Be aware of situations in which the same person may serve multiple functions (such as parent, guardian, and trustee), and distinguish which specific function the person is performing in order to determine whether the person is acting as an agent for the claimant. Note that it is allowable for the same person to perform multiple functions independently of each other without acting as an agent of the claimant. For the definition of a grantor, see SI 01120.200B.3. in this section.

b. Example of a grantor trust that is a countable resource

- **Situation**

On April 21, 1998, the trust beneficiary, a 17-year-old SSI recipient, received a $125,000 judgment as the result of a car accident that left him disabled. His mother, as his legal guardian, placed the money in an irrevocable trust for the sole benefit of the recipient with his sister as trustee. The trustee has absolute discretion as to how the trust funds are to be spent, and the trust has a prohibition against the trustee's spending funds in a way or amount that would make the recipient ineligible for Federal or State assistance payments. There is no named residual beneficiary. Under

the State law, if an individual is both the grantor of a trust and the sole beneficiary, the trust is revocable, regardless of language in the trust to the contrary.

- **Analysis**

Since the recipient's mother, as his legal guardian, established the trust with funds that belonged to the recipient, we treat the recipient as having established the trust himself. Therefore, he is the grantor of the trust. Since he is also the sole beneficiary of the trust, the trust is revocable under the State law and is the recipient's resource, regardless of the language in the trust document. The recipient is ineligible due to excess resources.

2. Trust principal is not a resource

a. Example of a trust that is not a countable resource

- **Situation**

The SSI recipient is the beneficiary of an irrevocable trust created and funded by her deceased parents. Her brother is the trustee. The terms of the trust give the brother full discretionary power to withdraw funds for his sister's educational expenses. The trustee uses these funds to pay the recipient's tuition and room and board at a boarding school. The trust pays $25 of monthly interest income into a separate account that designates the recipient as owner. She has the right to use these funds in any way she wishes. The trust also contains a valid spendthrift clause that prohibits the trust beneficiary from transferring her interest in the trust payments prior to receipt.

- **Analysis**

Since the recipient, as trust beneficiary, has no authority to terminate the trust established with her parents' assets or to access the principal directly, the trust principal is not her resource. While trust disbursements for the beneficiary's benefit may be income to her, the disbursements for tuition are not income since they do not provide food or shelter in any form. However, the trust disbursements for room and board are in-kind support and maintenance valued under the PMV rule. The $25 monthly deposits of trust earnings are income when deposited into the recipient's personal account and are resources to the extent retained into the following month. The trust beneficiary's right to the stream of $25 monthly payments is not a resource because she cannot sell or assign it prior to receiving the payments because of the valid spendthrift clause. For a definition of spendthrift clauses, see SI 01120.200B.13. in this section.

NOTE: If the SSI recipient is the beneficiary of an unfunded third- party trust; for example, the trust will be funded upon the death of a parent. It is not necessary to review and submit the unfunded trust to SSITMS for SSI eligibility purposes until it is funded.

b. Example of a trust that is not a countable resource

Situation

The claimant is a minor and the beneficiary of an irrevocable trust established in 1997 with the child's annuity payment by his father, who is his representative payee. The father is also the trustee. The claimant's brothers and sisters will become the trust beneficiaries in the event of the claimant's death. In the State where the claimant lives, the grantor can revoke the trust if he is also the sole beneficiary. The brothers and sisters are "residual beneficiaries" who become the beneficiaries upon the prior beneficiary's death.

Analysis

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

3. Trust requires legal review

a. Example of a trust that requires legal input

- **Situation**

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

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

- **Analysis**

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

b. Example of a trust that requires legal review

- **Situation**

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

- **Analysis**

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

O. References

- SI 00810.120 Income Determinations Involving Agents
- SI 00835.360 When to Charge In-Kind Support and Maintenance (ISM) from Third-Party Vendor Payments
- SI 01110.210 Excluded Resources
- SI 01120.020 Transactions Involving Agents
- SI 01120.195 Trusts Established under the Indian Gaming Regulatory Act (IGRA) for Minor Children and Legally Incompetent Adults (IGRA Trusts)
- SI 01120.201 Trusts Established with the Assets of an Individual on or After January 01, 2000
- SI 01140.200 Checking and Savings Accounts
- SI 01140.215 Conservatorship Accounts
- SI 01150.001 What is a Resource Transfer
- SI 01730.048 Medicaid Trusts
- MS INTRANETSSI 013.005 Trust

Social Security

POMS Recent Change

Identification Number:	**SI 01120 TN 52**
Intended Audience:	See Transmittal Sheet
Originating Office:	ORDP OISP
Title:	**Identifying Resources**
Type:	POMS Transmittals
Program:	**Title XVI (SSI)**
Link To Reference:	

PROGRAM OPERATIONS MANUAL SYSTEM
Part 05 - Supplemental Security Income
Chapter 011 - Resources
Subchapter 20 - Identifying Resources
Transmittal No. 52, 04/2018

Audience

FO/TSC: CS, CS TXVI, DRT, FR, OA, OS, RR, CSR, TA, CTE, TSC-CSR

Originating Component

OISP

Effective Date

April 30, 2018

Background

This transmittal provides instructions for determining the resource status for trusts established with the assets of an individual on or after 01/01/00 and it clarifies the three exceptions to the sole benefit rule for third party payments. We are updating this section to clarify which trust payments to third parties for travel expenses do not violate the sole benefit requirement and providing additional guidance.

Summary of Changes

SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00

We updated section headings, revised passive voice statements, and revised cross reference format throughout the instructions to meet POMS transmittal guidelines. Additionally, we made the following changes:

Subsection A - Clarified that trusts may also be established under tribal law.

Subsection B, D, E, G, and H - Proposed changes for clarity purposes.

Subsection C - Reorganized subsection for readability and clarity.

Subsection F - Clarified the three exceptions to the sole benefit rule for third party payments by providing detailed explanations for each exception.

Subsection I - Clarified that we treat trust disbursements to a trust beneficiary's personal debit card the same as cash disbursements.

Subsection J - Added subsections on how to treat assignment of Survivor Benefit Plans and direct deposits of SSI benefits to trusts.

Subsection K – Added new subsection that discusses when and how to use the 90-day amendment period

Subsection L - Reorganized references.

SI 01120.201 Trusts Established with the Assets of an Individual on or after 01/01/00

Citations:

Social Security Act as amended, Section 1613(e)

P.L. 106-169, Section 205

A. Background For Trusts Established With Assets Of An Individual On Or After 01/01/00

1. Foster Care Independence Act of 1999

On 12/14/99, the President signed into law the Foster Care Independence Act of 1999 (P.L. 106-169). Section 205 of this law provides, generally, that we consider trusts established with the assets of an individual (or spouse) as resources for Supplemental Security Inc

Social Security

POMS Recent Change

Identification Number:	**SI 01120 TN 53**
Intended Audience:	See Transmittal Sheet
Originating Office:	ORDP OISP
Title:	**Identifying Resources**
Type:	POMS Transmittals
Program:	**Title XVI (SSI)**
Link To Reference:	

PROGRAM OPERATIONS MANUAL SYSTEM
Part 05 - Supplemental Security Income
Chapter 011 - Resources
Subchapter 20 - Identifying Resources
Transmittal No. 53, 04/2018

Audience

FO/TSC: CS, CS TXVI, DRT, FR, OA, OS, RR, CSR, TA, CTE, TSC-CSR

Originating Component

OISP

Effective Date

April 30, 2018

Background

This transmittal provides the requirements for exception to counting trusts established with the individual's assets on or after January 01, 2000 and it incorporates the policy clarification published in the Administrative Message, AM-15032, regarding the establishment of special needs trusts by court orders. This transmittal also clarifies the requirement that the trust beneficiary must be disabled at the time the special needs or pooled trust is established. This transmittal also incorporates the new statutory provision published in the Emergency Message EM-16053 providing important information regarding a change in SSI trust policy as a result of the 21st Century Cures

Act (P.L. 114-255), which the President signed into law on December 13, 2016. Section 5007 of this Act allows individuals to establish their own special needs trusts and qualify for the exception to resource counting under Section 1917(d)(4)(A) of the Social Security Act. The Administrative Message AM-15032 is obsolete.

Summary of Changes

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

We updated section headings, reorganized subsections for readability and clarity, and revised cross reference format throughout the instructions to meet POMS transmittal guidelines.

Additionally, we made the following subsection changes:

- **Subsection B,** divided former subsection B into new Subsections B and C on Special Needs Trusts and D on Pooled Trusts;
- **Subsection B,** clarified that a third party can be a family member, non-family member or an entity;
- **Subsections B and D,** clarified policy that the trust beneficiary must be disabled at the time the special needs trust or pooled trust account is established and expanded on the requirement that court orders must require the creation of the special needs trust or pooled trust account by providing several examples;
- **Subsection C,** added new policy to reflect statutory change effective December 13, 2016, which allows individuals to establish their own special needs trusts and qualify for the exception to resource counting under Section 1917(d)(4)(A) of the Social Security Act;
- **Subsection E,** created this new subsection to discuss allowable and prohibited expenses for trusts established under Section 1917(d)(4)(A) and (C) of the Act;
- **Subsection F,** created this new subsection to discuss income trusts established under Section 1917(d)(4)(B) of the Act;
- **Subsection G,** retitled and incorporated instructions from subsection C;
- **Subsection H,** retitled and incorporated instructions from subsection G;
- **Subsection I,** retitled and incorporated instructions from subsection D;
- **Subsection J,** retitled and incorporated instructions from subsection F; and
- **Subsection K,** retitled and incorporated instructions from subsection E.

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

A. Introduction To Medicaid Trust Exceptions

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

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

There are two types of Medicaid trusts to consider:

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

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

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

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

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

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

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

CAUTION: A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in SI 01120.200 to

determine if it is a countable resource. If the trust meets the definition of a resource (see SI 01110.100B.1.), it will be subject to regular resource-counting rules.

2. Under age 65

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

3. Additions to trust after age 65

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

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

4. Disabled

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

In cases where you need to develop for disability (for example, a special needs trust beneficiary files for SSI aged benefits), obtain a disability determination from the disability determination services (DDS) following procedure in SI 01150.121D.2. Develop disability as of the date on which the trust was established (unless you need to develop for an earlier period for another purpose).

If DDS determines that the trust beneficiary was:

- disabled as of the date the trust was established, the special needs trust meets the disability requirements for exception; or
- **not** disabled as of the date the trust was established, evaluate the trust under instructions in SI 01120.201. Since the trust provisions take precedence over the transfer provisions (see SI

01150.201D.5.), depending on the terms of the trust, the trust may count as a resource or the transfer penalty may apply (see SI 01150.121.).

5. Definition of established

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

6. Established for the benefit of the individual

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

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

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

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

7. Who established the trust

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

- the disabled individual's parent(s);

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

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

8. Court-established trusts

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

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

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

John is a legally competent adult who inherited $250,000 in January 2015, and is an SSI recipient. His sister, Justine, petitioned the court to create and order the funding of the John Special Needs Trust. Justine also provided the court with an unsigned draft of the trust document. A month later, the court approved the petition and issued an order requiring the creation and funding of the trust. This trust meets the requirement in SI 01120.203B.8. in this section. The fact that the trust beneficiary is a competent adult and could have established the trust himself, is not a factor in the resource determination.

b. Example of a court-established trust

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

c. Example of a court-approved trust

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

d. Example of a court-approved trust

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

9. Legal authority and trusts

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

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

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

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

10. State Medicaid reimbursement requirement

To qualify for the special needs trust exception, the trust must contain specific language that provides that, upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in SI 01120.203D.1. in this section.

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

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

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

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

On December 13, 2016, the President signed into law the 21st Century Cures Act (Public Law 114-255). Section 5007 of this Act allows individuals to establish their own special needs trusts and qualify for the exception to resource counting under Section 1917(d)(4)(A) of the Social Security Act. The resource counting provisions of section 1613(e) do not apply to a trust that:

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

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

CAUTION: A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in SI 01120.200, to

determine if it is a countable resource. If the trust meets the definition of a resource (see SI 01110.100B.1.), it will be subject to regular resource-counting rules.

2. Who established the trust

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

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

a. Power of attorney

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

b. Use of a seed trust

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

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

3. Legal authority and trusts

The person or entity establishing the trust with the assets of the legally competent, disabled individual or transferring the assets of the individual into the trust must have legal authority to act with respect to the assets of the individual. Attempting to establish a trust with the assets of another

individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust under state law.

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

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

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

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

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

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

1. General rules for pooled trusts

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

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

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

- The pooled trust is established and managed by a **nonprofit association**;

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

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

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

2. Disabled

To qualify for the pooled trust exception, the individual whose assets were used to establish the trust account must be disabled for SSI purposes under section 1614(a)(3) of the Act at the time the trust was established. This also includes individuals age 65 and older.

In cases where you need to develop for disability (for example, a pooled trust beneficiary files for SSI aged benefits), obtain a disability determination from the Disability Determination Services (DDS) following procedure in SI 01150.121D.2. Develop disability as of the date on which the trust account was established (unless you need to develop for an earlier period for another purpose). If DDS determines that the trust beneficiary was:

- disabled as of the date the trust account was established, the trust account meets the disability requirement for exception; or
- **not** disabled as of the date the trust account was established, evaluate the trust under instructions in SI 01120.201. Since trust provisions take precedence over the transfer provisions (see SI 01120.201D.5.), depending on the terms of the trust, the trust might count as a resource or the transfer of penalty may apply (see SI 01150.121.).

3. Nonprofit association

The pooled trust must be established and maintained by the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute. For development of nonprofit associations, see SI

01120.203J. in this section. For more information on pooled trust management provisions, see SI 01120.225.

4. Separate account

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

5. Established for the sole benefit of the individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (For a definition of sole benefit, see SI 01120.201F.2.) Other than the payments described in SI 01120.201F.2.b. and SI 01120.201F.2.c., this exception does not apply if the trust account:

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

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

6. Who established the trust account

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

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

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

to the assets of that individual will generally result in an invalid trust under state law. If there is a question regarding authority, consult your precedents or regional chief counsel.

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

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

7. Court-established trusts

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

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

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

b. Example of a court-established trust account

Mary, a legally incompetent SSI recipient, wins a lawsuit in the amount of $50,000. As part of the settlement, the judge orders the creation of a pooled trust account in order for Mary to receive the $50,000. As a direct result of this court order, a pooled trust account was created with Mary's settlement money. The pooled trust records and documentation of the initial deposit list the $50,000 as the initial principal amount. This trust account meets the requirement in SI 01120.203D.6. in this section.

c. Example of a court-approved trust account

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

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

8. State Medicaid reimbursement provision

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in SI 01120.203D.1. in this section.

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

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

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

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

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

1. Allowable administrative expenses

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

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

2. Prohibited expenses and payments

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

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

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

3. Applicability

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

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

Income trusts, sometimes called *Miller* trusts (named after a court case), established under section 1917(d)(4)(B) of the Act are **not** considered exceptions to trust rules for SSI purposes. However,

some States may exclude these trusts from counting as a resource for Medicaid purposes. This type of trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust).

G. Policy For Waiver For Undue Hardship

1. Definitions

a. Undue hardship

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

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

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

b. Loss of shelter

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

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

2. Application of the undue hardship waiver

a. Applicability

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

- counting an **irrevocable** trust as a resource results in the individual's ineligibility for SSI due to excess resources;
- the individual alleges (or information in the file indicates) that not receiving SSI would deprive him or her of food or shelter; and

- the trust specifically prohibits disbursements, or prohibits the trustee from exercising his or her discretion to disburse funds, from the trust for the individual's support and maintenance.

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

b. Suspension of resource counting

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

c. Resource counting resumes

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

3. Available funds

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

a. Income

Income includes the following:

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

Do not include SSI payments received or items that are not income, per SI 00815.000.

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

b. Resources

Resources include the following:

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

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

Do not include non-liquid resources or assets determined not to be a resource, per SI 01120.000.

4. Example

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

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

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

1. When to use this procedure

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

2. Recontact period

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

3. Documentation

At each recontact:

- Obtain on a DROC the individual's statement, either signed or recorded, that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;

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

4. Recontact controls

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

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

I. Procedure For Developing Exceptions To Resource Counting

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

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

STEP	ACTION

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See SI 01120.203B.2. in this section.) • If **yes**, go to **Step 2**. • If **no**, go to **Step 9**.
2	Does the trust contain the assets of a disabled individual? (See SI 01120.203B.4. in this section.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 9**.
3	Is the disabled individual the sole beneficiary of the trust? (See SI 01120.203B.5. in this section.) • If **yes**, go to **Step 4.** • If **no**, go to **Step 9.**
4	Did a parent, grandparent, legal guardian, or court establish the trust? (See SI 01120.203B.6. in this section.) • If **yes**, go to **Step 5**. • If **no**, go to **Step 9.**
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.9. in this section? • If **yes**, go to **Step 6**. • If **no**, go to **Step 9**.
6	Verify if the trust contains any early termination provisions as described within SI 01120.199. If the trust does not contain any early termination provisions, go to Step 7. If the trust contains any early termination provisions, does it meet the early termination criteria in SI 01120.199F that would make early termination acceptable? • If **yes**, go to **Step 7**. • If **no**, go to **Step 9**.

STEP	ACTION
7	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.3. in this section. Go to **Step 8** for treatment of assets placed in trust prior to age 65. Go to **Step 9** for treatment of assets placed in trust after attaining age 65.
8	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.
9	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Consider if the pooled trust exception in SI 01120.203D in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under SI 01120.203K in this section.

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

STEP	ACTION
1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See SI 01120.203B.2. in this section.) • If **yes**, go to **Step 2**. • If **no**, go to **Step 9**.
2	Does the trust contain the assets of a disabled individual? (See SI 01120.203B.4. in this section.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 9**.
3	Is the disabled individual the sole beneficiary of the trust? (See SI 01120.203B.5. in this section.) • If **yes**, go to **Step 4.** • If **no**, go to **Step 9.**

STEP	ACTION
4	Did the individual, a parent, a grandparent, a legal guardian, or a court establish the trust? (See SI 01120.203B.6. in this section.) • If **yes**, go to **Step 5**. • If **no**, go to **Step 9.**
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.9. in this section? • If **yes**, go to **Step 6**. • If **no**, go to **Step 9**.
6	Verify if the trust contains any early termination provisions as described in SI 01120.199. If the trust does not contain any early termination provisions, go to **Step 7**. If the trust contains any early termination provisions, does it meet the early termination criteria in SI 01120.199F that would make early termination acceptable? • If **yes**, go to **Step 7**. • If **no**, go to **Step 9**.
7	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.3. in this section. Go to **Step 8** for treatment of assets placed in trust prior to age 65. Go to **Step 9** for treatment of assets placed in trust after attaining age 65.
8	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.
9	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Consider if the pooled trust exception in SI 01120.203D in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under SI 01120.203K in this section.

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

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

STEP	ACTION

STEP	ACTION
1	Does the trust account contain the assets of a disabled individual? (See SI 01120.203C.2. in this section.) • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Is the pooled trust established and managed by a nonprofit association? (See SI 01120.203C.1., SI 01120.203C.3., and development instructions in SI 01120.203F in this section.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the trust pool the funds yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (See SI 01120.203C.4. in this section.) • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.
4	Is the disabled individual the sole beneficiary of the trust account? (See SI 01120.203C.5. in this section.) • If **yes**, go to **Step 5**. • If **no**, go to **Step 8**.
5	Did the individual, (a) parent(s), (a) grandparent(s), (a) legal guardian(s), or a court establish the trust account? (See SI 01120.203C.1. and SI 01120.203C.6. in this section.) • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203C.8. in this section? • If **yes**, go to **Step 7**. • If **no**, go to **Step 8**.
7	The trust meets the Medicaid pooled trust exception; however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203I. in this section.

J. Procedure To Verify Nonprofit Associations When Evaluating Pooled Trusts

When a trust is alleged to be established through the actions of a nonprofit or a tax-exempt organization, consult the pooled trust precedent in SSITMS. If none exists, follow policy and procedure for verifying the tax-exempt status of organizations found at SI 01130.689E. "Gifts to children with life-threatening conditions."

K. Procedure For Development Of Undue Hardship Waiver

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

STEP	ACTION
1	Is the trust irrevocable? • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Would counting the trust result in excess resources? • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the individual allege, or information in the file indicate, that not receiving SSI would deprive the individual of food or shelter according to SI 01120.203G in this section? • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.

STEP	ACTION
4	Obtain the individual's signed statement (on the DPST screen in the SSI Claims System or, in non-SSI Claims System cases, on a SSA-795 faxed into NDRed) as to whether: • Failure to receive SSI payments would deprive the individual of food or shelter; • The individual's total available funds are less than the FBR plus any federally administered State supplement; • The individual agrees to report promptly any changes in income and resources; and • The individual understands that he or she may be overpaid if, for any month, available funds exceed the FBR plus any State supplement or if other situations change. • Go to **Step 5**.
5	Does the trust contain language that specifically prohibits the trustee from making disbursements for the individual's support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for the individual's support and maintenance? • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	Add up all of the individual's income, both countable and excludable (see SI 01120.203G.3.a. in this section). Do not include any SSI payments received or items that are not income, per SI 00815.000. If the individual is receiving ISM, include as income the ISM being charged (the PMV, VTR, or actual amount, if less). Add up all of the individual's liquid resources, both countable and excludable (see SI 01120.203G.3.b. in this section). Does the total of the income and the liquid resources equal or exceed the FBR plus any federally administered State supplement? • If **yes**, go to **Step 8.** • If **no**, go to **Step7**.

STEP	ACTION
7	Suspend counting of the trust as a resource for any month in which all requirements above are met (see SI 01120.203G.2. in this section). • In the SSI Claims System, document the findings of undue hardship and applicable months on the **DROC** screen. • On paper forms, document the information in the **REMARKS** section. For further documentation, see SI 01120.202C and SI 01120.202D; and for follow-up instructions, see SI 01120.203H in this section. **STOP**.
8	Undue hardship does not apply. However, in some instances where income and resources are currently too high, unless the trust is revocable, undue hardship may apply in future months.

Social Security

POMS Recent Change

Identification Number:	**SI 01120 TN 54**
Intended Audience:	See Transmittal Sheet
Originating Office:	ORDP OISP
Title:	**Identifying Resources**
Type:	POMS Transmittals
Program:	**Title XVI (SSI)**
Link To Reference:	

PROGRAM OPERATIONS MANUAL SYSTEM
Part 05 - Supplemental Security Income
Chapter 011 - Resources
Subchapter 20 - Identifying Resources
Transmittal No. 54 , 04/2018

Audience

FO/TSC: CS, CS TXVI, DRT, FR, OA, OS, RR, CSR, TA, CTE, TSC-CSR

Originating Component

OISP

Effective Date

April 30, 2018

Background

This transmittal clarifies procedure regarding the review of pooled trusts for Supplemental Security Income (SSI) purposes. We provide guidelines to establish pooled trust precedents in the SharePoint Repository. We provide new examples of pooled trust reviews as guidance for evaluating pooled trusts. This transmittal incorporates the emergency message "Guidelines on Reviewing and Establishing Pooled Trust Precedents" published on February 12, 2016. EM-16006 is obsolete.

Summary of Changes

SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00

We made the following changes:

Subsection A –

- Clarified procedure for when to evaluate trust documents and when to reopen cases
- added instructions to include certain information in denial manual notices.

Subsection B and C – Moved from subsection B to C the instructions on pooled trust reviews and establishing and managing SSITMS SharePoint files.

Subsection C – Added instructions for reviewing pooled trusts, and establishing and managing files in the SSITMS SharePoint.

Subsection D – Made minor changes for clarity.

Subsection H – Added examples for reviewing and evaluating pooled trusts.

Subsection I – Reorganized relevant references.

SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00

A. Procedure For Trust Development

1. General development for written trusts

a. When to evaluate trust documents

Evaluate all trusts where an applicant, recipient, or spouse alleges an interest in a trust that needs a resource determination (such as a new or amended trust) in all initial claims (IC) and posteligibility (PE) events.

For PE events, do not reevaluate the trust resource determination (of a trust that has previously been reviewed) unless there is new and material evidence, such as an amendment to the trust or a clarification or change in policy that may affect the trust resource determination. However, evaluate all potential income implications, such as those of trust distributions and payments. For resource status changes in PE events, see SI 01120.201K.

b. Review the trust document

Obtain a copy of the trust document (the original trust document is not required) and related documents and review the document to determine whether the:

- individual is the grantor, trustee, or trust beneficiary;

- trust was established before, on, or after 01/01/00;
- assets were transferred into the trust before, on, or after 01/01/00;
- trust was funded with assets of the individual or third parties or both;
- trust is revocable or can be terminated and, if so, whether the individual has authority to revoke or terminate the trust and to use the principal for his or her own support and maintenance;
- individual has access to the trust principal;
- trust provides for or permits payments to the individual or on the individual's behalf for the benefit of the individual;
- trust principal generates income (earnings) and, if so, whether the individual has the right to any of that income;
- trust provides for mandatory periodic payments and, if so, whether the trust contains a spendthrift clause that is valid under State law and prohibits the voluntary and involuntary alienation of any interest of the trust beneficiary in the trust payments; and
- trust is receiving payments from another source.

c. Which instructions apply when determining the resource status and income treatment of a trust

Depending on the trust's date of establishment and whose funds the trust principal contains, follow these instructions to determine the resource status and income treatment of the trust:

If the trust was established...	And contains...	Then follow instructions in:
On or after 01/01/00	Any assets of the individual	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225 and SI 01120.227
	Only assets of third parties	SI 01120.200
Before 01/01/00	Assets of the individual transferred before 01/01/00	SI 01120.200
	Any assets of the individual transferred on or after 01/01/00	SI 01120.199, SI 01120.201 through SI 01120.204, SI 01120.225, and SI 01120.227
	Only assets of third parties	SI 01120.200

NOTE: If the trust beneficiary adds his or her own assets to an existing third party trust on or after 01/01/00, redevelop the trust under the instructions in SI 01120.199, SI 01120.201 through SI

01120.204, SI 01120.225 and SI 01120.227. For more information on mixed trusts, see SI 01120.200A.1.b. and SI 01120.201I.3.

d. Consult regional instructions

Consult any regional instructions that pertain to trusts to see if there are any State or Tribal laws to consider on such issues as revocability or irrevocability and grantor trusts. You may also consult the Title XVI Regional Chief Counsel (RCC) Precedents. For RCC precedents on trusts, see PS 01825.000.

e. Referring a trust issue to the Regional Office (RO)

If there are unresolved issues that prevent you from determining the resource status of a trust, or there are issues that you believe need a legal opinion, follow your regional instructions or consult with your RO program staff via vHelp. If necessary, the RO staff will seek guidance from the central office (CO) or the Regional Chief Counsel (RCC). Do **not** contact or refer materials to the RCC directly.

NOTE: When referring a trust issue to the RO, make sure to include all documentation and an SSA-5002 (Report of Contact), if necessary, identifying the individual, source of the funds or assets, relevant relationships of others named in the trust, and a brief summary of the unresolved issue(s).

f. Reopening trust determinations

The field office may receive a request by any party to the determination, including SSA, questioning the correctness of the trust determination. The request to reopen a determination must be in writing and within the applicable time limit. For information on reopening SSI determinations, see SI 04070.015.

g. Manual notices

When applicable, issue a manual notice for trusts established with an individual's assets on or after 01/01/00 as required per SI 01120.204. For such notices, specify using free-form text each reason the trust is countable (that is, why it does not meet the relevant exception(s) or requirements). In the notice, you must cite:

- the applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue; and
- the Program Operations Manual System (POMS) citation that contains the policy requirements on that subject.

Additionally, provide the following language indicating where the POMS can be found on-line: "You can find the Program Operations Manual System (POMS) on the Social Security website at https://secure.ssa.gov/poms.nsf/Home?readform." For examples of manual notice language, see SI 01120.204.

NOTE: You should not provide legal advice or attempt to explain how to remedy the problem. For guidance on discussing trust policy with the public, see SI 01120.200M.

2. General development for oral trusts

a. State recognizes as binding

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

- record all relevant information;
- obtain from all parties signed statements describing the arrangement; and
- unless regional instructions specify otherwise, refer the case to your RO staff. The RO will refer the case, through the Assistant Regional Commissioner, Management and Operations Support (ARC, MOS), to the Regional Chief Counsel.

NOTE: The special needs trust and pooled trust exceptions do not apply in the case of an oral trust since these exceptions require written evidence as part of the trust document. For more information on the special needs trust and pooled trust exceptions, see SI 01120.203.

b. State does not recognize as binding

If the State does not recognize oral trusts as binding (see regional instructions), determine whether an agency relationship (a person or entity acting as an agent of the individual) exists and develop under regular resource-counting rules or transfer of resources rules, as applicable. For transactions involving agents, see SI 01120.020.

3. Determining whether a trust is revocable or irrevocable

Determine whether a trust is revocable or irrevocable based on the terms of the trust and State or Tribal law considerations (grantor trust rules). For revocability of grantor trusts, see SI 01120.200D.1.b and SI 01120.200D.3.

4. Determining if a self-funded trust established on or after 01/01/00 is a resource

When determining whether a trust is a resource, apply the policies in regional instructions and SI 01120.201C and SI 01120.201D For instructions on determining the resource status of third party trusts and self-funded trusts established prior to 01/01/00, see SI 01120.200. If the individual used his or her assets to establish a trust on or after 01/01/00, and the trust is:

- revocable, count the trust corpus as a resource **unless one of the exceptions in SI 01120.203 applies.**

  NOTE: The exceptions in SI 01120.203A only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the exception to counting for SSI

purposes under the statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource.

- irrevocable, count as a resource any portion of the trust attributable to the individual's assets and from which the trust can make payments to or for the benefit of the individual or the individual's spouse under any circumstance **unless one of the exceptions in SI 01120.203 applies**.
- irrevocable, and if the trust cannot make payments to or for the benefit of the individual or the individual's spouse under any circumstance, develop the establishment of the trust for a potential transfer of resources penalty using instructions in SI 01150.100.

  NOTE: If you determine that the trust is a resource, you must determine if an exception or waiver in SI 01120.203 applies.

5. Developing legal instruments and devices similar to a trust

a. Which legal instruments and devices to develop

Obtain any written documentation and review the legal instrument or device to determine if it meets the requirements in SI 01120.201G.

If it does, determine whether the arrangement created by the legal instrument or device is a countable resource under regular SSI resource counting rules. If the resource is:

- countable, develop the legal instrument or device under the other applicable resource rules.
- not countable, develop the legal instrument or device following the procedures for developing trusts.

NOTE: Review only a legal instrument or device established with the individual's assets on or after 01/01/00. Do **not** develop legal instruments and devices similar to a trust established with the individual's assets prior to 01/01/00 under instructions in SI 01120.200. However, transfers to such arrangements created by a legal instrument or device may be subject to the transfer of resources provisions. For instructions on transfer of resources, see SI 01150.100.

b. Referral to the RO

If you are unsure of whether the arrangement is one that you should develop as a legal instrument or device similar to a trust, refer the matter to the RO via the vHelp system. If necessary, the RO staff will seek guidance from the central office (CO) or the RCC.

B. Trust Review Process For Trusts Established On Or After 01/01/00

Claims Specialists evaluate all trusts **that need a resource determination** (such as a new or amended trust) in all IC and PE events. For PE events, do not reevaluate trusts that have a resource determination, unless there is:

- an amendment to the trust,
- a change of or clarification in policy that affects the resource determination,
- a request for reopening, or
- a situation where you become aware of a prior erroneous determination.

For resource status changes in PE events, see SI 01120.200K.

To ensure accurate and consistent trust resource determinations:

- Claims Specialists submit their trust resource determinations and any related documentation to the Regional Trust Review Team (RTRT) for review using the Supplemental Security Income Trust Monitoring System (SSITMS) website.
- The RTRT reviews all trust determinations and provide concurrence and any feedback to the Claims Specialists via the SSITMS website. After the Field Office (FO) receives the RTRT concurrence, Claims Specialists can adjudicate the case.

Claims Specialists and RTRT members can use this SSITMS (http://oestweb.ba.ad.ssa.gov/SSITM/default.aspx) link to access the website. SSITMS is a tool for SSA internal communication. Do not share information, including the precedents, with non-SSA personnel. For instructions on using the SSITMS website, visit the user guide located under the Help link on the SSITMS website.

NOTE: It is important to remember that trust determinations are subject to the rules of administrative finality. For more information on administrative finality, see SI 04070.040.

The following steps describe the trust review process for the Claims Specialists and RTRT members for reviewing trusts established with the assets of an individual on or after 01/01/00.

For the trust review process for trusts established prior to 01/01/00, third party trusts, or trusts not subject to Section 1613(e) of the Act, see SI 01120.200L. For instructions on the trust review process of Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.

1. Claims Specialists actions

For all IC and PE cases in which an individual alleges an interest in a trust established on or after 01/01/00 with his or her own (or spouse's) funds and which needs a resource determination, determine whether the trust is a countable resource. To make the trust resource determination, follow the appropriate trust policies in SI 01120.199, SI 01120.201, SI 01120.203, SI 01120.204, SI 01120.225, and SI 01120.227. Additionally, for pooled trusts follow instructions in SI 01120.202C. in this section.

After making a trust resource determination:

· Document the determination along with any references and rationale used in the decision-making process.

Ø For SSI Claims System cases, use the Report of Contact (DROC) screen.

Ø For non-SSI Claims System cases, use a Report of Contact form (SSA-5002) and fax it into the electronic folder (EF) or Non-Disability Repository for Evidentiary Document (NDRED).

· Fax the initial trust resource determination, trust document, and any pertinent information into the appropriate EF.

Follow the trust review process steps in SI 01120.202B.1.a. through SI 01120.202B.1.e. in this section.

a. Submitting trust determinations for RTRT review

To submit your trust determination for RTRT review:

- Access the SSITMS website and select the "Add New" tab. Add the applicant or recipient's name, representative payee's name (if any), social security number, and all other relevant trust information.
- Select the appropriate type of trust in SSITMS (for example, third party trust or special needs trust).
- Add remarks describing your determination and rationale.
- Submit the trust resource determination for RTRT review.

b. Reviewing the RTRT responses

SSITMS sends an email notification after the trust reviewer (TR) or regional trust lead (RTL) reviews the trust and provides a response. To view the RTRT's response:

- Access SSITMS and select the case from the Summary page listing or use the link in the email to access the case, and
- Click on the "Details/Update" tab.

The "Results" field will show that the RTRT member either agreed or disagreed with the trust resource determination. When the Claims Specialist is ready to process the case, change the trust status to "FO Effectuated" using the "Edit" function. The RTRT member may provide feedback in the remarks field.

NOTE: Select "FO Effectuated" only after completing all case development. Changing the Trust Status to "FO Effectuated" **locks** the case in SSITMS. Only the Remarks field will be accessible for additional comments.

c. Reevaluations of trust determinations

To request a reevaluation of a trust resource determination, access SSITMS and:

- Change the Trust Status to "Referred to RTL" using the "Edit" function.
- Provide the rationale, a summary of supporting documentation, and appropriate references in SSITMS remarks and select "Submit."

The RTL will select the case for review and determine if the central office (CO) or the Regional Chief Counsel (RCC) needs to review the case. The RTL will respond to the request via the SSITMS website, and SSITMS will send an email notification when the RTL completes the reevaluation process.

d. Appeals of trust determinations

When the applicant or recipient appeals the trust resource determination, the RTL must review the FO's reconsideration determination. To request a review of the trust reconsideration determination, access SSITMS and:

- select "Recon Pending" from the Recon Trust Status dropdown using the "Edit" function, and
- provide pertinent information about the reason for the appeal in FO remarks and select "Submit."

NOTE: Do not load a recon into SSITMS until you have made a trust recon determination. SSITMS will send an email notification when the RTL completes the FO reconsideration determination review.

NOTE: Goldberg-Kelly payments may apply during trust reconsiderations only when the SSI recipient is already in pay.

e. RTRT returns cases for further FO development

When the RTRT require additional information from the FO, they will return the case for further development. SSITMS will send an email notification about the further development requested to the FO mailbox. To view the RTRT's request, access SSITMS and:

- select the case from the Summary page listings or use the link in the email to access the case, and
- Click on the "Details/Update" tab.

View the request for additional information in the Remarks field. After completing the development requested, update the Trust Status to "FO Development Completed" using the "Edit" function and submit.

2. Trust Reviewer (TR) actions

Trust reviewers (TR) review the Claims Specialist's trust resource determination along with any pertinent documentation in the Supplemental Security Income Claims System (SSI Claims System), eView, and the Claims File User Interface (CFUI). When TRs receive a trust resource determination for

review in SSITMS, TRs select the case with "Pending" trust status from the SSITMS Summary listing or from the link in the email notification, and:

- Review the trust and associated information.
- Provide feedback in the Remarks field in SSITMS.
- Document the decision in a Report of Contact (DROC) screen or SSA-5002 .
- Indicate "agree" or "disagree" with the Claims Specialist's trust resource determination in Results.
- Change the trust status to "Review Completed" after making a decision on the trust resource determination.
- Submit the response to the FO.

Additionally, TRs refer:

- trusts back to the FO when the case needs further development.
- pooled trusts to the RTL for review and inclusion in the precedent file.
- trusts established outside their region, including pooled trusts with a precedent established in another region, to the RTL. The RTL will refer the trust to the appropriate region.

3. Regional Trust Lead (RTL) actions

Regional Trust Leads (RTL) review trust resource determinations for all pooled trusts, reevaluations, and appeals. When needed, RTLs request guidance from CO or the RCC, and refer trusts to other regions for their input or decision. RTLs also refer trusts back to the FO when the case needs further development. Additionally, RTLs monitor the SSITMS website and add pooled trust precedents to the SSITMS SharePoint Repository for Precedents. For instructions on establishing pooled trust precedents, see SI 01120.202C.3. in this section.

RTLs follow the trust review process steps in SI 01120.202B.3.a. to SI 01120.202B.3.d. in this section.

a. Reviewing pooled trust resource determinations

Select the case from the SSITMS Summary listing page or the link in the email notification and:

- Click the "Details/Update" tab.
- Review information provided by the Claims Specialist.
- Determine if consultation with CO or the RCC is necessary.
- Submit pooled trust documents to the RCC for a legal opinion when necessary.
- Provide the review results in the Remarks field.
- Update Trust Status to "Completed by RTL."

- Indicate "agree" or "disagree" with the FO's determination in Results and click "Submit."

NOTE: Add a precedent to the SSITMS SharePoint Repository for Precedents for all pooled trusts that do not have a precedent on file. Use the SSITMS "Help" link to access the precedent library on the SharePoint site.

For instructions on referring pooled trusts to the RCC and establishing and managing pooled trust precedent files, see SI 01120.202C.3. in this section.

b. Email notifications for reevaluation requests

RTLs will receive an email notification whenever a trust resource determination needs reevaluation. To view the reevaluation request, access the case from the SSITMS Summary page listing.

c. Reevaluate trust resource determinations

To reevaluate the trust resource determination, follow the steps listed in SI 01120.202B.3.a in this section. The Claims Specialist who submitted the case and the Claims Specialist's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to Trust for Reevaluation."

d. Appeal requests

SSITMS sends the RTL an email notification when he or she needs to review an FO determination on a trust reconsideration. An RTL who did not review the initial trust determination should review the FO reconsideration determination. To view appeal requests, access the case from the SSITMS Summary page listing or from the link in the email notification. To address the appeal request, follow the steps listed in SI 01120.202B.3.a. in this section.

The Claims Specialist who submitted the case and the Claims Specialist's FO mailbox will receive an automated email notification when the RTL makes a decision. The subject line will show "Response to SSI Trust Recon for Review."

C. Procedure For Reviewing Pooled Trusts And Establishing Precedent Files

To determine the resource status of a pooled trust, review the most recent version available of the master pooled trust for compliance with the requirements of section 1917(d)(4)(C) of the Act. Do not review prior versions of the master pooled trust agreement.

EXCEPTION: If the master trust has been amended, but the amendment does not cover the entire period of review, you may need to review the prior version(s) of the trust. See examples in SI 01120.202H.8.d. in this section.

For all IC and PE cases where an individual alleges establishment of a pooled trust subject to SI 01120.203:

- Review a copy of the master trust agreement, associated documents (such as any amendments) and his or her joinder agreement; and
- Determine whether a precedent for the pooled trust exists. Use the SSITMS "Help" link to access the SSI Trust Precedent SharePoint site that houses the precedent library.
- Review the precedent, if one exists. Trust precedents contain information to help you with evaluation of the pooled trust.

IMPORTANT: Do not share copies of trust precedents, RCC opinions, or other materials in the SSITMS SharePoint precedent file with the public, attorneys, or non-SSA personnel. The only precedents available to the public are in the PS part of the POMS instructions.

1. Procedure for reviewing pooled trusts that have not been amended and amended pooled trusts whose amendment applies to all prior versions

a. The pooled trust precedent is current and there has not been a policy change since the precedent was established

If the precedent in SSITMS SharePoint is for the most current version of the master pooled trust, and the applicant or recipient submits a trust agreement that is the same version or an older version of the master agreement amended by the current version, you do not need to review the master agreement submitted to make your determination. Use the resource determination in the precedent file. However, review the joinder agreement for SI 01120.203 compliance. Additionally, note that, before using the resource determination in the precedent file, you should check to make sure that there have been no policy changes since the precedent determination that would affect the trust resource determination.

After determining the resource status of the master pooled and joinder agreements:

- Document your determination and fax the master agreement and joinder agreement into the appropriate EF.
- Continue the trust review process in SI 01120.202B in this section. See the example of a current precedent for a pooled trust in SI 01120.202H.8.a. in this section.

b. The pooled trust precedent is current but there has been a policy change since the precedent was established

If the precedent in SSITMS SharePoint is for the most current version of the master pooled trust, but there has been a policy change since the precedent was established that may affect the resource determination for the master pooled trust, review the master agreement and joinder agreement for SI 01120.203 compliance, and take the following actions:

- Document your determination and fax the master agreement and joinder agreement into the appropriate EF.

- Continue the trust review process in SI 01120.202B. See the example of a current precedent for a pooled trust in SI 01120.202H.8.a. in this section.

c. The pooled trust precedent is not for the current version of the trust or there is no precedent

If the applicant or recipient submits a new or amended version of a pooled trust master agreement and/or the precedent in the SSITMS SharePoint is not for the most current version of the trust or no precedent exists, review the master pooled agreement and joinder agreement for SI 01120.203 compliance. Then take the following actions:

- Document your determination and fax the master agreement and joinder agreement to the appropriate EF.
- Continue the trust review process in SI 01120.202B in this section. See the example of an outdated precedent for a pooled trust in SI 01120.202H.8.b. in this section.

NOTE: RTLs submit the pooled trust documents to the Regional Chief Counsel (RCC) for a trust resource evaluation and update or establish a precedent in SSITMS SharePoint.

2. Procedure for reviewing amended pooled trusts whose amendment does not apply to all prior versions

If you encounter a situation where an applicant or recipient submits a pooled trust and the pooled trust manager established a new version of the master agreement that does not amend prior versions, take the following actions:

- If there is a precedent for the version of the agreement submitted, follow instructions in SI 01120.202C.1.a. in this section.
- If there is not a precedent for the version of the agreement submitted, follow instructions in SI 01120.202C.1.b. and SI 01120.202C.3. in this section. See example SI 01120.202H.8.c. in this section.
- Submit all versions of the pooled trust to the RTL by using SSITMS, including those with precedents.

3. Procedure for RTLs for establishing pooled trust precedents

a. Information in pooled trust precedents

Before adding or updating a pooled trust precedent in SSITMS SharePoint, RTLs must consult with the RCC. After the RCC evaluates the pooled trust documents, RTLs upload the trust precedent and related documents to the SharePoint site. Pooled trust precedents in SSITMS must contain the following information:

- A copy of the master trust agreement;
- A sample of a joinder agreement;
- A copy of the RCC evaluation of the pooled trust; and
- A precedent summary sheet containing the following information:
    a. Title of the pooled trust.
    b. Establishment date.
    c. Amendment dates.
    d. Resource determination (whether the master pooled trust agreement meets the requirements for exception) and date.
    e. Evaluation of whether the master pooled trust meets each of the requirements in SI 01120.203B.2. State in the summary the specific reason why the pooled trust does not meet any requirement.
    f. Conflicting trust provisions that render the trust countable: for example, a noncompliant early termination provision.

IMPORTANT: Do not share copies of trust precedents, RCC opinions, or other materials in the SSITMS SharePoint precedent file with the public, attorneys, or non-SSA personnel. The only precedents that are available to the public are in the PS Part of the POMS instructions.

b. Regional Chief Counsel (RCC) reviews all pooled trusts

RTLs must consult with the RCC before establishing and updating trust precedents in SSITMS SharePoint. The RCC reviews all pooled trusts and provides a written evaluation on whether they meet the requirements for exception in section 1917(d)(4)(C) of the Act.

c. RTLs manage the precedent files on the SSITMS SharePoint site

After consulting with the RCC, RTLs add precedents to SSITMS SharePoint for all pooled trusts that do not have a precedent on file and update the precedents when pooled trusts have been amended.

1. **Amended trusts that amend all prior versions**

For amended trusts that amend all prior versions, update the precedent summary sheet with the most recent information for the pooled trust and note that the amendments apply to all prior versions of the trust. For example:

- Add an amendment date and any reasons why the amended pooled trust is or is not in compliance.
- Add to SSITMS the most recent versions of the master pooled trust and joinder agreement.

- Do not delete prior versions of the pooled trust. Instead, identify them as "for historical purposes only."

2. **Amended trusts that do not amend all prior versions**

For amended trusts that do not amend all prior versions, keep a precedent for each version of the master agreement. For example, keep and update the prior version of a precedent summary sheet, a copy of the master trust agreement, and a copy of the RCC evaluation for each version of the pooled trust.

D. Summary For Trust Development

1. Trust development

The following is a summary of trust development presented in step-action format (for full development instructions, see SI 01120.202A in this section):

STEP	ACTION
1	Obtain and review a copy of the trust and all related documents. For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.
2	Does the trust contain **any** assets of the individual? • If **no**, follow instructions in SI 01120.200. **STOP.** **NOTE:** If the individual adds any of his or her assets to a third party trust on or after 01/01/00, redevelop the trust per SI 01120.201 through SI 01120.204. • If **yes**, go to **Step 3**.
3	Determine the date the individual transferred his or her assets to the trust. To know which instruction to follow, see SI 01120.201C.1. and SI 01120.202A.1.c. in this section. • If the individual transferred any of his or her assets prior to 01/01/00, follow instructions in SI 01120.200. **STOP.** • If the individual transferred his or her assets in the trust only on or after 01/01/00, go to **Step 4**.

STEP	ACTION
4	Consult national and regional instructions to determine if the trust is revocable or irrevocable (for determining revocability of a trust, see SI 01120.202A.3. in this section and SI 01120.200D): • If you are unable to make a determination, consult with your RO programs staff. • If the trust is revocable, go to **Step 5**. • If the trust is irrevocable, go to **Step 6**. For policy on irrevocable trusts, see SI 01120.201D.2.
5	The trust is a resource unless an exception applies. To see if an exception applies, go to SI 01120.203. For treatment of revocable trusts, see SI 01120.201D.1. Issue a manual notice per SI 01120.204 and include the following information: • The applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue; • The POMS citation that contains the policy requirements on that subject; and • The following language indicating where the POMS can be found on-line – "You can find the Program Operations Manual System (POMS) on the Social Security website at https://secure.ssa.gov/poms.nsf/Home?readform."
6	For the policy on irrevocable trusts see SI 01120.201D.2. Does the trust also contain assets of a third party? • If **yes**, determine the amounts in the trust attributable to the individual and the third party. Develop resource treatment of the portion attributable to the third party under SI 01120.200. Go to **Step 7** for the portion of the trust attributable to the individual. • If **no**, go to **Step 7**.
7	Are there **any** circumstances that would allow payment from the trust to or for the benefit of the individual? • If **no**, the trust is not a resource. To see if a transfer penalty is applicable, refer to SI 01150.100. • If **yes**, the trust is a resource in the amount that the trust can pay out from the portion attributable to the individual unless an exception applies. To see if an exception applies, go to SI 01120.203. Issue a manual notice as instructed in **Step 5** in this table.

2. FO actions during the trust review process

The following is a summary of FO actions during the trust review process presented in step-action format (for full development instructions, see SI 01120.202A and SI 01120.202B.1. in this section):

Step	Action
1	Determine whether the trust is a countable resource. To help you evaluate the trust, follow the steps in SI 01120.202D.1. in this section. Additionally, for pooled trusts, follow instructions in SI 01120.202C in this section. Go to **step 2.** For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.
2	Submit your trust resource determination to the RTRT for review using the SSITMS website. Follow instructions in SI 01120.202B.1.a. in this section. Go to **step 3.**
3	When SSITMS sends the automated notification that the RTRT completed review of the trust, access SSITMS to review the results. Go to **step 4**
4	Do you agree with the RTRT's review of the trust? • If yes, change the trust status in SSITMS to "FO effectuated" at the point when you are ready to adjudicate the IC or close the PE event. Do not change the status until all issues within the IC or PE event are resolved. **STOP.** • If not, request a reevaluation of the trust. For information on how to request a reevaluation, see SI 01120.202B.1.c. in this section. **NOTE**: You have to wait for the reevaluation's results to adjudicate your claim event.

3. RTRT actions during the trust review process

The following is a summary in step-action format indicating the RTRT's actions in the trust review process (for full development instructions, see SI 01120.202B.2. in this section):

STEP	ACTION
1	Access SSITMS to select the case with "pending" trust status or from the link in the email notification. Go to **step 2.** For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.

STEP	ACTION
2	Is the trust a pooled trust? • If yes, refer to RTL for review. STOP. • If not, go to **step 3.**
3	Review the FO's trust resource determination. Use information documented in the SSI Claims System, eView, and CFUI to help with your review of the trust. Go to **step 4.**
4	Determine whether you agree or disagree with the FO's determination and provide feedback in the remarks section of SSITMS and document the decision on a DROC or SSA-5002 . Go to **step 5.**
5	Select "Edit" to change the trust status to "Review Completed" and indicate in "Results" whether you agree or disagree with the Claims Specialist's trust resource determination. Go to **step 6.**
6	Submit your response. **STOP.**

4. RTL actions during the trust review process

The following is a summary in step-action format indicating the RTL's actions in the trust review process (for full development, see SI 01120.202B.3. and SI 01120.202C in this section):

STEP	ACTION
1	Access SSITMS to select the case from the SSITMS listing or from the link in the email notification. Go to **step 2.** For instructions on the trust review process for Indian Gaming Regulatory Act (IGRA) trusts, see SI 01120.195.
2	Is this a reevaluation request? If yes, go to **step 3.** If no, go to **step 6.**
3	A RTL who did not review the initial determination reviews the FO and TR determinations and the remarks section to see the reason for the disagreement. Go to **step 4.**

STEP	ACTION
4	Determine if CO or RCC consultation is necessary to resolve the disagreement. Contact CO or the RCC if necessary and go to **step 5** once you are ready to make a decision. If CO or RCC input is not necessary, go to **step 5.**
5	Make a determination on the reevaluation and submit your response via SSITMS. **STOP.**
6	Is the trust established outside your region? • If yes, refer the trust to the appropriate region for input. • If not, go to **step 7.**
7	Review the FO's trust resource determination for the pooled trust. **NOTE:** If the trust determination is for a new pooled trust, add a new precedent to SharePoint. For pooled trusts, you must consult with the RCC before establishing and updating a precedent in SharePoint. Contact the RCC or CO if you need input while evaluating the trust. Go to **step 8.**
8	Determine whether you agree or disagree with the FO's determination and provide feedback in the remarks section of SSITMS and document the decision on a DROC or SSA-5002 . Go to **step 9.**
9	Select "Edit" to change the status to "Completed by RTL" and indicate in "Results" whether you agree or disagree with the Claims Specialist's trust resource determination. Go to **step 10.**
10	Submit your response. **STOP.**

E. Procedure For Documenting Trusts

1. Documenting trusts in the SSI Claims System

Document the existence of a trust in the SSI Claims System by answering **Yes** on the Resource Selection (RMEN) page to the **Trusts** question. A **Yes** answer will bring the **Trust (RTRS) page** into the path.

- Complete the applicable trust questions on the Trust page.

- Enter the value of a trust that does not count as a resource in **excluded amount,** if an exception applies, and select the exclusion type, for example, meets special needs trust requirements or undue hardship, from the **exclusion reason** drop down menu.
- Record all information used in determining whether the trust is a resource and whether it generates income in the Trust page in the SSI Claims System. For more information on what information to record, see MS INTRANETSSI 013.005.
- Record your conclusion and rationale on the **DROC** screen or SSA-5002 and fax to NDRED.

2. Documenting trust on paper forms

Document the existence of a trust on the appropriate resources question on the form or in Remarks. Record all information used in determining whether the trust is a resource and whether it generates income. Record your rationale and determination on an SSA-5002 , and fax to NDRED. For non-SSI Claims Systems cases, document evidence on the **EVID** screen. For information on electronic evidence documentation and retention, see GN 00301.286.

3. Documentation requirements in all cases

Include in the file:

- A copy of the trust document;
- Copies of any signed documents between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned, either revocably or irrevocably, to the trust or trustee;
- Source of assets funding the trust;
- Records of any payments or disbursements (such as ledgers and bank statements) from the trust, as necessary; and
- Any other pertinent documents, such as court documents.

F. Procedure For Coding Trusts

1. Coding Medicaid trusts on paper

Code a **Q** and the date of establishment of the trust in the Third party Liability (PT) field of the Supplemental Security Record (SSR) if the trust qualifies as a Medicaid Trust.

2. Coding the CG field

Code **RE06** or **RE07**, as applicable in the CG (case characteristics) field to indicate a revocable or irrevocable trust, respectively. For a list of CG code entries, see SM 01301.820.

G. Procedure For Medicaid Determination

1. When not to make Medicaid eligibility determination

If the individual resides in a section 1634 State (in which SSA makes Medicaid determinations on behalf of the State), do not attempt to make a Medicaid eligibility determination since the Medicaid determination regarding the trust may differ from the SSI eligibility determination. For a discussion of Section 1634 States, see SI 01715.010A.3.

2. Prepare manual notice

Posteligibility discovery of a trust in a section 1634 State will not result in a correct automated notice paragraph. Suppress any automated notice and prepare a manual notice using Medicaid Paragraph 1147 in NL 00804.110.

NOTE: If the individual is blind or visually impaired, see instructions on the special blind or visually impaired notice options in NL 01001.010.

3. Send trust information to State

a. 1634 States

Copy the trust information and send it to the same address used for assignment of rights (AOR) and third party liability (TPL) information. See regional instructions or contact your RO staff for the correct address.

b. 209(b) and SSI criteria States

In States where SSA does not have an agreement to make the Medicaid eligibility determination:

- copy the trust information and see, as applicable, regional instructions SI NY01150.110, SI DEN01150.110, and SI BOS01150.110; or
- contact your RO staff for the correct address to send the information. For a discussion of section 209(b) and SSI criteria States, see SI 01715.010A.1. and SI 01715.010A.2.

H. Examples Of Trust Evaluations

1. Example of when the trust principal is a resource

a. Situation

A 20-year-old SSI claimant is the beneficiary of an irrevocable trust. The court established the trust in 02/2014 with the proceeds of the settlement of a lawsuit. The claimant lives with her parents, who support her fully. Her parents filed a medical malpractice suit on her behalf against her doctor. The

doctor's insurance company settled the lawsuit before it went to trial for $400,000. The court approved the settlement agreement, whereby the insurance company placed the money in an irrevocable trust for the claimant, naming her parents as trustees. The trust permits payments for the claimant's special needs other than support and maintenance. The trust does not provide for reimbursement of Medicaid expenditures to the State on behalf of the claimant.

b. Analysis

The trust was established with assets of the claimant. Although she never received them directly, the settlement proceeds meet the definition of assets in SI 01120.201B.2. Her parents, acting on her behalf, agreed to the settlement that established the trust. The court directed the proceeds to establish the trust after 01/01/00, so the instructions in SI 01120.201 apply. Although the trust is legally irrevocable under State law, it may be a resource because it permits disbursement of all the funds in the trust to or for the benefit of the claimant. The trust does not meet the exception for a special needs trust under SI 01120.203 because it does not require reimbursement of expenditures to the State(s) that provided medical assistance. Therefore, the trust is a resource in its full amount, $400,000. The claimant is ineligible due to excess resources.

2. Example of when the individual's assets form only part of the trust

See the example of when the individual's assets form only a part of the trust in SI 01120.201C.2.c.

3. Example of when part of the individual's assets in the trust is countable

a. Situation

Bill Murray is an SSI recipient. His wife, who is not eligible, won $150,000 in the State lottery, of which she received $85,000. She used the money to establish the Murray Family Irrevocable Trust. The trust stipulates that she must use $40,000 for their daughter's college education. She can use the remainder of the money for a number of purposes, including supplemental needs for Bill and income payments to herself, at the discretion of the trustee.

b. Analysis

Since Mrs. Murray established the trust with her assets and she can only pay $45,000 to or for the benefit of Mr. Murray, we will count $45,000 as a resource. We consider the remaining $40,000 in the trust a transfer of resources that we must evaluate under SI 01150.100.

4. Example of when a third party trust is not a resource

a. Situation

Woody King is a disabled young adult. In 08/2014, his parents established an irrevocable special needs trust on his behalf with $100,000 of their own funds. Prior to attaining age 18, he was ineligible because of the income and resources of his parents through deeming. Now that he has attained age 18, he is reapplying for SSI.

b. Analysis

Mr. King's resources do not include the trust established by his parents since he was not the grantor of the trust and it is irrevocable. The trust is not a countable resource for SSI purposes. However, payments from the trust, to or for the benefit of Mr. King, may be income.

NOTE: A third party trust can be revocable and not count as a resource as long as the trust beneficiary does not have the legal authority to revoke the trust or direct the use of the trust assets.

NOTE: If the SSI recipient is the beneficiary of an unfunded third party trust, — for example, the trust will be funded upon the death of a parent — it is not necessary to review and submit the unfunded trust to SSITMS for SSI eligibility purposes until it is funded.

5. Example of when the trust is self-established but no payment can be made to or for the benefit of the individual

a. Situation

Arnie Becker is permanently disabled due to an injury he suffered in an automobile accident. Mr. Becker received a $3.5 million dollar insurance settlement that he put into two irrevocable trusts. The first trust is a discretionary trust providing $2.5 million for the education and welfare of his children. The second trust is a charitable trust containing $1 million. The trustee must distribute annually the earnings on the trust in the form of scholarships for students at a nearby college.

b. Analysis

Although Mr. Becker's trusts constitute a very large amount of money, none of the trust assets can be disbursed to him or to provide for his or his spouse's needs. SSA does not count the trusts as resources for SSI purposes. However, the establishment of the trusts is a transfer of resources under SI 01150.100. Mr. Becker will likely be ineligible for SSI for at least 36 months.

6. Example of a burial trust

a. Situation

Mattie Walker, an SSI recipient, wishes to plan her funeral through a prepaid agreement. In the State where she lives, recipients of public assistance, including SSI, must place the funds for their prepaid agreement into a funeral trust. Ms. Walker enters into a contract for a casket and vault valued at $5,000, and the funeral services she wants are valued at $1,500. She places the full amount in a

revocable trust. As required by State law, the trust shows Ms. Walker as the grantor and the funeral home as the trust beneficiary.

b. Analysis

The revocable funeral trust is a resource under SSI burial trust policy in SI 01120.201H.2. This is the case because Ms. Walker is the grantor of the trust and the trust is revocable. The purpose of the trust is irrelevant for purposes of trust policy (see SI 01120.201C.2.d.).

However, since the trust is a resource, the SSI resource exclusions for burial spaces and funds apply. We exclude the vault and the casket as burial spaces. We exclude the $1,500 for funeral services under the $1,500 burial funds exclusion. Therefore, we exclude the total value of the trust. If the amount of funds for funeral services exceeds $1,500 (other than interest or appreciation), we would exclude up to $1,500, and the remaining amount would be countable.

For the burial space exclusion, see SI 01130.400, and for the burial fund exclusion, see SI 01130.409 through SI 01130.425.

NOTE: If a trust does not permit the use of the funds in the trust for burial, the burial exclusions are generally not applicable. Upon the individual's death, the individual would no longer be a beneficiary of the trust, unless the trust specifically provides otherwise. Therefore, individuals cannot designate $1,500 of an otherwise countable trust as a burial fund, unless the trust permits such a use. If you are unable to make this determination, consult with your RO programs staff using vHelp.

7. Example of a trust that includes an excluded resource

a. Situation

Armand Gonzales is a disabled adult SSI recipient. Mr. Gonzales received an award of $250,000 in a lawsuit in 06/2010 and the money went directly into a trust for his benefit. The trust does not meet any of the exceptions to the general SSI trust policy, so the trust would be a countable resource for SSI purposes. As a result, Mr. Gonzales has excess resources in 07/2010 (the month after the month in which the trust was established). The trustee uses all of the money in the trust to purchase a house for Mr. Gonzales (the trust holds the property title), and he moves into the home in 01/2011, when construction is completed. He contacts SSA and informs us of what has happened.

b. Analysis

Mr. Gonzales is ineligible due to excess income in 06/2010 and excess resources from 07/2010 to 01/11. When he moves into the house in 01/2011, we consider him to be living in his own home because he has an equitable ownership interest under a trust. The house qualifies for the home exclusion as of 02/2011, and if Mr. Gonzales meets all other SSI eligibility requirements, we will reinstate his benefits. For information on the home resource exclusion, see SI 01120.200F.1.

8. Examples of pooled trusts

a. Pooled trust precedent is current

Andy Smith filed for SSI benefits on 04/21/09. During his initial interview, he provided The Brothers of Townsville Master Pooled Trust and his joinder agreement for our evaluation. The master agreement states that the trust was established on 11/12/07 and there is no evidence that it has been amended.

The precedent summary sheet in SSITMS SharePoint shows that the trust was established on 11/12/07 and that it does not have any amendment dates. It also states that the master pooled trust meets the requirements of SI 01120.203 for exception.

Since SSITMS SharePoint has a current precedent on file for The Brothers of Townsville Master Pooled Trust, and there have not been any trust policy changes since 11/12/07 that would affect the resource determination in the precedent, we adopt the precedent determination for Mr. Smith's pooled trust, evaluate the joinder agreement for compliance, document the DROC, and submit our request for RTRT review via SSITMS.

b. Pooled trust precedent is not current

During Paul Baker's redetermination (RZ) on 06/02/10, he provided The Brothers of Townsville Master Pooled Trust and his joinder agreement for our evaluation.

The master agreement states the trust was established on 11/12/07 and amended on 10/24/09.

The precedent summary sheet in SSITMS SharePoint shows the trust was established on 11/12/07, but does not indicate any amendments.

The precedent in SSITMS SharePoint is not up-to-date. Therefore, we evaluate the master and joinder agreements for compliance, document our determination, and submit our determination via SSITMS for review.

Once the RCC evaluates the amended trust agreement, the RTL updates the precedent summary sheet in SSITMS SharePoint with the new determination information and a copy of the amended trust and updates all other trust-related documents.

c. No pooled trust precedent on file

Janet Moore reports during her RZ interview on 10/08/15 that she is a trust beneficiary of the Greater Los Angeles Master Pooled Trust. Her account was established in 07/2015. Ms. Moore submits her trust documents for our evaluation. We do not have a precedent in SSITMS SharePoint for the Greater Los Angeles Master Pooled Trust.

The Greater Los Angeles Master Pooled Trust was established on 05/15/08 and amended 06/04/12. The amendments do not apply to the prior version. We do not need to evaluate the 05/15/08 version of the master agreement to make a determination in Ms. Moore's case, because her trust was established under the 06/04/12 amended version of the trust. Therefore, we evaluate the 06/04/12 amended master trust agreement and joinder agreement for compliance and submit our determination via SSITMS for review.

Once the RCC evaluates the trust, the RTL creates a precedent for the Greater Los Angeles Master Pooled Trust that includes all the items listed in SI 01120.202C.3. in this section.

If another applicant who has a trust established under the original 2008 version of the trust submits a copy later (because the 2012 amendments do not apply to the 2008 version), establish a separate precedent for the 05/15/08 version of the trust.

d. Reviewing the most recent version of a master pooled trust

Scenario A: trust precedent is not current and 90-day trust amendment period does not apply

Gary Thompson has been a trust beneficiary of The Brothers of Townsville Master Pooled Trust since 02/01/08 and an SSI recipient since 2003. He reported the trust for the first time during an RZ interview in 08/20/15 and submitted his master and joinder trust documents. The Brothers of Townsville Master Pooled Trust has been amended three times, on 10/24/09, 03/18/12, and 02/15/13, and the amendments apply to prior versions. Our precedent file is not current because it shows that the master trust meets the requirement for exception based on the amended version of 03/18/12.

During Mr. Thompson's RZ, we evaluate the 02/15/13 amended version of the master pooled trust, because it is the most recent, and his joinder agreement. The RCC finds that the 02/15/13 version does not meet the requirements for exception. We document the trust determination and count the balance of the trust as a resource back to the start of the period of review based on administrative finality.

NOTE: Mr. Thompson does not qualify for a 90-day trust amendment period because his trust was not previously excepted from resource counting. A trust that either is newly formed or was not previously excepted from resource counting for that individual must meet all of the criteria in SI 01120.199 through SI 01120.203 and SI 01120.225 through SI 01120.227, to be excepted under section 1917(d)(4)(A) or 1917(d)(4)(C). Do not except such a trust from resource counting unless the trust meets all of these requirements.

Scenario B: trust precedent is not current and 90-day trust amendment period applies

Gary Thompson has been a trust beneficiary of The Brothers of Townsville Master Pooled Trust since 02/01/08 and an SSI recipient since 2003. We first excepted his pooled trust from resource counting in 03/2008. During an RZ interview on 08/20/15, Mr. Thompson submitted a copy of 02/15/13 amended master and joinder trust documents. The Brothers of Townsville Master Pooled Trust has been amended three times, on 10/24/09, 03/18/12, and 02/15/13, and the amendments apply to prior versions. Our precedent file is not current because it shows that the trust meets the requirements for exception as a resource based on the amended version of 10/24/09.

During Mr. Thompson's RZ, we evaluate the 02/15/13 version of the master pooled trust, because it is the most recent, and his joinder agreement. The RCC finds that the 02/15/13 version does not meet the requirements for exception because the early termination provision is noncompliant.

Since we had previously excepted The Brothers of Townsville Master Pooled Trust in Mr. Thompson's record (in 03/2008), we follow instructions in SI 01120.199 and offer him 90 days to

amend the trust. On 11/11/15, the trust is amended and becomes compliant. Since the trust was amended during the amendment period, the trust remains excepted from resource counting during the amendment period and continuing.

Scenario C: trust amendments do not cover the entire period of review

Gary Thompson has been a trust beneficiary of The Brothers of Townsville Master Pooled Trust since 02/16/08 and an SSI recipient since 2003. We first excepted his pooled trust from resource counting in 03/2008. During an RZ interview on 08/20/15, Mr. Thompson submitted a copy of 12/15/13 amended master and joinder trust documents. The Brothers of Townsville Master Pooled Trust has been amended three times, on 10/24/09, 03/18/12, and 12/15/13. Our precedent file is not current because it shows that the trust meets the requirements for exception as a resource based on the amended version of 10/24/09.

Mr. Thompson's RZ period of review is 08/13 through 08/15. We evaluate the 12/15/13 version of the master pooled trust because it is the most recent and covers the period 12/13 to 08/15 and the 03/18/12 version of the trust because it is applicable to the other part of the period of review (08/13 – 12/13). (The 12/15/13 version of the trust amended the 03/18/12 version of the trust, but only after 12/15/13. The 12/15/13 amendment is not retroactive to 03/18/12.) We also evaluate his joinder agreements. The RCC finds that the 03/18/12 version of the trust is compliant, but the 12/15/13 version does not meet the requirements for exception because the early termination provision is noncompliant.

Since we had previously excepted The Brothers of Townsville Master Pooled Trust in Mr. Thompson's record (in 03/2008), we follow instructions in SI 01120.199, and offer him 90 days to amend the trust. On 11/11/15, the trust is amended and becomes compliant. Since the trust was amended during the amendment period, the trust remains excepted from resource counting during the amendment period and continuing.

I. References

- SI 01120.199 Early Termination Provisions and Trusts
- SI 01120.201 Trusts established with the assets of an individual on or after 1/1/00
- SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00
- SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
- SI 01120.204 Notices for Trusts Established on or after 1/1/00
- SI 01120.225 Pooled Trusts Management Provisions
- SI 01120.227 Null and Void Clauses in Trust Documents

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART 2
Justice

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DELINDA BONIN,

Plaintiff,

- v -

WELLS, JAWORSKI & LIEBMAN, LLP, ANNMARIE PALERMO-SMITS

Defendant.

INDEX NO. 153167/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,

were read on this application to/for Dismissal

Upon the foregoing documents, it is ordered that **the motion is granted and the complaint is dismissed.**

Defendants Wells, Jaworski & Liebman, LLP and Annmarie Palermo-Smits, Esq. move, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7) and 3016 (b), for an order dismissing the complaint as barred by the relevant statutes of limitations and the documentary evidence.

FACTUAL AND PROCEDURAL BACKGROUND

In the complaint, plaintiff Delinda G. Bonin alleges that she and her husband, Carl J. Bonin ("Carl Bonin"), now deceased (collectively "the Bonins"), initially retained defendants to sell certain inherited real property. Subsequently, by written retainer

agreement executed October 10, 2007, the Bonins retained defendants to prepare an irrevocable trust to avoid having their assets, consisting primarily of the proceeds of that sale, affect their future eligibility for the Nursing Home Medicaid Program, in the event that either of them should require nursing home care in the future, and to prepare powers of attorney and living wills.

On December 14, 2007, the Bonins executed a trust agreement between them, as Grantors, and their son, nonparty Carl Gordon Bonin (a/k/a Gordon Carl Bonin), as the Trustee, prepared by defendants. The trust agreement created the Irrevocable Supplemental Benefits Trust (the Trust).

Plaintiff alleges that, in 2007, defendants advised the Bonins that the transfer of their assets into the Trust would insulate those assets from Medicaid's consideration after expiration of the 60-month look-back period. She further alleges that defendants advised the Bonins that, upon expiration of that period in 2013, they would be able to apply for institutional Medicaid, without being subject to a penalty period of ineligibility.

The Bonins funded the Trust in December 2007 and July 2008 by transferring $227,269 into the same, allegedly with defendants' advice and assistance.

Plaintiff alleges that defendants improperly drafted and structured the Trust and that, therefore, Medicaid would have considered the entire Trust property as an available resource upon a Medicaid benefits application filed by either of the Bonins. Plaintiff alleges that, because the Trust was self-settled, the principal of the Trust property would be considered by Medicaid as an available resource of the Bonins, citing 42 USC § 1396p (d) (3) (B) and 18 NYCRR § 360-4.5 (b) (1) (ii). She also alleges that the structure of the

Trust would permit discretionary payments for the benefit of either of the Bonins to be considered by Medicaid as available income, upon an application for Medicaid benefits by either, citing 18 NYCRR § 360-4.5 (b) (1) (iii).

Plaintiff further alleges that the trust agreement cites to New Jersey law in one instance, although the Bonins were New York residents, and although the Trust was to be administered in accordance with the laws of New York. She further alleges that one provision of the trust agreement is void as against public policy, citing EPTL § 7-3.1 [c]). Additionally, plaintiff alleges that the Trust cannot be a supplemental benefits/needs trust, as promised by defendants, because the relevant law does not allow self-settled supplemental benefits/needs trusts for individuals over the age of 65.

Plaintiff maintains that, had the Trust been properly drafted by defendants, she could have filed an application for Community Medicaid in-home benefits, without the 60-month look-back period, and could have made such application in 2011, four years after the Trust was created.

She alleges that, in 2009, in furtherance of legal advice previously provided by defendants to the Bonins, defendants prepared a gift tax return, reflecting both the transfer of their assets to the Trust, and Carl Bonin's transfer of his interest in the Bonins' residence to plaintiff.

Plaintiff alleges that, in 2011, she hired home health aides to care for Carl Bonin, paying the cost from the Bonins' checking account and with at least one distribution from the Trust.

In February 2013, plaintiff allegedly sought Medicaid planning assistance from an attorney specializing in elder care, nonparty Martin Hersh, Esq., who advised her by letters dated February 21 and 27, 2013 that the Trust assets would not be insulated for purposes of Medicaid eligibility because the trust agreement prepared by defendants was not properly structured. Plaintiff alleges that Hersh also advised that any attempt to amend the trust agreement or transfer the Trust property would subject the Bonins to a penalty period.

Plaintiff maintains that defendants never advised her that the Community Medicaid Program would have paid the Bonins benefits, without subjecting their assets to a look-back period, in the event that the Trust were broken.

By letter dated March 6, 2013, plaintiff, through the Trustee, forwarded Hersh's letters to defendants, and requested a response to Hersh's legal opinion about the structuring of the Trust.

By letter dated April 15, 2013, defendants advised plaintiff that the Trust estate plan was a good plan, and that the assets placed in the Trust would not be considered for purposes of Medicaid because the Trust was a "gifting trust," pursuant to which the Bonins gave up total control of the Trust assets. Defendants recommended that plaintiff file a Medicaid application as originally contemplated in 2007.

Plaintiff took Hersh's advice, rather than defendants'. She broke the Trust, transferred the assets to herself, and subsequently secured Medicaid benefits for Carl Bonin.

Plaintiff claims that, as a result of defendants' misconduct and improper legal advice, she incurred additional and unnecessary legal expenses to obtain proper Medicaid

planning and home health care for Carl Bonin, while waiting for the five-year look-back period to expire. She also alleges that, should she require nursing home care within the five-year period ending in 2020, Medicaid will assess a penalty against her, and she will be required to spend her assets on her medical care.

On April 13, 2016, plaintiff commenced the instant action, in which she asserts causes of action against defendants for legal malpractice, breach of contract, fraud, and violations of General Business Law (GBL) §§ 349, 349-c, and 350. She seeks to recover monetary damages in an amount to be determined at trial, together with court costs, disbursements, and reasonable attorneys' fees incurred in connection with prosecuting this action.

MOTION TO DISMISS

Defendants now seek to dismiss the complaint on numerous grounds, including that the complaint is barred by the relevant statutes of limitations and by the documentary evidence.

Section 3211 (a) (5) of the CPLR permits dismissal of a claim that is barred by the applicable statute limitations.

> "In moving to dismiss a cause of action pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period"

(*City of Yonkers v 58A JVD Indus., Ltd.*, 115 AD3d 635, 637 [2d Dept 2014] [internal quotation marks and citations omitted]).

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see* CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88).

"[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211 (a) (1), regardless of any extrinsic evidence or self-serving allegations offered by the proponent of the claim" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see* CPLR 3211 [a] [1]).

The Legal Malpractice Claim Is Time-Barred

Defendants contend that the legal malpractice claim is time barred pursuant to CPLR 214 (6).

In opposition, plaintiff contends that the claim is timely asserted on the ground that the continuous representation doctrine tolled the running of the limitations period.

The legal malpractice claim is not timely asserted. An action to recover for attorney malpractice is governed by a three-year statute of limitations, regardless of whether the underlying theory is based on contract or tort (*McCoy v Feinman*, 99 NY2d 295, 301

[2002]; *see* CPLR 214 [6]). The three-year limitations period accrues "when the malpractice is committed, not when the client discovers it" (*Williamson v PriceWaterhouseCoopers LLP*, 9 NY3d 1, 7-8 [2007]). This is true even where the plaintiff is unaware of any malpractice, damages, or injury (*McCoy v Feinman*, 99 NY2d at 300-301).

For statute of limitations purposes, plaintiff's legal malpractice claim accrued no later than July 2008, when the Trust was fully funded. A legal malpractice claim accrues when the alleged injury to the client occurs, such as when the trust agreement was funded, regardless of the client's awareness of the malpractice (*Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]; *Pace v Raisman & Assoc. Esqs., LLP*, 95 AD3d 1185, 1187-1188 [2d Dept 2012]). Therefore, the legal malpractice claim should have been asserted no later than July 2011 for it to have been timely commenced. However, plaintiff commenced this action on April 13, 2016, almost five years after expiration of the limitations period.

Contrary to plaintiff's argument, the continuous representation doctrine is not applicable here because, once the Trust was funded, the attorney/client relationship between the Bonins and defendants ended.

The continuous representation doctrine tolls the accrual of the malpractice claim until completion of the professional's ongoing representation concerning the matter out of which the malpractice claim arises (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]). The doctrine "recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected

to question and assess the techniques employed or the manner in which the services are rendered" (*Shumsky v Eisenstein*, 96 NY2d at 167 [internal citation and quotation marks omitted]). Where the doctrine is applied, the limitations period does not expire until the termination of the representation in connection with the subject matter of the alleged malpractice (*Droz v Karl*, 736 F Supp 2d 520, 527 [ND NY 2010] [applying New York law]; *Glamm v Allen*, 57 NY2d 87, 93-94 [1982]).

To toll the legal malpractice limitations period on a theory of continuous representation, the plaintiff must establish that there existed a mutual understanding between the attorney and client of the need for further representation on the specific subject matter underlying the malpractice alleged; a clear indication of an ongoing, continuous, developing, and dependent relationship between them pertaining specifically to the representation from which the alleged malpractice stems, that is not sporadic or intermittent; and a continuing relationship of trust and confidence between the attorney and the client (*Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005]).

Plaintiff has failed to plead any facts that suggest the existence of a continuing attorney/client relationship between defendants and herself. After the funding of the Trust in July 2008, no contact regarding the trust agreement is alleged to have occurred between the Bonins and defendants, until the Trustee's letter dated March 6, 2013, almost five years after the funding of the Trust and 1 ½ years after the expiration of the statutory limitations period. For purposes of the statute of limitations, an attorney/client relationship cannot be revived after the limitations period has expired (*see Droz v Karl*, 736 F Supp 2d at 527 [applying New York law]; *Maurice W. Pomfrey & Assoc., Ltd. v Hancock & Estabrook*,

50 AD3d 1531, 1533 [4th Dept 2008]). Therefore, the correspondence exchanged by the parties in 2013 does not constitute evidence of a continuing relationship, and cannot revive the relationship.

Defendants' reassurances that the Trust was properly created do not demonstrate the existence of a continuous representation. Repeated assurances by attorneys that they provided accurate advice and that they did nothing wrong do not constitute continuous representation, particularly where there exists no mutual understanding to maintain a professional relationship (*Arnold v KPMG LLP*, 543 F Supp 2d 230, 236 [SD NY 2008], *affd* 334 Fed Appx 349 [2d Cir], *cert denied* 558 US 901 [2009] [applying New York law]).

Plaintiff's consultation with Hersh demonstrates, at the very least, the absence of the required continuing relationship of trust and confidence.

Defendants' failure to advise in writing in 2013 that the attorney/client relationship had ended is not dispositive. The continuous representation doctrine does not provide that an attorney/client relationship continues indefinitely unless formally terminated in writing by either party.

Defendants' preparation of gift tax returns for the Trust in 2009 cannot establish the existence of a continuing relationship. Such preparation and legal representation was not related to the creation of the Trust, and, therefore, is not relevant to the issues raised here. Subsequent legal advice to an estate regarding tax liabilities is separate and distinct from the alleged negligence underlying the malpractice claim, and, therefore, cannot demonstrate the existence of a continuing relationship (*Pace v Raisman & Assoc. Esqs. LLC*, 95 AD3d at 1185).

In any event, the preparation of those returns would not render the legal malpractice claim timely commenced. Defendants prepared those returns more than three years prior to the commencement of this action in April 2016.

For the foregoing reasons, that branch of defendants' motion to dismiss the legal malpractice claim as untimely is granted, and that claim is dismissed.

Time-Barred Contract and Fraud Claims

The breach of contract and fraud claims are similarly time-barred.

Plaintiff cannot evade the three-year limitations period by re-characterizing the legal malpractice claim as one sounding in contract or fraud. Where the contract or fraud claim arises out of the same facts as does the legal malpractice claim, and does not seek to recover damages distinct from that claim, then the plaintiff may not benefit from the limitations periods applicable to contract or fraud claims (*Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.*], 3 NY3d 538, 542-543 [2004]; *Farage v Ehrenberg*, 124 AD3d 159, 169-170 [2d Dept 2014]; *see* CPLR 214 [2], 214 [8]).

The factual allegations underlying the contract and fraud claims are identical to those underlying the legal malpractice claim. In the contract claim, plaintiff alleges that she and Carl Bonin retained defendants "to prepare . . . an irrevocable trust, to take advantage of the maximum tax savings and asset protection techniques relative to Medicaid planning" (complaint, ¶ 31), and that defendants breached the retainer agreement by "performing legal services in a sub-standard, sloppy and deficient manner" (*id.*, ¶ 35). In the fraud claim, plaintiff alleges that defendants held themselves out as "experienced

attorneys with a substantial expertise in the areas of . . . trusts and estate planning and that they would assist the Bonins to take advantage of the maximum tax savings and asset protection techniques relative to Medicaid planning" (*id.*, ¶¶ 56 [internal quotation marks omitted]).

In addition, the breach of contract claim is time barred, without reference to the legal malpractice claim. A contract claim must be brought within six years after the alleged breach (CPLR 214 [2]). As held above, the breach occurred no later than July 2008, when the Trust was fully funded. Plaintiff commenced this action on April 13, 2016, almost eight years later.

The contract claim is also fatally defective on the ground that it duplicates the legal malpractice claim in all respects. "[A] breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim" (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 [1st Dept 1998]; *Xiong Ping Tang v Marks*, 133 AD3d 455, 456 [1st Dept 2015]).

The fraud claim is also time-barred, having been asserted more than six years after the fraud was allegedly committed in 2008, and more than two years from the time that the alleged fraud could have been discovered with due diligence, whichever is longer (*see Ghandour v Shearson Lehman Bros., Inc.*, 213 AD2d 304, 305 [1st Dept 1995]; CPLR 213 [8]). Here, plaintiff discovered the fraud no later than April 2013, upon her consultation with Hersh.

For the foregoing reasons, those branches of defendants' motion to dismiss the fraud and contract claims are granted, and those claims are dismissed.

Duplicity of Fraud And Legal Malpractice Claims

Defendants contend that the fraud claim is also fatally defective on the ground that it is duplicative of the legal malpractice claim.

In opposition, plaintiff contends that the fraud claim arises out of tortious conduct independent of the conduct giving rise to the malpractice claim.

A fraud claim that arises within the context of a legal malpractice claim will be dismissed as duplicative where it arises from the same facts as does the malpractice claim and does not allege separate and distinct damages (*Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 [1st Dept 2012]; *Carl v Cohen*, 55 AD3d 478, 478-479 [1st Dept 2008]). No separate cause of action for fraud will lie where the plaintiff's allegations essentially "consist of accusations that defendants committed malpractice" (*Kaiser v Van Houten*, 12 AD3d 1012, 1014 [3d Dept 2004]).

Here, the fraud claim is duplicative of the legal malpractice claim. In both claims, plaintiff alleges that defendants failed to do what the Bonins allegedly hired them to do, i.e., create a trust that would allow the Bonins to take advantage of the maximum tax savings and asset protection techniques available with respect to Medicaid planning, and to discharge their duties in an expert, skillful, and knowledgeable manner (*see* complaint, ¶¶ 8, 11, 38-47, 56-57).

In both claims, plaintiff seeks to recover monetary damages of no less than $100,000, incurred solely as a result of defendants' failure to properly discharge their duties with respect to creating a trust that would protect the Bonins' assets, in the event that either of the Bonins decided to apply for Medicaid benefits in the future (*see id.*, ¶¶ 46, 48, 57, 61). Plaintiff alleges that those monetary damages consist of additional and unnecessary legal expenses and disbursements incurred in obtaining Medicaid planning a second time and home care for Carl Bonin, while waiting for the five-year look-back period to expire, and health care expenses and Medicaid penalties to be incurred in the future, should plaintiff herself require nursing home care within the five-year period ending in 2020. Plaintiff also seeks to recover all sums that the Bonins paid to defendants for their estate and trust planning legal services.

The fraud claim is also fatally defective on the ground that the elements of fraud are not pleaded with the specificity and particularity required by CPLR 3016 (b).

To state a legally viable claim of fraud, a plaintiff must allege "a representation of a material existing fact, falsity, *scienter*, deception and injury" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995] [internal quotation marks and citation omitted]; *Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]). "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The allegations must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (*Accurate Copy Serv. of Am., Inc. v Fisk Bldg. Assoc.*

L.L.C., 72 AD3d 456, 456 [1st Dept 2010]; *Foley v D'Agostino*, 21 AD2d 60, 63-64 [1st Dept 1964], citing CPLR 3013, 3016 [b]). Mere conclusory language is insufficient to state a fraud claim (*Daly v Kochanowicz*, 67 AD3d 78, [2d Dept 2009]).

A fraud claim asserted against multiple defendants must include specific and separate allegations for each defendant, or it will be dismissed (*Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981]).

Here, plaintiff has failed to plead any actionable misrepresentation or material omission of fact by either defendant.

Plaintiff's allegations that defendants misrepresented their legal expertise in estate and trusts planning are not sufficient to support a legally viable fraud claim. A law firm's alleged statements regarding its attorneys' familiarity and expertise in an area of law are mere puffery and opinion, and, as such, are not actionable as fraud (*Schonfeld v Thompson*, 243 AD2d 343, 343 [1st Dept 1997]). Mere puffery regarding professional experience is promissory in nature, and, therefore, is not actionable as fraud (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000]; *Schonfeld v Thompson*, 243 AD2d at 343).

Further, plaintiff's allegation that defendants misrepresented their future intent to keep their promise to provide competent legal assistance regarding Medicaid planning is similarly insufficient. A fraud claim cannot be predicated upon statements which are promissory in nature at the time that they are made, and which relate to future actions or conduct (*P. Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385, 385 [1st Dept 1994]). A fraud claim "may not be based on disappointment that a promised future benefit did not materialize" (*Satler v Merlis*, 252 AD2d 551, 552 [2d Dept 1998]).

Plaintiff failed to allege any facts that might establish that defendants had a present intent to deceive her. A conclusory allegation of present intent is not adequate to plead sufficient details regarding the essential element of scienter (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]). Plaintiff's allegations that defendants never intended to assist her as promised are completely belied by the facts as alleged in the complaint and by the documentary evidence. Defendants created a Trust for the Bonins. As discussed above, plaintiff's current disappointment with that service is not actionable.

For the foregoing reasons, the branch of defendants' motion to dismiss the fraud claim is granted, and that claim is dismissed.

General Business Law Claims

Plaintiff's GBL §§ 349, 349-c, and 350 claims are time-barred, pursuant to CPLR 214 (2).

A claim based upon a liability created or imposed by statute is subject to a three-year limitations period (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 209 [2001]; *see* CPLR 214 [2]). A claim for a violation of either GBL § 349 or § 350 accrues when the plaintiff sustains injury as the result of a deceptive act or practice violating the statute (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d at 209).

Bonin's GBL §§ 349 and 350 claims accrued when plaintiff executed and funded the Trust in July 2008 because that was the point at which she allegedly sustained injury. Plaintiff alleges that, when she funded the Trust, the assets were not insulated from Medicaid, and her "expectations were not met" (complaint, ¶¶ 63-65). She commenced

this action on April 13, 2016, almost eight years later. Therefore, the GBL claims are time-barred.

The GBL § 349 claim is also fatally defective on the ground that plaintiff has not alleged that defendants engaged in consumer-oriented conduct that was deceptive or misleading in a material way. Nor can she demonstrate that she was injured as a result of such conduct. GBL § 349 provides, in relevant part, that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful" (GBL § 349 [a]).

Plaintiff's claim for violations of GBL § 349 is not legally cognizable. To state a claim for relief under GBL § 349, a plaintiff must allege "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]).

The GBL's "threshold requirement of consumer-oriented conduct is met by showing that acts or practices have a broader impact on consumers at large in that they are directed to consumers or potentially affect similarly situated consumers"
(*Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000] [internal quotation marks and citations omitted]).

Bonin's GBL § 349 claim is not based on a transaction that affects the consuming public at large. Instead, it is based on an alleged breach of a retainer agreement unique to the parties. A private contract dispute, such as the dispute here, does not come within the scope of GBL §§ 349 and 350 (*Canario v Gunn*, 300 AD2d 332, 333 [2d Dept 2002]).

Contrary to plaintiff's contention, the Rules of Professional Conduct prohibiting false advertising by an attorney (*see* 22 NYCRR 1200.0, Rules 7.1 [a] [1], 7.3 [a] [2]) do not create a private cause of action, nor may violations of those rules form the basis of claims under the GBL. "The violation of a disciplinary rule does not, without more, generate a cause of action" (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [1st Dept 2003]).

Plaintiff's GBL § 350 claim for false advertising is fatally defective on that ground as well. False advertising is defined by the statute as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity, if such advertising is misleading in a material respect" (GBL § 350-a). The provision of legal services does not involve any commodity, product, or employment opportunity.

Finally, plaintiff's GBL § 349-c claim is defective on its face. Section 349-c of the GBL does not support an independent cause of action, but, instead, imposes an additional civil penalty for violations of sections 349 and 350 of the GBL, when the plaintiff is 65 years of age or older (*see* GBL § 349-c). Inasmuch as plaintiff's claims asserted under GBL §§ 349 and 350 are fatally defective, the GBL § 349-c claim is also fatally defective.

For the foregoing reasons, those branches of defendants' motion to dismiss the claims for violations of GBL §§ 349, 349-c, and 350 are granted, and those claims are dismissed.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against each defendant, with costs and disbursements to each defendant, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of each defendant; and it is further

ORDERED that this constitutes the decision and order of the court.

10/4/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	DENIED	[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED			[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE

Jimenez v Concepts of Independence, Inc.
2018 NY Slip Op 30257(U)
February 14, 2018
Supreme Court, New York County
Docket Number: 653161/2016
Judge: Melissa A. Crane
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

JANETH JIMENEZ, on behalf of herself and all others similarly situated

Plaintiffs,

-against-

CONCEPTS OF INDEPENDENCE, INC.,

Defendant.

Index No.: 653161/2016

Mot. Seq. No. 001

MELISSA A. CRANE, J.S.C.:

Defendant Concepts of Independence, Inc. moves, pursuant to CPLR 3211 (a) (7), to dismiss plaintiff Janeth Jimenez's complaint for failure to state a cause of action.

Background

Defendant is a not-for-profit enterprise that employs aides to care for elderly and disabled people in New York through the Consumer Directed Personal Assistance Program ("CDPAP") (class action complaint, ¶ 1). Plaintiff alleges that she is a home care aide whom defendant employs. Defendant contracts with Independence Care Systems, Inc. to provide human resources and payroll services for the aides (*id.*, ¶ 2). Plaintiff alleges that she and other aides work 24-hour shifts and earn roughly $5.71 per hour, approximately half the minimum wage in New York (*id.*, ¶ 3). Moreover, they also work more than 40 hours per week without receiving any overtime pay (*id.*, ¶ 5). These shifts take place at the homes of individual elderly or infirm persons, defined as consumers (18 NYCRR 505.28 [b] [1]), but the aides live in their own homes, where they return after each shift (class action complaint, ¶ 4).

CDPAP is a statewide Medicaid program that allows consumers to choose their own aides, and how care will be provided (*id.*, ¶¶ 12-14). These services include "personal care services, home health aide tasks, or skilled nursing tasks" (*id.*, ¶ 16). More specifically, plaintiff

alleges that her duties included assistance with practically every facet of day to day living, scheduling appointments, acting as emotional support, and staying awake and alert during overnight shifts (*id.*, ¶¶ 25-30). Defendant then arranged for plaintiff's wages, taxes, other withholdings, and benefits. Defendant also maintained relevant records and coordinated reimbursement from the New York State Department of Health ("DOH"). Plaintiff received her pay and other various administrative assignments from DOH (*id.*, ¶¶ 31-37).

Plaintiff alleges that, from July 18, 2015 through August 28, 2015, she generally worked between three and five 24-hour shifts every week, for which she was only paid for 12 of the 24 hours, plus a per diem payment of $16.95 (*id.*, ¶¶ 10, 42, 44-45). Plaintiff further alleges that defendant under-paid her and other putative class members, despite requiring them to be present at each consumer's house to provide services for the entire 24-hour shift (*id.*, ¶ 41). Plaintiff claims that the entirety of each shift were compensable work hours (*id.*, ¶ 46). Moreover, she alleges that defendant had a policy and practice of not paying overtime for any hours over 40 worked in a given week (*id.*, ¶ 48). These practices allegedly violate various statutory and regulatory provisions (*id.*, ¶¶ 51-53, 59). Plaintiff claims that she attempted to discuss these discrepancies with defendant by phone, to no avail (*id.*, ¶ 50).

On June 15, 2016, plaintiff brought this class action on behalf of all individuals defendant employed as home care aides in New York City since March 1, 2012, and in Westchester, Nassau, and Suffolk Counties since March 1, 2013 (*id.*, ¶ 56). The complaint alleges six causes of action: failure to pay minimum wage, pursuant to Labor Law § 652 and 12 NYCRR § 142-3.1 (first cause of action); failure to pay overtime, pursuant to Labor Law § 650, *et seq.*, and 12 NYCRR § 142-3.2 (second cause of action); failure to pay spread-of-hours pay, pursuant to Labor Law § 650, *et seq.*, and 12 NYCRR § 142-3.4 (third cause of action); failure to pay wages

due and owing, pursuant to Labor Law § 663 (fourth cause of action); breach of contract for failure to comply with Public Health Law § 3614-c (the Wage Parity law) (fifth cause of action); and, unjust enrichment (sixth cause of action). Defendant now moves to dismiss the complaint for failure to state a cause of action.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

For the most part, defendant does not direct its motion at the individual causes of action themselves. Instead, defendant raises broader arguments that apply to multiple individual claims. In order to address these arguments, it is necessary to analyze the wage scheme under which the parties operated.

Under the Labor Law, an employee is "any person employed for hire by an employer in any employment" (Labor Law § 190 [2]). An employer is "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). Employment is not defined. However, the Labor Law does define "employed" quite broadly as "permitted or suffered to work" (Labor Law § 2 [7]).

During the time that plaintiff worked for defendant, employers were required to pay their employees a minimum wage of $8.75 per hour (Labor Law § 652 [1]). In addition, and subject to certain provisions of the Fair Labor Standards Act, employers must pay employees one and one-half times their regular rate for any hours worked over 40 hours per week (12 NYCRR 142-3.2), and an additional hour's worth of pay where the "spread-of-hours" worked exceeds 10 hours (12 NYCRR 142-3.4).[1] Not-for-profit entities, such as defendant, may exempt themselves from the statutory minimum wage and related regulations, provided they certify that their employees are paid "a wage, exclusive of allowances, of not less than the minimum wage" (Labor Law § 652 [3] [b]). This exemption lasts either until 60 days after the entity informs the Commissioner of the Department of Labor that it wishes these provisions to apply to it, or "immediately upon the issuance of an order by the commissioner finding that such institution has failed to pay" these wages (*id.*, § 652 [3] [c]).

In addition to the statutory and regulatory provisions cited above, the parties reference an opinion of the Counsel for the New York State Department of Labor regarding the number of hours for which live-in employees must receive payment. Specifically, live-in employees, whether residential or, like plaintiff, living off the premises,

> must be paid not less than for thirteen hours per twenty-four hour period provided they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable

(NY St Dept of Labor, Op No. RO-09-0169 at 4 [Mar. 11, 2010]). The Appellate Division, First

[1] "The spread of hours is the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals of duty" (12 NYCRR 142-3.16)

and Second Departments, have recently considered the application of this opinion letter to the minimum wage law. In *Tokhtaman v Human Care, LLC* (149 AD3d 476 [1st Dept 2017]), the court affirmed the trial court's denial of the defendant's motion to dismiss. The plaintiff, a home health care attendant, had alleged similar Labor Law violations to those in this case (*id.* at 476). The court held that the opinion letter, in failing to distinguish between residential and non-residential employees, conflicted with the Labor Law (*id.* at 477). Further, the court held that the plaintiff, as a non-residential employee, could recover unpaid wages for hours worked in excess of 13 hours, and that the defendant was not entitled to dismissal of her minimum wage, overtime, spread-of-hours, and failure to pay wages claims (*id.*). Similarly, in *Andryeyeva v New York Health Care, Inc.* (153 AD3d 1216 [2d Dept 2017]), the Second Department upheld class certification of home health care attendants raising similar claims. The court found that, because the plaintiffs, who were non-residential employees, had to remain at their clients' residences and perform services if necessary, "they were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals" (*id.* at 1219).[2]

After these appellate decisions, the Department of Labor issued an Emergency Rule amending the minimum wage orders, effective October 6, 2017 (2017 NY REG TEXT 471959 [NS]). Specifically, the Department of Labor amended 12 NYCRR 142-3.1 [b] as follows:

> Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more

(12 NYCRR 142-3.1 [b] [2]). 29 CFR 785.22 provides that an employer and employee may

[2] On the same day, the Second Department also reversed the denial of a motion for class certification in *Moreno v Future Care Health Servs., Inc.* (153 AD3d 1254 [2d Dept 2017]) on similar grounds.

agree to exclude bona fide meal and sleeping periods from the required wage, provided that sleeping facilities are "furnished by the employer" and that "the employee can usually enjoy an uninterrupted night's sleep" (29 CFR 785.22 [a]). In the absence of an agreement, meal and sleeping periods "constitute hours worked" (*id.*).

Against this backdrop, defendant makes three broad arguments. First, it argues that it has made the required certification, pursuant to Labor Law § 652 (3) (b), that it pays at least minimum wage and is therefore exempt from the statutory and regulatory minimum wage and related provisions. Second, it asserts that plaintiff is only entitled to thirteen hours of pay per day, pursuant to the Department of Labor's opinion that the eleven hours set forth for meals and sleep are not working hours, and, therefore, the court must dismiss plaintiff's claims based on 24 hours of work. Third, it claims that it is not plaintiff's employer, but rather the consumer is, and, accordingly, cannot be liable for plaintiff's allegedly unpaid wages.

Regarding the election under Labor Law § 652 (3) (b), defendant argues that because it has elected to exempt itself from the minimum wage requirements, plaintiff's claims, for failure to pay the minimum wage and overtime, are not viable. Moreover, 14 NYCRR 142-3.4 (a), that provides the spread-of-hours requirement, does not apply to nonprofits that have made the election. In opposition, plaintiff argues that defendant has not, in fact, paid her "not less than the minimum wage," pursuant to Labor Law § 652 (3) (b). Thus, defendant has not complied with the conditions of the election. Accordingly, plaintiff asserts that the requirements of minimum wage must apply.

Defendant attaches a copy of its request to be exempt from the minimum wage orders (Mischke Aff dated 10/7/16, exhibit 1, Statement of Non-Profitmaking Institutions dated 1/14/80 [election form]). The Labor Law is clear that its provisions and related wage orders apply to

entities like defendant under two circumstances: (1) sixty days after the entity notifies the commissioner that it wishes these provisions to apply to it, or (2) immediately upon the commissioner finding that the entity has failed to pay "a wage, exclusive of allowances, of not less than minimum wage" (Labor Law §§ 652 [3] [b], [c]). Plaintiff has not alleged that defendant requested that the wage orders apply to it, or that the commissioner has found that defendant has failed to pay the required wage. Thus, unlike the defendants in *Tokhtaman* and *Andryeyeva*, defendant here is not subject to the minimum wage regulations and related wage orders. Accordingly, the court dismisses plaintiff's second and thirds causes of action, for failure to pay overtime and spread-of-hours pay, respectively.

However, that defendant may not be required to pay overtime or spread-of-hours pay does not mean that plaintiff is not entitled to her regular pay for every hour that she works. While plaintiff argues that she is making below minimum wage, her argument is better understood as defendant was simply not paying her for her full day's work. Plaintiff's own allegations show that defendant paid $10 per hour on weekdays and $11.10 per hour on the weekend, respectively $1.25 and $2.35 more than the minimum wage in effect during plaintiff's employment with defendant (class action complaint, ¶ 44). Thus, the hourly rate is, in fact, not less than the minimum wage. However, the issue remains whether plaintiff has been paid for the correct number of hours, and that issue stands regardless of whether defendant's election remains in effect (*see Andryeyeva*, 153 AD3d at 1218-1219; *Tokhtaman*, 149 AD3d at 477 [allowing plaintiff's minimum wage claims to proceed]).

Defendant argues that the opinion letter and, by extension, the regulations it interprets, limit plaintiff to thirteen hours of pay per shift. Defendant points out that the client for whom plaintiff cared was only approved for "live-in 24-hour consumer directed personal assistance,"

that the regulations define as "the provision of care . . . for a consumer . . . whose need for assistance is sufficiently infrequent that an [aide] would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep" (18 NYCRR 505.28 [b] [12]). This is as opposed to "continuous consumer directed personal assistance," which is "the provision of uninterrupted care . . . for a consumer who, . . . needs assistance with such frequency that a live-in 24-hour [aide] would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep" (18 NYCRR 505.28 [b] [4]). Accordingly, defendant claims that plaintiff is only entitled to thirteen hours of pay per shift under the regulations, because she was not providing continuous care. Moreover, defendant asserts that plaintiff has not sufficiently pleaded that she was required to work during her breaks. In opposition, plaintiff states that she had to be present in the consumer's home for the entirety of her 24-hour shift, on call, awake and able to provide services. Accordingly, she asserts that she is entitled to pay for all of those hours, as she did not in reality receive any meal or sleep breaks.

Both the opinion letter and the current regulations require certain conditions before it is possible to exempt time set aside for meals and for sleeping from required wages. The opinion letter requires setting aside time for meals, and for at least five hours of regularly uninterrupted sleep, in order to qualify as "breaks" (NY St Dept of Labor, Op No,. RO-09-0169 at 4 [Mar. 11, 2010]). The newly amended regulation requires that the employer and employee must agree to exclude sleep and meal periods from regular pay, and, in the case of sleeping periods, the employer must furnish "adequate sleeping facilities" (12 NYCRR 142-3.1 [b]; 29 CFR 785.22 [a]). Moreover, *Tokhtaman* and *Andryeyeva* both hold that a non-residential employee, such as plaintiff, is entitled to a full day's pay if she is required to be at the consumer's residence (*Andryeyeva*, 153 AD3d at 1218-1219; *Tokhtaman*, 149 AD3d at 476). Here, plaintiff has

adequately alleged that she was a nonresidential employee, that the consumer required her presence at the consumer's home for the entirety of each 24-hour shift, and that she was required to remain alert and be prepared to render service throughout her shift (complaint, ¶¶ 4, 30, 41).

Relying on federal case law, defendant argues that plaintiff must plead wage and hour claims under the Labor Law with particularity. Accordingly, defendant claims that plaintiff's allegations are insufficient to show the extent that she was required to work during her breaks. Defendant, however, misapplies case law interpreting the Fair Labor Standards Act and the Labor Law. Regardless of whether the analysis is the same under either statute, defendant cites no New York State authority that Labor Law claims in state court are evaluated under the federal standard for purposes of a motion to dismiss. With the exception of fraud, defamation, and certain other claims and actions, a pleading need only "give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" (CPLR 3013). The federal standard for pleadings derives from *Bell Atlantic Corp. v Twombly* (550 US 544, 570 [2007]) and *Ashcroft v Iqbal* (556 US 662, 678 [2009]). Subsequent to those two decisions, the New York courts have adhered to New York's lower notice pleading standard (*e.g. MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]; *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144 [1st Dept 2009]; *see also Torchlight Loan Services, LLC v Column Fin., Inc.*, 42 Misc 3d 1236[A], 2014 NY Slip Op 50376[U], *5 [Sup Ct, NY County 2014] ["At the outset, the court notes that *Torchlight* only asserts breach of contract claims, which are subject to New York's notice pleading standards, not CPLR 3016(b), the Federal Rules of Civil Procedure, or *Iqbal* and *Twombly*"]). Thus, the court finds defendant's argument that plaintiff insufficiently pleaded its remaining Labor Law claims unavailing. Regardless, the factual issues surrounding

plaintiff's work schedule are "not suited to resolution on a motion to dismiss" (*see Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]).

Defendant argues that, pursuant to the "economic reality" test (*Irizarry v Catsimatidis*, 722 F3d 99, 105 [2d Cir 2013]), defendant cannot have been plaintiff's employer because in the CDPAP, the consumer controls the hiring, scheduling, training, supervision, and termination of plaintiff and the other putative class members. Defendant argues its role as fiscal intermediary is primarily administrative. If it were an employer, defendant asserts that nonprofits would fuel the CDPAP, such as defendants, rather than the consumers. Nonprofits would then intrude upon consumer decision-making to avoid the kind of liability that plaintiff seeks to impose.

In opposition, plaintiff argues that whether defendant was her employer is a fact intensive question, ill-suited to resolution on a motion to dismiss. Moreover, she asserts that the complaint adequately alleges, at minimum, a joint employer relationship between defendant and the consumers that is sufficient to hold defendant liable for the alleged Labor Law violations.

In determining whether an entity is an employer for purposes of the Labor Law, New York courts have adopted the economic reality test set forth by the federal courts (*see Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 626 [1st Dept 2013]; *Ponce v Lajaunie*, 2015 NY Slip Op 31216[U], *4-5 [Sup Ct, NY County 2015). The test has four factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (*Irizarry*, 722 F3d at 105).

Courts will also consider whether an entity is a joint employer under the "immediate control" test (*Brankov v Hazzard*, 142 AD3d 445, 445–46 [1st Dept 2016]). "[A] joint employer relationship may be found to exist where there is sufficient evidence that the defendant had

immediate control over the other company's employees, and particularly the defendant's control over the employee in setting the terms and conditions of the employee's work" (*id.* at 446 [internal quotation marks omitted]). Relevant factors include "commonality of hiring, firing, discipline, pay, insurance, records, and supervision" (*id.* [internal quotation marks omitted]; *see Sanchez v Brown, Harris, Stevens*, 234 AD2d 170, 170 [1st Dept 1996]). "A complaint will survive a motion to dismiss in this context as long as the facts set forth in the Complaint plausibly suggest a degree of control and involvement by [the defendant] in Plaintiff's employment" (*Zuccarini v PVH Corp.*, 2016 NY Slip Op 30350[U], *4 [Sup Ct, NY County 2016] [internal quotation marks and citations omitted]). Indeed, whether a joint employer relationship exists is "essentially [a] factual question[s] that cannot be disposed of on a motion to dismiss" (*Dias v Community Action Project, Inc.*, 2009 WL 595601, at *6, 2009 US Dist LEXIS 17562, at *20 [EDNY, Mar. 6, 2009, No. 07-CV-5163 (NGG)(RER)]).

Here, plaintiff alleges that defendant established her wages, processed payroll and deductions (class action complaint, ¶¶ 24, 32-34), and maintained personnel records (complaint, ¶ 36). However, the CDPAP's governing regulations provide that the consumer is responsible for hiring, firing, training, supervision, and scheduling (18 NYCRR 505.28 [g] [1]). Thus, plaintiff has not adequately alleged that defendant was her sole employer (*Irizarry*, 722 F3d at 105).

However, plaintiff has alleged enough to suggest that a joint employer relationship is plausible. As set forth above, the complaint alleges, and the regulations confirm, that while the consumer is responsible for hiring, retention, training, and supervision (18 NYCRR 505.28 [g] [1]), defendant is responsible for maintaining records for both aides and consumers (*id.* at [i] [1] [iii-iv]), for monitoring aides' health statuses and aides' compliance with applicable regulations

(*id.* at [i] [1] [ii]), for monitoring the abilities of consumers or their designated representatives to comply with the CDPAP requirements (*id.* at [i] [1] [v]), and for establishing appropriate wages (*id.* at [i] [1] [i]). A similar division of responsibility existed in *Sanchez* where the plaintiff concierge was paid by the condominium in which she worked, but was hired, supervised, and fired by the condominium's managing agent (*Sanchez*, 234 AD2d at 170). The Appellate Division, First Department, denied summary judgment to the managing agent, holding that there was sufficient evidence to raise an issue of fact about whether the condominium and its managing agent employed the plaintiff, especially given the "evidence of the managing agent's day-to-day control over both plaintiff and the [condominium] superintendent" (*id.*). Here, there is a similar division of authority, and defendant's responsibilities under the governing regulations suggest the necessary "degree of control and involvement" with plaintiff's employment to survive this motion (*Zuccarini*, 2016 NY Slip Op 30350[U] at *4). Whether defendant is plaintiff's employer, and what that means for plaintiff, are fact intensive questions that the court cannot readily decide on a motion to dismiss. Further, if the consumer assumes responsibility, rather than the employer, for plaintiff's unpaid hours, plaintiff is left with no recourse for the alleged underpayment because the consumer is not responsible for plaintiff's wages.

Finally, defendant alleges that the Wage Parity Act (the "Act") does not apply to it, and, therefore, the court must dismiss the fifth cause of action (*see* NY Public Health Law 3614 [c]). Defendant asserts that, because the Act does not cover it, defendant is not part of any contract requiring compliance with the Act. Therefore, defendant cannot claim to be a third-party beneficiary of a contract under the Act. In opposition, plaintiff argues that she has sufficiently alleged that defendant was party to contracts requiring compliance with the Act, that plaintiff was a third-party beneficiary, and that defendant breached those contracts.

At the time defendant allegedly employed plaintiff, the Wage Parity Act forbade government agencies from making payments to "certified home health agencies, long term home health care programs or managed care plans" for care that home care aides provide who are compensated at less than an established minimum rate (former Public Health Law § 3614-c [2]). The CDPAP was only included in the statute as of July 1, 2017 (Public Health Law § 3614-c [2], as amended by L 2017, ch 57). Where a statute expressly provides a list of items to which it applies, a court can infer anything not on that list has been purposefully excluded (*e.g. Matter of Awe v D'Alessandro*, 154 AD3d 932, 932 [2d Dept 2017]). Because the Wage Parity Act did not cover CDPAP at the time that plaintiff worked for defendant, defendant cannot be liable for breaching any contractual requirement to comply with it.

Accordingly, the court grants that branch of defendant's motion to dismiss the fifth cause of action for breach of contract for failure to comply with the Wage Parity Law. The court has examined the remaining contentions of the parties and found them without merit.

Accordingly, it is hereby

ORDERED that the court grants the motion to dismiss to the extent that the second, third, and fifth causes of action of the complaint are dismissed; and it is further

ORDERED that the court directs defendant to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the court directs counsel to appear for a preliminary conference in Room 304, 71 Thomas Street, on February 15, 2018, at 10:00AM.

Dated: February 14, 2018

ENTER:

HON. MELISSA A. CRANE, J.S.C.

Matter of Wellner v Jablonka

2018 NY Slip Op 02701 [160 AD3d 1261]

April 19, 2018

Appellate Division, Third Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, May 30, 2018

[*1]

In the Matter of Vaira Wellner, Petitioner,
v
Kary Jablonka, as Commissioner of Social Services of Columbia County, et al., Respondents.

Guterman Shallo & Alford, PLLC, Hudson (Matthew D. Cabral of counsel), for petitioner.

Carole Ann Kinnaw, Columbia County Department of Social Services, Hudson, for Commissioner of Social Services of Columbia County, respondent.

Eric T. Schneiderman, Attorney General, Albany (Kathleen M. Treasure of counsel), for Commissioner of Health, respondent.

Garry, P.J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Columbia County) to review a determination of the Department of Health finding petitioner ineligible for Medicaid benefits for a certain period of time.

Petitioner suffers from a progressive neurological disorder and resides in a nursing home. Until October 2014, she had resided with her spouse and received home health care assistance. Petitioner and her spouse have a son to whom, in 2010, the spouse transferred funds in exchange for a promissory note obliging the son to repay the loan in five annual installments. The son made only two of the payments, resulting in an unpaid balance. In February 2013, the spouse loaned him an additional and significantly greater sum in return for a 30-year mortgage on a newly-purchased residence for the son in New Jersey. Approximately three months following petitioner's entry into the nursing home, in January 2015, she submitted an application for Medicaid to the Columbia County Department of Social Services (hereinafter DSS). DSS denied the application and imposed a 45-month penalty period of ineligibility on the ground that the spouse had transferred assets for less [*2]than full market value during the 60-month period before the application.[FN1]

Acting as petitioner's attorney-in-fact, the spouse requested a fair hearing. The Department of Health (hereinafter DOH) upheld the determination following the hearing, finding petitioner ineligible for Medicaid because of the transfers, but reduced the length of the penalty period by crediting the sum of the mortgage payments that had been made by the son. Petitioner thereafter commenced this CPLR article 78 proceeding.

When an institutionalized applicant for Medicaid—or the applicant's spouse—transfers assets for less than fair market value during the 60-month "look-back period" before the date of the application, the applicant may be found to be ineligible for benefits for a period of time based upon the amount of the transfer (Social Services Law § 366 [5] [e] [3]; *see Matter of Whittier Health Servs., Inc. v Pospesel*, 133 AD3d 1176, 1177 [2015]). When such a transfer has occurred, a presumption arises that the transfer "was motivated, in

part if not in whole, by anticipation of a future need to qualify for medical assistance," and it is the applicant's burden to establish his or her eligibility for Medicaid by rebutting the presumption (*Matter of Mallery v Shah*, 93 AD3d 936, 937 [2012] [internal quotation marks, ellipsis and citations omitted]; *accord Matter of Krajewski v Zucker*, 145 AD3d 1252, 1253 [2016]). As pertinent here, an applicant may do so by demonstrating that he or she intended to receive fair consideration for the transfers or that the transfers were made exclusively for purposes other than qualifying for Medicaid (*see* Social Services Law § 366 [5] [e] [4] [i], [ii]).

Here, petitioner contended both that the spouse expected the note and mortgage to be repaid in full, and, in the alternative, that the transfers were made exclusively for purposes other than qualifying for Medicaid. DOH rejected these contentions. Upon review, we find the determinations to be supported by substantial evidence. At the fair hearing, the spouse testified that he made the 2010 loan to the son for the sole purpose of assisting in the purchase of a house in Columbia County, and that it would be "unrealistic" to believe that he knew then that petitioner would someday need to qualify for Medicaid assistance. Notably, however, he also testified that petitioner had begun to display symptoms of her progressive condition "many years" before this loan was made. She had been required to use a walker due to her symptoms, and, for several years before her 2014 nursing home admission, she had required care by home health aides during workdays and by the spouse at night and on weekends. She entered the nursing home in 2014 because the spouse was no longer able to handle her care. This testimony contrasts with the primary case that petitioner relies upon in this proceeding, in which the applicant, although of advanced age, had only relatively minor health concerns at the time of the transfers (*see Matter of Collins v Zucker*, 144 AD3d 1441, 1443 [2016]).[FN2]

The spouse testified that, at the time of the 2013 loan and mortgage, the son, who was [*3]an attorney, had recently left his employment in a law firm to establish his own practice and was thus unable to qualify for a bank loan. The spouse stated that he drafted the mortgage himself, without legal assistance, and included a 30-year term because he believed that this time period was customary. He further asserted that he expected the son to apply for and receive a conventional mortgage loan and make repayment in full within the next five years. However, there was no documentation supporting this expectation.

Assets conveyed through a note or a mortgage during the look-back period are considered to be transfers for full market value when the underlying loan is actuarially sound based upon the lender's life expectancy, provides for equal payments throughout the life of the loan—with no deferrals or balloon payments—and includes a provision prohibiting cancellation upon the lender's death (*see* Social Services Law § 366 [5] [e] [3] [iii]; 42 USC § 1396p [c] [1] [I]). Here, the mortgage was not actuarially sound, as its 30-year repayment term significantly exceeded the anticipated life expectancy of the spouse, who was 76 years old at the time of the transfer. After the rejection of petitioner's Medicaid application, the spouse executed an amended mortgage that reduced the repayment term to five years. However, this amended mortgage provided for the same monthly payment as had the original document, with a balloon payment at the end of the five-year term; it thus did not comply with the separate requirement for equal payments throughout the life of the loan. Moreover, neither the original nor the amended version of the mortgage included the required provision prohibiting cancellation upon the spouse's death; the 2010 note likewise included no such provision. Accordingly, substantial evidence supports DOH's determination that neither transaction

was made for fair market value (*see* 42 USC § 1396p [c] [1] [I]; *Matter of Rivera v Blass*, 127 AD3d 759, 762 [2015]).

A presumption thus arose in favor of DOH, and petitioner bore the burden of establishing her eligibility for Medicaid. As for the spouse's claim that he expected to be repaid in full, his testimony at the fair hearing established that the son made no payments on the 2010 loan after 2012, but that the spouse took no action to collect the balance due until after petitioner was found to be ineligible for Medicaid. He testified that he had expected the son to repay the balance of the 2010 loan in full upon the sale of the Columbia County house that had been purchased with his assistance, but acknowledged that the son had sold that house without repaying the loan. In December 2015, a week before the fair hearing, the spouse wrote to the son demanding payment of the remaining balance of the 2010 loan if there were adequate funds available upon the sale of the New Jersey residence, or otherwise within six months—thus deferring the deadline for final payment six months beyond the end of the original term. Proof was submitted that the New Jersey residence had been listed for sale, but there was no evidence of a contract of sale. In view of the entire record, including the spouse's belated efforts to collect the balance due on the promissory note, his provision of the 2013 loan and mortgage despite the son's default on the 2010 note, and the failure of the mortgage to comply with Medicaid requirements even after the spouse amended it, we find that substantial evidence supports DOH's determination that petitioner did not establish that the spouse expected to be fully repaid for the note and the mortgage.

As for whether the transfers were made solely for purposes other than qualifying for Medicaid, DOH declined to credit the spouse's testimony that he did not contemplate that petitioner might require nursing home placement at the time of the transfers, and this Court defers to such assessments (*see*

Matter of Mallery v Shah, 93 AD3d at 938-939). In view of the progressive nature of petitioner's condition and her poor health at the time of both transfers, substantial evidence supports DOH's conclusion that petitioner did not rebut the presumption that the transfers were made, at least in part, for the purpose of qualifying for Medicaid (*see Matter of Burke*, 145 AD3d 1588, 1589-1590 [2016]; *Matter of Corcoran v Shah*, 118 AD3d [*4]1473, 1473-1474 [2014]; *Matter of Mallery v Shah*, 93 AD3d at 938-939; *compare Matter of Collins v Zucker*, 144 AD3d at 1441; *Matter of Rivera v Blass*, 127 AD3d at 762-763).

McCarthy, Devine, Mulvey and Rumsey, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

Footnotes

Footnote 1: The assessment also included a 2012 gift that the spouse made to the son. Petitioner concedes that this gift was properly treated as an uncompensated transfer subject to a penalty period of ineligibility, and raises no related challenges in this proceeding.

Footnote 2: Petitioner did not appear at the hearing due to the severity of her condition at that time; she was no longer able to walk at all, and was suffering certain cognitive difficulties.

Tara Anne Pleat

From: Ira Salzman via New York State Bar Association <Mail@ConnectedCommunity.org>
Sent: Tuesday, February 06, 2018 7:55 AM
To: Tara Anne Pleat
Subject: [Elder] : Interesting Article 81 Fee Case

Elder Law and Special Needs Section

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Interesting Article 81 Fee Case

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Feb 6, 2018 7:55 AM
Ira Salzman, Esq.

In this case the 4th Dept. held that the trial court erred when it determined to appoint a guardian and at the same time ordered the petitioner to pay the fees of the court evaluator and the court appointed counsel.

Matter of Buttiglieri (Ferrel J.B.), 2018 N.Y. App. Div. LEXIS 648

Copy Citation

Supreme Court of New York, Appellate Division, Fourth Department

February 2, 2018, Decided; February 2, 2018, Entered

1400 CA 17-00589

Reporter
2018 N.Y. App. Div. LEXIS 648 * | 2018 NY Slip Op 00738 **

[**1] IN THE MATTER OF THE APPLICATION OF MARK BUTTIGLIERI, DESIGNEE OF THE CHIEF EXECUTIVE OFFICER OF UPSTATE UNIVERSITY HOSPITAL OF THE STATE UNIVERSITY OF NEW YORK, PETITIONER-APPELLANT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY PURSUANT TO ARTICLE 81 OF THE MENTAL HYGIENE LAW FOR FERREL J.B., AN ALLEGED INCOMPETENT PERSON, RESPONDENT. M. KATHLEEN LYNN, ESQ., RESPONDENT. (APPEAL NO. 2.)

Notice:
THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

evaluator, appoint, directing, court erred, services, legal services, mental hygiene, court-appointed, incapacitated, orders, reasonable compensation, well settled, inasmuch, indigent, provides, vacate

Counsel: **[*1]** ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-APPELLANT.

M. KATHLEEN LYNN, RESPONDENT, Pro se, FAYETTEVILLE.

Judges: PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

Opinion

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 26, 2016 in a proceeding pursuant to Mental Hygiene Law article 81. The order, insofar as appealed from, directed petitioner to pay M. Kathleen Lynn, Esq. certain attorneys' fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the language in the ordering paragraph ", and is to be paid by Petitioner as an administrative expense" is vacated.

Memorandum: In this proceeding in which petitioner sought the appointment of a guardian of the person and property of an alleged incapacitated person (AIP), petitioner appeals from two orders that, respectively, directed petitioner to pay the fees for services submitted by the court-appointed attorney for the AIP and by the court evaluator (collectively, respondents). We agree with petitioner that Supreme Court erred in directing it to pay those fees.

Petitioner contends in appeal No. 2 that the court erred **[*2]** in directing it to pay attorney fees for the court-appointed attorney. We agree. Article 81 of the Mental Hygiene Law provides that the court may appoint an attorney to represent the AIP, and that petitioner may be directed to pay for such services where the petition is dismissed or the AIP dies before the proceeding is concluded (*see* § 81.10 [f]). In all cases, "[t]he court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to" that statute (*id.*). Nevertheless, "the statute is silent as to the source of funds for payment of counsel [where, as here,] the AIP is indigent" (*Matter of St. Luke's-Roosevelt Hosp. Ctr. [Marie H.-City of New York]*, 89 N.Y.2d 889, 891, 675 N.E.2d 1209, 653 N.Y.S.2d 257 [1996]; *see Hirschfeld v Horton*, 88 AD3d 401, 403, 929 N.Y.S.2d 599 [2d Dept 2011], *lv denied* 18 N.Y.3d 804, 962 N.E.2d 287, 938 N.Y.S.2d 862 [2012]). Despite that silence, it is well settled that "the Legislature, by providing for the assignment of counsel for indigents in the Mental Hygiene Law, intended, by necessary implication, to authorize the court to compensate counsel" (*St. Luke's-Roosevelt Hosp. Ctr.*, 89 NY2d at 892), and it is likewise well settled that the court should direct that requests for such compensation should be determined "in accordance with the procedures set forth in County Law article 18-B" (*id.; see Matter of Rapoport v G.M.*, 239 AD2d 422, 422-423, 657 N.Y.S.2d 748 [2d Dept 1997]). Thus, the court erred in directing petitioner to pay those fees.

We also agree with the contention of petitioner in appeal No. **[*3]** 3 that the court erred in directing it to pay the fees requested by the court evaluator. Where, as here, a court appoints a court evaluator pursuant to Mental Hygiene Law § 81.09 (a) and then "grants a petition, the court may award a reasonable compensation to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person" (§ 81.09 [f]). The statute further provides that a court may direct petitioner to pay for the services of a court evaluator only where the court "denies or dismisses a petition," or the AIP "dies before the determination is made in the petition" (§ 81.09 [f]). Therefore, "notwithstanding Supreme Court's broad discretion to award reasonable fees in Mental Hygiene Law article 81 proceedings . . . , [inasmuch as] petitioner was successful

[and the AIP is alive], the court was without authority to ascribe responsibility to petitioner for payment of the court evaluator's fees" (*Matter of Charles X.*, 66 AD3d 1320, 1321, 887 N.Y.S.2d 731 [3d Dept 2009]). Contrary to petitioner's contentions, although the court had discretion to appoint Mental Hygiene Legal Services as attorney for the AIP and to dispense with a court evaluator (*see* Mental Hygiene Law § 81.10 [g]), under the circumstances presented here "the court did not abuse its discretion as a matter of law in failing to do so" (*St. Luke's-Roosevelt Hosp. Ctr.*, 89 NY2d at 892 n). Nevertheless, **[*4]** inasmuch as the court properly made the "determination that [the AIP] is incapacitated within the meaning of Mental Hygiene Law article 81, and [in] the absence of evidence that the petitioner commenced this proceeding in bad faith, it was an improvident exercise of discretion for . . . Supreme Court to direct the petitioner to pay the fees of the court-appointed evaluator and the attorney it appointed to represent [the AIP] in the proceeding" (*Matter of Loftman [Mae R.]*, 123 AD3d 1034, 1036-1037, 999 N.Y.S.2d 166 [2d Dept 2014]; *cf. Matter of Samuel S. [Helene S.]*, 96 AD3d 954, 958, 947 N.Y.S.2d 144 [2d Dept 2012], *lv dismissed* 19 N.Y.3d 1065, 979 N.E.2d 802, 955 N.Y.S.2d 542 [2012]). We therefore reverse, insofar as appealed from, the orders in appeal Nos. 2 and 3, and we vacate the language in each order directing petitioner to pay the respective fees for services rendered.
Entered: February 2, 2018

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Matter of KeyBank N.A.

Surrogate's Court of New York, Saratoga County

September 25, 2017, Decided

2016-769

Reporter
58 Misc. 3d 235 *; 67 N.Y.S.3d 407 **; 2017 N.Y. Misc. LEXIS 3800 ***; 2017 NY Slip Op 27321 ****

[**1]** In the Matter of the Application of KeyBank National Association, Kenneth F. ***Tyrrell*** and Polly E. ***Tyrrell***, Pursuant to SCPA § 2101.

Notice: THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

Core Terms

beneficiary, social services, eligibility, regulations, venue, surrogate's court, amend, modification, reformation, modified, grantor, social services department, disabled, trusts, drafting, requests, terms, remainder interest, parties, health department, set forth, accounting, provisions, proper venue, provides, marital deduction, observations, supplemental, recipient, comports

Counsel: **[***1]** For (KeyBank National Association, Kenneth and Polly ***Tyrrell***), Petitioners: Edward V. Wilcenski, Esq., Wilcenski & Pleat, Clifton Park, NY.

For Saratoga County Department of Social Services, Objectant: Hugh G. Burke Esq., Saratoga County Attorney's Office, Ballston Spa, NY.

Judges: HON. RICHARD A. KUPFERMAN, SARATOGA COUNTY SURROGATE.

Opinion by: Richard A. Kupferman

Opinion

[*236] **[**409]** Richard A. Kupferman, S.

Against the backdrop of a myriad of complex Federal and State statutes and regulations governing Medicaid eligibility, this case analyzes the extent and limitations of the authority of a local department of social services in an application to modify or reform a supplemental needs trust.

Kevin J. ***Tyrrell*** (the "Beneficiary") was the plaintiff in a personal injury/medical malpractice action commenced on his behalf by his parents, Kenneth F. ***Tyrrell*** and Polly E. ***Tyrrell*** in Albany County Supreme Court. By Stipulation of Settlement dated January 15, 2001 the underlying litigation was settled in the Albany County Supreme Court. Thereafter, by Agreement dated February 15, 2001 a Special Needs Trust ("SNT") was established for the benefit of the Beneficiary by his parents as lawful grantors. A review of the original SNT at the time **[***2]** of its creation establishes the Beneficiary's parents as co-Trustees along with KeyBank as the third (corporate) Trustee and repository of the Trust assets. Further, the beneficiary of the SNT **[*237]** (Kevin J. Tyrell) was (and remains) under sixty-five (65) years of age and (2) was (and remains) an individual with a disability thus eligible for the establishment of a SNT, and that (3) the SNT was being established by the beneficiary's parents and (4) the SNT provides the State as a Medicaid remainderman beneficiary **[**410]** upon the death of the Beneficiary. Thus, there appears to be no issue that the SNT as originally written comports with and had no negative effect upon the trust beneficiary's eligibility for Medicaid and is thus a lawfully created SNT.

By Order dated February 27, 2001 the Albany Court Supreme Court approved the terms of the above-referenced settlement and directed that the Beneficiary's share of the settlement be periodically paid into the SNT as established above. Pursuant to the terms of the Order, on March 20, 2001 the parties executed a Stipulation of Discontinuance and filed same with the Albany County Supreme Court. Upon the filing of the

Stipulation of Discontinuance, the **[***3]** matter in the Albany County Supreme Court was concluded and the parties (the Beneficiary and his parents) had no further dealings in the Albany County Supreme Court and relocated soon thereafter to Saratoga County.

By Verified Petition dated January 5, 2017 to this Court, Kenneth and Polly ***Tyrrell*** (the Beneficiary's parents, Grantors and Trustees) as well as KeyBank National Association commenced the instant action seeking permission to amend the terms of the February 27, 2001 SNT pursuant to *Surrogate's Court Procedure Act Section 2101*. Specifically, the SNT provides under Article II that upon the death of the Beneficiary, the Trust will terminate and the Trustee shall divide and distribute the remaining principal and accrued and undistributed income in the Trust Estate as follows:

> A. In the event that the probate estate of Kevin J. ***Tyrrell*** shall contain insufficient assets to cover all funeral expenses and debts of Kevin J. ***Tyrrell***, administration expenses of his Estate, or applicable estate taxes, the Trustee is authorized to distribute from the Trust Estate herein, to the extent of such insufficiency, such amounts as are necessary to pay said funeral expenses, debts, administration expenses and estate taxes of Kevin J. ***Tyrrell***. **[***4]**
>
> B. The Trustee shall reimburse the State of New York and/or any other state which has provided **[*238]** Medicaid assistance to Kevin J. ***Tyrrell*** during his lifetime, in an amount equal to the Medicaid assistance rendered to or paid on behalf of Kevin J. ***Tyrrell*** by such state or states. If Kevin J. ***Tyrrell*** received Medicaid assistance in more than one state, then the amount distributed to each state shall be based upon each state's proportionate share of the total amount of Medicaid assistance paid by all states on behalf of Kevin J. ***Tyrrell***.

As written, the provision that permits the payment of funeral expenses after death of the beneficiary and prior to reimbursement to the State is now inconsistent with *42 USC Section 1396p(d)(4)(A)*, which authorizes the use of a SNT by Social Security and Medicaid recipients. *See also*, Social Security Administration's Program Operations Manual ("POMS") Sections SSI SI 01120.203(B)(3)(a). The SNT in its current form renders the Beneficiary ineligible to receive Supplemental Security Income (SSI).

Thus, in order to render the Beneficiary eligible to qualify for SSI, the Petitioners have made this application seeking amendment of Article II of the SNT. Specifically, the Petitioners seek to **[***5]** amend the language of Article II to provide that upon the death of the Beneficiary that the Trustee may only pay those expenses enumerated in the Social Security Administration's Program Operations Manual ("POMS") Sections SSI SI 01120.203(B)(3)(a) prior to reimbursement to the Medicaid program for all medical assistance provided to the Beneficiary during his lifetime.

[411]** After receiving the instant Petition, the Court issued a Citation returnable on January 31, 2017 to the parties and to the local social services district; e.g. the Saratoga County Department of Social Services (the "Department"). Upon return of the Citation on January 31, 2017, counsel for the Petitioners appeared as well as the Saratoga County Attorney's Office on behalf of the Department. At this appearance, the Department asked for additional time to review the instant petition and trust. The Court then directed the Department to submit any objections (if so **[****2]** inclined to object) to the relief requested within thirty (30) days and then the Petitioner would have seven (7) days within receipt upon which to respond.

Thereafter and by letter dated February 13, 2017, the Department provided its objection to the Petition and **[***6]** its **[*239]** request to amend the terms of the SNT.[1] Specifically, the Department objected to the proposed language relative to the prepaid funeral expenses, and proceeded to make several "observations" and requests to amend the language of further sections of the Trust document. In support of its position, the Department posited that the filing of the application to amend an existing SNT subjects the language of the *entire* document to modification.

In response thereto, by letter dated February 22, 2017, counsel for the Petitioners submitted a reply to the specific objection of the Department, as well as replies to the Department's "observations" and requests to amend language as well as the Department's position relative to its right to have a seat at the drafting (or in the instant case, redrafting) table of the SNT. Specifically to address the Department's objection to the language of the pre-paid funeral expenses, the Petitioners identified that the language of the existing SNT rendered the Beneficiary ineligible for SSI and the

[1] While not captioned as formal objections, the Court chose to accept the Department's February 13, 2017 letter as such.

proposed amendment merely brought the language into the eligibility standards set forth in the Social Security Administration's Program Operations Manual ("POMS") **[***7]** and under relevant federal and state guidelines for SSI eligibility. In its reply, the Petitioners acknowledged that the Department does have a role in the formation and reformation of an SNT, but that role is limited to that which is specifically laid out in federal and state statutes. Specifically, to review a SNT to confirm that it meets the statutory criteria under *42 USC Section 1396p(d)(4)(A)* and *NY Social Services Law Section 366(2)(b)(2)(iii)* and to confirm that the SNT is being administered (and that the State's right as a remainderman under the terms of same is being upheld) consistent with statutory law and Social Services regulations.

The Petitioners identify that nothing in the Department's objections or observations suggests that the instant SNT as written (pre and post amendment) fails to comply with the federal and state statutory language governing same. The Petitioners likewise identify that nothing in the authority governing the drafting and approval of a SNT enlarges the role and responsibility of the Department beyond that which is expressly codified.

Thereafter, correspondence flowed between the parties, and the Court encouraged counsel for both parties to work collaboratively **[*240]** at resolving the issues and disagreement between them. By letter **[***8]** dated April 19, 2017, counsel for the Petitioners submitted a proposed Decree to **[**412]** the Court with a request for the Court to sign same and accompanying therewith a letter which outlined that the parties had yet to reach common ground on certain issues and identified the remaining issues of disagreement. The Court then scheduled a conference on the issues raised above and directed the parties to submit Memoranda of Law detailing their respective positions. Counsel for both sides submitted Memoranda of Law. The Court held a telephone conference on May 11, 2017 whereupon counsel for the Department acknowledged that issues remained in disagreement, that he objected to the terms of the proposed Decree and for the first time raised the issue that the entire proceeding in the Saratoga County Surrogate's Court was improperly venued.

With the issue of venue having been raised for the very first time at the May 11, 2017 **[****3]** telephone conference, the Court directed counsel for the Department to file (should he so choose to do so) a Motion for Change of Venue by May 31, 2017 and a response (by Cross-Petition or Answer) to the relief requested in the Petition by May 17, 2017. Counsel for the Petitioners **[***9]** was given until June 21, 2017 to respond to both the Department's Motion for Change of Venue and Answer/Cross-Petition.

Counsel for the Department filed an Answer and Cross-Petition and Motion to Change Venue and for dismissal of the Petition for failure to recite grounds for relief under *CPLR Section 2214(a) en toto* on May 17, 2017. The Court thereafter instructed counsel to segregate his papers into a Motion to Change Venue and an Answer with Cross-Petition as had been previously directed at the May 11, 2017 telephone conference. Counsel for the Department thereafter filed a Notice of Motion and Affirmation in Support of Motion to Change Venue on May 31, 2017 along with amendments to its original submission which the Court shall consider as its Answer and Cross-Petition for affirmative relief to enable the Court to implement its (the Department's) recommendations to the SNT.

In its Notice of Motion, the Department asserts that the Petitioners' application should properly be venued in Albany County as the court of original and continuing jurisdiction from the initial 2001 drafting of the SNT. The Department moved for a transfer of proceedings pursuant to *SCPA §§207, 209, 501*; *CPLR §503(b)* and for dismissal of the Petition on **[*241]** jurisdictional **[***10]** grounds for failure to recite grounds for relief sought under *CPLR §2214(a)*.[2]

Further, in its Answer and assuming that the Court retains venue over the matter, the Department nevertheless requests that the Court implement the modifications asserted in the Cross-Petition as set forth in its correspondence of February 13, 2017. In response thereto, counsel for the Petitioner filed papers in opposition to the Department's motion to transfer and dismiss, and also filed a Cross-Motion seeking Attorney's Fees pursuant to *22 NYCRR §130-1.1(c)(3)*. Thereafter, counsel for the Department filed a Cross-Motion seeking sanctions against Petitioners pursuant to *22 NYCRR §130-1.1(c)(1)*.

[2] Upon return of the Motion at oral argument on July 19, 2017, the Department conceded that the Court has jurisdiction to hear and preside over the matter, thus rendering the CPLR argument to dismiss relative to jurisdiction moot. In view of the same and of the Department's acknowledgment of jurisdiction, the Court will consider the issue of jurisdiction settled and will not address the Department's motion to dismiss and will consider it withdrawn.

Oral argument was held on July 19, 2017 before the Court. After significant argument **[**413]** by counsel for both parties, the Petitioner's motion for an award of Attorney's fees pursuant to *22 NYCRR §130-1.1(c)(3)* and the Department's motion for sanctions were dismissed, leaving before the Court the issue of venue as well as the Department's role in the drafting and reformation of the SNT. The Court shall first address the question of venue, and then consider the authority or lack thereof to modify or reform a SNT in turn herein.

In its Motion for Change of Venue, the Department asserts that the petition is **[***11]** improperly venued in this Court. At the oral argument of July 19, 2017, counsel for the Department acknowledged and stipulated that jurisdiction was not in contest, merely venue. In support of its position, the Department first identifies that the institutional trustee (KeyBank) is listed as having its principal place of business in Albany County and that the location of the assets of the trust are thus in Albany County as well. The Department further avers that as the original **[****4]** proceeding giving rise to the instant SNT began in Albany County Supreme Court, the proper venue is with Albany County. The Petitioner objects, and notes that the Beneficiary and the Grantor/Trustees (the Beneficiary's parents) all reside in Saratoga County, that there is no pending matter in the Albany County Supreme Court upon which to continue **[*242]** venue and/or jurisdiction, and that venue and jurisdiction has been properly acquired by the Saratoga County Surrogate's Court upon the commencement of the instant proceeding under *Sections 201*, *203* and *207 of the Surrogate's Court Procedure Act*.

As it relates to the Saratoga County Surrogate's Court as an appropriate venue, *Surrogate's Court Procedure Act Section 207(1)* states that;

> a proper venue for a proceeding is (a) the county where the assets of the trust are located, **[***12]** (b) the county where the grantor is domiciled at the time of the commencement of a proceeding or (c) the county where a trustee then acting resides. *NY SCPA Section 207(1)*

There is no argument that the Grantors/Trustees (the Beneficiary's parents) reside in Saratoga County, and did so at the *commencement* of the instant proceeding. A proceeding has been commenced concerning the Trust and the Grantors/Trustees are domiciled in Saratoga County, thus making the Saratoga County Surrogate's Court an appropriate venue pursuant to *NY SCPA Sections 207(1)(b)* and *(c)*.

Here, the Court acknowledges that the institutional Trustee (KeyBank) has its principal place of business located within Albany County and which would make Albany County an appropriate venue under *NY SCPA Section 207(1)(c)* as the Department suggests. The Court finds no merit in the Department's position that Albany County is an appropriate venue under *SCPA Section 207(1)(a)* because the "assets of the trust" are located at the office of the institutional Trustee in Albany County. The Court takes note that KeyBank is a national banking and lending institution with offices and branches throughout Saratoga County and specifically in Clifton Park, the town of residence for the Grantor/Trustees. The Court likewise notes that the "assets **[***13]** of the trust" are funds deposited into the trust account, and given the electronic nature of modern banking readily accessible at other locales as opposed to solely from the Albany County branch.

Even if the Court were to find the assets to be located in Albany County, in *Matter of Myers (45 AD3d 955, 845 N.Y.S.2d 510 [3rd Dept. 2007])*, the Appellate Division Third Department reconciled a similar question of venue. In that case, the subject **[**414]** property of the trust was located in Steuben County and the trustee resided in Chemung County. The Appellate Division found that venue for the proceeding was properly in Chemung county as the county of residence of the trustee (as opposed to the location of the assets of the trust) under *SCPA Section 207(1)(c)*. *NYS SCPA Section 207(1)*; *See also, Matter of Kelly, 17 AD3d 791, 794 N.Y.S.2d 458 (3rd Dept. 2005)*.

[*243] Two of the three Trustees (the Beneficiary's parents) reside in Saratoga County, the third and corporate Trustee (KeyBank) while having its principle office physically located in Albany County has joined in filing the instant application. In view of the same, Saratoga County is a proper venue under *NY SCPA Section 207(1)(c)*.

Under the facts of the instant case, venue would appropriately be in both Saratoga County and Albany County. Accordingly, the analysis must then turn to a reading of NY SCPA **[****5]** *Section 207(2)*.[3]

In the instant proceeding, there exists **[***14]** before the

[3] Ignoring, parenthetically, that the Albany County Trustee joined in the Petitioner's request for the petition and proceeding to be held in Saratoga County.

Court a duly filed Petition and commensurately proper proceeding under SCPA Section 203. As set forth above, the Court acknowledges that both Albany County and Saratoga County are proper venues for the filing of this petition under SCPA Section 207(1). Under SCPA Section 207(2) "where proper venue may lie in more than one county under the provisions of subdivision one, the court where *a proceeding* is first commenced with proper venue shall retain jurisdiction" (emphasis added).

In Surrogate's Court, all proceedings are special proceedings commenced by the filing of a petition and pursuant to New York Surrogate's Court Procedure Act Section 203. In addition, NY SCPA Section 301(a) provides that a proceeding is commenced with the filing of a petition, provided process is issued and service on all respondents is completed within 120 days. *See,* Matter of DeMaio, 13 Misc 3d 190, 819 N.Y.S.2d 648 (Sup. Ct., Kings Co. 2006).

Here, a Verified Petition was filed with the Court on January 5, 2017, and the Department having been duly served and appeared before the Court on the return date of January 31, 2017. The Court having acknowledged jurisdiction over the matter without objection from either party, including the Department. In view of the same, the instant matter represents an active and pending proceeding before the Saratoga County Surrogate's Court, and is the first and only proceeding **[***15]** seeking to address the relief requested in the Petition. There is no pending proceeding in the Albany County Supreme Court and there has never been a commensurate proceeding commenced in the Albany County Surrogate's Court.

Even assuming, *arguendo*, that there was an open proceeding or that the proceeding remained open in the Albany County **[*244]** Supreme Court, the law is well settled that a supreme court will defer to the surrogate's court on matters where the surrogate's court has expertise. H & G Operating Corp. v. Linden, 151 AD2d 898, 542 N.Y.S.2d 868 (3rd Dept. 1989). The review and administration of trusts is one of the experiential hallmarks of a surrogate's court. Even assuming (again, *arguendo*) that a subsequent proceeding were to be commenced in the Albany County Surrogate's Court, the Saratoga County Surrogate's Court would still retain possession of the matter as the "first" court upon which the proceeding was commenced. *See,* NY SCPA Section 207(2).

[415]** Accordingly, the Court finds that the Saratoga County Surrogate's Court is the proper venue for this matter and that there is no basis to remove this proceeding from the Saratoga County Surrogate's Court and transfer it to the Albany County Supreme Court. Therefore, the Department's motion for a change of venue is hereby denied.

The Court **[***16]** now directs its analysis to the true issue in contention between the Petitioner and the Department, specifically what, if any authority the local social services district has to seek modification or reformation of an existing SNT.

To begin, the Court notes that a SNT is a "discretionary trust established for the benefit of a person with a severe and chronic or persistent disability [*EPTL 7-1.12(a)(5)*] that is designed to enhance the quality of the disabled individual's life by providing for special needs without duplicating services covered by Medicaid or destroying Medicaid eligibility." Cricchio v Pennisi, 90 NY2d 296, 683 N.E.2d 301, 660 N.Y.S.2d 679 (1997); Matter of Abraham XX, 11 NY3d 429, 900 N.E.2d 136, 871 N.Y.S.2d 599 (2008). A SNT is a **[****6]** planning device authorized by federal and state law to insulate assets of a chronically ill and severely disabled individual "for the dual purpose of securing or maintaining eligibility for state-funded services, and enhancing the disabled person's quality of life with supplemental care paid by his or her trust assets." Abraham XX, 11 NY3d at 434; see also Matter of Morales, 1995 NY Misc. LEXIS 726, 214 N.Y.L.J. 19 (NY Sup. Ct. Kings Co. July 28, 1995).

Under the pertinent statutes, 42 USC §1396p(d)(4)(A) and Social Services Law §366(2)(b)(2)(iii), neither the corpus nor the income of a SNT is considered a resource or income available to the beneficiary. *See,* Abraham XX, 11 NY3d at 435, Cricchio, 90 NY2d at 303; *see also* 18 NYCRR 360-4.5(b)(5)(i)(a). Rather, the SNT is designed to "address the unique and **[*245]** difficult situation faced by severely disabled individuals **[***17]** with assets that are sufficient to end their Medicaid eligibility but insufficient to account for their medical costs." (*Id. at 437*).

Such treatment is extended to a SNT as long as the trust documents setting up same conform to the language and the requirements of *EPTL 7-1.12(a)(5)* as well as the applicable regulations of the Department of Health. *see* Cricchio, 90 NY2d at 303, *see also* Social Services Law § 366(2)(b)(2)(iii),(iv). Specifically, a SNT is exempted from the general rules governing available resources and Medicaid eligibility when (1) the recipient is "disabled" as that term is defined at 42 USC §

1382c(a)(3), and (2) the SNT contains the following provision:

> The assets of such a disabled individual and was established for the benefit of the disabled individual while such individual was under sixty-five years of age by a parent, grandparent, legal guardian, or court of competent jurisdiction, if upon the death of such individual the state will receive all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of such individual. Social Services Law § 366(2)(b)(2)(iii).

The relationship between the SNT, its beneficiary and the State is set forth in its clearest form by the Court of Appeals decision of Abraham XX, specifically that:

> The SNT is available only to applicants under the age of **[***18]** 65 with severe disabilities as defined by statute. Unless the **[**416]** applicant placed excess assets in the Medicaid SNT for supplemental care, he or she would no longer be eligible for Medicaid, thus relieving the State of a substantial financial burden. In order to further Medicaid's purpose of providing medical assistance to needy persons, the State agrees to continue paying Medicaid costs, in instances where it would otherwise be relieved of this obligation, in exchange for the possibility of reimbursement upon the recipient's death. The State in a sense is like an insurer calculating risk. For every recipient who depletes the trust before death, the State can expect some trusts to have sufficient assets upon a recipient's death to offset the additional cost of continuing Medicaid payments **[*246]** for these severely disabled individuals who otherwise would be ineligible. Moreover, the State's right to reimbursement occurs only upon the death of the beneficiary, at a time when the life-enhancing purpose of the trust can no longer be effectuated. The Medicaid SNT reflects a policy decision to balance the needs of the severely disabled and the State's needs for funds to sustain the system. Abraham XX, 11 NY3d at 436-437.

The State **[***19]** thus has a statutory role within the establishment and maintenance of a SNT. Specifically, the State's role is twofold; first to determine the SNT beneficiary's continued eligibility for Medicaid by ensuring that the proposed SNT comports with existing Federal and State Medicaid Law and second by protecting the State's ultimate remainder interest.

Under the Federal Medicaid statute, it is the individual state departments of health that are tasked with this particular review. In New York State, it is the Department of Health that is bound by these regulations, and the responsibility for its administration falls to the local social services district of each county as the individual Medicaid provider. Specifically, the local social services district (through the Department of Social Services) is to evaluate an applicant's interest in irrevocable trusts for purposes of Medicaid eligibility.

To this end, within the framework of the SNT statutes, there are safeguards are in place to protect both the beneficiary and the remainder interest. Specifically, Social Services Law §366(2)(b)(2)(iv) clearly seeks to protect 'the remainder interest' of the State by authorizing the promulgation of regulations to assure fulfillment of the **[***20]** trustee's fiduciary obligations. Further, Social Services Law §366(2)(b)(2)(iv) directs in relevant part that "the department [of health] shall promulgate such regulations as may be necessary to carry out the provisions of this [section, and such] regulations shall include provisions for assuring the fulfillment of fiduciary obligations of the trustee with respect to the remainder interest of the department or state; monitoring pooled trusts; applying this [section] to legal instruments and other devices **[*247]** similar to trusts, in accordance with applicable federal rules and regulations."[4] In addition to the aforementioned, there are numerous other safeguards and oversights prescribed under the Surrogate's Court Procedure Act, the Estates Powers and Trusts Law, the Social Services Law and Executive Law Section 63.

The statutory safeguards outline the responsibilities and procedural remedies of **[**417]** the State in its review of proposed SNTs. The role of the State is clearly defined and relates specifically to the review of proposed SNTs for its comport to the relevant statutes, Medicaid eligibility and protection of the State's remainder interest. There is nothing in the Federal Medicaid statute, the New York State Social Services law and regulations that **[***21]** expands the responsibility of the State or its local social services departments beyond its statutory role, e.g. the

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[4] It is important to distinguish at this point in the analysis that the New York State Department of Health is a distinct and separate entity from the Department. That the Department in and of itself has no independent authority to promulgate regulations absent the procedures found in NYS Social Services Law Section 20(3)(a).

assessment and determination of an applicant's initial and continuing eligibility for Medicaid. The State and its local social services departments are responsible for the *review* of a SNT and have not been granted any formal authority in the *drafting* of a SNT, as such responsibility is left with the creators of the SNT.

For as the State has a statutory role in the establishment and maintenance of the SNT, so to do the trustees and fiduciaries responsible for the SNT. The responsibilities of these individuals are set forth in *Article 11 of the Surrogate's Court Procedure Act* and at *18 NYCRR §360-4.5(b)(5)(iii)* and require a trustee of a SNT to fulfill not only their fiduciary obligation to the SNT beneficiary but also their concomitant fiduciary obligations with respect to the State's remainder interest in the trust. Specifically, under *18 NYCRR §360-4.5(b)(iii)* the trustee must, by way of example;

> a. notify the appropriate social services district of the creation or funding of the trust for the benefit of an MA applicant/recipient;
> b. notify the social services district of the death of the beneficiary of the trust;
>
> c. notify the social services district in advance of any **[***22]** transactions tending to substantially deplete the principal of the trust, in the case of a trust **[*248]** valued at more than $100,000; for purposes of this clause, the trustee must notify the district of disbursements from the trust in excess of the following percentage of the trust principal and accumulated income: five percent for trusts over $100,000.00 up to $500,000; 10 percent for trust valued over $500,000.00 up to $1,000,000.00; and 15 percent for trusts over $1,000,000.00;
> d. notify the social services district in advance of any transactions involving transfers from the trust principal for less than fair market value; and
> e. provide the social services district with proof of bonding if the assets of the trust at any time equal or exceed $1,000,000.00, unless that requirement has been waived by a court of competent jurisdiction, and provide proof of bonding if the assets of the trust are less than $1,000,000.00, if required by a court of competent jurisdiction.

Thus, the SNT represents a "bargain struck between the SNT beneficiary and the State" whereby the eligibility rights of the SNT beneficiary for social services are preserved, and the pecuniary remainder rights of the State are **[***23]** protected. *See, Matter of Abraham XX, 11 NY3d 429, 900 N.E.2d 136, 871 N.Y.S.2d 599 (2008).*

In addition to the roles of the State and the SNT parties, the Court likewise has a role in this process. The Court's role is to strike a balance to protect both the beneficiary and the State's remainder interest, thereby seeking also to protect public interest to fulfill "the ultimate goal of Medicaid [is] that the program 'be the payor of last resort." *See, Cricchio, 90 NY2d at 305.*

As it relates to the Court's role and responsibilities regarding a SNT, the following **[**418]** opinion most clearly defines same, specifically that:

> It is appropriate for the court to seek assurance that a proposed supplemental needs trust complies with the controlling laws and rules regarding Medicaid eligibility. This is consistent with the function of the court to assure that the best interests of the incapacitated person are promoted. It would be a clear dereliction of that duty for the court to deliberately overlook provisions of a proposed supplemental needs trust if such provisions were inconsistent with statutory guidelines and thus would bar an incapacitated person from **[*249]** receiving Medicaid benefits by its establishment. To do so would permit diverting of assets from the ownership or title of the incapacitated person **[***24]** to another legal entity with no consequent benefit to the incapacitated person." *Matter of McMullen, 166 Misc 2d 117, 632 N.Y.S.2d 401 (Sup Ct. Suffolk Co., 1995).*

These provisions, however, should not be read as obviating any additional controls required by the court since the regulations promulgated by the State are for the protection of its own remainder interest whereas the court is primarily concerned with the protection of the disabled person and likewise to assure fulfillment of the establishment of a SNT, in the inherent exercise of its power, the court may fashion or condition the exercise of that privilege in such manner as it believes will sufficiently protect the interest of the disabled person." *In Re Goldblatt, 162 Misc 2d 888, 618 N.Y.S.2d 959 (Sur Ct. Nassau Co., 1994).*

Turning to the instant matter, the Petitioners have come before this Court and seek the approval of a modification with respect to the SNT for Kevin ***Tyrrell***. The Department has reviewed the proposed modification to the SNT and has presented certain "observations" relative to same, as well as requests to modify certain language within the SNT. The Department has not raised any challenge that the SNT as written has any negative effect upon the beneficiary's

[****7] financial eligibility for Medicaid, nor that the application and SNT should be denied.[5]

There is no dispute [***25] that the beneficiary (Kevin ***Tyrrell***) is disabled and under sixty-five (65) years of age. Likewise, the Petitioners, as parents of the beneficiary, are lawful grantors under Social Services Law §366(2)(b)(2)(iii) and possess the requisite skill and competency to serve as Trustees. The language of the proposed SNT is in conformance with *EPTL §§7-1.12,7-3.1*; SSL §366(2)(b)(2)(iii) and 42 USC §§1396p(d)(4)(A); 1382b(e)(5) and provides the State of New York (e.g. Saratoga County Department of Social Services) with the remainder interest as described in and required by Social Services Law §366(2)(b)(2)(iii)(A).

[*250] There likewise appears to be no dispute that the SNT as written comports with, and has no negative effect upon, the trust beneficiary's eligibility for Medicaid. Thus, the Court finds that (1) the beneficiary of the SNT (Kevin ***Tyrrell***) is under sixty-five (65) years of age and (2) is an individual with a disability thus eligible for the establishment of a SNT, and that (3) the SNT is being established by the beneficiary's parents and guardians and (4) the SNT provides the State as a Medicaid remainderman beneficiary upon the death of Kevin ***Tyrrell***.

[**419] The Department's papers and accompanying brief avers that the terms to modify the SNT must be guided by *EPTL 7-1.9(a)*, and specifically "upon the written consent, acknowledged or proved in [***26] the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof." The Department believes that their consent as a beneficially interested party is necessary for the grantor to amend the trust. In support of its position, the Department relies on *EPTL 7-1.9(a)* and cites the case of Perosi v. LiGreci (98 AD3d 230, 948 N.Y.S.2d 629 (2nd Dept. 2012)) in its papers. The Court acknowledges that the Department is a person beneficially interested in a trust of property for purposes of *EPTL 7-1.9(a)* and therefore their consent to amend said trust would be necessary.

However, the Department's reliance on *EPTL 7-1.9(a)* is inapposite with regard to *this* specific SNT. *EPTL 7-1.9(a)* does not apply in this case, because Article VI of the SNT states that; "this Agreement and Trust created hereby are irrevocable. The Grantor shall have no right in any respect to later, amend, revoke, or terminate this Agreement or the Trust created hereby without *approval by a court of competent jurisdiction*" (emphasis added). Likewise, the holding in Perosi can be readily distinguished. In Perosi, the approval of the local social [***27] services department was required to amend the terms of the trust because the subject trust was silent on the issue of amendment. Here, Article VI of the subject SNT does set forth an amendment procedure by application to a court of competent jurisdiction for approval of same.

The Petitioners have exercised the specific procedure laid out in the SNT to seek an amendment by the filing of the instant [*251] proceeding with the Court. Therefore, taking this grant of express authority to amend the SNT, the Court will now set upon the analysis of judicial powers and limitations with regard to modification or reformation of a SNT. Reformation is generally available to correct mistakes in inter vivos instruments so that the written instrument accurately expresses the settlor's actual intent. As the court noted in *Matter of Dickinson v Bates* (NYLJ, Aug. 4, 1999, at 22, col 6, *affd* 273 AD2d 89, 709 N.Y.S.2d 69 [2000]), reformation may not be [****8] used to change the terms of a trust to effectuate what the settlor would have done had the settlor foreseen a change of circumstances that has occurred.

Similar to the facts in Dickinson, the Petitioner herein seeks to correct an element of the trust so as to allow the Beneficiary to maximize the availability of benefits. [***28] Courts have the power not only to ascertain the "validity, construction or effect" of language in a testamentary instrument (NY SCPA Section 1420), but also to reform such instrument and to add, excise, change or transpose language to effectuate a decedent's intent. *See e.g.*, Matter of Snide, 52 NY2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981).

Whether construction and/or reformation is sought in the context of an estate, the paramount duty of the court is to determine the intent of the testator from a reading of the will in its entirety Matter of Bieley, 91 NY2d 520, 695 N.E.2d 1119, 673 N.Y.S.2d 38 (1998); Matter of Snide, 52 NY2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981).

[5] In court and on the record, the Department has repeatedly supported the proposed modification to the SNT (although desires that different language be used) and has stated that there would be no financial harm to the Department as a remainderman by the Court's acceptance of same.

Courts have reformed instruments so that estates could take full advantage of available tax deductions and exemptions, but only if the literal application of an instrument's provisions **[**420]** would frustrate testator's actual intent as reflected in the court's review of the entire document. *In re Estate of Martin, 146 Misc 2d 144, 549 N.Y.S.2d 592 (Sur Ct. New York Co., 1989)*; *Matter of Choate, 141 Misc 2d 489, 533 N.Y.S.2d 272 (Sur Ct. New York Co., 1988)*; *In re Estate of Lepore, 128 Misc 2d 250, 492 N.Y.S.2d 689 (Sur Ct. Kings Co., 1985)*.

Of specific relevance to the Court's instant analysis is the holding of *In re Estate of Lepore (128 Misc 2d 250, 492 N.Y.S.2d 689, supra)*. In *Lepore*, the court permitted the reformation of a will so that certain "inadvertently excluded words" could be added to the document's definition of the marital deduction (*id. at 253*). In *Lepore*, the original will defined the marital deduction under prior law, which had limited the amount of the marital deduction to the greater of $250,000 or one-half the adjusted gross estate, **[***29]** instead of the unlimited marital deduction under current law. The court found that the complete reading of the will **[*252]** made it clear that the testator had intended to give his wife the largest possible bequest by use of the maximum available marital deduction, and in view thereof the court allowed reformation of the instrument to ensure that the entire residuary estate would qualify for the unlimited marital deduction.

In this case, the Petitioner's intent in seeking a modification to the terms of the SNT is clearly to ensure that the Beneficiary receives and is eligible for the maximum government entitlements, namely Medicaid and SSI, that are available to him. *In re Estate of Lepore, 128 Misc 2d 250, 492 N.Y.S.2d 689 (Sur Ct. New York Co., 1985)*; *Matter of Carcanagues, 2016 NY Misc. LEXIS 3436 (Sur Ct. New York Co., 2016)*.

Explicitly throughout the Department's moving papers and oral argument was reliance on the concept of the "bargain" as espoused in *Abraham XX* to elevate its status in the drafting and redrafting process of the SNT. It appears to the Court that through its "observations" and requests to amend the language of certain provisions of the SNT, the Department seeks to expand its role beyond that of Medicaid eligibility review and into the actual drafting process of the SNT. The Department posits that as a result the "bargain" between **[***30]** the beneficiary and the State as a Medicaid eligibility remainderman that it is due a seat at the drafting table.

The Department's interpretation of the Court of Appeal's rationale of a how the SNT represents a "bargain" is misguided. The bargain in an SNT represents the priority interest in the balance of the SNT upon the beneficiary's death in exchange for the Beneficiary's receipt of Medicaid. This is contrary to the Department's assertion that the Court of Appeals language in *Abraham XX* should be read to expand and somehow broaden the "bargain" and thereby authorize the Department to require additional modifications/reformations beyond the relief sought by the **[****9]** Petitioners. The Department's interpretation is also contrary to the plain language of *Abraham XX* and of the statutory authority governing SNTs.

Further, that the Department considers a SNT to be a "special" type of trust and thus seeks to broaden its authority into the dictation of the terms of a SNT or for that matter insert itself into the drafting process is likewise misplaced. This Court shares the opinion of Surrogate Czygier in "that a supplemental needs trust trustee should not be treated differently than a testamentary **[***31]** or *inter vivos* trustee there are safeguards in place to protect the lifetime beneficiary and DSS." **[*253]** *Matter of Kaidirmouglou*, NYLJ November 5, 2004 at Page 28 (Sur. Ct. Suffolk **[**421]** Co., 2004) There is nothing "special" about an SNT that would separate it from other types of trusts and thus grant an expansion of the authority of the State and its local social services department beyond that which is already provided for. To treat a SNT differently from similarly fashioned trusts without the authority to do so would setting same upon the precipice of a slippery slope towards an overreach of State authority.

The Court observed from its review of *Abraham XX* that nothing within that decision suggests an intention to deviate from established state law of trusts or to expand the rights given to the state agency in court proceedings. Likewise, the Court notes that there is nothing in the authority governing a SNT (the Federal Medicaid statute, the New York State Social Services law and regulations) that increases or broadens the role of the Department beyond one of assessment and determination of an applicant's initial and continuing eligibility for Medicaid. The clearly defined role of the Department **[***32]** is to determine whether the SNT as written comports with and affects the trust beneficiary's eligibility for Medicaid.

The State and its local social services department cannot exceed that authority which has been set forth in its own regulations. The local social services

department is subordinate to the State Department of Health. DOH is authorized to "supervise the local social services department and in exercising such supervision *shall approve or disapprove* rules, regulations and procedures made by local social services officials within thirty days after filing of same with the commissioner; such rules, regulations and procedures shall become operative immediately upon approval or on the thirtieth day after such submission to the commissioner unless the commissioner shall specifically disapprove said rule, regulation or procedure as being inconsistent with law or regulations of the department." *See*, NYS Social Services Law §20(3)(a).

The Court can not reach the Department's position that a local social services department, acting without the approval of the Department of Health, would have the unilateral authority **[*254]** to make its own rules and regulations. To do so would invite every local social services district **[***33]** across the State to implement rules that may not necessarily be cohesive or comport with existing regulations promulgated by the Department of Health.

As observed by the Court of Appeals in the matter of Beaudoin v Toia, 45 NY2d 343, 380 N.E.2d 246, 408 N.Y.S.2d 417 (1978), "inasmuch as the local commissioners are agents of the State Department they may not substitute their interpretations of the regulations of the State Department for those of the State Department or the State Commissioner. To recognize any such right would be to undermine the supervisory authority of the State commissioner and to invite administrative chaos." *Matter of Samuels v. Berger, 55 AD2d 913, 390 N.Y.S.2d 445 (2nd Dept. 1971); Matter of Bonfanti v. Kirby, 54 AD2d 714, 387 N.Y.S.2d 461 (2nd Dept. 1976); Matter Barbaro v. Wyman, 32 AD2d 647, 300 N.Y.S.2d 856 (2nd Dept. 1969).*

The Department misinterprets its role in this proceeding. The Department has no authority to impose demands for reformation for that which is neither mandated by statute and **[****10]** regulations nor in keeping with the grantors' intent. To echo the opinion of Surrogate Preminger in Matter of Rubin, 4 Misc 3d 634, 781 N.Y.S.2d 421 (Sur Ct. New York Co., 2004), "to reform the trust in the manner requested would stretch the doctrine of reformation beyond recognition."

[422]** Here, as the SNT meets the statutory requirements for approval as written, the Court will not consider and review each and every one of the Department's "observations" and requests for modification relative to same. The Court notes that none of **[***34]** the Department's proposed changes to the SNT has anything to do with the Beneficiary's eligibility (or ineligibility) for Medicaid. Many of the Department's requested modifications are duplicative to the language of the SNT,[6] unnecessary as already covered under statute[7] or in direct contravention to **[*255]** existing authority.[8] It is not necessary to mandate that which is not required by statute and regulations.[9]

It is well settled that New York courts have historically been reluctant to reform or modify the terms of a trust other than in very limited circumstances. Because a proceeding such as this seeks to modify documents which were established by a grantor based upon a set of facts and circumstances that existed at the time of creation, a court should use this form of relief sparingly. Modification, although intended to be used sparingly, is appropriate to achieve a specific objective. *Matter of Carcanagues*, 2016 NY Slip Op 31765(U)(Sur. Ct. New York Co., 2016). Here, modification of the terms of the SNT are appropriate to achieve the specific intent and objective sought by the Petitioners, specifically the maximization of the Beneficiary's eligibility for benefits.

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[6] The Department requests that Article VIII be amended to reflect that the Trustees are required to file a formal accounting for judicial approval and settlement with the Court. The SNT as drafted already provides that the Trustees are required to submit a final accounting for judicial settlement and the proposed amendment is duplicative.

[7] The Department requests that Article V be modified to reference that the Trustees are liable as per EPTL 11-1.7 and not exonerated for failure to use reasonable care. The existence of the statute already imposes said liabilities.

[8] The Department requests that Article II(b) be modified to provide notice to the local social services district within thirty (30) days of the beneficiary's death. 18 NYCRR 360-4.5(b)(iii)(b) directs that a trustee must notify the local social services department of the death of the trust beneficiary within a reasonable time. The Department has no authority to mandate that the SNT exceed or further define that which is already in the regulation.

[9] The Department requests that Articles IX(b), IX(d) and XI be modified to require that all trustees (including the corporate Trustee) acquire and serve with a bond. 18 NYCRR 360-4.5 directs that no bond is required from the trustees. The Department has no authority to mandate that the SNT exceed that which is already set forth under the regulation or requested by the grantor.

In view of the same, the Court will direct that Article II(A) of the SNT be modified to require the **[***35]** Trustee to pay those administrative expenses enumerated in the Social Security Administration Programs Operations Manual System (POMS) SI 01120.203(B)(3)(a).

Further, in the Court's discretionary role to "balance" the interests of the State with that of the **[****11]** Beneficiary, the Court directs that Article VII be modified to require that the Trustee shall prepare an annual accounting of the Trust and file same with the local social services district, or other appropriate Medicaid entity, responsible for determining the Beneficiary's Medicaid eligibility at the time of the accounting. *See, Matter of Goldblatt, 162 Misc 2d 888, 618 N.Y.S.2d 959 (Sur Ct. Nassau Co., 1994)*; *Matter of Morales*, NYLJ, Jul. 28, 1995 at 25, col1 (Sur Ct. Kings Co., 1995). The SNT as written directs the Trustee to file its annual accounting specifically with Albany County, and the Court will amend the SNT accordingly to **[*256]** permit **[**423]** the Trustees to file their annual accounting with their local social services department or other appropriate Medicaid servicing entity.

It is therefore so

ORDERED, that Article II, paragraph (A) of the Trust Agreement for the Benefit of Kevin J. ***Tyrrell*** dated February 15, 2001 be modified as follows: "(A) The Trustee shall pay those administrative expenses enumerated in the Social Security **[***36]** Administration Programs Operations Manual System (POMS) SI 01120.203(B)(3)(a); and it is further

ORDERED, that Article VII of the Trust Agreement for the Benefit of Kevin J. Tyrell dated February 15, 2001 be modified as follows: "The Trustee shall prepare an annual accounting of the Trust and file same with the local social services district, or other appropriate Medicaid entity, responsible for determining Kevin J. Tyrell's Medicaid eligibility at the time of the accounting; and it is further

ORDERED, that all other motions not specifically addressed herein are dismissed; and it is

SO ORDERED.

DATED: September 25, 2017

HON. RICHARD A. KUPFERMAN

SARATOGA COUNTY SURROGATE

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Cronin

Surrogate's Court of New York, Kings County

December, 2017, Decided; January 19, 2018, Published

1980-4246/A/B

Reporter
2017 NYLJ LEXIS 3753 *

Cronin

(Matter of ***Cronin***, NYLJ, Jan. 19, 2018 at 42)

Core Terms

guardian, appointed, beneficiary's, cross-petitioner

Judges: **[*1]** Judge: Surrogate Margarita Lopez Torres

Opinion

Cross-petitioner Nicholson sought to be appointed ***Cronin***'s guardian after his mother, Mildred died May 1, 2017, and prior thereto renounced and consented to appointment of Nicholson--***Cronin***'s cousin. A guardian ad litem was appointed for ***Cronin***. A hearing was held; the court heard testimony from ***Cronin***, among others, finding that even with support, he demonstrated a want of understanding arising from his intellectual disability resulting in an inability to manage his affairs, including any financial or medical decisions. As such, the court was satisfied ***Cronin*** remained a person in need of a guardian under SCPA Article 17-A, and it was in his best interest to appoint Nicholson. During the proceeding, a $100,000 trust created in 2009 for ***Cronin***'s benefit was revealed, yet the court found it troubling that no money was ever expended on ***Cronin***'s behalf until three years ago, stating it was unacceptable for trustees to sit back and do nothing until a request was made. It directed that moving forward trust assets would continue to be spent for its intended purpose--to enhance ***Cronin***'s quality of life in proactive consultation with him and his guardian.

Full Case Digest **[*2]** Text

DECISION

***1**

Before the court is a cross-petition by Pam-Eve Nicholson (the cross-petitioner) seeking to be appointed guardian of the person of Andrew ***Cronin*** (Andrew). Andrew's mother and legal guardian, Mildred ***Cronin***[1] (Mildred), died on May 1, 2017. Before her death, Mildred ***Cronin*** renounced and consented to the appointment of the cross-petitioner, who is Andrew's cousin. A guardianship petition initially filed by NYSARC was withdrawn upon the filing of the cross-petition. Jurisdiction is complete and a guardian ad litem was appointed for Andrew. Letters of guardianship of Andrew and of his post-deceased twin brother, Douglas ***Cronin***, who was also intellectually disabled, had been issued to Mildred on September 5, 1980. Subsequently, by decree dated July 2, 1996, NYSARC was appointed stand-by guardian for Andrew. A hearing was held on February 1, 2017, continued onto March 8, 2017, and September 27, 2017, during which testimony was adduced from various witnesses, including Andrew, Mildred, the cross-petitioner, and the individuals whom Andrew fondly refers to as "my staff:" Donatella Horavath, Andrew's medicaid service coordinator, and Rosetta Williams, the manager at the AHRC supported **[*3]** residence where Andrew lives. The Court had the opportunity to observe the demeanor of Andrew, finding Andrew to be an extremely personable individual who is able to express his preferences and desires, and who enjoys robust support from his family and the staff at the residential facility wherein he resides. However, even with support, it is also clear that

[1] The Court wishes to express deep gratitude for the assistance of Dominic Famulari, Esq., who served as counsel to Mildred, and to Jill Kupferberg, Esq., who served as guardian ad litem, for their exemplary representation and invaluable insights.

Andrew demonstrates a want of understanding arising from his intellectual disability that results in the inability to manage his own affairs, including making medical and financial decisions. Upon the record, the Court is satisfied that Andrew continues to be a person in need of a guardian pursuant to Article 17-A of the Surrogate's Court Procedure Act, and that it is in his best interest that the cross-petitioner be appointed the guardian of his person. Decisions by the guardian for Andrew shall be made in meaningful consultation with Andrew, taking into consideration his wants and preferences.

During the course of this proceeding, the existence of a trust created for the benefit of Andrew, which NYSARC believed was administered by NYSARC or AHRC (the trust), was revealed. The court requested NYSARC to furnish information about the trust, including the amount in the trust and what **[*4]** disbursements had been made. Questioned further, it was revealed that Andrew's trust account was valued at almost $100,000.00,[2] yet up until three

***2**

months ago, not a single dollar had been spent on Andrew's behalf since its creation in 2009. Ms. Williams testified that she was unaware of trust monies that could benefit Andrew, that Andrew, whose source of income is social security benefits of which AHRC is the designated payee, lives on food stamps and has a clothing allowance of $250.00 for the year, with Mildred or the cross-petitioner providing some spending money in a nominal amount. Andrew, who is 51 years old, testified that he does not have money to go to the movies, that he is unable to attend sports games or to buy his favorite and coveted sports jerseys. He further testified that he mostly eats food that his elderly mother[3] shared with him out of her "Meals on Wheels" ration, stating "we divide the meals — with me and for her. And we have to divide each," explaining that they split the food containers among themselves.

It is deeply troubling that over the course of seven years since the establishment of the trust, no steps had been taken by the trustees whatsoever to ascertain **[*5]** or meet the needs of Andrew, despite the clear intention of the trust that it be used for Andrew's benefit. The duty of trustees to act in the best interest of the trust beneficiary carries with it the concomitant obligation that trustees make themselves knowledgeable about a beneficiary's condition and needs.

Trustees, institutional and individual alike, bear an affirmative obligation to ascertain the beneficiary's educational, medical, or quality of life needs in order to use trust money for the enhancement of the beneficiary's life, regardless of whether the trust is pooled[4] or otherwise.

Indeed, the plain language of Andrew's trust states that its purpose "is intended to provide, in the sole and absolute discretion of the Trustees, extra and supplemental items for the best interests of the Designated Beneficiary including, without limitation, the care, comfort, education and training of the Designated Beneficiaries..."[5] It is unacceptable for trustees to simply sit back and do nothing until a request is made. In serving as trustee over a beneficiary living with disabilities, a fiduciary's responsibility is "something stricter than the mere morals of the marketplace...but a punctilio **[*6]** of honor most sensitive," *In re JP Morgan Chase, NA, 38 Misc 3d 363* (Sur Ct New York County2012) citing *Meinhard v. Salmon, 249 NY 458, 464 (1928)* (Cardozo, C.J.). "Both case law and basic principles of trust administration and fiduciary obligation requires the trustees to take appropriate steps to keep abreast of [the beneficiary's] condition, needs, and quality of life, and to utilize trust assets for his actual benefit," In re JP Morgan Chase, supra at 868. See also *Matter of Mark C.H., 28 Misc 3d 765 (Sur Ct, New York County 2010)* The trustees bear an affirmative duty to inquire with diligence into the quality of Andrew's life and to apply trust income towards significantly improving it.

At the final hearing date in September 2017, the Court was pleased to learn that a list of items had finally been provided from Andrew's trust for Andrew's benefit, including a watch, an electric shaver, bedding, sneakers, and a desktop computer. Moving forward, it is expected that Andrew's trust assets will continue to be

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[2] According to counsel for AHRC, a trust account was established for Andrew's benefit on July 7, 2009, under the AHRC New York City Foundation, Inc. Community Trust II, in the sum of $77,769.56. Inclusive of interest, the value of the trust as of December 16, 2016, was $99,579.00.

[3] In the course of this proceeding, Andrew's mother passed away.

[4] Funds contained in pooled special needs trusts are to be used during the individuals' lifetime to enhance their life and upon their death the funds remain in the special needs trust for the benefit of other trust beneficiaries.

[5] Paragraph 2 (B), AHRC New York City Foundation Inc. Community Trust II, as amended July 2, 2014

spent for its intended purpose, that is to enhance Andrew's quality of life in proactive consultation with Andrew and his guardian to determine his needs and preferences.

*3

The cross-petition is hereby granted, the petition by NYSARC is withdrawn, and letters of guardianship of the person of Andrew ***Cronin*** shall issue to Pam-Eve **[*7]** Nicholson, upon duly qualifying according to law.

Dated: December, 2017

Brooklyn, New York

New York Law Journal

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TO:	Local District Commissioners, Medicaid Directors
FROM:	Judith Arnold, Director Division of Eligibility and Marketplace Integration
SUBJECT:	Medicaid Managed Care Transition for Enrollees Gaining Medicare
EFFECTIVE DATE:	Immediately
CONTACT PERSON:	Local District Support Unit Upstate (518) 473-6397 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to advise local departments of social services (LDSS) of the Medicaid Managed Care (MMC) transition process for enrollees who gain Medicare eligibility.

1. Transition from MMC to MLTC

To ensure that enrollees who are receiving long term services and supports (LTSS) do not experience a lapse in services when they are disenrolled from MMC due to receipt of Medicare, New York Medicaid Choice (NYMC) will process *all* managed care transfers and disenrollments for recipients with Medicare, including recipients residing in non-enrollment broker counties. Each month, NYMC performs an electronic search to identify MMC enrollees with current Medicare or Medicare that will become effective within the next 60 days. Once identified, NYMC contacts the Medicaid managed care plans to have the plans identify those enrollees in receipt of LTSS. If in receipt of LTSS, NYMC will enroll eligible recipients into a managed long-term care (MLTC) plan. If a recipient is receiving LTSS and is excluded from MLTC, NYMC will disenroll the consumer from MMC and notify the MMC plan that the recipient is excluded from MLTC. The MMC plan is required to provide the current service authorization plan to the local district managed care coordinator to coordinate the delivery of LTSS through fee-for-service Medicaid.

The monthly Medicare disenrollment report produced by NYMC is available on MoveIt. Local district managed care coordinators and other designated staff have access to this report. The report identifies transfers and disenrollments for recipients with Medicare. The name of the report is the "Medicare Disenrollment and Transfer Report [County Name] _ Effective MMDDYYYY.xls."

2. Individuals Turning Age 65 and Enrollment in Medicare

In many cases, enrollment in Medicare will coincide with the recipient turning age 65. For adults in the Modified Adjusted Gross Income (MAGI) category who are turning age 65, and who are not a parent or caretaker relative, Medicaid eligibility must be redetermined under the individual's non-MAGI category of assistance (SSI-related). If the individual is receiving coverage through NY State of Health (NYSOH), the individual will be transitioned to the district the month prior to the individual's 65th birthday for a redetermination of eligibility. Medicaid coverage must continue while eligibility is being redetermined. To avoid a gap in enrollment for individuals receiving LTSS, enrollment from a MMC plan to a MLTC can occur pending the district's redetermination of eligibility.

Ideally, the district should have information concerning an individual's disenrollment from MMC or transition to MLTC (due to receipt of Medicare) in time to redetermine eligibility and issue a timely notice concerning the individual's on-going eligibility by the first day of the month following the individual's 65th birthday. However, if the district does not have the necessary MMC information concerning the individual's disenrollment or transition to a MLTC plan, the district should contact

NYMC to obtain this information prior to taking any action on the eligibility redetermination. The resource documentation requirements will be different for an individual transitioning to MLTC or needing community-based long-term care than the requirements will be for a person who is not in need of long-term care services. If the district is not able to make the new eligibility determination and provide timely notice by the first day of the month following the individual's 65th birthday, Medicaid coverage must be extended until timely notice is provided.

3. Individuals Under Age 65 with Medicare

Individuals under age 65 who gain Medicare eligibility remain in the MAGI category of assistance until their Medicaid renewal due to continuous coverage. Parents and caretaker relatives remain in the MAGI category regardless of Medicare eligibility. If these MAGI recipients are enrolled in MMC through NYSOH and are receiving LTSS, the individual will be transitioned to the district for enrollment in MLTC or for the delivery of services through fee-for-service Medicaid. The transition to the district is facilitated by staff in the Department of Health (DOH).

4. Reimbursement of Medicare Premiums

NYSOH Medicaid recipients newly in receipt of Medicare will have their Medicare Part B premiums reimbursed by DOH through the Medicare Insurance Premium Payment (MIPP) process. For Medicare beneficiaries who are referred to the local district on the daily NYSOH "referral file," MIPP payments will be made through the end of the month, following the month of referral, for upstate recipients and through the month of referral, plus two prospective months, for New York City (NYC) recipients.

Note: For Medicare beneficiaries who are referred to the district by DOH staff for LTSS (MLTC or fee-for-service Medicaid), MIPP payments will be made through the end date of the NYSOH authorization for upstate recipients (month of referral) and for the month of referral, plus three prospective months, for NYC recipients.

For Medicaid recipients in receipt of Medicare who have coverage through the local district, the district is responsible for determining eligibility for the Medicare Savings Program (MSP). For adults in a MAGI category, the district should do a "scratchpad" MSP budget to determine eligibility for the Buy-in. If income is equal to or over 120% of the federal poverty level (FPL), reimbursement of the Part B premiums should be made through MIPP payments for the months the individual remains eligible under the MAGI category/budget. If income is below 120% of the FPL, the individual should be added to the Buy-in. For individuals transitioning from MIPP payments for reimbursement of Medicare Part B premiums to the Buy-in, the Buy-in begin date should be the first day of the month following the last MIPP payment. Recipients should never receive a MIPP payment and the Buy-in payment in the same month. MIPP payment dates are viewable on the eMedNY resource page.

Effective immediately, dually eligible MMC enrollees who are transitioning to MLTC, or fee-for-service Medicaid, are entitled to have their Medicare premiums paid or reimbursed. It had been DOH's policy to not reimburse individuals their Medicare Part B premiums for months in which the individual was enrolled in MMC. Due to efforts to transition individuals who gain Medicare eligibility and who require LTSS, individuals may not be disenrolled from MMC upon receipt of Medicare. To facilitate the transition and not disadvantage the recipient, the Medicaid program is approving reimbursement of Part B premiums for enrollees in MMC.

5. District MMC Dis-enrollment

It should be noted that there are instances when the local district managed care coordinator or designated staff will need to process MMC dis-enrollments. This occurs when there is insufficient Medicaid eligibility in the system. For example, NYMC is unable to process a January 1, 2017 disenrollment if eligibility does not extend beyond December 31, 2016, which can occur at the end of an authorization period. In the case where a MLTC transfer is required, the district must re-determine eligibility and extend coverage, if the individual is determined eligible for MLTC or if additional time is needed to complete the eligibility re-determination for MLTC. The district will need to coordinate the MLTC enrollment with the eligibility change. The district has the option to either notify NYMC to process the enrollment, or the district can process the enrollment. For any actions processed by local district staff, the local district must either send managed care disenrollment/enrollment notices or advise NYMC to send the notice. If a MMC enrollee with Medicare is not found on the report, the local district managed care coordinator should contact NYMC so that NYMC can conduct outreach to the plan.

Please direct any questions concerning this message to your local district liaison.

TO:	Local District Commissioners, Medicaid Directors
FROM:	Judith Arnold, Director Division of Eligibility and Marketplace Integration
SUBJECT:	Treatment of New York Achieving a Better Life Experience (ABLE) Accounts
EFFECTIVE DATE:	Immediately
CONTACT PERSON:	Local District Support Unit Upstate (518) 474-8887 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to advise local departments of social services (LDSS) of the treatment of accounts established pursuant to the federal Achieving a Better Life Experience Act of 2014 (ABLE Act) in determining eligibility for Medicaid. The ABLE Act allows individuals with disabilities the opportunity to set aside funds in an account established pursuant to Section 529A of the Internal Revenue Code for disability-related expenses, with limited impact on their eligibility for Medicaid. For Modified Adjusted Gross Income (MAGI) and non-MAGI based eligibility determinations, funds in an ABLE account, earnings on funds in the account, contributions to an ABLE account from a third party, and distributions from the account for qualified disability expenses (QDEs) are disregarded, as reflected in Section 366(2)(a)(11) of the Social Services Law. Individuals must meet certain disability criteria to be eligible for participation in an ABLE program, however the treatment of funds in an ABLE account is not contingent upon the individual being certified disabled.

Designated beneficiaries of an ABLE account can contribute their own income to their ABLE account but it does not reduce the amount of income that is countable for purposes of determining Medicaid eligibility, or reduce the amount of income that the beneficiary (Medicaid applicant/recipient) may be required to contribute toward the cost of medical care. Resources that are used to fund an ABLE account are subject to resource counting rules until the funds are deposited into an ABLE account. Assets in an ABLE account are available to the account owner to meet his/her QDEs; therefore, funds deposited to the account by the beneficiary (Medicaid applicant/recipient) him or herself are not considered a transfer of assets.

Distributions from an individual's ABLE account are not counted as income for purposes of determining Medicaid eligibility, or for purposes of post-eligibility treatment of income, provided the funds are used to pay for QDEs. For SSI-related individuals, ABLE account distributions retained after the month of receipt continue to be disregarded unless the money is used for a non-qualifying expense. If the individual uses the distribution for a non-QDE, the distribution would be subject to treatment as a countable resource in the month the distribution is spent. Since resources are reviewed as of the first day of the month to determine eligibility for an SSI-related individual, a distribution spent after the first day of the month is not considered a countable resource. For MAGI eligibility, distributions which exceed the QDEs incurred by the beneficiary in a taxable year are taxable and therefore included in determining MAGI-based income eligibility. Individuals may self-attest to this taxable income, if any.

The ABLE Act allows States the option to file a claim for reimbursement of Medicaid costs from funds remaining in an ABLE account upon death of the designated beneficiary. New York has implemented this right pursuant to 2 NYCRR Section 156.5. If such a claim is not filed, and funds remaining in the ABLE account become part of the decedent's estate, the funds are subject to Medicaid estate recovery.

In New York (NY), the ABLE program is authorized by Article 84 of the Mental Hygiene Law and is administered by the Office of the State Comptroller in accordance with regulations at 2 NYCRR Part 156. The policy for the treatment of ABLE accounts applies to accounts established with the New York ABLE Program, and to accounts established through ABLE programs administered by other states.

Information about the NY ABLE Program can be found at:
https://www.osc.state.ny.us/savings/able.htm and https://www.mynyable.org/home.html.

TO:	Local District Commissioners, Medicaid Directors
FROM:	Judith Arnold, Director Division of Eligibility and Marketplace Integration
SUBJECT:	2018 Federal Poverty Levels
EFFECTIVE DATE:	January 1, 2018
CONTACT PERSON:	Local District Support Unit Upstate (518) 474-8887 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to inform local departments of social services (LDSS) of the revised federal poverty levels (FPLs). The revised FPLs are effective January 1, 2018, as published in the Federal Register.

The new FPLs should be used for all transactions with a January 1, 2018 MBL/eligibility "From" date. The revised figures will be available on MBL on March 19, 2018. For all new and pending applications, income must be compared to the 2018 FPLs.

Due to the increase in the FPLs, some Specified Low-Income Medicare Beneficiaries (SLIMB) may be income eligible for the Qualified Medicare Beneficiary (QMB) benefit and some Qualified Individuals-1 (QI-1) may become eligible for SLIMB. In such cases, staff must complete a 99-change transaction on the eMedNY Buy-in span, with the effective date of January 1, 2018, and change the Medicare Savings Program (MSP) code appropriately. For NYC, the change in MSP level can be transmitted via an undercare case transaction.

To assist districts with evaluating possible necessary changes, the following will occur:

- Upstate will perform a limited Mass Re-Budget (MRB) on March 17, 2018. The cases to be re-budgeted and have a 2018 Cost of Living Adjustment (COLA) applied are those that are included in the Aged, Blind, Disabled (ABD) or Medicare Savings Program (MSP) Automated Renewal Process. Upstate will not perform a MRB on any other budgets. Districts are required to manually update all other affected budgets at next contact or at renewal.

- New York City will perform a MRB on April 7, 2018 on Budget Types 01 - 07 for qualified budgets on open Case Type 20. The MRB will only impact cases with Social Security income. A closing transaction will be established for cases as appropriate. The MRB Reports of Exclusions and Exceptions will be created for the following budgets:

    - Budget 01 with EEC Code of "M";
    - Budget 04 with EEC codes of "E", "A", "H";
    - Budget 04, 05, 06, 07 with Buy-In Indicator = "A"; and
    - Budget 04 for MBI-WPD cases with MA RESP area code = "WD" or "PD".

The Human Resources Administration must evaluate and take appropriate action on these cases.

Medicare Part B Premium

In 2018, there is a COLA of 2% for Social Security benefits. Under a "hold-harmless" provision of federal law, basic Medicare Part B premiums in any year cannot rise higher than that year's COLA.

Many people were held harmless in 2017 because the COLA for that year (0.3%) was not large enough to cover the full amount of the increased Part B premium ($134.00).

In 2018, most of those who will be held harmless, will pay the full Part B premium. In other words, the 2% COLA will generate enough increased income for them to pay $134.00 without reducing their net Social Security benefits.

For the remainder of those held harmless, their 2% Social Security COLA increase will not be sufficient to cover the entire Part B premium. They will pay a range of smaller Part B premiums, based on their 2018 COLAs.

The "hold-harmless" provision does not apply to all beneficiaries. The Medicare Part B premium for individuals in the following categories will pay the standard premium of $134.00 (or higher) in 2018:

- Individuals whose income is above $85,000, or a married individual when the couple's combined income is over $170,000, will pay the standard premium and an Income Related Monthly Adjustment Amount (IRMAA);
- New Medicare Part B beneficiaries. Since these individuals did not pay the Medicare Part B premium in 2017, the "hold harmless" provision does not apply; and
- Individuals who do not have the Medicare Part B premium deducted from their Social Security benefit. This includes individuals who are enrolled in the Medicare Savings Program. These individuals will not be directly affected; the increased premium will be paid by Medicaid.

If a person has chosen to pay the Medicare Part B premium to reduce excess income, the actual premium that is paid must be used in calculating the individual's budget.

Family Member Allowance

As a result of the increase in the FPLs, the amount used in the Family Member Allowance (FMA) formula increased to $2,058. The maximum monthly FMA increased to $686. All spousal impoverishment cases involving a family member entitled to the family member allowance, which were active on or after January 1, 2018, and which were budgeted using the 2017 Family Member Allowance, must be re-budgeted using the 2018 Family Member Allowance. In addition, the increased Family Member Allowance must be used effective January 1, 2018, in determining any requested contribution of income from a community spouse or from a spouse living apart from an SSI-related applicant/recipient. Budget adjustments should be made at next contact or renewal.

If a district determines that a previously budgeted case has been negatively affected due to use of the 2017 FPL, or a case is brought to the district's attention, the case should be re-budgeted using the revised FPLs. If eligible, covered medical expenses paid by an individual as a result of an improper calculation, must be reimbursed pursuant to 10 OHIP/ADM-9, "Reimbursement of Paid Medical Expenses Under 18 NYCCR §360-7.5(a)."

Charts with the 2018 FPLs for the various categories of Medicaid eligibility are attached to this GIS.

NEW YORK STATE | Department of Health | Office of Health Insurance Programs

NEW YORK STATE INCOME AND RESOURCE STANDARDS FOR NON-MAGI POPULATION
EFFECTIVE JANUARY 1, 2018

HOUSE HOLD SIZE	MEDICAID INCOME LEVEL		100% FPL		120% FPL		133% FPL		135% FPL		150% FPL		185% FPL		200% FPL		250% FPL		RESOURCES	
	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY		
ONE	10,100	842	12,140	1,012	14,568	1,214	16,147	1,346	16,389	1,366	18,210	1,518	22,459	1,872	24,280	2,024	30,350	2,530	15,150	1
TWO	14,800	1,233	16,460	1,372	19,752	1,646	21,892	1,825	22,221	1,852	24,690	2,058	30,451	2,538	32,920	2,744	41,150	3,430	22,200	2
THREE	17,020	1,418	20,780	1,732			27,638	2,304			31,170	2,598	38,443	3,204	41,560	3,464				3
FOUR	19,240	1,603	25,100	2,092			33,383	2,782			37,650	3,138	46,435	3,870	50,200	4,184				4
FIVE	21,460	1,788	29,420	2,452			39,129	3,261			44,130	3,678	54,427	4,536	58,840	4,904				5
SIX	23,680	1,973	33,740	2,812			44,875	3,740			50,610	4,218	62,419	5,202	67,480	5,624				6
SEVEN	25,900	2,158	38,060	3,172			50,620	4,219			57,090	4,758	70,411	5,868	76,120	6,344				7
EIGHT	28,120	2,343	42,380	3,532			56,366	4,698			63,570	5,298	78,403	6,534	84,760	7,064				8
NINE	30,340	2,528	46,700	3,892			62,111	5,176			70,050	5,838	86,395	7,200	93,400	7,784				9
TEN	32,560	2,713	51,020	4,252			67,857	5,655			76,530	6,378	94,387	7,866	102,040	8,504				10
EACH ADD'L PERSON	2,220	185	4,320	360			5,746	479			6,480	540	7,992	666	8,640	720				+

SPOUSAL IMPOVERISHMENT	INCOME	RESOURCES
Community Spouse	$3,090.00	$123,600
Institutionalized Spouse	$50	$15,150
Family Member Allowance	$2,058 (150% of FPL for 2) is used in the FMA formula the maximum allowance is $686.	N/A

SPECIAL STANDARDS FOR HOUSING EXPENSES					
REGION	Amount	REGION	Amount	REGION	Amount
Central	$417	Northeastern	$467	Northern Metropolitan	$935
Rochester	$424	Long Island	$1,274		
Western	$365	New York City	$1,305		

*In determining the community resource allowance on and after January 1, 2018, the community spouse is permitted to retain resources in an amount equal to the greater of the following $74,820 or the amount of the spousal share up to $123,600. The spousal share is the amount equal to one-half of the total value of the countable resources of the couple as of the beginning of the most recent continuous period of institutionalization of the institutionalized spouse on or after September 30, 1989.

Revised January 30, 2018

NEW YORK STATE | Department of Health | Office of Health Insurance Programs

NON-MAGI POPULATION

CATEGORY	INCOME COMPARED TO	HOUSEHOLD SIZE		RESOURCE LEVEL		SPECIAL NOTES
		1	2	1	2	
UNDER 21, ADC-RELATED	MEDICAID LEVEL	842	1,233	NO RESOURCE TEST		
SSI-RELATED	MEDICAID LEVEL	842	1,233	15,150	22,200	Household size is always one or two.
Qualified Medicare Beneficiary (QMB)	AT OR BELOW 100% FPL	1,012	1,372	NO RESOURCE TEST		Medicare Part A & B, coinsurance, deductible and premium will be paid if eligible.
COBRA CONTINUATION COVERAGE	100% FPL	1,012	1,372	4,000	6,000	A/R may be eligible for Medicaid to pay the COBRA premium.
AIDS INSURANCE	185% FPL	1,872	2,538	NO RESOURCE TEST		A/R must be ineligible for Medicaid, including COBRA continuation.
QUALIFIED DISABLED & WORKING INDIVIDUAL	200% FPL	2,024	2,744	4,000	6,000	Medicaid will pay Medicare Part A premium.
SPECIFIED LOW INCOME MEDICARE BENEFICIARIES (SLIMBS)	OVER 100% BUT BELOW 120% FPL	1,012	1,372	NO RESOURCE TEST		If the A/R is determined eligible, Medicaid will pay Medicare Part B premium.
		1,214	1,646			
QUALIFIED INDIVIDUALS (QI-1)	GREATER THAN OR EQUAL TO 120% BUT LESS THAN 135% FPL	1,214	1,646	NO RESOURCE TEST		If the A/R is determined eligible, Medicaid will pay Medicare Part B premium.
		1,366	1,852			
MEDICAID BUY-IN PROGRAM FOR WORKING PEOPLE WITH DISABILITIES (MBI-WPD)	250%	2,530	3,430	20,000	30,000	Countable retirement accounts are disregarded as resources effective 10/01/11.

NEW YORK STATE | Department of Health | Office of Health Insurance Programs

New York State Income Standards for MAGI Population
Effective January 1, 2018

House Hold Size	LIF LEVEL		100% FPL		110% FPL		138% FPL		154% FPL		155% FPL		223% FPL	
	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY	ANNUAL	MONTHLY
One	12,211	1,018	12,140	1,012	13,354	1,113	16,754	1,397	18,696	1,558	18,817	1,569	27,073	2,257
Two	15,504	1,292	16,460	1,372	18,106	1,509	22,715	1,893	25,349	2,113	25,513	2,127	36,706	3,059
Three	18,691	1,558	20,780	1,732	22,858	1,905	28,677	2,390	32,002	2,667	32,209	2,685	46,340	3,862
Four	21,897	1,825	25,100	2,092	27,610	2,301	34,638	2,887	38,654	3,222	38,905	3,243	55,973	4,665
Five	25,195	2,100	29,420	2,452	32,362	2,697	40,600	3,384	45,307	3,776	45,601	3,801	65,607	5,468
Six	27,848	2,321	33,740	2,812	37,114	3,093	46,562	3,881	51,960	4,330	52,297	4,359	75,241	6,271
Seven	30,594	2,550	38,060	3,172	41,866	3,489	52,523	4,377	58,613	4,885	58,993	4,917	84,874	7,073
Eight	33,851	2,821	42,380	3,532	46,618	3,885	58,485	4,874	65,266	5,439	65,689	5,475	94,508	7,876
Nine	36,117	3,010	46,700	3,892	51,370	4,281	64,446	5,371	71,918	5,994	72,385	6,033	104,141	8,679
Ten	38,385	3,199	51,020	4,252	56,122	4,677	70,408	5,868	78,571	6,548	79,081	6,591	113,775	9,482
Each Add't Person	2,269	190	4,320	360	4,752	396	5,962	497	6,653	555	6,696	558	9,634	803

Revised January 30, 2018

NEW YORK STATE | Department of Health | Office of Health Insurance Programs

MAGI POPULATION						
CATEGORY	INCOME COMPARED TO	HOUSEHOLD SIZE		RESOURCE LEVEL		SPECIAL NOTES
		1	2	1	2	
PRESUMPTIVE ELIGIBILITY FOR PREGNANT WOMEN	223% FPL	N/A	3,059	NO RESOURCE TEST		Qualified provider makes the presumptive eligibility determination. Cannot spenddown to become eligible for presumptive eligibility.
PREGNANT WOMEN	223% FPL	N/A	3,059	NO RESOURCE TEST		A woman determined eligible for Medicaid for any time during her pregnancy remains eligible for Medicaid coverage until the last day of the month in which the 60th day from the date the pregnancy ends occurs, regardless of any change in income or household size composition. If the income is above 223% FPL the A/R must spenddown to the Medicaid income level. The baby will have guaranteed eligibility for one year.
CHILDREN UNDER ONE	223% FPL	2,257	3,059	NO RESOURCE TEST		If the income is above 223% FPL the A/R may apply for CHPlus or if chooses to spenddown, must spenddown to the Medicaid level. One year guaranteed eligibility if mother is in receipt of Medicaid on delivery. Eligibility can be determined in the 3 months retro to obtain the one year extension.
CHILDREN AGE 1 THROUGH 5	154% FPL	1,558	2,113	NO RESOURCE TEST		If income is above 154% FPL the A/R may apply for CHPlus or if chooses to spenddown, must spenddown to the Medicaid level.
CHILDREN AGE 6 THROUGH 18	110% FPL	1,113	1,509	NO RESOURCE TEST		If income is above 154% FPL the A/R may apply for CHPlus or if chooses to spenddown, must spenddown to the Medicaid level.
	154% FPL	1,558	2,113			
PARENTS/CARETAKER RELATIVES	138% FPL	1,397	1,893	NO RESOURCE TEST		If income is above 138% FPL the A/R may apply for APTC or if chooses to spenddown, must spenddown to the Medicaid Level.
19 AND 20 YEAR OLDS LIVING WITH PARENTS	138% FPL	1,397	1,893	NO RESOURCE TEST		If income is above 155% FPL the A/R can apply for APTC or if chooses to spenddown, must spenddown to Medicaid level.
	155% FPL	1,569	2,127			
SINGLE/CHILDLESS COUPLES AND 19 AND 20 YEARS LIVING ALONE	100% FPL	1,012	1,372	NO RESOURCE TEST		S/CCs cannot spenddown , but can apply for APTC. 19 and 20 year olds if income over 138% may apply for APTC or if chooses to spenddown, must spenddown to the Medicaid level.
	138% FPL	1,397	1,893			
FAMILY PLANNING PROGRAM	223% FPL	2,257	3,059	NO RESOURCE TEST		Eligibility determined using only applicant's income.

Section 503 of Public Law 94-566, referred to as the Pickle Amendment, protects Medicaid eligibility for all recipients of Retirement Survivors and Disability Insurance (RSDI) who were previously eligible for SSI benefits concurrently. These recipients are individuals who would be eligible for SSI, if all RSDI Cost of Living Allowances (COLAs) received since they were last eligible for and receiving RSDI and SSI benefits concurrently, were deducted from their countable income. (See 85 ADM-35 for further information). The reduction factors in the chart below, "REDUCTION FACTORS FOR CALCULATING MEDICAID ELIGIBILITY UNDER THE PICKLE AMENDMENT", should be used when determining Medicaid eligibility for individuals who are entitled to a reduction to their countable SSI Income.

If SSI was terminated during this period:	Multiply 2018 Social Security income by:	If SS was terminated during this period:	Multiply 2018 Social Security income by:	If SSI was terminated during this period:	Multiply 2018 Social Security income by:
May – June 1977	0.240	Jan. 1990 – Dec. 1990	0.515	Jan. 2003 – Dec. 2003	0.736
July 1977 – June 1978	0.254	Jan. 1991 – Dec. 1991	0.542	Jan. 2004 – Dec. 2004	0.752
July 1978 – June 1979	0.270	Jan. 1992 – Dec. 1992	0.562	Jan. 2005 – Dec. 2005	0.772
July 1979 – June 1980	0.297	Jan. 1993 – Dec. 1993	0.579	Jan. 2006 – Dec. 2006	0.804
July 1980 – June 1981	0.339	Jan. 1994 – Dec. 1994	0.594	Jan. 2007 – Dec. 2007	0.830
July 1981 – June 1982	0.377	Jan. 1995 – Dec. 1995	0.611	Jan. 2008 – Dec. 2008	0.849
July 1982 – Dec. 1983	0.405	Jan. 1996 – Dec. 1996	0.627	Jan. 2009 – Dec. 2011	0.899
Jan. 1984 – Dec. 1984	0.420	Jan. 1997 – Dec. 1997	0.645	Jan. 2012 – Dec. 2012	0.931
Jan. 1985 – Dec. 1985	0.434	Jan. 1998 – Dec. 1998	0.659	Jan. 2013 – Dec. 2013	0.947
Jan. 1986 – Dec. 1986	0.448	Jan. 1999 – Dec. 1999	0.667	Jan. 2014 – Dec. 2014	0.961
Jan. 1987 – Dec. 1987	0.454	Jan. 2000 – Dec. 2000	0.684	Jan. 2015 -Dec 2016	0.977
Jan. 1988 – Dec. 1988	0.473	Jan. 2001 – Dec. 2001	0.708	Jan. 2017 - Dec. 2017	0.980
Jan. 1989 – Dec. 1989	0.492	Jan. 2002 – Dec. 2002	0.726		

Note: This updates the Reduction Factors included in the Medicaid Reference Guide (MRG). The MRG table should no longer be used.

Revised January 30, 2018

TO:	Local District Commissioners, Medicaid Directors
FROM:	Judith Arnold, Director Division of Eligibility and Marketplace Integration
SUBJECT:	Treatment of Income of Dependents Under MAGI-like Rules, 2018 Update
ATTACHMENT:	Dependent Income Counting Worksheet 2018
EFFECTIVE DATE:	Immediately
CONTACT PERSON:	Local District Support Unit Upstate (518) 474-8887 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to inform local departments of social services (LDSS) of an update regarding the treatment of a dependent's income under Modified Adjusted Gross Income (MAGI) rules.

CMS (Centers for Medicare & Medicaid Services) has advised that due to the Tax Cuts and Jobs Act of 2017, the threshold that determines whether a tax dependent is required to file a tax return has been updated, and should be used in MAGI determinations immediately.

As per GIS 15 MA/08 "Treatment of Income of Dependents Under MAGI-like Rules," this income threshold is used to determine if the income of a child or tax dependent is included in the MAGI-like budget. This information is generally released via IRS publication 501, which is not yet available. Attached to the GIS is a worksheet to assist in calculating whether a dependent's income is countable.

The income threshold for dependents for tax year 2018 is $12,000 for earned income and $1,050 for unearned income.

- If a dependent has earned income only and it exceeds $12,000, the dependent must file a return.
- If a dependent has unearned income only and it exceeds $1,050, the dependent must file a return.
- If a dependent has both earned and unearned income and one income type exceeds the IRS threshold, the dependent must file a return.
- In addition, if a dependent has both earned and unearned income and each is less than the applicable threshold, the dependent, nevertheless, must file a return if the combined (gross) income exceeds the larger of $1,050 or the amount of the dependent's earned income (up to $11,650) plus $350.

If a district determines that a previously budgeted case has been negatively affected due to use of the 2017 threshold, or a case is brought to the district's attention, the case should be re-budgeted using the revised threshold level. If eligible, covered medical expenses paid by an individual as a result of an improper calculation, must be reimbursed pursuant to 10 OHIP/ADM-9, "Reimbursement of Paid Medical Expenses Under 18 NYCCR §360-7.5(a)."

Please direct any questions to your Local District Support Liaison.

Counting children's (< 21) income for MAGI-like ("M") budgeting

If child has:	*Income should be:*
Title II income only	Excluded
Earned Income only	Counted if over IRS threshold ($12,000)*
Unearned Income only	Counted if over IRS threshold ($1050)*
Earned and Unearned Income	Counted if one or both are over the applicable thresholds
Earned and Unearned Income	If both are under the applicable thresholds, refer to worksheet below
Title II and other Income (earned or unearned)	Title II and other are counted if other income is over applicable threshold
Title II and other Income (earned and unearned)	If earned and unearned are both under the applicable thresholds, refer to worksheet below

Earned and Unearned income Worksheet

Line		Amount
1	Enter dependent's earned income plus $350	
2	Minimum amount	$1050*
3	Compare lines 1 and 2. Enter the **larger** amount	
4	Maximum amount	$12,000 *
5	Compare lines 3 and 4. Enter the **smaller** amount	
6	Enter the dependent's gross income (earned+unearned). If line 6 is more than line 5, the dependent **must file** an income tax return, and all their income is countable.	

*Yearly figures are for tax year 2018, refer to IRS publication 501 for updates
[section: Filing requirements for dependents]

5/7/18

TO:	Local District Commissioners, Medicaid Directors
FROM:	Judith Arnold, Director Division of Eligibility and Marketplace Integration
SUBJECT:	2017 Update to the Actuarial Life Expectancy Table
ATTACHMENT:	2017 Life Expectancy Table
EFFECTIVE DATE:	Immediately
CONTACT PERSON:	Local District Support Unit Upstate (518) 474-8887 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to provide local departments of social services with the updated life expectancy table issued by the Office of the Chief Actuary of the Social Security Administration (SSA).

As advised in Administrative Directive 06 OMM/ADM-5, "Deficit Reduction Act of 2005 – Long-Term Care Medicaid Eligibility," the life expectancy table issued by SSA is required to be used in evaluating whether an annuity purchased by or on behalf of an applicant/recipient on or after February 8, 2006 is actuarially sound. The table is also used in determining whether the repayment term for a promissory note, loan or mortgage is actuarially sound.

The life expectancy table that was attached to 06 OMM/ADM-5 as Attachment VIII, is being updated to reflect the current information obtained from the Office of the Chief Actuary of the Social Security Administration. The revised life expectancy table is provided as an attachment to this GIS. Effective with the release of this GIS, districts must use the revised table.

Please direct any questions to your local district support liaison.

2017 Life Expectancy Table

Age	Male Life Expectancy	Female Life Expectancy	Age	Male Life Expectancy	Female Life Expectancy
0	76.33	81.11	30	47.86	52.06
1	75.81	80.54	31	46.93	51.10
2	74.84	79.57	32	46.00	50.13
3	73.86	78.59	33	45.07	49.17
4	72.88	77.60	34	44.15	48.21
5	71.89	76.61	35	43.22	47.25
6	70.90	75.62	36	42.29	46.29
7	69.91	74.63	37	41.37	45.34
8	68.92	73.64	38	40.44	44.39
9	67.93	72.64	39	39.52	43.44
10	66.94	71.65	40	38.60	42.49
11	65.94	70.66	41	37.68	41.55
12	64.95	69.66	42	36.76	40.61
13	63.96	68.67	43	35.85	39.67
14	62.97	67.68	44	34.95	38.74
15	61.99	66.69	45	34.04	37.81
16	61.02	65.70	46	33.15	36.88
17	60.05	64.72	47	32.26	35.96
18	59.08	63.73	48	31.38	35.05
19	58.13	62.75	49	30.51	34.14
20	57.18	61.77	50	29.64	33.24
21	56.24	60.80	51	28.79	32.34
22	55.30	59.82	52	27.94	31.45
23	54.37	58.85	53	27.11	30.57
24	53.44	57.87	54	26.29	29.70
25	52.51	56.90	55	25.47	28.83
26	51.58	55.93	56	24.67	27.96
27	50.65	54.96	57	23.87	27.10
28	49.72	53.99	58	23.09	26.25
29	48.79	53.03	59	22.32	25.40

2017 Life Expectancy Table

Age	Male Life Expectancy	Female Life Expectancy	Age	Male Life Expectancy	Female Life Expectancy
60	21.55	24.56	90	4.08	4.85
61	20.79	23.72	91	3.79	4.50
62	20.04	22.89	92	3.52	4.18
63	19.30	22.07	93	3.27	3.88
64	18.57	21.25	94	3.05	3.61
65	17.84	20.44	95	2.85	3.37
66	17.12	19.63	96	2.68	3.16
67	16.40	18.84	97	2.53	2.96
68	15.70	18.06	98	2.39	2.79
69	15.01	17.29	99	2.27	2.63
70	14.32	16.53	100	2.15	2.48
71	13.66	15.78	101	2.04	2.33
72	13.00	15.05	102	1.93	2.19
73	12.36	14.34	103	1.83	2.06
74	11.73	13.63	104	1.73	1.93
75	11.11	12.94	105	1.63	1.81
76	10.51	12.26	106	1.54	1.69
77	9.93	11.60	107	1.45	1.58
78	9.36	10.96	108	1.36	1.47
79	8.81	10.33	109	1.28	1.37
80	8.28	9.73	110	1.20	1.27
81	7.76	9.14	111	1.13	1.18
82	7.27	8.58	112	1.05	1.09
83	6.80	8.04	113	0.98	1.01
84	6.34	7.52	114	0.92	0.93
85	5.91	7.01	115	0.86	0.86
86	5.50	6.53	116	0.79	0.79
87	5.11	6.08	117	0.74	0.74
88	4.74	5.64	118	0.68	0.68
89	4.40	5.23	119	0.63	0.63

necessary for the proper and efficient operation of the plan.

(3) Section 1932(b)(4) requires Medicaid managed care organizations to establish internal grievance procedures under which Medicaid enrollees, or providers acting on their behalf, may challenge the denial of coverage of, or payment for, medical assistance.

(b) *Definitions.* As used in this subpart, the following terms have the indicated meanings:

Action means—

In the case of an MCO or PIHP—

(1) The denial or limited authorization of a requested service, including the type or level of service;

(2) The reduction, suspension, or termination of a previously authorized service;

(3) The denial, in whole or in part, of payment for a service;

(4) The failure to provide services in a timely manner, as defined by the State;

(5) The failure of an MCO or PIHP to act within the timeframes provided in § 438.408(b); or

(6) For a resident of a rural area with only one MCO, the denial of a Medicaid enrollee's request to exercise his or her right, under § 438.52(b)(2)(ii), to obtain services outside the network.

Appeal means a request for review of an action, as "action" is defined in this section.

Grievance means an expression of dissatisfaction about any matter other than an action, as "action" is defined in this section. The term is also used to refer to the overall system that includes grievances and appeals handled at the MCO or PIHP level and access to the State fair hearing process. (Possible subjects for grievances include, but are not limited to, the quality of care or services provided, and aspects of interpersonal relationships such as rudeness of a provider or employee, or failure to respect the enrollee's rights.)

§ 438.402 General requirements.

(a) *The grievance system.* Each MCO and PIHP must have a system in place for enrollees that includes a grievance process, an appeal process, and access to the State's fair hearing system.

(b) *Filing requirements*—(1) *Authority to file.* (i) An enrollee may file a grievance and an MCO or PIHP level appeal, and may request a State fair hearing.

(ii) A provider, acting on behalf of the enrollee and with the enrollee's written consent, may file an appeal. A provider may file a grievance or request a State fair hearing on behalf of an enrollee, if the State permits the provider to act as the enrollee's authorized representative in doing so.

(2) *Timing.* The State specifies a reasonable timeframe that may be no less than 20 days and not to exceed 90 days from the date on the MCO's or PIHP's notice of action. Within that timeframe—

(i) The enrollee or the provider may file an appeal; and

(ii) In a State that does not require exhaustion of MCO and PIHP level appeals, the enrollee may request a State fair hearing.

(3) *Procedures.* (i) The enrollee may file a grievance either orally or in writing and, as determined by the State, either with the State or with the MCO or the PIHP.

(ii) The enrollee or the provider may file an appeal either orally or in writing, and unless he or she requests expedited resolution, must follow an oral filing with a written, signed, appeal.

§ 438.404 Notice of action.

(a) *Language and format requirements.* The notice must be in writing and must meet the language and format requirements of § 438.10(c) and (d) to ensure ease of understanding.

(b) *Content of notice.* The notice must explain the following:

(1) The action the MCO or PIHP or its contractor has taken or intends to take.

(2) The reasons for the action.

(3) The enrollee's or the provider's right to file an MCO or PIHP appeal.

(4) If the State does not require the enrollee to exhaust the MCO or PIHP level appeal procedures, the enrollee's right to request a State fair hearing.

(5) The procedures for exercising the rights specified in this paragraph.

(6) The circumstances under which expedited resolution is available and how to request it.

(7) The enrollee's right to have benefits continue pending resolution of the appeal, how to request that benefits be

STATE OF NEW YORK
DEPARTMENT OF HEALTH

REQUEST: September 25, 2017
[redacted]
AGENCY: Erie
FH #: 7618249Z

In the Matter of the Appeal of

[redacted]

from a determination by the Erie County Department of Social Services

DECISION AFTER FAIR HEARING

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter Regulations), a fair hearing was held on March 21, 2018, in Erie County, before an Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

[redacted]

For the Social Services Agency

Candace O'Toole, Fair Hearing Representative

ISSUE

Was the Agency's August 31, 2017 determination that the Appellant was not eligible under Medical Assistance ("Medicaid") for nursing facility services for 16.2805 months, commencing April 1, 2017 because he transferred assets for less than fair market value correct?

FINDINGS OF FACT

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. On May 15, 2017, an application for Medicaid was made by or on behalf of the Appellant. The Appellant was [redacted] years of age at the time of application.

2. The Appellant was admitted to a skilled nursing facility for long-term care in June 2016 and remained there until his death on October 14, 2017.

3. The Appellant is seeking coverage retroactive to April 1, 2017.

4. The Appellant's spouse is deceased.

5. The Appellant has no minor or disabled children.

6. The Agency calculated the sanction based on the following uncompensated transfers:

August 24, 2012: $1,022.60 -1/2 the value of a bank account transferred to son
October 23, 2012: $2,000.00- cash withdrawal without proof of what it was spent on
April 24, 2013: $18,850.00- car purchase for son
September 4, 2013: $3,500.00- paid lawyer fees for son
June 5, 2014: $5,000.00- cash withdrawal without proof of what it was spent on
October 10, 2014: $3,500.000- cash withdrawal without proof of what it was spent on
February 27, 2015: $2,500- cash withdrawal without proof of what it was spent on
April 16, 2015: $4,000.00- cash withdrawal without proof of what it was spent on
March 27, 2017: $57,708.86- gift to son
March 21, 2007: $105,363.86—annuity purchased without listing the State as a remainder beneficiary; amount is value of annuity on March 31, 2017.

Total Uncompensated Transfers:	$203,444.74
Minus Returned Assets:	(1,661.09)
Minus Promissory Note dated March 27, 2017	($37,708.28)
Net Uncompensated Transfers:	$164,075.37

7. By notice dated August 31, 2017, the Agency determined that the Appellant was not eligible under Medicaid for nursing facility services because the Appellant transferred assets valued at $164,075.37 for less than market value. This amount was divided by the regional nursing home rate of $10,078.00 which resulted in a 16.2805-month sanction being imposed, commencing April 1, 2017.

8. On September 25, 2017, the Appellant requested this fair hearing.

APPLICABLE LAW

Sections 360-4.1 and 360-4.8(b) of 18 NYCRR (herein referred to as "the Regulations") provide that all income and resources actually or potentially available to a Medicaid applicant or recipient must be evaluated, but only such income and/or resources as are found to be available may be considered in determining eligibility for Medicaid. A Medicaid applicant or recipient whose available non-exempt resources exceed the resource standards will be ineligible for Medicaid coverage until he or she incurs medical expenses equal to or greater than the excess resources.

Under Section 360-4.4 of the Regulations, "Resources" are defined to include any liquid or easily liquidated resources in the control of an applicant or recipient, or anyone acting on his or

behalf, such as a conservator, representative, or committee. Certain resources of a Medicaid-qualifying trust, as described in Section 360-4.5 of the Regulations, may also be counted in evaluating Medicaid eligibility.

Section 366.5(d) of the Social Services Law and Section 360-4.4(c)(2) of the Regulations govern Transfers of Assets made by an applicant or recipient or his or her spouse) on or after August 11, 1993. Section 366.5(e) governs transfers made on or after February 8, 2006.

Generally, in determining the Medicaid eligibility of a person receiving nursing facility services, either as an in-patient in a nursing facility (including an intermediate care facility for the mentally retarded), as an in-patient in a medical facility at a level of care such as is provided in a nursing facility, or as a recipient of care, services, or supplies at home pursuant to a waiver under section 1915(c) of the federal Social Security Act ("waivered services"), any transfer of assets for less than fair market value made by the person or his or her spouse within or after the "look-back period" will render the person ineligible for nursing facility services.

For applications filed on or after August 1, 2006, for Medical Assistance coverage of nursing facility services, the "look-back period" is the period immediately preceding the date that an institutionalized individual is both institutionalized and has applied for Medical Assistance. Beginning in February 1, 2009 the look back period will increase from 36 months to 37 months and each month thereafter it will increase by one month until February 1, 2011 when a 60-month look-back period will be in place for all types of transfers of assets. 06 OMM/ADM-5. The uncompensated value of an asset is the fair market value of such asset at the time of transfer less any outstanding loans, mortgages, or other encumbrances on the asset, minus the amount of the compensation received in exchange for the asset. Social Services Law 366.5(e).

Effective August 1, 2006 if an applicant or recipient seeking coverage for nursing facility services purchased an annuity on or after February 8, 2006 the State must be named as the beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant, or the State must be named in the second position after a community spouse or minor or disabled child and must be named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value. If the applicant/recipient or applicant or recipient's spouse fails or refuses to so name the State as the remainder beneficiary the purchase will be considered a transfer of assets for less than fair market value. In addition, if an annuity is purchased by or on behalf of an applicant or recipient, the purchase will be treated as a transfer of assets for less than fair market value unless the annuity is:

- an annuity described in subsection (b) or (q) of Section 408 of the Internal Revenue Code of 1986, or

- purchased with the proceeds from an account described in subsection (a), (c), (p) of Section 408 of such Code; a simplified employee pension within the meaning of Section 408(k) of such Code; or a Roth IRA described in section 408A of such Code; or

the annuity is:

- irrevocable and non-assignable;
- is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and
- provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.

The annuity provisions apply to transactions, including purchases, which occur on or after February 8, 2006. Transactions subject to these provisions include any action by the individual that changes the course of payment from the annuity or that changes the treatment of the income or principal of the annuity. These transactions include additions of principal, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions. Social Services Law 366.5(e), 06 OMM/ADM-5

Sections 366.5(d) and (e) of the Social Services Law provide that an individual will not be ineligible for Medicaid as a result of a transfer of assets if:

(a) the asset transferred was other than a homestead and was a disregarded or exempt asset under Section 360-4.4(d), 360-4.6, and/or 360-4.7 of the Regulations; or

(b) the asset transferred was a home, and title to the home was transferred to:

(1) the individual's spouse; or

(2) the individual's child, who is blind, disabled, or under the age of 21; or

(3) the individual's sibling, who has an equity interest in the home and was residing in the home for a period of at least one year immediately before the date the person became an institutionalized individual, or

(4) the individual's child, who was residing in the home for a period of at least two years immediately before the date the person became an institutionalized individual, and who provided care to the person which permitted her or him to continue residing at home rather than enter into an institution or facility; or

(c) the asset was transferred:

(i) to the individual's spouse or to another for the sole benefit of the spouse; or

(ii) from the individual's spouse to another for the sole benefit of the spouse; or

(iii) to the individual's child who is blind or disabled, or to a trust established solely for the benefit of such child; or

(iv) to a trust established solely for the benefit of a disabled person under 65 years of age.

(d) a satisfactory showing is made that:

(i) the individual or his or her spouse intended to dispose of the asset either at fair market value, or for other valuable consideration; or

(ii) the asset was transferred exclusively for a purpose other than to qualify for Medicaid; or

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

In addition, Sections 366.5(d) and (e) of the Social Services Law provide that an individual will not be ineligible for Medicaid as a result of a transfer of assets if denial of eligibility will result in an undue hardship. Section 360-4.4 of the Regulations provides that denial of eligibility will result in an undue hardship if:

(i) the individual is otherwise eligible for Medicaid;

(ii) said person is unable to obtain appropriate medical care without the provision of Medicaid; and

(iii) despite his or her best efforts, said person or his or her spouse is unable to have the transferred asset returned or to receive fair market value for the asset. Best efforts include cooperating, as deemed appropriate by the commissioner of the social services district, in efforts to seek the return of the asset.

For transfers made on or after February 8, 2006, section 366.5(e)(4)(iv) of the Social Services Law provides that an individual shall not be ineligible for services solely by reason of any such transfer to the extent that denial of eligibility would cause an undue hardship such that application of the transfer of assets provision would deprive the individual of medical care such that the individual's health or life would be endangered, or would deprive the individual of food, clothing, shelter or other necessities of life. The Department of Health in 06 OMM/ADM-5 has incorporated in addition to the deprivation of food, clothing, shelter or other necessities of life as set forth in the statute, the regulatory grounds set forth in Section 360-4.4 of the Regulations as stated above.

A transfer for less than fair market value, unless it meets one of the above exceptions, will cause an applicant or recipient to be ineligible for nursing facility services for a period of months equal to the total cumulative uncompensated value of all assets transferred during or after the look-back period, divided by the average cost of care to a private patient for nursing facility services in the region in which such person seeks or receives nursing facility services, on the date the person first applies or recertifies for Medicaid as an institutionalized person. For purposes of this calculation, the cost of care to a private patient in the region in which the person is seeking or receiving such long-term care will be presumed to be 120 percent of the average Medicaid rate for nursing facility care for the facilities within the region. The average regional rate is updated each January first.

For uncompensated transfers made on or after February 8, 2006, the penalty period starts the first day of the month during or after which assets have been transferred for less than fair market value, or the first day of the month the otherwise eligible individual is receiving services for which Medical Assistance would be available but for the transfer penalty, whichever is later, and which does not occur during any other period of ineligibility. Social Services Law 366.5(e).

DISCUSSION

The Agency's August 31, 2017 determination that the Appellant was not eligible under Medical Assistance ("Medicaid") for nursing facility services for 16.2805 months commencing April 1, 2017 because he transferred assets for less than fair market value was correct.

At the outset it will be noted that the Appellant's attorney only disputed that part of the Agency determination that sought to impose a transfer penalty on the Appellant's purchase of an annuity that did not include the State as a named beneficiary. The Appellant's attorney stipulated and waived the right to a hearing on the remaining transfers totaling $58,711.51, and therefore the imposition of a penalty on the transfer of these assets is sustained.

Turning to the sole issue in dispute, the record showed that on March 21, 2007, the Appellant purchased an annuity contract #[redacted], from [redacted] through an Individual Retirement Account (IRA) rollover and that the annuity at issue is an IRA held Annuity. The Appellant is the annuitant. The Appellant's deceased spouse and son are listed as the sole beneficiaries. It is undisputed that New York State was not named as a beneficiary. As of March 31, 2017, the Appellant's purchase payments since issue totaled $116,349.55, the Appellant's withdrawals since issue totaled $40,470.74, and the total value of the annuity was $105,363.86.

The Agency maintains that the value of the annuity as of the date the Appellant was seeking Medicaid coverage of nursing facility services ($105,363.86) must be considered an uncompensated transfer because the annuity was purchased after February 8, 2006, that subsequent additions to principal and elective withdrawals have been made in the annuity, and the State has not been named as a remainder beneficiary for at least the amount of Medicaid paid on the Appellant's behalf. In response, the Appellant argues that the annuity at issue is not an

"asset" subject to a Medicaid transfer penalty, and therefore the requirement to name the State as a remainder beneficiary does not apply.

The Deficit Reduction Act of 2005 (DRA) added new requirements to the Medicaid statute with respect to the treatment of annuities purchased on or after the date of enactment, February 8, 2006. These new requirements impact the annuity at issue herein, which was purchased by the Appellant on March 21, 2007. Specifically, Section 6012(b) of the DRA added a new section 1917(c)(1)(F) to the Social Security Act, which provided that the purchase of an annuity shall be treated as a disposal of an asset for less than fair market value unless the State is named as a remainder beneficiary. See, 42 U.S.C. Section 1396p(c)(l)(F). In addition, Section 6012(c) of the DRA amended section 1917(c)(1) of the Social Security Act by adding a new subparagraph (G) which provides that the purchase of an annuity on or after February 8, 2006, by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services shall be treated as a transfer of assets for less than fair market value unless the annuity meets certain criteria. See, 42 U.S.C. Section 1396p(c)(l)(G). One of the criterion exempts an annuity described in subsection (b) of Internal Revenue Code Section 408. See, 42 U.S.C. Section 1396p(c)(l)(G)(i)(I).

The Appellant's attorney argues that the annuity under review is one described in subsection (b) of section 408 of the Internal Revenue Code of 1986, and therefore is not an asset that can be subject to a Medicaid transfer penalty. The Appellant's attorney made the annuity contract part of the record, which is titled as an IRA annuity, and includes an endorsement that indicates the annuity contract was issued under the Internal Revenue Code of 1986, as amended, IRS Code Section 408(b). The Agency did not otherwise challenge this evidence, and for purposes of this decision, the annuity contract at issue will be found to be an asset exempt from transfer penalty under 42 U.S.C. Section 1396p(c)(l)(G).

The Appellant's attorney next argued that because the annuity at issue is exempt from transfer penalty under 42 U.S.C. Section 1396p(c)(l)(G), it must also be exempt from transfer penalty under 42 U.S.C. Section 1396p(c)(l)(F), even if the State is not named as a remainder beneficiary. In support of this position, the attorney cited *In the Matter of the Application of Virginia Entz v Reed*, Index No. 2009-10454, from Monroe County Supreme Court, decided on March 10, 2010, where a Department of Health (DOH) determination to impose a transfer penalty for an IRA annuity where the State was not named as the remainder beneficiary was reversed. In *Entz*, the court analyzed the provisions of 42 U.S.C. Section 1396p(c)(l)(F) and 42 U.S.C. Section 1396p(c)(l)(G), concluding that DOH policy requiring adherence to both Sections (F)and (G) was incorrect. In its analysis the Court stated: 'This court reads (c)(l)(G) not conjunctively with (c)(l)(F), but explicitly excluding from the term "assets" the qualified retirement annuities and IRAs described in section (G). Therefore, to give fair credence to federal law, the State must be named as remainder beneficiary of an annuity unless the annuity is accepted by the requirements of (c)(l)(G)'.

The Appellant's argument, as supported by the *Entz* decision from the [redacted] County Supreme Court, is unpersuasive in the context of the present hearing. The Centers for Medicare and Medicaid Services (CMS) issued a "Dear State Medicaid Director" letter on July 27, 2006

that clarified the interplay between paragraphs (c)(1)(F) and (c)(1)(G) at issue herein. Specifically, enclosure 6012 II(c) of that letter clarifies the requirement under subparagraph (G) "is in addition to those specified in 1917(c)(1)(F) pertaining to the State's position as a remainder beneficiary". The CMS letter further distinguishes the two sections by pointing out that 1917(c)(1)(F) applies to annuities purchased by an applicant or a spouse, while 1917(c)(1)(G) applies only to annuities purchased by an applicant. The interpretation of CMS is entitled to significant deference with regard to Medicaid law and policy, and supports the conjunctive interpretation followed in State law and policy. See, Social Services Law 366.5(e)(3)(i)'s use of the conjunctive "and" to separate the two annuity requirements, and 06 OMM/ADM-5's use of the designator "in addition" to separate the two annuity requirements. Based on the foregoing, the Appellant's argument that a Medicaid applicant's IRA annuity need not designate the State as a remainder beneficiary to avoid the imposition of a transfer penalty is rejected.

It was undisputed that the annuity at issue failed to designate the State as a remainder beneficiary. Consequently, the Agency determination to impose a transfer penalty based upon the full purchase value of the annuity is sustained. The Appellant did not dispute the full purchase valuation used by the Agency ($105,363.86), and therefore the determination to impose a transfer penalty on this amount is also sustained. Coupled with the otherwise undisputed uncompensated transfers of $58,711.51, the Agency's determination that the Appellant transferred assets totaling $164,075.37 for less than fair market value was correct. The record showed that the Agency properly divided these uncompensated transfers by the applicable nursing home regional rate of $10,078.00, which resulted in a 16.2805-month sanction being imposed as of April 1, 2017. The Agency determination under review was correct.

DECISION

The Agency's August 31, 2017 determination that the Appellant was not eligible under Medical Assistance ("Medicaid") for nursing facility services for 16.2805 months commencing April 1, 2017 because he transferred assets for less than fair market value was correct.

DATED: Albany, New York
04/12/2018

NEW YORK STATE
DEPARTMENT OF HEALTH

By

Commissioner's Designee

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, MD 21244-1850

SMD# 18-004

RE: Penalty period start date for certain HCBS waiver participants

April 17, 2018

Dear State Medicaid Director:

The purpose of this letter is to provide guidance on the proper start date of an asset transfer penalty period under section 1917(c) of the Social Security Act (the Act) for certain Medicaid applicants who are seeking eligibility for Home and Community-Based Services (HCBS) delivered through waivers approved under section 1915(c) of the Act.

Background. Section 1917(c)(1)(A) of the Act requires that states apply a coverage penalty against certain individuals when such individuals have transferred assets for less than fair market value on or after the "look back date," which is the date that precedes by 60 months the point at which an individual has both applied for Medicaid and is an "institutionalized individual." The coverage penalty applies to nursing facility services, a level of care in an institution equivalent to that of nursing facility services, and HCBS provided under a section 1915(c) waiver ("waiver services"). The length of the penalty period is calculated by dividing the total amount transferred for less than fair market value by the average monthly cost of nursing facility services in the state (or locality in which the individual is located). The quotient is the number of months the individual will be denied institutional or waiver services.

For purposes of penalties, an "institutionalized individual" is defined in section 1917(h)(3) of the Act as an inpatient of a nursing facility or similar medical institution or individuals who are eligible for Medicaid under section 1902(a)(10)(A)(ii)(VI) of the Act, implemented at 42 CFR §435.217 (referred to as the "217" group). The 217 group provides Medicaid coverage to individuals who need HCBS to avert institutional placement, who would be eligible for Medicaid under another eligibility group if they were in an institution, and who receive waiver services.

The Deficit Reduction Act of 2005 (Pub. L. No. 109-171, "DRA") amended section 1917(c)(1)(D) of the Act to make the asset transfer penalty start date (for post-DRA transfers) the later of (1) the month during or after which a transfer is made or (2) "the date on which the individual is eligible for medical assistance under the State plan and *would otherwise* be receiving institutional level [of] care services" but for the penalty. (Emphasis added.)

Prior Guidance. In an enclosure to the State Medicaid Director Letter (SMDL) published on July 27, 2006 (SMDL #06-018), we explained that the penalty start date for post-DRA transfers is the later of the month during or after which a transfer is made or "the date on which the

individual is eligible for Medicaid and *is receiving* institutional level of care services" but for the penalty.[1] (Emphasis added.)

The substitution of "is receiving institutional level care services" for "would otherwise be receiving institutional level [of] care services" has had unintended consequences for 217 group applicants. This is because, in contrast to nursing facility services and other institutional services, HCBS received by an individual only become "waiver services" once the individual is enrolled in the state's 1915(c) waiver program and Medicaid is providing coverage.

For example, the personal care services an individual is receiving under the Medicaid state plan prior to placement in a 1915(c) waiver, and which become part of the individual's service plan under the relevant 1915(c) waiver after placement in the waiver, only become *waiver* services after the individual's waiver enrollment. Thus, for 217 group applicants who are subject to an asset transfer penalty period, the penalty period does not begin to run until the individual begins *receiving* HCBS waiver services, but the individual cannot begin to receive waiver services until the penalty period has run.

The result under the prior guidance is an infinite penalty period. Under the interpretation of the DRA's changes expressed in our July 27, 2006, guidance, an individual would have to enter an institution to begin the penalty period. We do not believe that this result is supported by the language or intent of the DRA.

Revised Guidance. We are revising our earlier guidance to be consistent with the statute. Under the revised interpretation, the penalty period start date for a 217 applicant is no later than the point at which a 217 applicant *would otherwise* be receiving HCBS waiver coverage based on an approved application for such care but for a penalty. For a 217 group applicant, this would be at the point at which a state has: determined that the applicant meets the financial and nonfinancial requirements for Medicaid eligibility and the level-of-care criteria for the 1915(c) waiver; developed for the individual a person-centered service plan; and identified an available waiver slot for the individual's placement. The penalty period for a 217 group applicant begins no later than the date on which a state has confirmed that all of these requirements are met. Transfers that would be subject to a penalty would be those that were made on or after the 60 months preceding this same date.[2]

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[1] See State Medicaid Director Letter, #06-018 (July 27, 2006), Enclosure, "Sections 6011 and 6016 – New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005."

[2] Under section 1917(c)(1)(B) of the Act, the look-back period is "the first date as of which the individual is both an institutionalized individual and has applied for medical assistance. . . ." As indicated above, an "institutionalized individual" is one who is actually in an institution or who "is described in section 1902(a)(10)(A)(ii)(VI)." An individual is not described in section 1902(a)(10)(A)(ii)(VI) of the Act unless and until he or she is eligible to actually receive services under the 217 group. This means that, for individuals seeking coverage under the 217 group, the look-back period dates back from the point at which the state has confirmed all of the requirements for coverage under that group are met.

If you have any questions about this guidance, please contact Gene Coffey at 410-786-2234, or gene.coffey@cms.hhs.gov, or contact your SOTA team lead.

Sincerely,

/s/

Timothy B. Hill
Acting Director, CMCS