SSI Update: The "Top Ten Lessons" from a Review of SSA Regional Chief Counsel Precedents on Trusts Published between 2006-2008, now somewhat incorporated in the new 2009 POMS on Trusts

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[NOTE: After this presentation was originally completed on January 15th, the Social Security Administration issued 2009 revisions to the 2001 POMS on Trusts. We therefore revised the written materials to incorporate where possible the 2009 POMS].

Introduction. As of December 14, 2008, it has been nine years since Congress grafted the Medicaid disqualifying transfer of assets penalty limitations on to the Supplemental Security Income (SSI) program. SSI is the monthly cash benefit paid to elderly persons age 65 and over and disabled individuals from birth to age 65, as long as they meet the financial qualifications for the SSI means-tested program. Means-testing involves two aspects, a once-per-month test of resources (assets) on the first day of each month, and the countable income determinations that prescribe how much, if any, the monthly SSI check will be for the elder of disabled person.

The basic statutory change in SSI eligibility in December of 1999 was to impose, for the first time in eleven years, a transfer of resources penalty. Under the 1999 changes, a claimant cannot give away resources, then claim poverty and ask the taxpayers to provide the claimant funds for food and shelter. The penalty imposed by the legislation is determined by a formula: the amount given away, divided by the Federal Benefit Rate (FBR) which is the amount of the maximum SSI payment for an individual. The result is the number of months of future ineligibility because of the transfer of the resource, capped at a penalty limit no greater than 36 months. For example: SSI claimant transfers $10,000 on January 1, 2009. The penalty period is $10,000 divided by $674 (the FBR for 2009), yielding 14.83 months, which SSA then rounds

down to a 14 month penalty. Therefore, the claimant, even if elderly or disabled and otherwise qualifying for SSI benefits, would not be eligible for a monthly SSI check until March, 2010.

Congress grafted the OBRA '93 Medicaid exception to transfers to trusts contained in the 42 USC 1396p(d)(4)(A) and (C), individual and pooled Special Needs Trusts.

To date, not one federal regulation has been issued by SSA to interpret or instruct staff or the public on what constitutes a proper Special Needs Trust (SNT). However, SSA did issue over 2,000 pages of POMS, the "Program Operations Manual System," which instructs staff on how to evaluate transfer of resources penalties and the statutory exceptions for Special Needs Trusts in compliance with OBRA '93. See POMS SI 01120.200 *et seq*. An complete review of the original 2001 POMS on Special Needs Trusts was presented at ASNP's first Annual Conference at Stone Mountain, Georgia, with a follow up last year at the Second Annual ASNP conference in New Orleans.

However, even with those detailed POMS instructions, there is a need for more specific, individual, legal assessments of compliance with trust law in general, and the OBRA '93 provisions in particular. The Social Security Administration uses a two-step procedure for analyzing the validity of Special Needs Trusts: does the trust comply with the specific terms of 42 USC 1396p(d)(4)(A) or (C), and in addition, is the a trust, as an instrument, a valid document that properly creates and funds an irrevocable trust under state law. For example, under Florida state law, no trust, whether it be a Special Needs Trust, Revocable Living Trust, or whatever, is valid as an instrument for disposition of assets after the death of the beneficiary, unless it is executed with the same formalities as the execution of a Last Will and Testament, which requires, among other things, the physical presence of two witnesses and their signature on the trust document.

It goes without saying that SSA Claims Representatives at the various offices around the fifty states are not lawyers, and are not skilled in determining the validity of a trust, or in some cases, even interpreting the convoluted language some trust drafting attorneys use in their feeble

attempts to qualify the trust as a d4A or d4C Special Needs Trust. SSA's solution is to provide legal backup to the local Claims Representatives through the SSA Regional Chief Counsel's office. The United States is divided into ten administrative regions, each administering to multiple states.

When a Social Security Administration Claims Rep has a question about the validity of a trust and its compliance with SSI rules for Special Needs Trusts that cannot be answered by reference to the promulgated POMS, the Claims Rep forwards the trust to the Regional Chief Counsel's (RCC) office for instructions. Occasionally, some of the responses prepared by RCC staff are published in the POMS for our guidance and that of SSA staff everywhere at all levels.

This presentation looks at those Regional Chief Counsel "Precedents" as SSA calls these legal opinion letters on trusts, that were published between 2006 and 2008. An analysis of the precedents published prior to 2006 was the subject of a presentation at the Stetson College of Law's Annual Special Needs Trust Conference in 2006.

First, where do we find these SSA legal opinion letters? They are published on the SSA website, www.socialsecurity.gov. On the first page, at the bottom in small type, click on "Our Program Rules" then scroll down the next page to "Employee Operating Instructions" and click on "Program Operations Manual System," then POMS Table of Contents, where you will see the following:

RM - Records Maintenance
GN - General
RS - Retirement and Survivors Insurance
DI - Disability Insurance
SI - Supplemental Security Income
HI - Health Insurance
NL - Notices, Letters and Paragraphs
OS - Operational Support
VB - Special Veterans Benefits
PR - Title II Regional Chief Counsel Precedents
➔ **PS - Title XVI Regional Chief Counsel Precedents**
SL - State and Local Coverage Handbook

Clicking on the second to last hyperlink category, "**PS - Title XVI Regional Chief Counsel Precedents**," leads to a list of topics. Click on "**PS 018: PROGRAM REQUIREMENTS – Resources"** and then on "**PS 01825.000 Trusts."**

Unfortunately, the legal opinion letters are organized by states of the country, not by sub-topics on trusts. Therefore, to help everyone along, I have prepared a table that summarizes the subject matter of the published "Precedent" which appears as Exhibit A. The full opinions are attached as Exhibit B.

So, what are we to learn from the survey of these comprehensive legal analyses by SSA attorneys of the Special Needs Trusts that we are drafting? The "Top Ten Lessons" follow, after a brief statistical analysis.

There were 42 opinion letters on trusts issued in the last three years:

By states:

California (1)
Illinois (9)
Indiana (2)
Michigan (6)
Minnesota (4)
Ohio (11)
Pennsylvania and other Regional Three states (1)
Texas (1)
Wisconsin (7)

Results of the trust reviews by SSA Regional attorneys:

15 trusts were approved by SSA
17 trusts were disapproved
10 trusts were approved in part, and disapproved in party

Number of Types of Trusts Reviewed:

17 First Party (d4A) Special Needs Trusts
8 Third Party Special Needs Trusts
10 (d4C) Pooled Trusts
4 Life Insurance-funded Burial Trusts

2 Child Support Special Needs Trusts

1 Other (annuity payments as qualifying or disqualifying)

[NOTE: the totals in the sub-categories above may add up to more than 42 (the total number of opinions), since some legal opinions involved more than one type of trust, and more than one category].

The **Top Ten Lessons** to be learned by reading the SSA Regional Chief Counsel Precedents (or How to Avoid the Easy Mistakes Made by those Other SNT Drafting Attorneys):

Lesson #1	One word: K – I – S – S.
Lesson #2	"Deemed death" provisions can be deadly.
Lesson #3	Remember 1L: the Doctrine of Worthier Title.
Lesson #4	Know your state law on irrevocable funeral service contracts.
Lesson #5	Structured settlement annuities can lead to SSI disqualification.
Lesson #6	Use the two-step approach to evaluating Special Needs Trusts that SSA attorneys use.
Lesson #7	Provide for Medicaid reimbursement to ALL states.
Lesson #8	Provide for Medicaid reimbursement for all services rendered during the life of the beneficiary.
Lesson #9	Know your state law on "dry" or unfunded trusts, and if not permitted in your state, use the parents' $10 seed money trust provision.
Lesson #10	Always include a "Get out of jail free card" also known as a "savings clause" in your trust.

Lesson #1: KISS.

"Keep it Simple, Stupid" is a good motto to follow when drafting SNTs. The Social Security staff at all levels, policy makers who draft the POMS, and the SSA attorneys who

measure compliance with the statute, stick extremely closely to the language of the statute. Adding additional terms, as will be seen in the lessons that follow, only leads to possible denial of SSI eligibility, and in the 31 states that link SSI and Medicaid, loss of Medicaid health insurance benefits also. In the case cited at *Michigan A. PS 07-190 SSI-Michigan-Review of the Cheryl I. S~ Irrevocable Special Needs Trust* that at first blush seemed to place the drafting attorney in a bind between state requirements and federal requirements, SSA held:

> We believe that the language in this trust should be interpreted to meet the requirements of the statute and the POMS, because, to the extent the trust allows payments "given higher priority by law," (1) the trust closely tracks language from the POMS regarding permissible and prohibited expenses that may be paid prior to reimbursing Medicaid, and payments "given higher priority by law" appear to be limited to those that would be permissible under the POMS; (2) the trust appears to include language about making payments "given higher priority by law" because this language seems to be required by the Michigan Medicaid program; and (3) the stated intent of the trust is that the State Medicaid payback trust requirements be incorporated into the trust and that the trust be interpreted consistently with the primary goal that the trust not prevent Cheryl from being eligible for governmental financial assistance. [Emphasis added].

There are numerous examples throughout the rest of the approvals and denials of trusts that encourage the use of simple, direct trust language that includes only those provisions necessary to meet the exact requirements of 42 USC 1396p(d)(4)(A) or (C). Where drafting attorneys try to get creative, they also get in trouble. See for example, E. PS 07-120 SSI- Ohio Review of the Jennifer C. S~ Special Needs Trust. The attorney wrote:

> 3.4 Payment of Final Administrative Costs and Taxes. Prior to reimbursing any state plan under Section 3.3 hereof, to the extent permitted by applicable Medicaid or SSI law, regulation or policy at the time of JENNIFER's death, the Trustee shall pay:
>
> A. all final administrative costs of this trust; and
>
> B. all taxes arising as the result of JENNIFER's death, including estate, gift, generation-skipping, and inheritance taxes, whether federal, state, or local. {Emphasis added].

The SSA's 2001 POMS stated at SI 01120.203(B)(3):

> The following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State:
>
> - Taxes due from the trust to the State 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.

Therefore, SSA held that

> All or most of the taxes described in section 3.4(B) would fall outside the scope of allowable expenses. See POMS SI 01120.203(B)(3). Indeed, the only permissible tax would be estate taxes due by reason of inclusion of the trust corpus in the claimant's estate.

The trust was disapproved for including the phrase "estate, gift, generation-skipping, and inheritance taxes, whether federal, state, or local" instead of simply mimicking the POMS phrase "Taxes due from the trust to the State or Federal government because of the death of the beneficiary." K-I-S-S. Fortunately, the attorney's product was saved by including a "get out of jail card free" clause (see Lesson #10).

The new 2009 POMS have been amended at SI POMS 01120.203.B.3. as follows:

> **3. Allowable and Prohibited Expenses**
> The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.
>
> **a. Allowable Administrative Expenses**
>
> The following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):
>
> - Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
> - Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.
>
> **b. Prohibited Expenses and Payments**
>
> The following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State(s) for medical assistance:
>
> - Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
> - Inheritance taxes due for residual beneficiaries;
> - Payment of debts owed to third parties;
> - Funeral expenses; and
> - Payments to residual beneficiaries.

Lesson #2: "Deemed death" can be deadly.

Some attorneys try to anticipate situations when the disabled SSI recipient wants to get out of the trust, and provide for scenarios when the trust will end and other persons will benefit from the funds held in the trust. Don't. This violates the sole benefit rule, and ensures that what is sought to be avoided, the disqualification of the beneficiary from public benefits, will in fact

occur because of this language. See for example, Exhibit page 18, the Illinois disability Pooled Trust that was disqualified, in part because…

> Section 11.1(A) of the Trust continues to provide:
>
> *11.1 Sub-Account Terminations.* Every reasonable attempt will be made to continue the Trust for the purposes for which it is established. However, the Trustee does not and cannot know how future developments in the law including administrative agency and judicial decisions, may affect the Trust of any Trust Sub-Account. If the Trustee has reasonable cause to believe that the assets of a Trust Sub-Account are or will become liable for basic maintenance, support, or care that has been or that would otherwise be provided to such Beneficiary by local, state, or federal government, or an agency or department thereof, the Trustee in its sole discretion, may:
>
> Terminate the Trust Sub-Account as to the affected Beneficiary as though he or she had died, and the Trustee shall then treat the assets in the Trust Sub-Account according to the provisions of Section 11.2....

This "deemed death" provision violates the sole benefit rule of 42 USC 1396p(d)(4)(C). Jennifer's trust, page 68, has the same problem:

> The Trust shall terminate upon Jennifer's death, or upon the first of the following to occur: (1) a court finds that the Trust renders Jennifer ineligible for benefits from any governmental unit or agency; or (2) the trustees determine that the Trust is or may be subject to garnishment, attachment, execution or bankruptcy proceedings by a creditor of Jennifer. Trust, Article Three, paragraphs 3.2.7, 3.3. If the Trust is terminated prior to Jennifer's death, the Trust assets shall be distributed as if Jennifer were deceased. Trust, Article Three, paragraph 3.2.7.

Also see disapprovals for trusts on pages 25, 48, 68, 72, 110 and 105 for the same reasons.

The 2009 POMS have been amended to emphasize this point:

> **e. Established for the Benefit of the Individual**
>
> Under the special needs trust exception, the trust must be established for and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual, as described in SI 01120.201.F.2. Any provisions that:
>
> - provide benefits to other individuals or entities, or
> - allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual), will result in disqualification for the special needs trust exception. [Emphasis added].

Lesson #3: Remember 1L – the Doctrine of Worthier Title.

Attorneys sometimes forget the Doctrine of Worthier Title, which converts, by operation of law, a trust that was intended to be "irrevocable" to a revocable trust where the grantor is also

the beneficiary, and there is no other named contingent beneficiary who could object if the disabled person sought to revoke the "irrevocable" trust. SSA describes is as follows, on page 70:

> A trust established by an individual after January 1, 2000 will be considered a resource to her if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1)(a). Although a trust agreement may contain language stating that the trust is irrevocable, see Trust, Article Two, paragraph 2.1, a trust is revocable where the grantor or settlor of the trust is also the sole beneficiary. Restatement (Second) of Trusts § 339, comment a (1959); Restatement (Third) of Trusts § 65 and comment a and Reporter's Note (2003). Here, the Trust Agreement identifies Kyle and Lori T~ as the settlors, but Jennifer is the true settlor of the Trust because the Trust was formed with her assets. POMS SI 1120.200(L)(3).

Some states like Florida and Michigan, have specifically abandoned, by statute, the Doctrine of Worthier Title as both a rule of law and a rule of construction. For a discussion, with approval, of Michigan's new law, see the trust at page 52. Also, for Illinois, at page 29.

For examples of trusts in states that retained the Doctrine, unbeknownst to their drafting attorneys, see pages 25 and 126.

Unlike other defects, this defect cannot be cured by the "Get out of jail free card" described in Lesson #10 below. See SSA's explanation on page 71.

> Moreover, we do not believe that this task could be accomplished under the Trust Agreement's "self-correction" provisions. The provisions relate to the requirements for special needs trusts and Medicaid benefits. They do not concern irrevocability or residual beneficiaries. Furthermore, we could find no legal authority that would allow a "self-correcting" trust provision to substitute for the settlor's intent to name beneficiaries to the trust. *See* Restatement (Third) of Trusts § 48 ("A person is a beneficiary of a trust if the settler manifests an intention to give the person a beneficial interest…"); *see also Id.* § 44, comment a ("The interests of some beneficiaries may be valid although the intended interests of others are not, including invalidity for indefiniteness…."). Until a residual beneficiary is added, the Trust remains a resource to Jennifer.

Lesson #4: Know your state law on irrevocable funeral service contracts.

To prevent fraud, abuse and over-reaching, many states have strict laws protecting individuals who purchase prepaid funeral service contracts, or fund them with life insurance irrevocably assigned to the funeral home. Although SSA will approve the purchase of properly executed funeral home contracts, during the rescission time (3 days or 30 days, or whatever is provided by the particular state's laws), the resources used to purchase the properly assigned life insurance or fund the irrevocable funeral service contract will be counted as a resource of the SSI beneficiary. These funeral service arrangements are good ways to spend down limited PI

settlements, or very small inheritances, but if not done correctly according to strict adherence to state law on the topic, will result in disqualification from SSI and SSI-related Medicaid by SSA.

For examples, see the discussions of such arrangements on page 3 (violations of state statute), page 13 (assignment fails for lack of a written contract), 55 (failure on three counts to follow Michigan's state statutes), and 126 (single premium life insurance improperly assigned to an irrevocable trust).

Lesson #5: Structured settlement annuities can lead to loss of SSI.

A few Regional Chief Counsel Precedents have dealt with the use of personal injury structured settlement annuities, and their impact on SSI, and thereby SSI-related Medicaid, eligibility. Most of the difficulties and uncertainties deal with the irrevocability of the assignment of the annuity. For example, in the Indiana case of *PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~* (page 33) a medical malpractice claim settled for a minor disabled plaintiff, the Precedent held that the annuity payments may become income to Savanna, the child, in 2022, when she attains the age of majority. Similarly, in the Illinois matter of ** , SSA held that the annuity payments will not be counted against the disabled person during her minority, but the annuity payments become countable income at her age of majority, since Dyrsten could re-direct them to herself, under Illinois guardianship law:

> Thus, as of Krysten's eighteenth birthday, in January 2007, her guardianship terminated. As such, she was then entitled to receive the periodic payments directly. In re Estate of W~, 673 N.E.2d at 277 (Upon restoration of a ward, the ward has the right to be put in possession of his or her property, "and to ask the court to order the guardian to deliver to the ward all of the ward's money and property that the guardian has, or the money and property to which the ward is entitled."). Thus, even though Regions B~ continued to receive and deposit the periodic payments into Krysten's trust account, because Krysten, as of the time she became an adult, could have requested that the payments be turned over to her directly, the assignment was revocable and the payments were income to her as of January 12, 2007.

In the Ohio matter of *PS 07-161 SSI-Ohio-Review of the Rodney S. H~ Irrevocable Special Needs Trust* (page 88) the RCC precedent holds that the remaining guaranteed payments after the disabled person's death must be turned over to the state to satisfy the Medicaid lien.

The 2009 POMS do not resolve these annuity problems, and specifically others which are based on the ability of deemor parents to cash in their annuities through J. G. Wentworth, Peachtree, or other companies, using state statutes that specifically permit cashing out an annuity stream.

However, the 2009 POMS do contain a statement that resolves one concern, which was whether the structured settlement annuity payments begun prior to age 65, but paid after the disabled person passed his or her 65th birthday, were impermissible additions to a trust since the annuity payments contain both principal and interest. SSA's 2009 POMS now contain the following statement:

> **c. Additions to Trust After Age 65**
>
> Additions to or augmentation of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust, depending on the source of the funds (see SI 01120.201J.) and may be counted as resources in the following months under regular SSI trust rules.
>
> Additions or augmentation do not include interest, dividends or other earnings of the trust or portion of the trust meeting the special needs trust exception. If the trust contains the irrevocable assignment of the right to receive payments from an annuity or support payments made when the trust beneficiary was less than 65 years of age, annuity or support payments paid to a special needs trust are treated the same as payments made before the individual attained age 65 and do not disqualify the trust from the special needs trust exception.

Lesson #6: Use the SSA two-step approach to evaluating SNTs.

The SSA uses two-step evaluation process. The first step is to see if the Special Needs Trust meets the requirements of d4A or d4C. For example, SSA says that with regard to d4A, the trust must meet three requirements:

> The exception under 42 U.S.C. § 1396p(d)(4)(A) applies to a trust which: (1) is established with the assets of an individual under age 65 who is disabled; (2) is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) provides that on the death of the individual, any funds remaining in the trust will be used to reimburse the State for Medicaid payments made on behalf of the individual. *See also* 42 U.S.C. § 1382b(e)(5); POMS SI 01120.203(B)(1).

These requirements are laid out in the POMS in SI 01120.203. Section 203 contains the rules for meeting the OBRA '93 Medicaid trust rules.

The second step is meeting the requirement is to comply with the provisions for creating a valid, irrevocable trust, as stated in the POMS at SI 01120.200. Section 200 is the collection of rules for making sure the trust corpus cannot be accessed by the disabled individual during his or her lifetime. For example, in *PS 07-153 SSI- Illinois - review of the David C~ f/k/a K~ Supplemental Care and Needs Trust* (page 15), the document provided that the trustee, a bank, could revoke the trust. Unfortunately, the bank was also the guardian of the minor child. Revocation by a guardian, who is an agent of the principal, is revocation by the principal, who is the disabled child in this case. Therefore, the trust provided that the trust could be revoked by the disabled beneficiary. Failure to make the trust irrevocable means that the trust is currently an available and countable resource, and if there is more than $2,000 in the trust, a disqualifying resource for SSI purposes.

The 2009 POMS added two sections to codify the prior Regional Chief Counsel Precedents. In SI 01120.200.B.19 and 20, we have the following provisions:

> **19. Revoke**
>
> The grantor of a trust may have the power or authority to **revoke** (i.e., reclaim or take back) the assets deposited in the trust. If the individual at issue (a claimant, recipient, or deemor (see SI 01310.127)) is the grantor of the trust, the trust will generally be a resource to that individual if that individual can revoke the trust and reclaim the trust assets. However, if a third party is the grantor of the trust, the trust will not be a resource to the beneficiary of the trust merely because the trust is revocable by the grantor. In a third party trust situation, the focus should be on whether the individual (claimant, recipient, or deemor) can terminate the trust and obtain the assets for him or herself.
>
> **20. Terminate**
>
> In rare instances, a trustee or beneficiary of a third-party trust (i.e., a trust established with the assets of a third party) can **terminate** (i.e., end) a trust and obtain the assets for him or herself.

Similarly, special needs trusts must contain a spendthrift clause. If not, there is nothing to prevent a disabled person from assigning his or her rights to distributions from the trust to another person or entity. As stated in the new 2009 POMS, SI 01120.200.B.16: "A spendthrift clause or trust prohibits both involuntary and voluntary transfers fo the beneficiary's interest in the trust income or principal….In other words, a valid spendthrift clause would make the value of the beneficiary's right to receive payments not countable as a resource."

Another area of consideration, outside of the technical requirements of d4A and d4C, is whether the income stream being assigned to the trust, is in fact, assignable. For example, in *PS 07- 179 SSI-Michigan - Review of Peggy Jo V~ Special Needs Trust and Pension Benefits* (page 45), the attorney for the disabled divorced wife attempted to assign the court-awarded 50% of the husband's General Motors pension benefits. As the RCC Precedent notes, such benefits are not assignable by law. On the other hand, child support payments and alimony payments, if assignable under state law to any trust, will be honored by SSA if assigned by court order to a special needs trust. See, for example, *PS 06-152 SSI-Illinois-Review of Assignment to a Trust of Child Support Payments for Michael L~, ~* - (page 27).

SSA has amended the POMS in the 2009 version to include the following:

> **d. Assignment of Income**
> A legally assignable payment (see SI 01120.200G.1.c. for what is **not** assignable), that is assigned to a trust, is income for SSI purposes **unless** the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust as a result of a court order, are not income. If the assignment is revocable, the payment is income to the individual legally entitled to receive it. [Emphasis added].

Lesson #7: Provide for reimbursement to ALL states.

As another example of K-I-S-S, an attorney who was apparently frustrated with the length of time it sometimes takes to get the Medicaid payoff amounts after the death of the claimant, provided the other Medicaid states had to respond promptly or lose their chance for repayment:

> Section 3.2 includes a requirement that the Trustee obtain an accounting from any and all appropriate state agencies of payments made under public benefits programs on behalf of the Beneficiary during her lifetime. See Trust, Article III, Section 3.2. The Trustee is directed to send in writing by certified mail notification at any state agency of Ani's death and subsequent good faith attempts to contact the agencies. If the agencies respond, the Trustee shall pay them any reimbursement owed. However, if the Trustee does not receive a response after two attempts to contact the agency over one year, the Trustee shall send a final notice to the agency and shall disburse the remainder of the trust to the person(s) appointed under Section 2.3 or to Ani or her heirs-at-law within 30 days. See Trust, Article III, Section 3.3, 3.4.

PS 08-054 SSI-Illinois-Review of the Ani M. H~ OBRA Pay Back Trust Thus, simply putting an obstacle to full repayment to ALL states violates d4A and d4C according to SSA.

The ARC of Indiana Master Pooled Trust was disallowed because it failed to provide for multi-state reimbursement:

> Finally, we note that Section F of the Joinder Agreement allows the ARC to retain 50% of the Trust assets at the time of the beneficiary's death, and requires that the remaining 50% be distributed to the State of Indiana up to an amount equal to the total medical assistance paid on the beneficiary's behalf under the State Medicaid plan, appeared consistent with this POMS provision. *See* Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Indiana-Review of the Sub-Account of Deborah C~ in the ARC of Indiana Master Trust II (March 21, 2007). The trust does not provide for reimbursing any other State for Medicaid payments. The Office of Income and Security Programs (OISP) recently clarified that language such as this is problematic because it frustrates any State Agency's (other than Indiana's) ability to recoup medical assistance paid on behalf of the individual.

SSA has amended the POMS in the 2009 version in SI 01120.203.B.1.h to include the following:

> **h. State Medicaid Reimbursement Requirement**
>
> To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a.
>
> The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

Lesson #8: Provide for lifetime reimbursement to Medicaid.

Recently, a couple of conflicting decisions emerged from New York courts on the issue of whether the reimbursement to Medicaid is to include all Medicaid benefits paid to a beneficiary during his or her lifetime, or just those benefits that were paid subsequent to the creation of the special needs trust.

For SSI purposes, the federal government has resolved the issue. Repayment to all the states is for all the Medicaid benefits paid, not just those after the creation of the trust. See the analysis in the Ohio matter of *PS 08-150 SSI - Ohio -- Review of Ashley E. D~ Irrevocable Special Needs Trust* (page 80);

> …the trust does not meet the third requirement for the Medicaid special needs trust exception because Article 3.5 of the Agreement of Trust provides that, at Ashley's death, the trust is to terminate and the remaining assets are to be distributed first to any states that provided Medicaid benefits to Ashley during the existence of the trust. Agreement of

> Trust, Art. 3.5(a). Because the Agreement of Trust does not contain specific language providing for reimbursement of Medicaid payments made throughout Ashley's lifetime, rather than merely during the existence of the trust, the trust does not comply with the Medicaid special needs trust exception requirements. *See* 42 U.S.C. § 1396p(d)(4)(A) (trust must provide that Medicaid is reimbursed for "the total medical assistance paid"); POMS PS 01825.039 A., PS 08-075 SSI-Ohio: Review of Sub-Account of Nathan H~ in the Ohio Community Pooled Flexible Spending Trust (provision for reimbursement for Medicaid assistance since establishment of trust did not comply with special needs trust exception requirements); Memorandum from Regional Chief Counsel, Reg. V, Chicago to Asst. Reg. Comm'r-MOS, Chicago, Reg. V, *SSI-Ohio Review of Reconsideration Request on the Joanne F. M. Trust Agreement* at 5 (same). Therefore, the trust is a resource under the statutory trust provisions.

See also the denials of trusts for failure to reimburse for all Medicaid paid in *PS 08-075 SSI-Ohio: Review of Sub-Account of Nathan H~, ~, in the Ohio Community Pooled Flexible Spending Trust* (page 83), and the Texas case of *PS 05-166 SSI-Review of the D~ R~ Trust* (page 120).

SSA has amended the POMS in the 2009 version to include the following:

> **h. State Medicaid Reimbursement Requirement**
> … Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

Lesson #9: Know your state law on "dry" trusts.

Parents and grandparents of competent adults can establish a d4A special needs trust, but must "seed" it with some nominal amount of their own money (a seed money trust) to which the competent disabled adult adds his or her funds. In some states, a "dry" trust may be established. For an excellent discussion of this requirement, see page 115, the Pennsylvania matter of *PS 03-178 Request for Review: Survey of State Trust Law Within Region III.* However, not knowing whether your particular state allows "dry" trusts, or requires that the trust be nominally funded as a "seed money" trust, can result in a disqualification of benefits, as it did in the Wisconsin case of *PS 06-104 SSI-Wisconsin-Review of the Request for Reconsideration on the Sub-Account of Robert G~, ~ , in the WisPACT Trust II* (page 138).

SSA has now added a new section in the 2009 POMS discussing the "seed money" concept, but does not list dry versus seed money states. It is a matter of particular state law, which may be changed from year to year.

> In the case of a legally competent, disabled adult, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust. After the seed trust is established, the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g. power of attorney) may transfer the individual's assets into the trust.
>
> In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.
>
> **NOTE:** Under 1613(e) of the Act, a trust is considered to have been "established by" an individual if any of the individual's (or the individual's spouse) assets are transferred to the trust other by will.
>
> Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be "established by" an individual who does not provide the corpus of the trust, or transfer any of his/her assets to the trust, but rather someone who took action to establish the trust. To avoid confusion, we use the phrase "established through the actions of" rather than "established by" when referring to the individual who physically took action to establish a special needs or pooled trust.

Lesson #10: Always include a "Get out of jail free card" in your trust.

OK, so you screwed up. Maybe you're still OK if you included a clause like one of the following examples from the Regional Chief Counsel Precedents:

SSA approved a pooled Ohio trust in *PS 06-356 SSI-Ohio-Review of the Sub-Account of Jackie R~, ~ in the Ohio Pooled Trust* (page 105) which had defects, but were cured by including the following:

> Article 10, § 10.4 provides that if any provision of the trust disqualifies a beneficiary for government assistance, that provision may be voided to avoid such disqualification. This clause appears to void the offending language, which permits the trust to meet the Medicaid payback trust exception.

Similarly, the "Get out of jail free card" of a "savings clause" saved the Illinois Disability Pooled Trust that contained an impermissible "deemed death" clause. See *PS 07-069 SSI-Illinois Review of the Second Amendment to the Illinois Disability Pooled Trust* (page 18):

> For the reasons discussed below, it is our opinion that, despite the changes made by the Second Amendment to the Trust, the Trust still would not meet the pooled trust exception to counting sub-trust accounts as resources under the statute. However, the "null and void" clause still enables the Trust to qualify for the statutory exception, since that clause nullifies the offending language in the Trust….
>
> **C. The Savings Clause Voids Any Provisions That Are Inconsistent With the Statute.**
>
> Even if the foregoing provisions [deemed death resulting in termination of the trust prior to the death of the disabled beneficiary] are inconsistent with the statute, the Trust nevertheless qualifies for the Medicaid payback exception for pooled trusts. The Joinder Agreement at Section Q(3) provides "[t]his Trust is a pooled trust, governed by the laws of Illinois, in conformity with the provisions of 42 U.S.C. § 1396p, amended August 10, 1993,

> by the Omnibus Budget Reconciliation Act of 1993. To the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control." [Emphasis added].

Neither the old 2001 POMS nor the new 2009 POMS advise the local SSA District Office staff that a "bad trust" can be "made good" by the types of savings clauses shown above. This will inevitably lead to some denials of benefits at the local level and hopefully successful resolutions before the federal Administrative Law Judge or in the federal courts on appeal. Given the demonstrated importance of "savings clauses" it is hard to imagine why every trust would not have one in the future.

However, it is very important to note that savings clauses cannot cure one defect – the violation of the Doctrine of Worthier Title. That is because in those states that still have it, the Doctrine requires the naming of a specific contingent named beneficiary in the trust itself. A savings clause usually does not have a provision that "if I forgot to name a specific residual beneficiary, it should be X person…" And SSA says they cannot supply the name either, so a trust in violation of the Doctrine will fail, even with a savings clause. See page 68, *PS 07-045 SSI-Minnesota-Review of the Jennifer T~ Special Needs Trust*,

> The Trust Agreement purports to self-correct certain deficiencies. The Trust provides that, if any provision of the Trust Agreement is inconsistent with the provisions of 42 U.S.C. §1396p(c)(2) (B) or Part 3 § 3257.6 of the Medicaid Manual regarding required language "*and any other requirement for special needs trusts,*" the Trust Agreement "shall be deemed to be amended accordingly, without need for court approval" to "conform this Trust to the requirements for 'special needs' trusts."… Furthermore, we could find no legal authority that would allow a "self-correcting" trust provision to substitute for the settlor's intent to name beneficiaries to the trust. *See* Restatement (Third) of Trusts § 48 ("A person is a beneficiary of a trust if the settler manifests an intention to give the person a beneficial interest…"); *see also Id.* § 44, comment a ("The interests of some beneficiaries may be valid although the intended interests of others are not, including invalidity for indefiniteness…."). Until a residual beneficiary is added, the Trust remains a resource to Jennifer.

Conclusion. The Social Security Administration's publication of the Regional Chief Counsel Precedents as a section of the POMS provides useful insight into the thinking and approach of the agency in applying the otherwise terse rules enumerated in the mere statutory language of 42 USC 1396p(d)(4) for individual and pooled trusts. As we have seen, these

opinion letters lead the national staff of SSA to include many of the concepts into the new 2009 revisions of the Social Security Administration's Program Operations Manual System (POMS). Forewarned is forearmed.

Finalized January 31, 2009.

State	Name	Exh. A Page #	Type of Trust	Approved by SSA?	Issue
California	A. Carlotta P. S~	1	Third Party Living Trust with SNT	Yes	Held: Purpose of SNT "to provide financial aid that supplements rather than replace government benefits…" approved; rental income paid to trust is not countable income to SSI trust beneficiary
Illinois	A. Marilyn M~	3	Life Ins-Funded Burial Contract	No	Life ins is resource during 30 day period of right to cancel policy; thereafter, failure to irrevocably assign life ins to burial trust due to violations of state funeral services statutes
"	B. Krysten M~	6	Review of Annuity Payments	Yes & No	OK, during minority, but annuity payments become countable income at age of majority, since Krysten could re-direct them to herself, under Ill. Guardianship statute
"	C. Ani M. H~	9	d4A SNT	No	Multiple defects: 1) terminates not solely on death, as required, but also if Ani is no longer disabled; 2) reimbursement to parents for taxes paid violates sole benefit rule; 3) although requires reimbursement to Ill. Medicaid, other states have to promptly respond to get repaid, and imposes waiver if they do not – violates act.
"	D. Connie T~	13	Life Ins.-Funded Burial Trust	No	Assignment of life ins policy to funeral home fails for lack of written contract; therefore Connie had right to request return of life ins contract to her, and it had surrender value
"	E. David C~f/k/a K~	15	d4A SNT	No	Multiple defects: 1) fails to provide for reimbursement to multiple states; 2) trust is revocable by bank, which is guardian, and therefore, David can revoke through agent: "Action by David's grdn is equivalent to an action by David."
"	F. Illinois Disability Pooled Trust	18	Pooled Trust	No, but Yes	BAD: Contingent provisions allow other persons to benefit during beneficiary's life due to "deemed death" provisions; GOOD: trust has provision that defects in trust are cured by "Savings Clause" which voids any provisions inconsistent with d4A statute. "This trust governed by 1396p. To the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control."
"	G. Monica D. L~	25	d4A SNT	No	Multiple defects: 1) violates Doctrine of Worthier Title by failure to name specific residual beneficiary; 2) provides for early termination, other than death, if Monica's rights are restored

Illinois	H. Michael L~	27	Child Support Third Party SNT – no Medicaid Payback	Yes	Child support paid directly to SNT per agreed court order for disabled adult child is approved: “Under Agency [SSA] policy, child support payments will not be considered income if they are irrevocably assigned to a trust that is not a resource.” [TP-SNT].
“	I. Teresa R~ - Illinois Disability Pooled Trust	29	Pooled Trust	Yes	Doctrine of Worthier Title is met, because beneficiary could not amend an anti-lapse provision, and therefore there is a contingent beneficiary, and trust is irrevocable
Indiana	A. Savanna R. W~	33	d4A SNT	Yes and No	Trust is OK, but annuity payments may become disqualifying income when they start in 2022; to be re-evaluated at that time.
“	B. Review of ARC Indiana Master Trust II	37	Pooled Trust	No	Multiple defects: 1) Trust fails to provide for multi-state Medicaid repayment; 2) violation of termination on death, since trust allows termination during life of beneficiary if he/she moves to another state
Michigan	A. Cheryl I. S~	41	d4A SNT	Yes	SSA approves of drafters using specific quotes from SSI statutes and rules: “The language in this trust seems to limit payments ‘permitted by law’ to those that would fit within the language of SSA’s POMS provisions.”
“	B. Peggy Jo V~	45	d4A SNT	No	Disabled wife divorced. Court awarded 50% of husband’s General Motors pension benefits. Wife attempted to assign to d4A SNT. By law (ERISA), such benefits cannot be assigned. See POMS SI 01120.201(J)(1)(c).
	C. Ricky H~ - Synod Pooled Disability Trust	48	Pooled Trust	No, but Yes	BAD: under some circumstances, beneficiary’s “deemed death” provision for distribution to other beneficiaries of pooled trust violates d4A statute (which requires termination ONLY on death of beneficiary); but GOOD, Savings Clause makes offensive clause unenforceable
“	D. Elaine M~	52	d4A SNT	Yes	Acknowledgment that Michigan abolished the Doctrine of Worthier Title and it applies retroactively
“	E. Barbara V~ D~	55	Life Ins Funded Burial Trust	No	A single premium life ins policy subsequently assigned to a funeral home; however, contract fails to satisfy three of the Michigan state statutory requirements, so contract is invalid and assignment of proceeds is voidable by a court; therefore it is a countable resource
“	F. Julia Z~	58	d4A SNT	Yes	Both d4A trust and assignment of annuity proceeds are approved, but only because it would take guardianship court approval to find a “change of circumstances” that would be in best interests of child; therefore “at this time” the annuity payments are not income.

Minnesota	A. David Lee H~	61	d4A SNT – three versions	Yes	Trust funded from UTMA account – OK because David Lee had not yet reached age of majority, therefore father had authority to transfer to SNT
"	B. James S~	65	1998 trust – pre SSI d4A rules	Yes	Trusts established prior to 1-1-2000 are evaluated under "regular trust resource rules" found at POMS Si 01120.200 not d4A rules that require payback.
"	C. Jennifer T~	68	d4A SNT	No	Multiple defects: 1) failure to name residual beneficiary in a Doctrine of Worthier Title state; and 2) "deemed death" provision – if Jennifer is found ineligible for benefits, funds distributed as though Jennifer had died; violates the termination on death requirement of d4A; although SNT has self-correcting provisions, it cannot correct the first problem above, since it cannot name a residual beneficiary.
"	D. Ryan A. S~	72	d4A SNT	No	UTMA account move to SNT was proper, but trust defective because it permitted termination if beneficiary was not awarded SSI, i.e., violated the trust must last for lifetime of beneficiary, end only on death.
Ohio	A. Dustin J. E~	76	d4A SNT	Yes	1993 trust, with annuity properly irrevocably assigned to SNT
"	B. Ashley E. D~	80	d4A SNT	No	Provision that "upon Ashley's death, the trust terminates and the assets remaining in the trust are to be distributed first for Medicaid payback, to the extent that Medicaid benefits were paid on Ashley's behalf by any state ***during the existence of the trust***" reimbursement of all Medicaid benefits paid during Ashley's lifetime."
"	C. Nathan H~ - Ohio Community Pooled Flexible Spending Trust	83	Pooled trust	No	Multiple defects: 1) violates Medicaid payback by limiting to only Medicaid provided after the establishment of the pooled trust, and 2) improperly allows for payment of unallowable taxes, fees, and expenses before Medicaid reimbursement

Ohio	D. Rodney S. H~	88	d4A SNT	Yes	Annuity payments after death of individual are required to be used to repay Medicaid; "Although the court order states that the annuity payments will be made directly to the Trust, if Rodney could ask the court to modify the order so that the payments would be made directly to him, the annuity payments should be considered income to him." Here, SSA is unaware of any change of circumstance that would cause the court to reconsider its finding that assigning the annuity payments to the Trust is in Rodney's best interest, therefore, the payments are not income. [Conversely, however, if there was no guardianship court to consider "the best interests" standard in preventing transfer of payments to disabled person, then it follows that the annuity would be countable.]
"	E. Jennifer C. S~	92	d4A SNT	Yes, with instruction	Language that "all taxes arising as the result of Jennifer's death, including estate, gift, generation-skipping, and inheritance taxes, whether federal, state, or local" violates federal rules, but trust has language "to the extent permitted by applicable SSI law" which "saves" the trust; note, however, that SSA believes that "the only taxes permissible are estate taxes due by reason of inclusion of the trust corpus in the claimant's estate."
"	F. Anthony P. C~	95	Third party SNT	Yes	Restates and applies the general trust rules for third party trusts.
"	G. Gwen M. F~	97	Mixed d4A SNT and Third Party SNT	No and Yes	d4A SNT is bad because it allows payments of more estate taxes than allowed by rule; the portion of the trust that is TP-SNT part is OK because there is no Medicaid payback required, so d4A impermissible taxes are not .
"	H. James J. S~	101	d4A SNT	No	Inheritance trust has Multiple defects: 1) "deemed death" provision to benefit other persons if State of Ohio fails to honor the trust, therefore violates sole benefit rule; 2) improperly allows for burial expenses prior to Medicaid reimbursement.
"	I. Jackie R~ - Ohio Pooled Trust	105	Pooled Trust	No, but Yes	Pooled trust has "deemed death" provision, but also has "savings clause" which states that "Any provision of the trust that may disqualify the beneficiary for government assistance shall be automatically, ab initio, amended, limited or void, to avoid that disqualification." And that provision allows SSA approval.
"	J. Nicole R. R~	110	Two trusts - d4A SNT and Third Party SNT for same beneficiary	No, and Yes	d4A SNT is denied because Trustee is empowered to transfer d4A trust funds to the TP-SNT if Nicole is found ineligible; therefore, d4A trust violates sole benefit rule; however, third party SNT is OK.
"	K. Janalyn M. H~ - Ohio Community Pooled Trust	114	Pooled Trust	Yes, but not retroactively	Pooled trust rep requested review to correct prior deficiencies, but while SSA approved the new language, it is not retroactive. Therefore Jennifer's assets are protected but only AFTER the date the amendment was made; it was a countable disqualifying resource to Jennifer prior to the amendment

Pennsylvania & Region III states	Survey of State Trust Law on Dry or Seed Trusts	115	d4A SNT	Yes	Great discussion of creation of SNT by parent of competent disabled adult – seed money and dry trusts are permitted in the states of Pennsylvania, Virginia, Delaware, District of Columbia, and West Virginia. A must read opinion!
Texas	A. D~ R~	120	d4A SNT Child support trust	No	"The trust only provides that Medicaid expenses incurred after the trust was established will be reimbursed. Regulations require that the trust language provide for repayment of all incurred medical expenses, regardless of occurrence before or after trust establishment."
Wisconsin	A. Brian G~	124	Third Party SNT	Yes, until age 60	Trust okay now, but provides that can be terminated at Brian's age 60; therefore SSA must re-evaluate at that time.
"	B. Nancy S~	126	Irrevocable Life Is Trust	No	Multiple defects: 1)Life insurance proceeds to be paid to funeral home, but not made retroactive; 2) insurance proceeds paid to trust, but trust violates Doctrine of Worthier Title; 3) even if it didn't violate DWT, there's no Medicaid payback, so trust is a countable disqualifying resource.
"	C. William S~	129	Pre-2000 SNT	Yes	A 1995 trust was amended to make it SNT qualifying; SSA held that the 2007 amendments were a re-statement of the 1995 trust with
"	D. Sharon C~	131	Amended Third Party Testamentary Trust	Yes	Trust originally provided for mandatory regular distributions to SSI beneficiary; amended by court order reforming trust to restrict trustee to distributions that don't make Sharon ineligible; trust OK as third party SNT without Medicaid payback.
"	E. SSI-WISH Pooled Trust	134	Pooled Trust	Yes	Pooled trust originally violated Medicaid payback provisions, now OK
"	F. Robert G~	138	Pooled Trust Joinder	No	Parents failed to provide seed money to fund pooled trust contribution for competent disabled adult; Wisconsin law does not permit dry (unfunded) trusts; therefore, it failed as a trust under state law

wisconsin	G. SSI-WISH Pooled Trust	145	Pooled Trust	No	The POMS unequivocally states that "[t]o qualify for the pooled trust exception, the trust *must contain* specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust pays to the State 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." POMS SI 01120.203(B)(2)(g) (emphasis added). Under the terms of the Declaration …, the Trustee first pays any expenses listed … incurred prior to the SB's death, including funeral and burial expenses, and fees and expenses connected with closing the sub-account. Decl. Art. 5.3; ACA Art. XIII. Only after payment of these allowable expenses does the Trust retain the remaining assets of the sub-account. *Id.* Thus, the Trust does not qualify for the pooled trust exception under 42 U.S.C. § 1396p(d)(4)(C), and a self-settled sub-account within the Trust would be considered a resource under 42 U.S.C. § 1382b(e).

2006 through 2008 SSA Regional Chief Counsel Precedents on Trusts

PS 01825.006 California

A. PS 06-130 Carlotta P. S~ Living Trust SSI beneficiary: Loretta M. S~, DOB 1/19/48

DATE: May 10, 2006

1. SYLLABUS

This opinion examines whether the assets and income of a living trust should be counted when determining the eligibility of an SSI beneficiary. The living trust was established in 2002 by the beneficiary's mother using only the mother's assets. Upon the death of the mother the trust became irrevocable and her sons succeeded her as co-trustees. The assets remaining in the trust post-mortem were to be used for the benefit of the SSI beneficiary at the sole discretion of the trustees. Since the trust is irrevocable and the SSI beneficiary cannot revoke the trust or direct the use of assets the trust principal is excluded from resource counting. Furthermore, income derived from the real property contained in the trust is deposited directly in the trust and is not directly accessible to the SSI beneficiary at any time.

Thus, the rental income is not countable for purposes of determining SSI eligibility and payment amount.

2. OPINION

QUESTION

(1) Whether the assets of the Carlotta P. S~ Living Trust are resources of Loretta M. S~ (the "claimant") for purposes of determining her continuing eligibility for Supplemental Security Income (SSI) benefits.

(2) Whether monthly rental income generated by 266 Belmont Avenue, Los Angeles, California is the claimant's income for purposes of determining her continuing eligibility for SSI benefits.

ANSWER

(1) The assets of the Carlotta P. S~ Living Trust are not the claimant's resources for purposes of determining her continuing eligibility for SSI benefits.(2) Unless distributed to the claimant, monthly rental income generated by 266 Belmont Avenue, Los Angeles,

California is not the claimant's income for purposes of determining her continuing eligibility for SSI benefits.

FACTUAL BACKGROUND

The claimant, who was born on January 19, 1948, has received SSI benefits since 1986. The Social Security Administration (SSA) recently discovered that the claimant is a trust beneficiary.

On October 24, 2002, the claimant's mother, Carlotta P. S~, established the Carlotta P. S~ Living Trust as Settlor, Trustee, and beneficiary (Trust at 19). The trust provided that it was subject to revocation and/or modification during the life of Carlotta P. S~, and that, upon her death, it would be irrevocable and not subject to modification (Trust at 18-19).

Carlotta P. S~ died on April 16, 2004. Two of her sons, John R. S~ and Bernard L. S~, succeeded her as co-trustees (John R. S~ statement).

In pertinent part, the trust provided that, upon the Settlor's death, the successor trustee(s) would distribute all trust property except (1) the real property commonly known as 266 Belmont Avenue, Los Angeles, California (the Belmont Avenue property) and (2) a one-sixth interest in the residual trust estate (Trust at 3-5). The trust further provided that the successor trustee(s) would administer the two remaining trust assets solely for the claimant's benefit as a Supplemental Needs Trust according to Article 4 of the trust (Trust at 4-5). The explicit purpose of the Supplemental Needs Trust is "to provide financial aid that supplements, rather than replaces, government benefits provided to . . . [the claimant], without disturbing government benefits that would be available . . . if the trust did not exist" (Trust at 6). Article 4 also provides that the successor trustee(s) would have sole discretion to apply as much trust income and trust principal as may be necessary or desirable to meet the claimant's supplemental needs and that the successor trustee(s) is/are neither obligated nor compelled to make any distribution from the trust (Trust at 6). Article 4 further provides that no part of the principal or undistributed income of the trust shall be considered available to the claimant and that the claimant essentially cannot compel the trustee to release any part of the principal or undistributed income of the trust (Trust at 7).

The trust conferred general property powers on the successor trustee(s) (Trust at 11). The trust also specifically authorized the successor trustee(s) to collect rent to which the trust is entitled (Trust at 11) and maintain financial trust accounts (Trust at 12). In addition, the trust provided that "[a]ny undistributed income shall be accumulated and added to principal" (Trust at 6).

The successor co-trustees have not made any trust distribution to the claimant and continue to hold the Belmont Avenue property in trust according to Article 4 of the trust (John R. S~ statement at 1). The successor co-trustees also collect $800 per month in gross rent generated by the Belmont Avenue property (John R. S~ statement at 1). The successor co-trustees deposit such rental income into a trust account that is not accessible by the claimant, not subject to the claimant's control, and not available to the claimant (John R. S~ statement at 2).

Although established in the State of Michigan, the trust expressly provides that California law governs the validity and construction of the trust (Trust at 18).

DISCUSSION

(1) The assets of the Carlotta P. S~ Living Trust are not resources of the claimant for purposes of determining her continuing eligibility for SSI benefits.

The Carlotta P. S~ Living Trust was established in October 2002 solely with assets of a third person, i.e., the claimant's mother. Accordingly, although established after January 1, 2000, the Carlotta P. S~ Living Trust is governed by Program Operations Manual System (POMS) SI 01120.200. POMS SI 01120.200.A.2(b).

When Carlotta S~ died, the Carlotta P. S~ Living Trust became an irrevocable trust. *See* Trust at 18-19 (trust became irrevocable by its terms); and Cal. Prob. Code § 15400 (2006) (trust irrevocable by its terms is irrevocable under California law). In addition, the claimant does not have authority to revoke the trust, does not have authority to direct the use of any trust asset, and otherwise cannot compel the successor co-trustees to take any particular action. Trust at 6-7, 18-19. Accordingly, given such circumstances, "the trust principal is not the individual's resource for SSI purposes." POMS SI 01120.200.D.2 (emphasis in original).

(2) Unless distributed to the claimant, monthly rental income generated by 266 Belmont Avenue, Los Angeles, California is not the claimant's income for purposes of determining her continuing eligibility for SSI benefits.

Trust earnings (e.g., interest, dividends, royalties, or rents) are not income to the SSI recipient unless the trust directs, or the trustee makes, payment to the SSI recipient. POMS SI 01120.200G.1.a. Here, the claimant never received any distribution from the trust. Moreover, the claimant and successor co-trustees all state that the rental income generated by the Belmont Avenue property is deposited in a segregated trust account that is neither accessible by the claimant nor made available to the claimant (John R. S~ statement at 2). Accordingly, unless a future distribution is made to the claimant, the rental income collected from the Belmont Avenue property is not the claimant's income for purposes of determining her continuing eligibility for SSI benefits. If the successor co-trustees ever distribute such rental income to the claimant, such monies then will be deemed unearned income to the claimant and assessed according to the regular rules for determining the effect of income on the claimant's continuing eligibility for SSI benefits. POMS SI 01120.200.E.1.

PS 01825.016 Illinois

A. PS 08-080 SSI - Illinois: Review of the Life Insurance-Funded Burial Contract of Marilyn M~, ~ -Reply Your Reference: S2D5G6 (M~, Marilyn) Our Reference: 08-082-NC

DATE: March 14, 2008

1. SYLLABUS

This opinion evaluates a life insurance funded burial contract to determine if it is a countable resource for SSI purposes. The contract was signed in January, 2008 and the SSI beneficiary attempted to irrevocably assign the life insurance policy to fund the contract. Irrevocable assignment of a life insurance policy to fund a burial contract is permissible under Illinois state law, however, certain conditions must be met. One such condition is that the burial contract must specify whether the price of merchandise and services is guaranteed. In this case, the contract itself fails to meet that criteria and several others dictated by Illinois law. Failure to meet the required criteria means that the burial contract in this case may be void and unenforceable and, in any case, the life insurance policy has not been irrevocably assigned. Since the beneficiary can revoke the assignment and access the cash surrender value of the life insurance policy it is considered a resource for SSI purposes.

2. OPINION

This opinion is in reply to your February 1, 2008, inquiry concerning whether claimant Marilyn M~'s life insurance funded "Funeral Purchase Contract" constitutes a resource for purposes of SSI eligibility. For the following reasons, we conclude that the policy designed to fund the contract constitutes a resource.

Background

Ms. M~ signed a document, apparently in January 2008, entitled "Funeral Purchase Contract." The document outlines funeral services for Ms. M~ in the amount of $8,734.25, to be arranged by Solon Baker & Telford Funeral Home ("Solon"), of Streator, Illinois. Ms. M~ funded the Funeral Purchase Contract with a life insurance policy that she purchased from Great Western Insurance Company ("Great Western") for $8,734.25. The face value of the policy is $9,098, and the cash surrender value is currently $3,812.52, and increases annually. Ms. M~ had the right to cancel the policy within 30 days after it was issued on January 22, 2008. The policy states that if there has been an irrevocable assignment of the policy, the cash value cannot be paid out. Ms. M~ attempted to irrevocably assign the policy to Solon, which agreed to transfer ownership immediately to the Great Western Funeral Trust.

DISCUSSION

A life insurance policy funded burial contract involves an individual purchasing a life insurance policy in her name and then assigning, revocably or irrevocably, either the proceeds or ownership of the policy to a third party, generally a funeral provider. The purpose of the assignment is to fund a pre-arranged burial contract. *See* POMS § SI 01130.425 (A)(1). We assume in these cases that the burial agreement itself is not a resource since it is tied to an insurance policy on the life of that individual. *See* POMS SI 01130.425(B)(1). The policy and its value, though, may be a resource. An asset is a resource for purposes of SSI eligibility if the claimant owns it and can convert it to cash to be used for his or her support and maintenance. See 20 C.F.R. § 416.1201(a). Thus, a life insurance policy may be a resource if a claimant can surrender it for cash or recover the premiums paid. See 20 C.F.R. § 416.1230.

Here, the policy was a resource for the first 30 days after it was issued because Ms. M~ had the absolute right to cancel the policy and recover the $8,735 premium paid during

that time period. Further, the policy would continue to be a resource after the first 30 days, unless the policy was validly irrevocably assigned to the funeral home that put it into the trust. See POMS SI 01130.425(E); POMS SI 01120.201(H)(1) (statutory trust-counting provision would not apply if funeral provider placed funds for funeral in trust); POMS SI 01120.200(D) (trust established by a third party not a resource if individual cannot terminate the trust and recover the assets; directs trustee to provide for support and maintenance; or sells the right to mandatory future disbursements from the trust).

Ms. M~ attempted to irrevocably assign to Solon ownership and all benefits and proceeds of the policy used to fund her funeral services in exchange for Solon's promise to deliver funeral services. Further, such assignments are in accordance with Illinois law, and, indeed, when made irrevocable, protect the benefits and proceeds assigned from being deemed resources for purposes of SSI eligibility: "Nothing shall prohibit the purchaser [of a life insurance funded pre-need contract] from irrevocably assigning ownership of the policy or annuity used to fund a guaranteed price pre-need contract to a person or trust for the purpose of obtaining a favorable consideration for . . . Supplemental Security Income . . . . The seller or contract provider may be named a nominal owner of the life insurance policy only for such time as it takes to immediately transfer the policy to trust." 225 ILCS 45/2a(c). Nevertheless, while sanctioning life insurance funded pre-need burial contracts, the Illinois "Funeral or Burial Funds Act" ("the Act") considers such contracts "unlawful" and forbids a seller from "accept[ing] sales proceeds" where a pre-need contract fails to meet each of several requirements. 225 ILCS 45/1a-1. Here, the pre-need contract does not meet those requirements and is revocable and invalid. Therefore, the assignment of the policy to fund the agreement is revocable and invalid, and Ms. M~ can access the cash surrender value of the policy.

A. The Pre-Need Contract Is Not Price-Guaranteed, Making it Impossible Under Illinois Law to Irrevocably Assign the Policy Used to Fund It and, Consequently, Rendering the Assignment of the Policy Revocable.

Ms. M~'s Funeral Purchase Contract-which, after Agency follow-up with Solon, appears to be the only pre-needs contract-related document among the parties-does not meet most of the requirements set forth in the Act. Among other things, and perhaps most importantly, the purchase contract does not specify whether the "price of the merchandise and services is guaranteed or not guaranteed as to price." 225 ILCS 45/1a-1(3). Also, whether the price is guaranteed or not, a pre-needs contract must include one of two different "12 point bold type" clauses that elaborate additional conditions depending on whether the price is guaranteed or not. *See* 225 ILCS 45/1a-1(3). Ms. M~'s purchase contract contains neither clause, and without this necessary language the contract cannot be considered price-guaranteed. Thus, because under Illinois law only a policy used to "fund a guaranteed price pre-need contract" may be irrevocably assigned, Ms. M~ could not have validly irrevocably assigned the policy at stake here. Further, where a pre-needs contract is not price-guaranteed, and therefore revocable, the assignment of the policy used to fund the contract must also be revocable. *See* 225 ILCS 45/2a(c), (d). Accordingly, Ms. M~ would be entitled to the policy's cash surrender value.

B. The Pre-Need Contract May Be Void and Unenforceable.

When a statute declares that it shall be unlawful to perform an act, and imposes a penalty for its violation, contracts for the performance of such acts are generally void and

incapable of enforcement. *See Broverman v. City of Taylorville*, 381 N.E.2d 373, 376-77 (Ill. App. Ct. 1978); *but see, Dixon v. Mercury Finance Company of Wisconsin*, 694 N.E.2d 693, 697 (Ill. App. Ct. 1998) (refusing to invalidate a contract where the Sales Finance Agency Act did "not allow a plaintiff to declare a contract void; it only allow[ed] a plaintiff to recover damages for losses incurred due to a violation of the Act."). Here, the pre-need agreement may be void and unenforceable because it unlawfully failed to address several key aspects, including, as explained above, specifying whether the price was guaranteed and whether the agreement was revocable. Given the possibly unlawful and unenforceable nature of the policy, Ms. M~ would likely be entitled to restitution. See RESTATEMENT (SECOND) CONTRACTS § 198, CMT. B (1981) (noting that restitution applies where the public policy violated was intended for the claimant's protection). Therefore, she could recover the insurance policy she assigned to fund the agreement.

In addition, it is not clear whether Ms. M~ was informed of her rights under the agreement and given a copy of the "Illinois Consumers Guide, Pre-Need Funeral and Burial Purchases"; there is no copy of this, or a similar booklet, in the file, and the contract does not contain a required statement "confirming that the seller has explained the terms of the contract prior to the purchaser signing." 225 ILCS 45/1a-1(e). Among other things, the booklet spells out that Ms. M~ may seek restitution through the Illinois Office of the Comptroller and the Attorney General's office if she believes that she has been treated unfairly. See Ill. Admin. Code, Title 38, § 610, Exh. A (2008).

CONCLUSION

In sum, the life insurance policy was a resource for the first 30 days after it was issued because Ms. M~ could cancel the policy and recover the $8,734.25 premium paid. After that time, the policy was still a resource because the pre-need funeral contract was revocable and invalid. Therefore, the assignment of the insurance policy to fund the agreement is revocable and invalid, entitling Ms. M~ to policy's cash surrender value (currently $3,812.52). The $1500 burial funds exclusion, however, may be applied. See POMS SI 01130.412(C)(1)(b).

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By: _____
Kyle K~
Assistant Regional Counsel

B. PS 08-061 SSI-Illinois-Review of Annuity Payments for Krysten M~, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 IL (M~) Our Ref: 07-0337-nc

DATE: February 11, 2008

1. SYLLABUS

This opinion addresses whether or not the periodic payments made to the special needs trust in question are income for SSI purposes. A legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. If the assignment is revocable, then the payments are income to the individual legally entitled to receive them. In this case, while the SSI recipient is a minor, the payments were effectively irrevocably assigned to the trust, and thus they are not income for SSI purposes. However, once the recipient reached the age of majority in Illinois (18 years old), the recipient was entitled to directly receive the periodic payments. The entitlement to direct payments means the assignment is revocable and thus the payments are considered income to the recipient upon reaching the age of majority.

2. OPINION

You asked us whether certain periodic payments made to the Krysten M~ Supplemental Needs Trust are income for SSI purposes. You indicated that you have already determined that the trust is not a resource. We conclude that the annuity payments should not be considered income prior to the date that Krysten became an adult, January 12, 2007. However, beginning January 2007, when Krysten became an adult, the payments should be considered income.

Background

On October 24, 1997, when Krysten was a minor (Krysten is currently 19 years old, having been born in January 1989), Magna B~, then the guardian of Krysten's estate, entered into a personal injury settlement agreement that provided for monthly payments of $1,500 to Magna B~, as guardian. The payments began in November 1997, and will increase to $2,000 per month in 2011, and they continue for Krysten's lifetime. In addition, the payments are guaranteed through 2047, even if Krysten were to die. The guaranteed payments would go to Krysten's parents or as designated by Magna B~, as guardian. The settlement agreement provides that payments cannot be sold, anticipated or assigned.

Also on October 24, 1997, the Krysten M~ Special Needs Trust (hereinafter trust) was established by Krysten's parents and Magna B~, as guardian. The trust states that the trustee (Magna B~) shall receive monthly payments in accordance with the attached schedule of payments commencing in November 1997 and lasting for Krysten's lifetime.

The trust further states that it was established pursuant to a state probate court order, and, indeed, the record contains a probate court order dated October 24, 1997, that approves the creation of a supplemental needs trust as set forth in a petition filed by Krysten's parents and Magna B~, as guardian, and finds that the trust is fair, equitable and in the best interests of Krysten. The petition states that the purpose of the trust is to provide a system for the management of the settlement funds, and a copy of the trust was attached as an exhibit. In addition, at this same time, Magna B~, as guardian, also filed a petition seeking court approval for distribution of Krysten's estate that stated, in part, that the settlement funds and periodic payments would be deposited into the trust. The court also approved this petition.

At some point thereafter, Magna B~ was acquired by Regions B~, and Regions B~ assumed the duties of Krysten's guardian and trustee.

On January 12, 2007, Krysten turned 18 years old.

The monthly periodic payments were originally and continue to be made payable to Magna B~, as guardian. The payments are mailed to the attention of one of the trust officers at Regions B~, and then deposited into Krysten's trust account at Regions B~.

There has been no court activity at any time since the October 1997 order approving the creation of the trust.

DISCUSSION

As you know, under the resource rules, a legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. POMS SI 01120.200(G)(1)(d). If the assignment is revocable, then it is income to the individual legally entitled to receive it. Because the treatment of the periodic payments differs depending on whether Krysten was a minor or an adult, we address the revocability question in two sections.

Treatment of the Periodic Payments During the Time that Krysten Was a Minor

Here, the probate court order approved the creation of a special needs trust as set forth in and attached to the petition filed by Magna B~, as guardian, and Krysten's parents. See 755 ILL. COMP. STAT. 5/11-13(b) (West 2008) (court, upon petition of guardian, may permit guardian to create irrevocable trust for minor). And, the trust states that the trustee (Magna B~) shall receive monthly payments in accordance with an attached schedule of payments commencing in November 1997 and lasting for Krysten's lifetime. Moreover, in the petition seeking approval for distribution of Krysten's estate, which was approved by the court, Magna B~, as guardian, stated that the periodic payments would be deposited into the trust. Thus, although the settlement agreement provides that the payments go to Magna B~, as guardian, and that the payments cannot be sold, anticipated or assigned, the probate court order would require that Magna B~, as guardian, turn over the payments to Magna B~, as trustee. See 755 ILL. COMP. STAT. 5/11-13(b) (guardian shall apply income and principal of minor's estate for any purpose which the court deems to be in the best interests of the ward.). As such, Magna B~ (or Regions B~), as guardians of Krysten's estate, would be blocked from using the periodic payments for the support and maintenance of Krysten. See POMS SI CHI01140.215. And, it follows that any change in this court-ordered disposition of the periodic payments would also require a showing that such a change was in the best interests of Krysten. 755 ILL. COMP. STAT. 5/11-13(b). This, however, would be unlikely since we are not aware of any change of circumstances since the probate court order was entered that would cause the court to reconsider its finding that directing the periodic payments to the trust was in Krysten's best interests. Therefore, during the time that Magna B~, or its successor, Regions B~, was obligated by the probate court order to deposit the periodic payments into the trust (which, as we discuss below, was only during Krysten's minority), the payments were effectively irrevocably assigned to the trust, and thus were not income under POMS SI 01120.200(G)(1)(d). See Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, Review of the Marital Settlement Agreement for Patricia J. H~ and Floyd A. H~ and the Patricia J. H~ Special Needs Trust, at 3-4 (Dec. 4, 2003).

Treatment of the Periodic Payments After Krysten Became an Adult

In Illinois, upon reaching the age of majority (18 years old), a guardianship established during minority is automatically terminated, without the need for court involvement. See

In re Estate of W~, 673 N.E.2d 272, 277 (1996) ("The Probate Act of 1975 does not provide for the automatic termination of a guardianship for a disabled ward as in the case of a minor ward who reaches the age of majority (see 755 ILCS 5/11-14.1 (West 1992))." (emphasis in original)); 755 ILL. COMP. STAT. 5/11-14.1 (West 2008) ("Upon the minor reaching the age of majority, the letters of office shall be revoked . . . and the guardianship over that minor shall be terminated."). Thus, as of Krysten's eighteenth birthday, in January 2007, her guardianship terminated. As such, she was then entitled to receive the periodic payments directly. In re Estate of W~, 673 N.E.2d at 277 (Upon restoration of a ward, the ward has the right to be put in possession of his or her property, "and to ask the court to order the guardian to deliver to the ward all of the ward's money and property that the guardian has, or the money and property to which the ward is entitled."). Thus, even though Regions B~ continued to receive and deposit the periodic payments into Krysten's trust account, because Krysten, as of the time she became an adult, could have requested that the payments be turned over to her directly, the assignment was revocable and the payments were income to her as of January 12, 2007.

Finally, we note that the settlement agreement provided that the periodic payments were guaranteed through 2047, even if Krysten should die sooner, and that Magna B~, as guardian, could decide who would receive these guaranteed payments. After Krysten turned 18, this right to designate who would receive the guaranteed payments, like the right to receive the periodic payments while she was alive, would also belong to her. It is possible that this right has some market value; however, given Krysten's young age and without any indication that she has a reduced life span due to her impairment (double leg amputee), the value of this right would likely be insignificant, and thus further development of this issue is probably unnecessary.

CONCLUSION

For the reasons discussed above, we conclude that the periodic payments are income to Krysten as of her eighteenth birthday, in January 2007, but not before.

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Todd D~
Assistant Regional Counsel

C. PS 08-054 SSI-Illinois-Review of the Ani M. H~ OBRA Pay Back Trust, SSN ~ - REPLY Your Reference: S2D5G6, SI 2-1-3 IL (H~) Our Reference: 08-028

DATE: January 28, 2008

1. SYLLABUS

This opinion evaluates a trust established for a disabled SSI beneficiary. The trust is intended to meet the requirements for the Medicaid trust exception. It was established for

the benefit of the SSI beneficiary with the assets of the beneficiary's parents and subsequently funded with the beneficiary's assets. While the trust meets the first two requirements under the Medicaid trust exception, it does not meet the third requirement pertaining to Medicaid reimbursement upon death. The terms of the trust state that the beneficiary's home state of Illinois must be reimbursed for Medicaid expenditures, but do not require reimbursement to other states. Instead, the terms establish a complicated process of reimbursement for other states that may not ultimately result in repayment to those states. Specifically, the two sections of the trust require other states to respond to one of the first two requests within a specified timeframe or the remainder of the trust will be distributed to the beneficiary or their heirs-at-law. Since the trust does not comport to the requirements of the Medicaid trust exception, it is determined to be a countable resource.

2. OPINION

You have asked whether the trust established for the benefit of Ani M. H~ is a countable resource for purposes of determining Ani's eligibility for Supplemental Security Income (SSI). For the reasons explained below, we conclude that the portion of the trust attributable to Ani's contribution to the trust should be considered a countable resource when determining Ani's eligibility for SSI.

BACKGROUND

The Ani M. H~ OBRA Pay Back Trust (the trust) was established for the benefit of Ani, who is disabled. Ani's parents established the trust with a gift of $10.00, but we assume that the rest of the trust was funded with Ani's assets. The stated purpose of the trust is to maintain Ani's qualifications for all applicable government benefits and to enable Ani to lead as normal, comfortable, and fulfilling life as possible. See Trust, Article I, section 1.2.

Distribution of the income and principal of the trust is made by the Trustees, David and Shirley H~. The Trustees are to distribute the income and principal for Ani's benefit, but shall make no distributions which could result in the disqualification of Ani receiving state provided funds or charity provided funds. See Trust, Article II, section 2.1. The Trustees are authorized to reimburse the Grantor or a family member for any and all federal, state, and municipal income taxes which the Grantor or such family member may be required to pay for taxable income allocable to Ani which is taxable to the Grantor or a family member. See Trust, Article II, section 2.2. Ani may, upon her death, appoint all or any part of the trust estate for the benefit of any one or more persons other than herself, her estate, her creditors or the creditors of her estate, subject to sections 3.1 and 3.2. See Trust, Article II, section 2.3.

The Trust specifies that it may terminate: upon Ani's death; in the event that Ani no longer qualifies as a disabled person; or in the event that the relevant statutes authorizing the execution of the trust are revoked and such revocation is applicable to the trust. See Trust Article 3, section 3.4. Upon termination of the trust, the Trustee shall pay: the Illinois Department of Healthcare and Family Services any amounts due and owing; reasonable fees for the administration of the Beneficiary's guardianship, trust, or probate estate; and all taxes due from the trust to the State or Federal government. See Trust, Article III, Section 3.1. Section 3.2 includes a requirement that the Trustee obtain an

accounting from any and all appropriate state agencies of payments made under public benefits programs on behalf of the Beneficiary during her lifetime. See Trust, Article III, Section 3.2. The Trustee is directed to send in writing by certified mail notification at any state agency of Ani's death and subsequent good faith attempts to contact the agencies. If the agencies respond, the Trustee shall pay them any reimbursement owed. However, if the Trustee does not receive a response after two attempts to contact the agency over one year, the Trustee shall send a final notice to the agency and shall disburse the remainder of the trust to the person(s) appointed under Section 2.3 or to Ani or her heirs-at-law within 30 days. See Trust, Article III, Section 3.3, 3.4.

The Trust is described as "irrevocable" and is intended to be irrevocable pursuant to SI-01120.200.D.2 of the POMS. See Trust, Article V, section 5.1.

DISCUSSION

Pursuant to POMS SI 001120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual, unless one of the exceptions applies in POMS SI 01120.203 (listing Medicaid trust exceptions for individuals).

Although the trust purports to fall under the Medicaid payback trust exception, the trust does not meet all of the requirements to qualify for a Medicaid payback trust exception. The Medicaid payback trust exception for individual trusts applies where the trust is: (1) established with assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. 42 U.S.C.§ 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

While the trust meets the first two requirements of the Medicaid payback trust exception, it fails to meet the third requirement, namely that the state be reimbursed for Medicaid payments made for Ani's benefit during her lifetime. The statute provides that a trust is excepted only "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State [Medicaid] plan . . . ." 42 U.S.C. § 1396p(d)(4)(A). POMS SI 01120.203 (B)(1)(f) explains that, "[t]o qualify for the special-needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State 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. This State must be listed as the first payee and have priority over payment of other debts and administrative expenses," subject to specific exceptions. The POMS directs that the trust at issue "must contain language substantially similar to" the above-quoted language. POMS SI 001120.203(B)(1)(f).

The Trust in this case does not identify the state as the primary beneficiary and requires only that the Illinois Department of Healthcare and Family Services be reimbursed for Medicaid expenses made for Ani's benefit during her lifetime. The trust does not require the Trustee to reimburse any other states for Medicaid expenses they have made for Ani automatically. Instead, Sections 3.2 and 3.3 require a complicated process of reimbursement for any state other than the State of Illinois and allow for the possibility

that those states could forfeit any amount owed if the state is dilatory in responding to the Trustee's two written notifications. *See* Trust, Article III, Section 3.2 and 3.3. Sections 3.2 and 3.3 require the State to respond within a specific timeframe to the Trustee's correspondence and, if no response is received, the Trustee is directed to distribute the remainder of the trust to Ani or her heirs-at-law. This provision is at odds with the Medicaid payback trust exception which requires states to be reimbursed for medical assistance paid on behalf of the individual under the State Medicaid plan. The Medicaid payback trust exception does not allow for the possibility of forfeiture of the state's entitlement to costs and, therefore, the trust does not qualify under the exception.

Moreover, it appears that the trust allows for other payments prior to the reimbursement to states other than Illinois which are not allowable expenses. This is inconsistent with the requirement that the State be listed as the first payee and have priority over payment of other debts and administrative expenses. *See* 42 U.S.C. 1396p(d)(4)(A); *see also* POMS SI 001120.203(B)(1)(f). While the trust provides for payment to the Illinois Department of Healthcare and Family Services any amounts due and owing upon termination of the trust, it then allows for reasonable fees to be paid for the administration and termination of the Beneficiary's guardianship prior to reimbursement to any other state which may be entitled to reimbursement under the Medicaid payback exception. See Trust, Article III, Section 3.1. While taxes due from the trust and fees for trust administration may be paid prior to reimbursing the State Medicaid expenses, payments of debts to third parties prior to Medicaid reimbursement are specifically prohibited. POMS SI 001120.203(B)(3)(a), POMS SI 001120.203(B)(3)(b). As such, the allowance of payment owed for the administration and termination of the guardianship may not be made prior to reimbursement of the State.

Additionally, the trust's provision allowing for the Grantor or Ani's family members to be reimbursed for income taxes they are required to pay for taxable income allocable to Ani which is taxable to the Grantor or such family member is problematic because it could allow for reimbursement which could benefit someone other than Ani during Ani's lifetime. *See* Trust, Article II, Section 2.2. In order to qualify for the Medicaid payback exception, the trust must be established for the *sole benefit* of the disabled individual (during his or her lifetime). POMS SI 01120.203(B)(1)(a); POMS PS 01825.016 Illinois - Review of the Brian V~ Irrevocable OBRA Pay Back Trust Our Reference: 04S044 Your Reference: S2D5G6, S1 2-1-3 IL (V~). This provision is too broad as it allows for relief of another individual's tax burden which is not necessarily associated with the trust itself, even if the income is allocable to Ani.

Finally, you have questioned whether the trust would be a countable resource for SSI purposes under the regular resource rules. As we have previously advised, the rules governing when trust assets affect eligibility for Medicaid are different from SSI rules for determining when assets are countable resource. Even if the trust is amended such that it is consistent with the provisions of the Medicaid payback exception, it may still be a resource for SSI purposes. *See States Named as Beneficiary of a Trust*, OGC-V (D~) to Gloria P~, ARC-MOS (June 24, 1997). Assets are a resource for SSI purposes if the individual owns them and can convert them into cash to be used for her support and maintenance. *See* 20 C.F.R. § 416.1201(a). Trust assets are a resource if the individual can revoke the trust and use the assets to meet her needs for food, clothing and shelter, or if the individual can direct the use of the trust assets to be used for her support and

maintenance. See POMS SI 01120.200(D). An individual's beneficial interest in a trust may also be a resource if the individual can sell that interest. *See Zebley Trust as aan SSI Resource-Wisconsin, Bernard W~;* OGC V (M~) to M~, Acting ARC-POS (Feb. 23, 1993) at 5.

Here, we conclude that if the trust were amended so that it met the Medicaid payback exception, it would not be a countable resource for SSI purposes. Under the terms of the trust, Ani cannot direct the Trustees to use the assets in the trust for her support and maintenance. Rather, the trustees have sole discretion to disburse such funds and disbursements are to be made only for the beneficiary's supplemental care. *See* Trust, Article I, Section 1.2, and Article II, Section 2.1.

Ani also lacks the right to revoke the trust. The trust expressly provides that it is irrevocable pursuant to SI-01120.200.D.2 of the POMS. See Trust, Article V, section 5.1. And, indeed, there are remainder beneficiaries to the trust whose assent would be required in order to revoke the trust. See Trust, Article 3, Section 3.5.

We do not believe that the limited power of appointment afforded to Ani in sections 2.3 and 8.2 constitutes the ability to sell her interest in the trust. See Trust, Article II, section 2.3 and Article VIII, Section 8.2. Although these sections allow for the possibility that Ani could assign a future heir of her choosing the right to receive the proceeds of her trust in exchange for money in the present day, there is no real likelihood of that occurring because the trust is valued at only about $40,000.00, and the trust will likely be exhausted by obligations to reimburse the state, as Ani is only 19 years old.

CONCLUSION

For the above reasons, we conclude that any portion of the trust that was established with Ani's funds is a countable resource and does not satisfy the requirements of a Medicaid payback trust because it does not require reimbursement to all states for Medicaid expenses and it allows for payments relating to Ani's guardianship to be made prior to state reimbursement. For these reasons, we conclude that trust does not comply with the Medicaid trust payback exception and therefore is a resource. If the trust is amended to comply with the Medicaid trust payback exception, we conclude that it would not constitute a resource for SSI purposes.

D. PS 08-017 SSI- Illinois-Review of the Life Insurance Funded Burial Contract of Connie T~, ~-REPLY Your Ref: S2D5G6, SI 2-1-4 IL Our Ref: 07-0329-NC

DATE: October 31, 2007

1. SYLLABUS

In this case the assignment of a life insurance policy as collateral to a funeral home does not meet the requirement to be non-countable because there is no written contract. A written contract is a required element of a pre-need funeral arrangement under the Illinois Funeral or Burial Funds Act. In fact, the absence of a written contract in this situation is unlawful under Illinois law. Being unlawful at the outset the owner of the policy has a

right to request that the funeral home surrender the life insurance policy to her and therefore, the policy is considered a countable resource.

2. OPINION

You asked us whether a life insurance policy originally owned by the claimant, but recently assigned as collateral to a funeral home, should be considered a resource. For the reasons discussed below, we conclude that it should.

BACKGROUND

In March 2007, the claimant, Connie T~, signed a document that purports to assign to Templeton Funeral Homes, Paris, IL, ("Templeton") an interest in Country insurance policy number ~. The document states that it "protects [Templeton] in case [Ms. T~ does] not live up to [her] obligations." The document also states that most rights under the policy are being assigned, including the right to collect the surrender value, the right to collect the proceeds when they become payable, and the right to borrow on the policy. The document adds that Templeton will not cash in the policy or borrow on it unless Ms. T~ is in "default," which is defined as occurring (1) when Ms. T~ fails to pay any obligations to Templeton as they become due, (2) when Ms. T~ files for bankruptcy, or (3) when Ms. T~ dies.

The Country insurance policy that was assigned listed Ms. T~ as both the owner and the insured. The policy apparently has a net value, as of May 9, 2007, of $3,486.65 (cash value plus paid-up additions minus a loan amount of $1,180.40).

In response to your concern about the absence of a contract with Templeton, an individual from the Field Office contacted Templeton, but was told that all they had in Ms. T~'s file was the assignment document and some personal identifying information.

DISCUSSION

It appears that Ms. T~ intended to enter into a prepaid burial contract with Templeton, which would be funded with her life insurance policy. *See* generally POMS SI 01130.420, 01130.425 (describing prepaid burial contracts and life insurance funded burial contracts). Unfortunately, although Ms. T~ assigned her life insurance policy as collateral for the arrangement, which is acceptable in Illinois, *see, e.g., Winstead v. Peoples Bank of Bloomington*, 493 N.E.2d 1183 (Ill. App. Ct. 1986), it does not appear that Ms. T~ ever entered into a contract for goods or services-at least not a written contract.

A written contract, however, is a required element of a pre-need funeral arrangement under the Illinois Funeral or Burial Funds Act, 225 ILL. COMP. STAT. ANN. § 45/1a-1(a)(3), (d) (West 2007). Indeed, the Act states that it "shall be unlawful . . . to accept sales proceeds . . . unless the seller enters into a [written] pre-need contract with the purchaser." *Id.* "Sales proceeds" is defined as "the entire amount paid to a seller . . . for the purpose of performing funeral services or furnishing . . . property . . . of any nature in connection with the final disposition of a dead human body, including, but not limited to, the retail price paid for such services and . . . property." 225 ILL. COMP. STAT. ANN. § 45/1a (West 2007). We believe that this broad definition of "sales proceeds" would encompass the assignment of an insurance policy that was clearly intended to be used to

pay for the claimant's funeral, if she has one, and thus, Ms. T~'s pre-need arrangement is unlawful under Illinois law.

Contracts of insurance, including assignments thereof, are governed by the principles of contract law generally. *In re Cohen's Estate*, 163 N.E.2d 533, 536-37 (Ill. App. Ct. 1959). And, under contract law, "when a statute declares that it shall be unlawful to perform an act, and imposes a penalty for its violation, contracts for the performance of such acts are void and incapable of enforcement." *Frankel v. Allied Mills*, 17 N.E.2d 570, 583 (Ill. 1938); *Broverman v. City of Taylorville*, 381 N.E.2d 373, 376-77 (Ill. App. Ct. 1978); see also RESTATEMENT (SECOND) CONTRACTS §§ 178, 179 (1981) (discussing unenforceability on grounds of public policy). Here, the statute has a penalty provision, 225 ILL. COMP. STAT. ANN. § 45/8 (West 2007), and thus the assignment was void at the outset, at least in terms of Templeton's ability to enforce the arrangement.

Notwithstanding the unlawful nature of the arrangement entered into by Ms. T~, she might be able to enforce it despite the absence of a written contract, if she could prove that the parties had a contract for the provision of goods and/or services. *Broverman*, 381 N.E.2d at 376 ("Exceptions to the rule may be applicable where the parties are not In pari delicto, or where the law which makes the agreement unlawful is intended for the protection of the party seeking relief."). In any case, what is critical here is that Ms. T~ would also have the alternative remedy of restitution, meaning she could ask for the insurance policy to be returned to her. RESTATEMENT (SECOND) CONTRACTS § 198, cmt. b (1981) (noting that restitution applies where the public policy that was violated was intended to protect the claimant, as is the case with the Illinois Funeral or Burial Funds Act). Because of this right to request that Templeton surrender the insurance policy, the policy is a resource to the extent of its cash surrender value, $3,486.65, although the $1,500 exclusion should be applied, if applicable. POMS SI 01130.300(B)(1), (2).

CONCLUSION

For the reasons discussed above, the Trust should be considered a resource for SSI purposes.

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By: _____
Todd D~
Assistant Regional Counsel

E. PS 07-153 SSI- Illinois - review of the David C~ f/k/a K~ Supplemental Care and Needs Trust, ~ - REPLY Our Ref: 07-0266 Your Ref: S2D5G6; SI 2-1-3 IL (C~)

DATE: June 11, 2007

1. SYLLABUS

This opinion evaluates whether a self-funded trust meets the statutory requirements to be excluded under section 1917(d)(4)(A) of the Social Security Act. The trust in question was funded by a settlement awarded to an SSI eligible minor child and established by the child's guardian. The trust recognizes that the child may, at some point, move to another state, but fails to provide for potential payback for Medicaid services provided in any state other than Illinois. This type of provision does not satisfy the statutory requirements because it would frustrate any other state's ability to receive reimbursement. Further, even if that language was amended, the trust is countable resource due to the ability of the child's guardian to revoke the trust in her capacity as the child's agent.

2. OPINION

You have asked whether the David C~ f/k/a K~ Supplemental Care and Needs Trust (Trust) is a resource. We have reviewed the Trust documents and determined that the Trust is a resource to David C~, a disabled minor (David), because the Trust does not meet the Medicaid payback requirements. In addition, even if the Trust were amended to meet these requirements, it would still be a resource because it can be revoked and/or amended by the guardian of David's estate.

BACKGROUND

On February 20, 2007, the Trust was established by Tina M~, David's mother and guardian, and Trust and Investment Group of Belvidere Bank (Bank), guardian of David's estate. *See* Trust, introductory paragraph. The Bank was also named as trustee of the Trust. *Id.* Although the Trust does not state the source of the corpus, we are aware that the Trust was funded with proceeds of a malpractice settlement on David's behalf. The purpose of the Trust is to provide for David's supplemental needs and is designed to meet the Medicaid Trust Exception under section 1917(d)(4)(A) of the Social Security Act, commonly referred to as the special needs trust exception. *See* Trust, Art. One. Although David cannot revoke or amend the Trust directly, the Trust can be revoked and/or amended by the Bank as grantor of the Trust. *See* Trust, Art. One, § 1.03; Art. Two, § 2.05. The Trust is to be interpreted by Illinois law or the state "in which the Trust Corpus is present." Trust, Art. Seven, § 7.01.

At David's death, the Trust provides that the principal is to be distributed as follows:

a. Pay back to the State of Illinois, or its successor government agency, the amount expended on David's behalf for medical assistance under the State of Illinois Medicaid Plan;
b. The remaining principal is to be distributed to Tina M~;
c. If Tina M~ predeceases David (or does not survive him for more than thirty days), the remainder shall be divided equally and distributed to Linda L~ and Debra H~.

Trust, Art. Four.

APPLICABLE LAW

Under the statutory trust resource rules, 42 U.S.C. § 1382b(e), a self-funded trust is generally considered a resource to the individual unless it satisfies one of the Medicaid trust exceptions or the waiver for undue hardship. POMS SI 01120.203.

The Medicaid trust exception for individual trusts requires that the trust (1) be established with the assets of a disabled individual under age sixty-five; (2) be established for the

[sole] benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) expressly provide that any amounts remaining in the trust upon the death of the individual will be distributed first to the State, up to an amount equal to the total medical assistance paid on behalf of the individual under a state Medicaid plan. *See* 42 U.S.C. §§ 1382b(e)(1) and (5), 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(a).

The trust must also satisfy the regular trust resource rules. POMS S 01120.200 (B)(1)(a). Thus, regardless of whether the statute applies, or whether the trust qualifies for the Medicaid payment trust exception, the trust must be irrevocable and satisfy the regular resource rules or it will be considered a resource for purposes of SSI eligibility. *Id.*

DISCUSSION

This Trust Does not Satisfy the Medicaid Trust Exception for Individual Trusts.

To meet the Medicaid trust exception, a trust must contain the assets of a disabled person. David is disabled and receiving SSI. The Trust is funded with the assets from David's Settlement Agreement. The individual must be younger than sixty-five and David was born in 1993, so he is younger than sixty-five. The trust must have been established by a parent, grandparent, legal guardian or court. In this case, the Trust was established by both David's mother and the guardian of his estate. An additional requirement is that the trust must be established for the sole benefit of the beneficiary. Here, the Trust repeats several times that the purpose of the Trust is for David's benefit. No other individual is named as receiving any benefit during David's lifetime.

However, the key element of the Medicaid trust exception is that, at the death of the beneficiary, all amounts remaining in the trust must be distributed ***first*** to the State as payback for prior medical assistance. At David's death, the Trust provides that the principal is to be distributed to the State of Illinois as payback for prior medical assistance. Although the Trust recognizes that the Trust may, at some point, move to a different state, see Trust § 7.01, the Trust does not provide for the payment of medical assistance paid by any other state if David were to move. The Office of Income Security Programs advised that the agency does not consider this type of provision to satisfy the statutory requirements because it would frustrate any state's (other than Illinois') ability to receive medical assistance paid to David during his lifetime. The Statute requires that the trust must provide for reimbursement of "the total medical assistance paid on behalf of the individual under a State plan under this subchapter." 42 U.S.C. § 1396p(d)(4)(a). Because this Trust permits reimbursement only to payments made under Illinois' plan, it does not meet this standard. Thus, we believe that not all of the elements of the Medicaid trust exception are satisfied. POMS SI 01120.203(B)(1)(a).

This is a Revocable Trust: David can Revoke the Trust Through his Guardian .

However, even if the Trust satisfied the Medicaid Payback provisions, the Trust would still be a resource if (1) David can revoke the Trust and use the assets for his support and maintenance, or (2) he can direct the Trustee to pay him the funds or use the funds for his support and maintenance. POMS SI 01120.200(D). In addition, David's interest in the Trust is a resource if it can be sold. *Id.*

The Trust provides that David does not have the right or ability to obtain Trust assets, to direct the Trustee to use the Trust assets for his support or maintenance; and does not have the authority to liquidate the beneficial interest in the Trust or otherwise alienate the beneficial interest of the Trust. *See* Trust, Art. Two, § 2.05; Art. Five, §§ 5.01, 5.03, 5.04.

Thus, the only consideration is whether the Trust is revocable. If so, it would be considered a resource. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1)(a); *see also, generally*, 20 C.F.R. § 416.1201(a) (defining resources for SSI purposes). Here, the plain language of the Trust states that the Trust is revocable and can be amended. See Trust Art. One, § 1.03. However, this power appears to be limited to the Bank, as the named grantor of the Trust and guardian of David's estate. The Trust specifically states that David, as the Trust beneficiary, is unable to revoke or amend the Trust. *See* Trust Art. Two, § 2.05.

For SSI purposes, an agent is a person or organization acting on behalf of and/or with the authorization of another person. The term applies to anyone acting in a fiduciary capacity, whether formal or informal, and regardless of the applicable title, which, in this case, is guardian of David's estate. See POMS SI 01120.020(B)(1). An action by David's guardian of his estate is equivalent to an action by David. See POMS SI 01120.020(C)(1) (action of an agent is equivalent to an action by the individual for whom he acts). Thus, since the guardian of David's estate is presumed to act on his behalf, the question is whether the Trust, notwithstanding its provision that David is unable to revoke the Trust, can be revoked indirectly by David. Because the Trust clearly allows the guardian to amend and/or revoke the Trust, the Trust is revocable. Since the Trust is revocable, it is a resource to David.

CONCLUSION

For the reasons discussed above, the Trust should be considered a resource for SSI purposes.

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By: _____
Janet M. G~
Assistant Regional Counsel

F. PS 07-069 SSI-Illinois Review of the Second Amendment to the Illinois Disability Pooled Trust - ACTION, Your Ref: SI 2-1-3 IL, Our Ref: 06-0064

DATE: February 14, 2007

1. SYLLABUS

This opinion addresses whether or not a sub-account in the Illinois Disability Pooled Trust can be excluded from resources for SSI purposes. To be excluded from resources under the Medicaid trust exception a pooled trust must satisfy several criteria. Two of the criteria are that the trust must be established for the sole benefit of the beneficiary and that to the extent that the trust does not retain funds remaining in the sub-account, the State Medicaid Agency must be listed as first payee. The amended trust below contains several provisions that could allow for third-parties to benefit from the trust during the beneficiary's lifetime. In addition, the trust also contains provisions that frustrate the

Medicaid payback requirement. While these provisions would preclude the trust from being excluded from resources for SSI purposes, the trust contains a null and void clause. This clause renders the offending provisions as void and thus the trust can be excluded under the Medicaid pooled trust exception.

2. OPINION

You asked whether the Second Amendment to the Illinois Disability Association's Pooled Trust (Trust) corrects the defects which, but for the Trust's "null and void" clause, would have prevented the Trust from meeting the Medicaid payback exception for pooled trusts as discussed in the legal opinion dated May 4, 2005, for the sub-account of Robert K~. *See* Memorandum from OGC Region V to SSA-ARC-MOS, SSI-Illinois-Review of the Sub-Account of Robert K~ In the Illinois Disability Pooled Trust - REPLY, (May 4, 2005). For the reasons discussed below, it is our opinion that, despite the changes made by the Second Amendment to the Trust, the Trust still would not meet the pooled trust exception to counting sub-trust accounts as resources under the statute. However, the "null and void" clause still enables the Trust to qualify for the statutory exception, since that clause nullifies the offending language in the Trust.

BACKGROUND

On July 17, 1998, the Illinois Disability Association, an Illinois not-for-profit corporation, established the Illinois Disability Pooled Trust ("Trust"). See Trust at 1, 3, 21. The purpose of the Trust is to provide for each beneficiary's supplemental care, and not to provide for a "disabled" beneficiary's basic support and maintenance. See Trust at 3-4. The Trust identifies the beneficiaries as disabled persons as defined by Section 1614(a)(3) of the Social Security Act ("Act"), 42 U.S.C. § 1382c(a)(5). See Trust at 4.

Within the Trust, individual trust accounts, called sub-accounts, are created and maintained for each beneficiary, but the funds from each sub-account are pooled for investment and management of funds. See Trust at 9. The Trust is activated for an individual beneficiary when a Joinder Agreement is signed by a grantor (defined under the Trust as a parent, grandparent, guardian, the beneficiary himself, any court, or any person that establishes a sub-account for the benefit of a beneficiary or contributes assets to an existing sub-account) and a trustee. See Trust 2, 8. Upon approval of the Joinder Agreement by the trustee and acceptance of assets from the grantor by the trustee, the sub-account is established, and the trustee has sole discretion to handle all funding matters. See Trust at 8. The Trust states that the Trust and each sub-account are irrevocable, and a spendthrift provision provides that, to the extent permitted by law, a beneficiary cannot assign or transfer his or her interest in the Trust. See Trust at 7-8.

At the time of the original signing, July 17, 1998, the Trust provided that upon the death of a beneficiary, any amounts remaining in the beneficiary's sub-account, would be distributed first to pay the beneficiary's funeral and estate administration expenses; then to the Trust, to the extent the beneficiary authorized in the Joinder Agreement that funds be retained by the Trust to be used for the benefit of other trust beneficiaries who are indigent; then, to the extent that the deceased beneficiary's sub-account was funded with his or her own money, to reimburse the State for any benefits provided under the Medicaid program. See Trust at 18. Any funds remaining after this would be paid to remainder beneficiaries as named in the Joinder Agreement. See Trust at 18. The Joinder

Agreement further provides, in an anti-lapse clause, that "if a lapse occurs in distribution, all remaining funds shall be retained as part of the Trust's Remainder Share." Joinder Agreement at 19.

On April 30, 2002, the Trust was amended. See Trust at 17 (permitting amendments by trustee). This "First Amendment" revised the payment of any monies that had been authorized by the Grantor upon the death of the Beneficiary. See First Amendment to the Illinois Disability Pooled Trust (First Amendment). In particular, the First Amendment deletes the language that would require or allow payment of funeral expenses before any amounts are retained by the Trust or used to reimburse Medicaid.

In 2005, the Agency informed the Illinois Disability Pooled Association that there were some provisions in the Trust that were inconsistent with the Program Operations Manual System ("POMS") provisions discussing and interpreting statutory provisions at 42 U.S.C. § 1396p. *See* POMS PS 01825.016(D) (PS 05-225 SSI - Review of the Sub-Account of Jesus C~(~) in the Illinois Disability Pooled Trust). However, the Agency concluded at that time that sub-accounts in the Trust nevertheless would not be resources under the statute because a provision in the Joinder Agreement incorporated the provisions of the statute and states that if there is a conflict between the trust and the statutory provision, the statutory provisions apply. *Id.* We advised that this provision rendered null and void any trust provision that is inconsistent with the statute. *Id.*

In July 2006, the Illinois Disability Association sent the Agency a draft of a Second Amendment to the Illinois Disability Pooled Trust (Second Amendment). See Trust at 17 (permitting amendments by trustee). In particular, the Second Amendment revokes Section 4.2 of the Trust. In addition, the Second Amendment revokes Section 11.2(A) of the First Amendment by inserting the following in lieu thereof:

11.2 . Distribution of Remainder Interest Upon Death of Beneficiary. Upon the death of a Beneficiary, any amounts remaining in the Beneficiary's Trust sub-account (the "Remainder") shall be distributed as follows, to the extent that there are funds remaining:

A. First, after the payment of a beneficiary's estate administration expenses (including taxes and attorney's fees) and reimbursement for income taxes (if any), to the extent they are not due from the trust to the State or federal government because of the death of the beneficiary, may not be paid from the trust prior to reimbursing the State, the Trust shall retain the portion of the Remainder that has been authorized by the Grantor in the Joinder Agreement to be added to the sub-account retained by and in the name of the Trust (the "Trust's Remainder Share"), if any, to be used as set forth in Section 12.1; then,

DISCUSSION

The Social Security Act ("Act") provides that an individual is not eligible for SSI if he or she has resources that exceed $2,000.00. 42 U.S.C. §§ 1382(a)(1)(B)(ii), (a)(3)(B). A resource is defined as "[c]ash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). Trust property may be such a resource for SSI purposes. 42 U.S.C. § 1382b(e); POMS SI 01120.200(A). Trust assets are a resource to an individual if he can revoke the trust and use the assets to meet his needs for food, clothing, and shelter, or if the individual can direct the use of the trust assets to be used for his support and maintenance under the terms of the trust. *See* POMS

SI 01120.200(D). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201(A).

As we have previously advised, under the regular resource rules, a sub-account in the Trust would not be considered a resource to individual beneficiaries of the pooled Trust, since the individual cannot direct the trustee to make payments on their behalf for their support and maintenance, cannot sell their beneficial interests in the trusts, and cannot revoke or terminate the trust and obtain the assets. *See* Memorandum from OGC Region V to SSA-MOS, *SSI-Illinois-Review of the Illinois Disability Association's Pooled Trust Drafted by the Office of the Cook County Public Guardian*, (July 13, 1998). We previously reasoned, in particular, that the Trust was not unilaterally revocable because the anti-lapse provision establishes a contingent, but irrevocable beneficial interest in the Trust itself. *Id.* Thus, the Trust is not a resource under the regular resource rules.

However, under the statutory amendments that took effect on January 1, 2000, even an irrevocable trust will be considered a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201(D)(2). Since the Trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary, the sub-account would generally be a resource under this provision if the individual signed a Joinder Agreement after the effective date of the statute, January 1, 2000. *See* POMS SI 01120.201(D)(2).

Certain pooled trusts, however, are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). The Medicaid payback trust exception applies to pooled trusts where the trust:

- contains the assets of an individual who is disabled as defined in the Act;
- is established and managed by a nonprofit association;
- maintains a separate account for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts;
- contains accounts established by the individual, or parent, grandparent, legal guardian, or court solely for the benefit of the disabled individual;
- provides that, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2).

Although the Trust represents that the beneficiary's sub-account is established for the sole benefit of the beneficiary, a reading of the Trust reveals that certain provisions continue to create contingent interests that could benefit third parties during the beneficiary's lifetime. *See* POMS PS 01825.016(D)(2). If these contingent interests were valid, the Trust would not be considered to be established for the sole benefit of the beneficiary. However, the Joinder Agreement has a clause that appears to void this offending language and, thus, we continue to conclude that use of the "null and void" clause is necessary for the Trust to be not be considered a resource under the statutory trust resource rules. *See* Joinder Agreement at 3. Furthermore, there is still some ambiguity,

even after the "Second Amendment," as to whether certain taxes could be paid before Medicaid is reimbursed. However, as we previously advised, to the extent that these provisions could be read as inconsistent with the statutory requirements of 42 U.S.C. § 1396p, those provisions would be null and void.

A. Under the Current Language, If Valid, the Sub-Account Could Potentially Benefit Others During the Lifetime of the Beneficiary.

Section 1917(d)(4)(C)(iii) of the Act, 42 U.S.C. § 1396P(d)(4)(C)(iii), states, in relevant part, "[a]ccounts in the trust are established solely for the benefit of individuals who are disabled . . . ." The implementing POMS provide that one should "[c]onsider a trust established ***for the sole benefit of*** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." *See* POMS SI 01120.201(F)(2) (emphasis in original). However, several provisions of the Trust continue to create contingent interests that could benefit third parties during the lifetime of the beneficiary such that beneficiary's sub-account cannot be considered established for his sole benefit.

Termination Clauses Create Contingent Interests That Could Benefit Third Parties During the Lifetime of the Beneficiary.

a. "Deemed Death" Termination.

Section 11.1(A) of the Trust continues to provide:

11.1 Sub-Account Terminations. Every reasonable attempt will be made to continue the Trust for the purposes for which it is established. However, the Trustee does not and cannot know how future developments in the law including administrative agency and judicial decisions, may affect the Trust of any Trust Sub-Account. If the Trustee has reasonable cause to believe that the assets of a Trust Sub-Account are or will become liable for basic maintenance, support, or care that has been or that would otherwise be provided to such Beneficiary by local, state, or federal government, or an agency or department thereof, the Trustee in its sole discretion, may:

Terminate the Trust Sub-Account as to the affected Beneficiary as though he or she had died, and the Trustee shall then treat the assets in the Trust Sub-Account according to the provisions of Section 11.2....

Trust at 17. This section of the Trust results in a "Deemed Death" termination, in which the trustee terminates the Sub-Account as though the beneficiary has died. Under this fiction, the trustee, upon terminating a Sub-Account, distributes the amounts remaining in the Sub-Account in accordance with Section 11.2 of the Trust. Trust at 17.

The new Section 11.2(A) of the Second Amendment provides that if there are amounts remaining in the sub-account, after reimbursing the State, "…the Trust shall retain the portion of the Remainder that has been authorized by the Grantor in the Joinder Agreement to be added to the sub-account retained by the and in the name of the Trust (the "Trust's Remainder Share"), if any, to be used as set forth in Section 12.1…." Because the Trust may retain funds under this provision, a Sub-Account cannot be considered established for the sole benefit of the beneficiary because a third-party, in this case the Trust and other Trust beneficiaries (under Section 12.1), could benefit from the assets of the sub-account during the beneficiary's lifetime.

Moreover, Section 11.2(C) continues to provides, "the Trustee shall distribute all remaining funds, subject to Section 11.2(A) and (B) of this Trust Agreement, to the Final

Remainder Beneficiaries listed under the Joinder Agreement...." Under 11.2(C), individuals named as Final Remainder Beneficiaries have a contingent interest in the assets of the sub-account. Thus, the sub-account would not have been established for the sole benefit of the disabled individual during the beneficiary's lifetime.

b. Termination of Trust During Beneficiary's Lifetime.

Section 11.3 of the Trust continues to provide that the Trustee may, in his or her sole discretion, terminate the sub-account during the beneficiary's life if "it becomes impracticable to fulfill the conditions of the Trust with regard to the respective Beneficiary's sub-account for reasons other that [sic] death of the Beneficiary." Trust at 18. In such an event, the trustee terminates a Sub-Account and may distribute all or any portion of the assets in the Trust sub-account "to such party designated by the Primary Representative...." Thus, if the Primary Representative irrevocably designates a party to receive distributions in the event of an early termination, there exists a contingent interest in the assets of the sub-account that benefits third parties during the claimant's lifetime.

c. Termination of Entire Trust.

Section 11.4 of the Trust continues to permit the Trustee to terminate the entire Trust "[i]f it becomes impossible or impracticable to carry out the Trust's purposes with respect to all or substantially all Beneficiaries...." In such an event, the Trustee terminates the Trust and distributes the assets of the sub-account "to such party designated by the Primary Representative" in accordance with Section 11.3. Trust at 18-19. As discussed above, this clause would also create a beneficial interest in a third party, assuming the Primary Representative has irrevocably designated a party to receive such distributions.

B. Medicaid Must Be Reimbursed First.

To qualify for the pooled trust exception, the Trust also must contain specific language that provides that, to the extent that amounts remaining in the beneficiary's sub-account upon the death of the beneficiary are not retained by the Trust, the Trust pays to the State from such remaining amounts in the sub-account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan. *See* POMS 01120.203(B)(2)(g). To the extent that the Trust does not retain the funds remaining in the sub-account, the State must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in POMS SI 01120.203(B)(2)(g); SI 01120.203(B)(3)(a). POMS SI 01120.203(B)(2)(a) explains that only the following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State: "[t]axes due from the trust to the State or Federal government because of the death of the beneficiary" and "[r]easonable 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."

Here, Section 11.2(A) of the Second Amendment provides that:

11.2 Distribution of Remainder Interest Upon Death of Beneficiary. Upon the death of a Beneficiary, any amounts remaining in the Beneficiary's Trust sub-account (the "Remainder") shall be distributed as follows, to the extent that there are funds remaining:

A. First, after the payment of a beneficiary's estate administration expenses (including taxes and attorney's fees) and reimbursement for income taxes (if any), to the extent they are not due from the trust to the State or federal government

because of the death of the beneficiary, may not be paid from the trust prior to reimbursing the State, the Trust shall retain the portion of the Remainder that has been authorized by the Grantor in the Joinder Agreement to be added to the sub-account retained by and in the name of the Trust (the "Trust's Remainder Share"), if any, to be used as set forth in Section 12.1; then,

It is not clear what the phrase "***may not be paid from the Trust prior to reimbursing the State***" is intended to modify. *See* Second Amendment, Section 11.2(A). It appears that the amended language may be intended to state that the trustee can pay estate expenses and taxes and reimburse taxes owed by others, but that the trustee cannot pay these expenses or taxes before reimbursing the state if the amounts at issue are not "due from the trust…because of the death of the beneficiary." In that case, the language of the trust would be consistent with the statutory requirements. We have previously advised that the trustee can pay estate and other taxes due by virtue of the trust if the trust is included in the state. *See* Memorandum from OGC Region V to *SSA-ARC-MOS, SSI-Ohio-Review of the Trust for Dustin D~, ~ -REPLY,* (December 6, 2006). However, it is far from clear that this is what is intended by the amended language. Nevertheless, due to savings clause, the provisions must be read to be consistent with the statute.

C. The Savings Clause Voids Any Provisions That Are Inconsistent With the Statute.

Even if the foregoing provisions are inconsistent with the statute, the Trust nevertheless qualifies for the Medicaid payback exception for pooled trusts. The Joinder Agreement at Section Q(3) provides "[t]his Trust is a pooled trust, governed by the laws of Illinois, in conformity with the provisions of 42 U.S.C. § 1396p, amended August 10, 1993, by the Omnibus Budget Reconciliation Act of 1993. To the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control." Joinder Agreement at 23. The clause appears to void any offending language, which permits the Trust to meet the exception under 42 U.S.C. § 1396p(d)(4)(C). Section 12.4 of the Trust states that "[s]hould any provision of this Agreement be or become invalid or unenforceable, the remaining provisions of this Trust Agreement shall be and continue to be fully effective." Trust at 20. As such, the offending provisions should be considered void and the remainder of the trust would be valid and would not be a resource under the statutory resource rules. See POMS PS 01825.016(D)(2).

CONCLUSION

In sum, we conclude that, while the Second Amendment to the Trust does not bring the Trust in line with the statutory requirements, sub-accounts in the Trust with the null and void clause in the Joinder Agreement still are not resources under the statute.

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By: _____
Alfred C. S~
Assistant Regional Counsel

G. PS 06-165 SSI-IL-Review of the Declaration of Trust for Monica D. L~--REPLYOur Ref: 06-0031 Your Ref: S2D5G6, SI 2-1-3 IL (L~)

DATE: June 7, 2006

1. SYLLABUS

This opinion addresses whether or not the trust in question is a resource for SSI purposes. As outlined in the POMS at SI 01120.201(D)(1)(a), a trust established by an individual after January 1, 2000 is a countable resource if the trust is revocable. In this case, the trust claims to be irrevocable and identifies a as the grantor. However, the actual trust language indicates that the SSI claimant is the true grantor of the trust and the trust can be revoked by the claimant who is the sole beneficiary. Because the trust can be revoked by the claimant, it is a countable resources for SSI purposes.

2. OPINION

You asked whether the Monica D. L~ Supplemental Care Trust (hereinafter "trust") is a resource for purposes of determining eligibility for Supplemental Security Income (SSI). We conclude that the trust is a resource.

BACKGROUND

The trust was created for the benefit of Monica D. L~ (hereinafter "Monica"), who is disabled. According to the trust, Trust and Savings (), as guardian of the estate of Monica, is both the trust grantor or settlor, and trustee. Trust, at 1, paragraph 1. The trust was funded with assets from a personal injury settlement on behalf of Monica. The stated purpose of the trust is to provide for extra and supplemental needs, comforts and luxuries to Monica which are over and above, and will not cause disqualification from the benefits that Monica otherwise receives as a result of her disability from any local, state or federal program, or from private agencies or any combination thereof. Trust, Article Two, paragraphs 1-3. The trust provides that neither Monica nor the guardian of her person or estate shall have any right or power to demand distribution from the trust at any time. Trust, Article Two, paragraph 4. The trustee is to use the trust income and principal to enhance the quality of Monica's life without disqualifying her for any state, federal or local benefits or programs when providing for her needs. Trust, Article Two, paragraph 5. Making any such expenditure is subject to approval by the probate court. Trust, Article Two, paragraph 5.

Unless the trust is terminated sooner by exhaustion of the corpus, the trust terminates upon Monica's election following her restoration of rights or upon her death. Trust, Article Three. Upon termination of the trust, the remaining trust assets shall be paid to the appropriate State agencies, as reimbursement to the State of Illinois for benefits provided to Monica during her lifetime, except that the trustee may with court approval and consistent with existing law first pay any outstanding, reasonable expenses for maintaining the existence of the trust, and final taxes, legal fees, and trustee fees. Trust,

Article Three. After these payments, any remaining amounts are to be paid as provided in Monica's will, or in the absence of a will, to Monica's estate. Trust, Article Three.

DISCUSSION

Under federal law, a trust established by an individual after January 2000 will be considered a resource to her if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1)(a). While a trust, like this one, purports to be irrevocable, it can be revoked because the grantor or settlor of the trust is also the sole beneficiary. *See Stewart v. Merchants National of Aurora*, 278 N.E.2d 10, 12 (Ill. App. 1972); Restatement (Second) of Trusts § 339, comment a (1959); Restatement (Third) of Trusts § 65 and comment a and Reporter's Note (2003). Although the trust identifies as the grantor or settlor, Monica is the true settlor of the trust because the trust was formed with her assets. *See In re Estate of* , 635 N.E.2d 853, 855 (Ill. App. 1994); POMS SI 01120.200(L)(3).

Based on our research, we conclude that Monica is also the sole beneficiary of the trust. Monica is the only named beneficiary of the trust during her lifetime, and on termination of the trust, or her death, the remainder of the trust assets, after reimbursement to state agencies for benefits received and other specified administrative costs, are to be distributed as provided in Monica's will, or if there is no will, to her estate. Trust, Article Three. *Scott on Trusts* clarifies that Monica is the sole beneficiary of the trust. Under *Scott*, a settlor is a sole beneficiary when she coveys property in trust to pay the income to her for life, and on her death to covey the property to her estate, or as she should by will or deed appoint. William F. F~, *Scott on Trusts*, § 127.1 (1987).

It follows that, under the Restatement (Second) of Trusts, the inference is that, although there is a provision under the power of appointment as to the disposition of the trust property on Monica's death, Monica intended to be the sole beneficiary of the trust and no residual interest was created. *See* Restatement (Second) of Trusts § 127, comment b; *Bescor, Inc., v. Chicago Title & Trust Co.*, 446 N.E.2d 1209, 1211 (Ill. App. 1983) (the test for determining who is the beneficiary of an express trust is the intent of the parties imposing the trust, and this intention will be ascertained from the express language of the trust). Section 127 also provides that Monica is the sole beneficiary where she transfers the property in the trust to pay the income to herself for life and on her death to pay the principal to her estate. *See* Restatement (Second) of Trusts § 127, comment b. Under Restatement (Second) of Trusts § 127, Monica is the sole beneficiary of the trust. The trust is, therefore, revocable and should be considered a resource.

Sections of the Restatement (Third) of Trusts present apparently conflicting interpretations of the trust's language and whether Monica would be the sole beneficiary. Under § 44 of the Restatement (Third), it is not necessary that the intended beneficiary or beneficiaries be known at the time of the creation of the trust, but a beneficiary must be capable of becoming existent and ascertainable in the future by exercise of a power of appointment. Restatement (Third) of Trusts § 44, comment a. Under this explanation, the power of appointment by will arguably creates a residual interest and Monica is not the sole beneficiary.

However, § 46 of the Restatement (Third) of Trusts states that where "…the owner of property transfers it upon intended trust for the members of an indefinite class of persons, no trust is created." Restatement (Third) of Trusts § 46(1). A class of persons is indefinite if the identity of all individuals comprising its membership cannot be ascertained.

Restatement (Third) of Trusts § 44, general comment. We note that, with the paragraph discussing the termination of the trust upon Monica's death with the remainder of the trust assets to be distributed as provided in Monica's will, the trust gives Monica the right to distribute the property to persons to be selected from an indefinite class of beneficiaries. Under this explanation of the Restatement (Third) of Trusts, this power of appointment by will does not create a residual interest, and Monica is, therefore, the sole beneficiary.

Because the Restatement (Third) does not resolve this apparent conflict, and does not purport to reverse the position taken in the Restatement (Second), we believe that application of § 127 of the Restatement (Second) and *Scott* is appropriate. Accordingly, the disposition of the trust property on Monica's death under the power of appointment does not create a residual interest, and the trust is revocable and should be considered a resource.

Finally, we note that the trust provides for termination during Monica's lifetime, "following her restoration of rights." Article III. It appears that remaining assets would then be distributed as if Monica had actually died. Thus, if the trust had named residual beneficiaries, this could result in trust assets being distributed to third parties during Monica's lifetime. This, however, would be inconsistent with 42 U.S.C. § 1396p(d)(4)(a), and would result in the trust being characterized as a resource. *See* POMS PS01825.016(E), PS 05-033 SSI-Illinois-Review of the Brian V~ Irrevocable OBRA Pay Back Trust (termination clause that created contingent interests in third parties rendered the exception under Section 1917(d)(4)(A) of the Act unavailable). Accordingly, the claimant may want to remove the termination clause along with the absence-of-residual-beneficiaries issue.

CONCLUSION

For these reasons, we conclude that the trust is a resource.

H. PS 06-152 SSI-Illinois-Review of Assignment to a Trust of Child Support Payments for Michael L~, ~ - REPLY Our Ref: 06-0040 Your Ref: S2D5G6, SI 2-1-3 IL (L~)

DATE: June 2, 2006

1. SYLLABUS

This opinion addresses whether or not the assignment of child support payments into a supplemental needs trust is irrevocable and whether the payments should be considered countable income for SSI purposes. According to the POMS at SI 01120.200(G)(1)(d), a legally assignable payment that is assigned to a trust is income for SSI purposes unless the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

Under Illinois law, a trust is allowed to receive child support payments. In this case, it has been determined that the child support payments have been irrevocably assigned to a trust that is not a countable resource, thus the child support payments are not countable income for SSI purposes.

2. OPINION

You asked whether the assignment of child support payments into "The Michael P~ L~ Irrevocable Discretionary Supplemental Needs Trust" is irrevocable and whether the payments should be considered income to Michael for purposes of determining eligibility for Supplemental Security Income (SSI). You did not request an opinion on whether the trust is a resource. We conclude that the child support payments do not count as income.

BACKGROUND

Michael L~ was born on July 14, 1983. His parents, Judith L~ and James L~, divorced and entered into an Agreed Order, dated September 23, 2002, that required James L~ to pay Judith L~ $660.00 a month in child support. This order contemplated continued child support payments even though Michael is an adult, apparently because he is mentally disabled. On December 2, 2005, Michael's parents created "The Michael P~ L~ Irrevocable Discretionary Supplemental Needs Trust," which is intended to provide for Michael's needs that are not otherwise received as a result of Michael's disability. Trust at Article 4.02(a). The Trustee is authorized to use Trust income and principal to provide for Michael's supplemental care and funeral expenses, but may not use funds to provide basic support such as food and shelter. Id. On January 4, 2006, an Illinois state court modified the prior Agreed Order so that the child support payments (still in the amount of $660.00 per month) would be paid into the Supplemental Needs Trust.

DISCUSSION

Child Support Payments Paid Directly to the Trust Pursuant to the Court Order Are Not Income to Michael

In Illinois, child support generally terminates when a child reaches the age of 18. *In re Marriage of F~*, 570 N.E.2d 636 (Ill. App. 1991). However, under the Illinois Marriage and Dissolution of Marriage Act,

"The court may award sums of money out of the property and income of either or both parties or the estate of a deceased parent, as equity may require, for the support of the child or children of the parties who have attained majority:

(1) When the child is mentally or physically disabled and not otherwise emancipated**

750 ILCS 5/513(a)(1). The Illinois Marriage and Dissolution Act also contains a statutory provision that allows a trust to receive child support payments. 750 ILCS 5/503(g). Illinois courts have recognized the validity of such trusts. *See In re Marriage of G~*, 576 N.E.2d 946 (Ill. App. 1991).

Here, Michael's parents entered into an Agreed Order pursuant to 750 ILCS 5/513(a)(1), and after creating a Special Needs Trust in December 2005, petitioned the court for modification so that the child support payments would be made to the Trust instead of Michael's mother. The petition was granted on January 4, 2006, and child support payments are presumably being made to the Trust at present. We believe that under Illinois law, it is permissible for the child support payments to be made to "The Michael

P~ L~ Irrevocable Discretionary Supplemental Needs Trust" instead of to Michael's mother.

Under Agency policy, child support payments will not be considered income if they are irrevocably assigned to a trust that is not a resource. POMS SI 01120.200(G)(1)(d). In this case, whether the Trust itself is a resource is not at issue. As such, the question at this juncture is whether the court would grant a request by Michael to have the support payments go directly to him, and thus be considered income. POMS SI 01120.200(G)(1)(d). Although the court order states that the payments will be made directly to the Trustee, if Michael could ask the court to modify the order so that the payments would be made directly to him, the child support payments should be considered Michael's income. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, Review of the Crable Special Needs Trust for the Benefit of Taneal Huffman, at 4 (September 27, 2005); Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Review of the Marital Settlement Agreement for Patricia J. H~ and Floyd A. H~ and the Patricia J. H~ Special Needs Trust*, at 3-4 (December 4, 2003).

Our reading of the law in Illinois suggests that Michael could not obtain such an order absent some change in circumstance. The pertinent statutes, 750 ILCS 5/513(a)(1) and 5/510(a), contemplate modification of a court order providing for the support of a child who has attained the age of majority and is disabled when there is a change of circumstances. But, Illinois courts have held that the order awarding child support benefits is res judicata so long as there is no change in circumstances underlying the decree. *See In re Marriage of L~*, 597 N.E.2d 907, 910 (Ill. App. 1992); *In re Marriage of W~*, 512 N.E.2d 1371, 1377 (Ill. App. 1987). At this time, we are not aware of any change of circumstance that would cause the court to modify its order requiring the child support payments to be made to the Trust. Therefore, the child support payments are, at this time, irrevocably assigned to the trust, and thus are not income under POMS SI 01120.200(G)(1).

We further note that it is unclear whether Michael would even have standing to seek modification of the court order. Several Illinois courts have questioned whether a third-party beneficiary, such as Michael, has standing to seek modification of a support order. *In re Marriage of P~*, 696 N.E.2d 1263, 1266 (Ill. App. 1998); *People ex rel. Collins v. Burton*, 668 N.E.2d 1185, 1187 (Ill.App. 1996); *In re Marriage of G~*, 593 N.E.2d 102, 104 (Ill. App. 1992). In the event there was a case of changed circumstances here or in another case that might warrant modification of a support order under 750 ILCS 5/513(a)(1), it would be appropriate to consult our office further regarding developments in the law on the standing issue.

CONCLUSION

For the reasons discussed above, we conclude that the sub-account assets should not be considered a resource to R~, the individual beneficiary of the pooled trust.

I. PS 06-078 SSI - Illinois - Review of the Sub-Account of Teresa R~ in the Illinois Disability Pooled Trust

Joinder Agreement - REPLY Your Reference: S2 D 5G6 SI 2-1-3 IL (R~) Our Ref: 05-0185

DATE: February 28, 2006

1. SYLLABUS

This opinion reviews a sub-account in the Illinois Disability Pooled Trust. The corpus of the sub-account was formed in August, 2005 from funds held in a guardianship account for the SSI beneficiary. The execution of the Joinder Agreement by the Public Guardian created the sub-account with the SSI beneficiary as the sole beneficiary of the Trust and her estate as the Final Remainder Beneficiary. The Agreement states that the State will receive reimbursement for services provided (e.g. Medicaid) upon the death of the beneficiary. Based on the terms of the Master Trust and the sub-account, the Trust qualifies as a Medicaid payback Trust meeting the pooled trust exception and is excluded from resource counting under those provisions. Further, since the beneficiary cannot direct use of the funds and the anti-lapse Trust language creates an irrevocable residual beneficiary, the Trust is not countable under normal resource counting policy.

2. OPINION

You asked whether the Sub-Account of Teresa R~ in the Illinois Disability Pooled Trust, should be treated as a countable resource because the remainder beneficiary is the decedent's estate of Teresa R~. We have reviewed the documents provided to us and, for the reasons discussed below, we conclude that this trust should not be counted as a resource.

FACTS

On August 17, 2005, Robert F. H~, Cook County Public Guardian (Cook County Guardian), on behalf of Teresa R~ (R~), executed a Joinder Agreement (Agreement) creating a sub account in the Illinois Disability Pooled Trust (Trust) for R~. The corpus of the sub account would be comprised of the assets of R~, consisting of $120,000.00 currently held in a guardianship account at Northern Trust. Agreement Part K at p. 9. The Agreement names the Cook County Guardian as the Grantor of the Trust. Agreement Part C at p. 1. It also names the Cook County Guardian as the Primary Representative unless the beneficiary has a legal representative. Agreement Part E at p. 2. R~ is the sole beneficiary of the Trust while she is alive. Agreement Part D at p. 2. Upon her death, the Agreement directs that, if the Trust assets are insufficient to satisfy the State's Reimbursement Claim, then the Grantor/Beneficiary elects to have the assets utilized to reimburse the State's Reimbursement Claim. Agreement Part L at p. 13. If the Trust assets are sufficient to satisfy the State's remainder claim, then the Beneficiary/Grantor also elects to satisfy the State's Remainder Claim and have the remaining amount paid to the final remainder beneficiary. Agreement Part L at p. 14. The Agreement names the Decedent's estate of Teresa R~ as the Final Remainder Beneficiary upon the death of R~. Agreement Part L at p. 15. The Agreement provides that the Cook County Guardian, the named Grantor of the trust, reserves the authority to amend the designation of remainder

beneficiaries. Agreement Part L at p. 15. Finally, the Agreement contains an anti-lapse provision which provides that, "[i]f a lapse occurs in distribution, all remaining funds shall be retained as part of the Trust's Remainder Share." Agreement Part L at p. 15.

DISCUSSION

The Social Security Act ("Act") provides that an individual is not eligible for SSI if she has resources that exceed $2,000.00. 42 U.S.C. § 1382(a)(1)(B)(ii). A resource is defined as "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). Trust property may be such a resource for SSI purposes. 42 U.S.C. § 1382b(e); Program Operations Manual System ("POMS") SI 01120.200(A). Trust assets are a resource to an individual if she can revoke the trust and use the assets to meet her needs for food and shelter, or if the individual can direct the use of the trust assets to be used for her support and maintenance under the terms of the trust. *See* POMS SI 01120.200(D). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201(A).

Under the statutory amendments that took effect on January 1, 2000, even an irrevocable trust will be considered a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201(D)(2). Since the Trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary, the sub-account would be a resource under this provision if the individual signed a Joinder Agreement after the effective date of the statute, January 1, 2000. *See* POMS SI 01120.201(C)(1).

Certain pooled trusts, however, are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). The Medicaid payback trust exception applies to pooled trusts where the trust:

contains the assets of an individual who is disabled as defined in the Act;

is established and managed by a nonprofit association;

maintains a separate account for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts;

contains accounts established by the individual, or parent, grandparent, legal guardian, or court solely for the benefit of the disabled individual;

provides that, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2).

Here, the Joinder Agreement appears to qualify for the Medicaid payback trust exception. Part K of the Joinder Agreement indicates that the Sub-Account is to be funded with "$120,000.00 in N. Trust G'ship account". Agreement Part K at 9. The Joinder Agreement indicates that R~ does not receive Social Security Disability Insurance Benefits or Supplemental Security Income. However, the Agreement indicates that R~ is disabled due to schizophrenia, paranoid type. Agreement Part I at p. 8. The Master

Illinois Disability Pooled Trust provides that the Illinois Disability Association, which established and manages the Trust, has identified itself as an Illinois not-for-profit corporation. *See* Trust Agreement at page 2, § 1.2. The Joinder Agreement lists R~ as the sole beneficiary of the trust. Agreement Part D at p. 2. Finally, the Joinder Agreement provides that, in accordance with section 11.2 of the Illinois Disability Pooled Trust Agreement, upon the death of the beneficiary, to the extent the beneficiary's sub-account was funded with her own money, claims for reimbursement for services by the State of Illinois that provide Medicaid or other benefits to the beneficiary shall be satisfied, equal to the amount of total assistance paid on behalf of the beneficiary. Agreement Part L at p. 13. Accordingly, we believe that the Joinder Agreement qualifies for the Medicaid Trust exception because all of the conditions are met.

However, even if a trust is not a resource under POMS SI 01120.203(B)(2), the Agency applies regular resource counting rules to determine if it is a resource. POMS SI 01120.203(B). Under the ordinary resource rules, the trust principal will be a resource if (1) the claimant can revoke the trust and use the assets for her support and maintenance, or (2) the claimant can direct the trustee to pay her the funds or use the funds for her support and maintenance. POMS SI 01120.200(D). In addition, the claimant's interest in the Trust is a resource if it can be sold. POMS SI 01120.200(D).

Here, we believe that R~ cannot revoke the Trust. The Master Agreement provides that the Settlor (Grantor) relinquishes all power to amend, alter, or revoke the trust agreement. It further provides that the Trustee, in his sole discretion, may make payment or distributions under the Trust. However, Illinois follows the general rule that even if a trust purports to be irrevocable, it nevertheless may be revoked if the settlor and all beneficiaries consent. SSA does not consider a trust fund to be a resource if the settlor would be required to obtain the consent of another beneficiary in order to revoke the trust and obtain the funds. Under the Joinder Agreement, R~ would not be the sole beneficiary of the trust.

Though R~ is the sole lifetime beneficiary of the sub-account, the Joinder Agreement provides that, on the death of R~, assets are to be paid subject to section 11.2 of the Master Pooled Trust to the State for reimbursement for Medicaid or other government benefits paid to the Beneficiary, with any remaining amount paid to the Final Remainder Beneficiaries. Joinder Agreement Part L at p. 15. The Joinder Agreement names the "Decedent's estate of Teresa R~" as the Final Remainder Beneficiary. Agreement Part L at p. 13-15. It also reserves a right in the Grantor (Cook County Public Guardian), to amend the designation of remainder beneficiaries. Agreement Part L at p. 15. Finally, the Joinder Agreement contains an anti-lapse provision which provides that, "[i]f a lapse in distribution occurs, all remaining funds shall be retained as a part of the Trust's Remainder Share." Agreement Part L at p. 18. Though the Grantor can amend the designation of the Remainder Beneficiary, pursuant to the Master Agreement, this right to amend is limited and "shall not reduce the amount to be retained by the Trust (if any) upon the death of a Beneficiary as set forth in the original Joinder Agreement." Pooled Agreement, Art. VI, §6.2.

The anti-lapse provision of the Joinder Agreement creates an irrevocable additional residual beneficiary. As noted above, the anti-lapse provision provides that: "[i]f a lapse in distribution occurs, all remaining funds shall be retained as a part of the Trust's Remainder Share." Agreement Part L at p. 18. The Pooled Trust Agreement provides that

a beneficiary “shall not reduce the amount to be retained by the Trust (if any) upon the death of a Beneficiary as set forth in the original Joinder Agreement.” Pooled Agreement, Art. VI § 6.2. Though the Joinder Agreement designates the “decedent's estate of Teresa R~” the Final Remainder beneficiary, a designation we do not believe could lapse, it also reserves in the Grantor the authority to amend the designation of Remainder Beneficiaries, subject to the limitations imposed by the Pooled Agreement at § 6.2. . While we believe that the current Remainder beneficiary, the decedent's estate of Teresa R~ cannot lapse, there exists the possibility that Grantor may amend the Joinder Agreement and name a different remainder beneficiary whose interest could lapse. This creates a contingent remainder interest in the Trust's Remainder Share. *See* Memorandum from OGC Region V to SSA-MOS, *SSI-Illinois-Review of The Disability Association's Pooled Trust Drafted by the Office of the Cook County Guardian*, (July 13, 1998). It appears, therefore, that a beneficiary could not amend the trust to exclude this anti-lapse provision which creates an irrevocable residual interest in the Trust's Remainder Share. As such, R~ is not the sole Trust beneficiary and R~ would not be able to unilaterally revoke the Trust. Accordingly, the Joinder Agreement should not be counted as a resource for SSI purposes under the regular resource rules either. *Id.* (discussing the other two elements of the regular resource rules as they apply to sub-accounts in their pooled trust).

CONCLUSION

For the reasons discussed above, we conclude that the sub-account assets should not be considered a resource to R~, the individual beneficiary of the pooled trust.

PS 01825.017 Indiana

A. PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~ Your Ref: S2D5G6 SI 2-1-3 IN

DATE: November 3, 2008

1. SYLLABUS

This opinion examines whether or not the trust and annuity in question are a resource for SSI purposes. In this case, the trust meets all of the criteria required to meet the special needs trust exception. Likewise, the annuity is not currently a resource because the claimant does not have the ability to sell her right to receive future payments. The claimant is eligible to receive payments from the annuity beginning in August 2022. The annuity payments may be income to the claimant beginning in 2022 and should be evaluated at that time

2. OPINION

You asked us whether the Trust and Annuity constitutes a resource or income for SSI purposes. For the reasons stated below, we believe that the Trust is not a resource and that the Annuity also is not a resource and does not currently result in any income to Savanna. The Annuity, though, may be income beginning in August 2022.

BACKGROUND

The Trust for the Sole Benefit of Savanna R. W~ was established in 2007, pursuant to court order. The Trust indicates that Savanna suffers from a severe and permanent brain injury, as well as from permanent physical injuries, arising from substandard care during her birth. The Trust was established around the time of settlement of two related lawsuits.

One lawsuit was a medical malpractice lawsuit against Dr. Z~-B~ brought by Ronnie and Mollie W~, individually and as parents and natural guardians on behalf of Savanna W~. The June 2007 Settlement Agreement and Release provided that the W~s were to receive $150,000, and that the guardians of the estate of Savanna W~ were to receive periodic payments of $1,000 per month for 100 months beginning August 10, 2022.

According to a subsequent court order, the $150,000 lump sum was distributed with: a) a total of $96,700 paid to the attorneys; and b) $53,300 held in escrow pending resolution of an unidentified ERISA subrogation claim (which was ultimately waived).

The Settlement Agreement gave the defendant or its insurer the right to purchase an annuity policy, of which the defendant/insurer would be the sole owner, for the purpose of funding the periodic payments. The Agreement also states that the W~s have no power to sell, mortgage, encumber or anticipate the periodic payments, by assignment or otherwise.

In or around May 2007, Prudential Assigned Settlement Services Corporation (PASSCorp) assumed the annuity payment obligations to the W~s, and purchased an annuity contract from the Prudential Insurance Company. The Annuity Certificate indicates that the certificate holder (i.e., PASSCorp) had sole and exclusive ownership rights in the Certificate, and that no other person had any right to anticipate, sell or absolutely assign payments under the Certificate. The Certificate indicated that Prudential Insurance would make $1,000 payments each month for 100 months, beginning on August 10, 2022, to Ronnie and Mollie W~ as guardians of Savanna R. W~, for her benefit.

On June 13, 2007, the Lawrence County Circuit Court issued an order directing Mollie W~ to establish the Trust for the Sole Benefit of Savanna R. W~ with Fifth Third Bank as the Trustee, and to pay the portion of the settlement that would otherwise be payable to Savanna to the Trust. The Trust was established that same day.

On June 29, 2007, Ronnie W~ and Mollie W~, individually and as parents and natural guardians on behalf of Savanna W~, settled a suit they had filed against the Indiana Patient Compensation Fund for $1,000,000. Of this amount, the W~'s proceeds were $726,430.33.

According to a court order dated December 3, 2007, the net settlement proceeds from both the Z~-B~ suit (including the $53,300 previously held in escrow) and the IPCF suit were $779,730.33, after payment of fees and costs. From that amount, $51,806.36 was paid to Ronnie and Mollie W~ for their own claims, and the remaining $727,923.97 was ordered to be paid to the Trustee. The Trustee received that amount on December 12, 2007.

Trust Terms

Article I of the Trust indicates that its purpose is to "protect Savanna's long-term interests, to generally provide supplemental care . . . and to increase the quality of her life, after utilizing available assistance from governmental and private agencies and when such assistance or benefits are incomplete or insufficient, and not to replace assistance or benefits or to render Savanna ineligible for any assistance or benefits to which she would otherwise be entitled . . ."

Article II indicates that the Trust estate is to consist of funds ordered by a court to be paid to the Trust, including a lump sum amount as well as a periodic annuity payment for a term certain, and any funds or property ordered by the court to be paid to the Trust.

Article III states that the Trust is irrevocable, other than by order of the court. The Trustee has the discretion and authority to distribute the principal and income of the Trust, but is not to "supplant services, assistance, and medical care available to Savanna from any such source [as Medicaid or SSI benefits]" and the Trustee is authorized to deny requests to release income or principal to pay for expenses otherwise covered by public assistance programs. Trust, Art. IV, C. The Trustee is also authorized to take those steps necessary to ensure that Savanna remains eligible for public assistance, unless it determines that such is contrary to Savanna's best interests. Trust, Art. IV, C. The Trustee may make disbursements directly to Savanna. Trust, Art. IV, C-D.

Article V of the Trust provides that upon Savanna's death, the Trustee shall repay the State of Indiana, or any other state that may provide Savanna with Medicaid assistance, that amount required to satisfy 42 U.S.C. § 1396p(d)(4)(A). Trust, Art. V. The Trustee then to pay Mollie W~ $10 and to pay the remainder of the Trust estate to the personal representative of Savanna's estate. The Trust contains a spendthrift clause which prohibits attachment by creditors, or transfer or assignment by any beneficiary. Trust, Art. V.

DISCUSSION

Under regular resource rules, assets are resources for SSI purposes if the individual owns them and can convert them to cash for her support and maintenance. 20 C.F.R. § 416.1201(a). Under special statutory trust resource rules, trusts established with the assets of an individual after January 1, 2000 will also generally be considered resources. 42 U.S.C. § 1382b(e).

Certain trusts - known as Medicaid payback trusts or special needs trusts - are excluded from the statutory trust resource rules. *See* 42 U.S.C. §§ 1382b(e), 1396p(d)(4); POMS SI 01120.203. These trusts, however, must still be evaluated under regular resource rules to determine whether they are resources. POMS SI 01120.203(B)(1)(a).

A Medicaid payback trust will be exempt from the statutory rules if it: (a) contains the assets of a disabled individual under the age of 65; (b) is established for the benefit of that individual by a parent, grandparent, guardian or court order; and (c) provides that the state will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance pain on behalf of the individual under a state Medicaid plan. POMS SI 01120.203(B)(1)(a); 42 U.S.C. § 1396p(d)(4)(A).

A Medicaid payback trust, though exempt from statutory trust resource rules, will nonetheless be a resource under regular resource rules if: (a) it is revocable; (b) the claimant can compel the trustee to use the funds for her support and maintenance; or (c)

the claimant can sell her beneficial interest in the Trust. POMS SI 01120.200(D)(1)(a); 01120.200(D)(2).

This Trust meets the special needs trust exception. Based on the information we have, Savanna is under 65, and she is disabled. The Trust was funded solely with Savanna's assets. Under the terms of the June court order, the Trust had the right to Savanna's settlement funds at that time, despite not receiving the actual monies until December. Ind. Code § 30-4-2-1(c) ("it is not necessary to the validity of a trust that the trust be funded with or have a corpus that includes property other than the present or future, vested or contingent right of the trustee to receive proceeds or property").

The Trust was established for Savanna's benefit by her mother upon court order. Finally, the Trust provides that the state of Indiana, as well as any other state that provides Savanna medical assistance, will receive that amount required to satisfy 42 U.S.C. § 1396p(d)(4)(A). POMS SI 01120.203(B)(1)(f); Trust, Art. V.

While the Trust is therefore exempt from the statutory trust resource rules, it still must be analyzed under regular resource rules. Here, the Trust is not a resource under the regular resource rules.

The Trust is irrevocable. As a general rule, under Indiana law, a trust is presumed to be irrevocable absent an explicit reservation of power to revoke by the grantor at the time of creation of the trust. Ind. Code Ann. § 30-4-3-1.5(a); *Hinds v. McNair*, 413 N.E.2d 586, 594 (Ind. App. 1980). Here, the Trust explicitly states that it is irrevocable, except by court order. However, a trust that purports to be irrevocable can nonetheless be revoked where the settlor/grantor and all the beneficiaries agree. *See Colbo v. Buyer*, 134 N.E.2d 45 (Ind. 1956); Restatement (Second) of Trusts § 339 comment a (settlor who is sole beneficiary can revoke irrevocable trust). Here, Savanna is the true settlor/grantor of the Trust, POMS SI 01120.200(L)(3), but she is not the sole beneficiary, because the Trust provides that, upon her death, her mother is to receive $10. *Breeze v. Breeze*, 428 N.E.2d 286, 287-88 (Ind. App. 1981). Thus, Savanna does not have the power to revoke the Trust unilaterally.

Further, Savanna has no power to direct the use of Trust principal; the Trustee has sole discretion to make disbursements. Finally, the Trust has a spendthrift provision, which purports to prohibit attachment by creditors or transfer or assignment by any beneficiary. Trust, Art. V. Indiana law provides that if the settlor is also the beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of her interest will not prevent her creditors from satisfying claims from the trust. Ind. Code § 30-4-3-2. This statute does not state, though, that a transferee could reach the settlor's interest in such a case. Therefore, any attempt by Savanna to sell her beneficial interest in the Trust would likely fail. And even if she could sell it, it would have no significant value, for the trust is discretionary. Thus, under regular resource rules, the Trust is not a resource.

Also relevant is the annuity, under which payments do not begin until 2022. The Settlement Agreement and the Annuity Certificate specify that the annuity cannot be assigned. Therefore, the annuity is not currently a resource because Savanna cannot sell her right to receive the future payments. The question, then, is whether the annuity payments will be income to Savanna beginning in 2022, or whether the future payments have been irrevocably assigned to the Trust. See POMS SI 01120.200(G)(1)(d). While the court order of June 2007 requires that Mollie W~ "pay and distribute the remaining

balance of the settlement that would otherwise be payable to Savanna to the Trustee of the Trust for the Sole Benefit of Savanna R. W~," and the Trust Agreement also explicitly references "a periodic annuity payment . . . to be made to the Trust for a term certain," it is not clear that the annuity has been assigned irrevocably to the Trust, particularly since the Settlement Agreement and the Annuity both state that the payments cannot be assigned. When the payments begin in 2022: (a) Savanna may be emancipated, and she may be able to receive the annuity payments directly; or (b) Savanna's guardians could petition the court to use the payments for Savanna's support instead of placing the payments in the Trust. Thus, the payments may be income when they begin in 2022, and this issue should be reevaluated at that time.

CONCLUSION

The terms of the Proposed Trust II and the Proposed Joinder Agreement eliminate the possibility that other individuals could benefit from the disabled beneficiary's sub-account during her lifetime. However, the amendments outlined in the Proposed Trust II and Proposed Joinder Agreement are "modifications." As such, they would become effective on the date of execution of the new Trust II and new Joinder Agreement. Consequently, any sub-account created under the Joinder Agreement or Proposed Joinder Agreement would be considered a resource for SSI purposes. However, the Joinder Agreement and Proposed Joinder Agreement should be further modified to provide that, when an individual has received Medicaid benefits from more than one State, the funds remaining in the trust will be distributed to each State from which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. If such modification occurs, the Joinder Agreement and Proposed Joinder Agreement would satisfy the statutory requirements for the Medicaid trust exception. However, we also recommend that the trust be clarified to state that, if and when a new trust is established in or after 2078, that trust will include all amendments made to the current trust as of that date.

Conclusion

The Trust is not a resource to Savanna for SSI purposes. The anticipated annuity payments are not a resource to Savanna now. They may be income to her beginning in 2022 and should be evaluated at that time.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Allen D~
Assistant Regional Counsel

B. PS 07-170 SSI-Indiana-Review of Proposed Restatement of the ARC of Indiana Master Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3 IN (ARC) Our Ref: 07-0277

DATE: July 2, 2007

1. SYLLABUS

The Chicago Regional Counsel previously determined that a sub-account created under the ARC of Indiana Master Trust (Trust II) and Joinder Agreement was a resource for SSI purposes. This opinion addresses proposed amendments to the trust which are intended to make it a non-countable resource for SSI purposes. Upon review, the proposed changes would be considered modifications, not revisions, and would only be effective on the date they were executed. Even with the modifications, the trust amendments still are not sufficient to change the previous determination. Two areas remain which make this trust a countable resource. One is that no provision is made for a change of residence so that more than one state would be eligible for the Medicaid assistance payback on the death of the claimant. Another is that the potential exists for distribution to others on the "deemed death" of the claimant. Therefore, the distribution resulting from this early termination would not be for the sole use of the claimant. The precedent here is that revisions or modifications to trusts that do not address and solve the central issues for exclusion remain a countable resource for SSI purposes.

2. OPINION

We previously reviewed the ARC of Indiana Master Trust II (Trust II) and Joinder Agreement and concluded that a sub-account created under Trust II and the Joinder Agreement was a resource for purposes of determining eligibility for Supplemental Security Income (SSI). The ARC recently submitted proposed revisions to the Trust II (Proposed Trust II) and the Joinder Agreement (Proposed Joinder Agreement). You asked whether sub-accounts in the Proposed Trust II would be a resource for SSI purposes. For the reasons discussed below, we conclude that sub-accounts in the Proposed Trust II still would be considered a resource for SSI purposes.

BACKGROUND

We previously identified three problems with Trust II and the Joinder Agreement. First, we advised that a sub-account created under Trust II did not qualify for the Medicaid payback exception because it was not established for the sole benefit the disabled individual. See 42 U.S.C. §§ 1382b(e)(3)(B), 1396d(4)(C); Program Operations Manual Systems (POMS) SI 01120.203(B) (2); Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Indiana-Review of the Sub-Account of Deborah Cobb in the ARC of Indiana Master Trust II (March 21, 2007). Under certain circumstances, the trustee could terminate Trust II as though the beneficiary had died. Upon the beneficiary's "deemed death," the Trustee would distribute property held in the beneficiary's name in accordance with the Joinder Agreement. Trust II, Articles Nine and Ten. Pursuant to the Joinder Agreement, the Arc of Indiana would retain 50% of the disabled beneficiary's assets, and the remaining 50% would be distributed to the State of Indiana, up to an amount equal to the total medical assistance paid on the disabled beneficiary's behalf. Joinder Agreement, section F. This created the possibility that individuals other than the beneficiary could benefit from the beneficiary's sub-account during her lifetime. Thus, the sub-account was not established solely for the benefit of the beneficiary.

Second, we previously advised that, even if the "deemed death" clause were removed, the Trust would still fail to qualify for the Medicaid payback exception. Pursuant to the Joinder Agreement, the Trustee could terminate the beneficiary's sub-account if she changed residence from Indiana to another state and the Trustee was unable to make appropriate arrangements for distributions. If that occurred, the Trustee could distribute the beneficiary's remaining sub-account property in the same manner as if the beneficiary had died. Joinder Agreement, Sections D and F, n..1. Thus, the potential distribution on change of residency provision was inconsistent with the requirements that pooled trust accounts be created for the beneficiary's sole benefit during her lifetime.

Third, we noted that Trust II was scheduled to terminate in the year 2078, theoretically within the beneficiary's lifetime. Upon such termination, a New Trust II would be created into which all ARC trust property would be contributed. Except for a new termination date, the New Trust II would contain identical terms as Trust II. Trust, Article Nine, Section IV. We noted that, unless the New Trust II was amended to remove the "deemed death" clause and amend the "change of residence" provisions, the 2078 termination would effectively resurrect the provisions from Trust II that caused a sub-account to constitute a resource for SSI purposes.

DISCUSSION

The proposed amendments to the trust address most of our concerns. Namely, the proposed language would eliminate our concerns that the trust was not for the sole benefit of the disabled individual during his or her lifetime. However, the attempt to make these changes effective "*ab initio*" is ineffective. The changes will only be effective prospectively. Furthermore, although the revised provisions for moving out of the State of Indiana no longer would raise concern that the trust could benefit individuals other than the disabled beneficiary during the disabled beneficiary's lifetime, we are concerned that the trust does not provide for re-payment of Medicaid expenditures made by any other State. We also recommend further clarification of the provisions relating to the new trust that may be established in 2078.

The proposed Trust II eliminates the "deemed death" clause. We note, however, that the proposed Trust II attempts to delete the "deemed death" clause "*ab initio*," i.e., as of January 9, 1995, the date Trust II was originally created. Proposed Trust II, Article Nine, Section II. This appears inappropriate. The Restatement (Third) of Trusts distinguishes between two types of alteration of a trust document. A "'reformation' involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain - and properly restate - the true, legally effective intent of a settlor with respect to the original terms of trusts they have created." Restatement (Third) of Trusts § 62, Reporter's Notes. A reformation alters the text of a donative document so that it expresses the intention it was intended to express." *See* Restatement (Third) of Property, § 12.1. It relates back to alter the text as of the date of the original declaration of trust. *See Id.* In contrast, a "modification involves a change in - a departure from - the true, original terms of the trust, whether the modification is done by a court [cites omitted] or by the beneficiaries." Restatement (Third) of Trusts § 62, Reporter's Notes. Because a modification is a "departure from the true, original terms of the trust," a modification becomes effective upon its execution. *Id.*

It appears that the original intent of the Trust was to allow for distributions upon a beneficiary's deemed death and that the proposed alteration changes the original intent of

the parties. Thus, the proposed alteration is a modification, rather than a reformation. *Id. See* Restatement (Third) of Trusts, § 62, Reporter's Notes. By stating that the deletion is effective "ab initio," the proposed Trust II attempts to apply modified trust terms retroactively to January 9, 1995, the original date of the Trust II Declaration. Such retroactive application is inconsistent with modification. Because the proposed deletion of the deemed death clause is a "departure from the true, original terms of the trust," the proposed deletion would become effective upon its execution and would not relate back ab initio to January 9, 1995. *See* Restatement (Third) of Trusts § 62, Reporter's Notes.

The proposed Joinder Agreement also deletes the provision that previously allowed the Trustee to distribute the beneficiary's remaining sub-account property in Trust II if she changed residence from Indiana to another state. Proposed Joinder Agreement, Section F, n.1. We note, however, that the Proposed Joinder Agreement similarly attempts to apply the deletion "*ab initio.*" Proposed Joinder Agreement, Section F., n.1. For the same reasons explained above, we believe that a retroactive application of this clause to January 9, 1995, would be inconsistent with the Restatement (Third) of Trusts. Such modification would, instead, become effective upon its execution.

The Proposed Trust II also contains slightly altered language concerning termination in the year 2078. The new provision states that, upon such termination, a New Trust II will be created that, except for a new termination date, will contain identical terms as Trust II, "*as amended.*" Proposed Trust II, Section IV. Because Trust II has previously been amended several times, we believe it would be prudent to clarify that "*as amended*" refers to the proposed 2007 amendments or all amendments made to the trust as of 2078 or the creation of the new trust.

Finally, we note that Section F of the Joinder Agreement allows the ARC to retain 50% of the Trust assets at the time of the beneficiary's death, and requires that the remaining 50% be distributed to the State of Indiana up to an amount equal to the total medical assistance paid on the beneficiary's behalf under the State Medicaid plan, appeared consistent with this POMS provision. *See* Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Indiana-Review of the Sub-Account of Deborah C~ in the ARC of Indiana Master Trust II (March 21, 2007). The trust does not provide for reimbursing any other State for Medicaid payments. The Office of Income and Security Programs (OISP) recently clarified that language such as this is problematic because it frustrates any State Agency's (other than Indiana's) ability to recoup medical assistance paid on behalf of the individual. *See* Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Illinois-Review of the David C~ f/k/a Karr Supplemental Care and Need Trust (June 11, 2007). OISP informed us that the trust must provide that the funds remaining in the trust are distributed to each State from which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. This is in keeping with the Act's requirement that the trust must provide for reimbursement of "the total medical assistance paid on behalf of the individual under a State plan under this subchapter." 42 U.S.C. § 1396p(d)(4)(a). Because the Joinder Agreement and Proposed Joinder Agreement permit reimbursement for payments made under only the Indiana Medicaid plan, they do not meet the statutory standard. Thus, any sub-account created under the Joinder Agreement or Proposed

Joinder Agreement would not satisfy all of the elements of the Medicaid trust exception and would be considered a resource for SSI purposes.

CONCLUSION

The terms of the Proposed Trust II and the Proposed Joinder Agreement eliminate the possibility that other individuals could benefit from the disabled beneficiary's sub-account during her lifetime. However, the amendments outlined in the Proposed Trust II and Proposed Joinder Agreement are "modifications." As such, they would become effective on the date of execution of the new Trust II and new Joinder Agreement. Consequently, any sub-account created under the Joinder Agreement or Proposed Joinder Agreement would be considered a resource for SSI purposes. However, the Joinder Agreement and Proposed Joinder Agreement should be further modified to provide that, when an individual has received Medicaid benefits from more than one State, the funds remaining in the trust will be distributed to each State from which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. If such modification occurs, the Joinder Agreement and Proposed Joinder Agreement would satisfy the statutory requirements for the Medicaid trust exception. However, we also recommend that the trust be clarified to state that, if and when a new trust is established in or after 2078, that trust will include all amendments made to the current trust as of that date.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Anne K. K~
Assistant Regional Counsel

PS 01825.025 Michigan

A. PS 07-190 SSI-Michigan-Review of the Cheryl I. S~ Irrevocable Special Needs Trust, ~ - REPLY Your Reference: S2D5G6, SI 2-1-3 MI (S~)Our Reference: 07-0302

DATE: August 8, 2007

1. SYLLABUS

This decision emphasizes a more direct approach in defining the requirements of a Special Needs Trust. Although several provisions of the Trust appear ambiguous specific language, taken almost directly from the POMS, leaves no doubt that Medicaid reimbursement is the first priority. The possibility that another party could profit from the

Trust during the recipient's lifetime through a partial termination of stock was also addressed and the Regional Counsel makes clear that any distribution could only be made to the recipient. If a distribution was made it would be counted as income.

2. OPINION

You asked whether the Cheryl I. S~ Irrevocable Special Needs Trust is a resource for purposes of determining eligibility for SSI. After reviewing the trust and relevant laws and regulations, we have concluded that the trust should not be considered a resource.

BACKGROUND

On May 29, 2007, a Michigan probate judge ordered the establishment of an OBRA '93 Disability Payback Trust for the benefit of Cheryl I. S~, who was identified as a person in need of protection. Pursuant to that order, the Cheryl I S~ Irrevocable Special Needs trust was created with Cheryl's assets. *See* Trust Art. I(B). The trust states that it is for Cheryl's sole benefit during her lifetime to supplement any government benefits or assistance she receives. *See* Trust Art. I(A)-(B), Art. II(B). The trustee has full discretion to determine whether and how the assets in the trust are to be used to meet Cheryl's special needs. *See* Trust Art. II(A). Generally, the trustee should not disburse trust funds directly to Cheryl in an amount that would disqualify her from any government benefits. Trust. Art. (H)(1). Under one provision, however, the trustee has discretion to distribute stock in an S corporation directly "to the beneficiaries as if the trust had terminated while continuing to hold any other property in such trust." Trust Art. VI(D)(15).

The trust provides that there is an automatic duty to repay Medicaid or any successor program for all benefits received by Cheryl during her lifetime, but only upon her death. Trust Art. I(C), Art. II(D)(7), (F), (G). Under the terms of the trust, the "duty to repay Medicaid has higher priority over all debts and expenses except those given higher priority by law." *See* Trust Art. III(D)(7), Art. IV(A). The trust is to terminate on Cheryl's death, and at that time, the trustee may pay for Cheryl's last illness, funeral, and burial expenses. However, the trust also specifies that payments of debts owed to third parties, funeral expenses, and payments to residual beneficiaries are prohibited and cannot be paid prior to reimbursing the State for any and all medical assistance. Trust Art. IV. If any funds remain in the trust after all of these payments, the funds are to be distributed as Cheryl directs in her will, or, if she does not appoint anyone to receive the trust property in her will, then to her spouse and then her dependants or to her heirs at law. Trust Art. IV.

DISCUSSION

Generally, a trust established with the assets of the individual is considered a resource for SSI purposes under the statute, even if the trust is irrevocable, unless the trust meets one of the Medicaid payback exceptions under 42 U.S.C. § 1396p(d)(4)(A). *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201, 01120.203. For the exception to apply to an individual trust like this one, the trust must:

(1) be established with the assets of a disabled individual under age 65;

(2) be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court; and

(3) provide that the state 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.

42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(a). Although some of the language in this trust document is confusing, we believe that the trust should be read consistently with these requirements.

You noted that the trust contains language that the "duty to repay Medicaid has higher priority over all debts and expenses except those given higher priority by law." *See* Trust Art. III(D)(7), Art. IV(A). This language could be problematic if State or local laws were used to circumvent the duty to repay Medicaid. However, it appears that this language was included in the trust because the Michigan Department of Human Services, which administers the Medicaid program in that State, requires that the trust "provide that repaying Medicaid has priority over all debts and expenses except those given higher priority by law." Program Eligibility Manual 401, at 6 (available at http://www.mfia.state.mi.us/olmweb/ex/pem/401.pdf). The language in the trust appears to be included to track that apparently required language. In fact, the trust incorporates by reference, "the specific regulations promulgated by the Michigan Department of Human Services." Trust Art. I(A).

The Social Security POMS also recognizes that certain payments may be made from the trust prior to reimbursing Medicaid. Specifically, the trustee may pay taxes due from the trust because of the death of the beneficiary and reasonable fees for administration of the trust, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with terminating and wrapping up of the trust. POMS SI 01120.203(B)(3)(a). The POMS also lists examples of payments that may not be made prior to reimbursing Medicaid, including payment of debts owed to third parties, funeral expenses, and payments to residual beneficiaries. POMS SI 01120.203(B)(3)(b).

In this trust, immediately after language stating that expenses "given higher priority by law" may be paid prior to Medicaid, the trust states (in bolded type):

So that there is no misunderstanding, it shall be understood that the State is the first payee and has priority under this Trust over payment of all other debts and administrative expenses, except as permitted by law, such as taxes, reasonable administrative expenses, fees for maintaining the Trust, court costs, or other required actions associated with the termination or disposition of the trust. Payments of debts owed to third parties, funeral expenses and payments to residual beneficiaries are considered Prohibited Expenses and Payments and cannot be paid prior to reimbursing the State for any and all medical assistance.

Trust Art. IV (emphasis in original). This language fairly closely tracks the language in the POMS.

This situation is different from the situation we found in some other trusts that used broad language that would allow payments prior to reimbursing Medicaid if the payment was permitted under any statute or regulation now in existence or hereafter enacted or issued. *Compare* POMS PS 01825.016 (MM. PS 00259) (Illinois). The language in this trust seems to limit payments "permitted by law" to those that would fit within the language of SSA's POMS provisions. It appears that the trust was drafted with an intent to meet the criteria for both the Michigan Medicaid program and the Social Security program and to

limit any payments made prior to reimbursing the State for Medicaid payments to those payments that are permitted to be paid first under both of those programs. Indeed, the trust states that "[a]ll terms of this trust, wherever they may appear, shall be interpreted to conform to this primary goal, namely that the governmental financial assistance, which would otherwise be available to the beneficiary if this trust and/or trust corpus did not exist, will in no way be reduced, diminished, or denied." Trust Art. II(A).

We believe that the language in this trust should be interpreted to meet the requirements of the statute and the POMS, because, to the extent the trust allows payments "given higher priority by law," (1) the trust closely tracks language from the POMS regarding permissible and prohibited expenses that may be paid prior to reimbursing Medicaid, and payments "given higher priority by law" appear to be limited to those that would be permissible under the POMS; (2) the trust appears to include language about making payments "given higher priority by law" because this language seems to be required by the Michigan Medicaid program; and (3) the stated intent of the trust is that the State Medicaid payback trust requirements be incorporated into the trust and that the trust be interpreted consistently with the primary goal that the trust not prevent Cheryl from being eligible for governmental financial assistance.

We also carefully examined the trust provision that allows for partial termination of the trust in certain situations when the trust holds stock in an S corporation. Initially, we were concerned that this provision might result in someone benefiting from the trust, besides Cheryl, during her lifetime. The trust provision states that, in some circumstances, the trustee would have discretion to distribute the stock in such a corporation outright to the trust "beneficiaries as if the trust had terminated while continuing to hold any other property in such trust." Trust Art. VI(D)(15). However, it appears that any such distribution would be made only to Cheryl during her lifetime. The trust provides for distributions to other beneficiaries after Cheryl's death, but there are no provisions that would allow payment to any other beneficiaries if the trust is terminated or partially terminated during Cheryl's lifetime. In fact, the trust was intended to be solely for Cheryl's benefit. See Trust (introductory paragraphs). Under Michigan law (which controls this trust), when a trust is terminated and there are no provisions stating to whom the property would pass on termination, the property reverts back to the original owner. *See Thompson v. Stehle*, 116 N.W.2d 900, 905-06 (Mich. 1962). Here, if the partial termination occurred while Cheryl was living, the trust property would revert back to Cheryl, and she would be the only beneficiary entitled to such a distribution. Therefore, this trust provision does not create a beneficial interest in anyone other than Cheryl during her lifetime. If and when the trustee were to make such a distribution, however, that distribution would be income to Cheryl.

Since the trust appears to meet the Medicaid payback exception to counting the trust as a resource under the statute, we also considered whether the trust would be a resource under the regular resource rules. *See* POMS SI 011020.200. We concluded that the trust would not be a resource under those rules since Cheryl cannot revoke the trust without the consent of the contingent residual beneficiaries; she cannot compel the trustee to provide for her support and maintenance; and she is not entitled to mandatory disbursements under the trust which she might be able to sell. *See* POMS SI 011020.200(D)(1)(a).

CONCLUSION

For these reasons, we believe the trust should not be considered a resource under the statutory or regular resource rules.

Donna L. C~
Regional Chief Counsel, Region V
By:_____
Suzanne D~
Assistant Regional Counsel

B. PS 07- 179 SSI-Michigan - Review of Peggy Jo V~ Special Needs Trust and Pension Benefits ~ -REPLY Your Reference: S2D5G6, SI 2-1-3 MI (V~) Our Reference: 07-0231

DATE: July 16, 2007

1. SYLLABUS

This precedent involves a non-countable trust funded by countable income. The trust meets all the requirements for exception as a Special Needs Trust. However, the funds that are received by the claimant are considered income because the benefits are non-assignable. The Employee Retirement Income Security Act (ERISA) makes clear that certain types of income are not assignable. The attorney for our claimant used two arguments to assert that the income should not be countable. First, he indicated his claimant was not the individual who earned the pension and second, that it was a state court that awarded her the benefits from her spouse's retirement funds. The Regional Counsel determined that ERISA states that an individual named as alternate payee, as our claimant was, has a right under Federal law to receive payments and these payments cannot be assigned. This Federal act preempts state law. The Trust is not countable but the income is countable.

2. OPINION

You asked us to review a trust agreement created by the Saginaw County Probate Court for the benefit of Peggy Jo V~ to determine whether, for Supplemental Security Income (SSI) purposes, the funds placed in the trust constitute a resource to Peggy Jo and whether the pension payments awarded to Peggy Jo as a result of an Amended Judgment of Divorce by the Saginaw County Circuit Court constitute income to Peggy Jo. For the reasons set forth below, we believe that the trust meets the requirements of the Medicaid Trust exception and is not a resource. However, we also believe that the monthly annuity payments into the trust constitute income for SSI purposes.

BACKGROUND

On December 12, 2005, the Saginaw County Circuit Court entered an Amended Judgment of Divorce awarding Peggy Jo 50% of her ex-husband's General Motors Pension Benefits, including post-retirement surviving spouse benefits. As part of its

Amended Judgment, the court ordered that Peggy Jo's portion of the Qualified Domestic Relations Order (QDRO) concerning the General Motors Pension Benefits be paid to a special needs trust based on agreement of the parties.

On May 17, 2006, the Saginaw County Probate Court entered an order establishing the "Peggy Jo V~ Discretionary Trust" (hereinafter "the Trust"). In establishing the Trust, the court found clear and convincing evidence that Peggy Jo is an adult who is unable to manage her property and business affairs due to her physical and mental disabilities and is dependent in need of support, care, and welfare which is necessary and desirable for her to obtain. The court ordered that the property and benefits Peggy Jo is entitled to receive as part of the QDRO entered by the Saginaw County Circuit Court be irrevocably transferred to the Trust.

The Trust states that it is established pursuant to 42 U.S.C. 1396p(D)(4)(A). The express intent of the Trust is to be a Medicaid payback trust. Trust 1.3. The Trust names Nancy K. M~, Peggy Jo's guardian, as grantor and trustee. Trust, page 1. Under the terms of the Trust, the trustee has full authority and power to manage the funds of the Trust at her discretion. Trust 1.4(B). The trustee shall pay for Peggy Jo's special needs at the trustee's discretion. Trust 2.1(a). The Trust defines "special needs" as including expenses for: medical and dental needs; housing; transportation; companionship; education; entertainment; travel; and quality of life items. Trust 2.1(b). The Trust contains a spendthrift clause, prohibiting any of the principal or income of the estate or any interest therein from being anticipated, assigned, encumbered by any beneficiary. Trust 5.5. The Trust states that it is irrevocable. Trust 1.2. Peggy Jo has no right or power, whether alone or in conjunction with others to alter, amend, revoke or terminate the Trust or to designate persons who shall posses or enjoy the Trust estate. Trust 1.2.

The Trust provides that it will terminate upon Peggy Jo's death, unless it terminates sooner by exhaustion of the corpus. Trust 3.1. Upon Peggy Jo's death, the trustee shall distribute to the State of Michigan and any other state which has provided medical assistance Trust property up to an amount equal to the total medical assistance paid on behalf of Peggy Jo by the State. Trust 3.1(a). The trustee shall have authority to pay administrative expenses, legally enforceable debts, last illness and funeral expenses, and any inheritance, state and succession taxes. Trust 3.1(b). Any undistributed income of the Trust shall be distributed equally to the living children of Peggy Jo and their descendents. Trust 3.1(c).

DISCUSSION

The Social Security Act was amended in 1999 to explain when some trusts would be considered resources for purposes of SSI eligibility. Pursuant to the new rules for determining SSI eligibility, a trust established on or after January 1, 2000, counts as a resource if it is a revocable trust established by an individual. *See* 42 U.S.C. § 1382b(e)(3)(A). Irrevocable trusts established by an individual on or after January 1, 2000, count as a resource to the extent that payments from the trust could be made to or for the benefit of the individual or his/her spouse. *See* 42 U.S.C. § 1382(e)(3)(B). However, these rules do not apply where (1) the Commissioner determines that such rules would work an undue hardship on an individual or (2) the trust is a Medicaid payback trust as described in 42 U.S.C. § 1396p(d)(4)(A) or (C). *See* 42 U.S.C. § 1382b(e)(4)-(5); POMS SI 01120.203. If a trust meets the definition of a Medicaid payback trust, the regular resource rules still apply, and the trust will be a resource if: (1) it is revocable; (2)

the claimant can compel the trustee to use the funds for her support and maintenance; or (3) the claimant can sell her beneficial interest in the trust. POMS SI 01120.203(B)(1)(a); 01120.200.

The Medicaid payback trust exception for individual trusts applies where a trust created on or after January 1, 2000, (1) is established with the assets of a disabled individual under age 65; (2) is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) expressly provides that any amounts remaining in the trust upon the death of the individual will be distributed first to the state, up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan. *See* POMS 01120.203(B)(1). The "Peggy Jo V~ Discretionary Trust" appears to meet these criteria.

First, the protective order authorizing the establishment of the Trust indicates that Peggy Jo is under age 65. POMS 01120.203(B)(1)(b). The protective order also indicates that Peggy Jo is disabled. POMS 01120.203(B)(1)(c). Further, it appears that the Trust currently consists of Peggy Jo's assets-in particular, assets derived from the December 2005 Amended Judgment of Divorce, including monthly payments from the General Motors pension benefits. Second, the Trust was established by a court and provides that it is for the benefit of Peggy Jo. POMS 01120.203(B)(1)(d)-(e). Third, on the death of Peggy Jo, any remaining funds in the Trust will first be used to reimburse all states where Peggy Jo received medical assistance payments. POMS 01120.203(B)(1)(f). Because the Trust satisfies the Medicaid Trust exception requirements, the Trust is not a countable resource under the statute. Therefore, the regular resource rules apply.

Under these rules, the Trust would not be a resource. Peggy Jo could not revoke the Trust unilaterally because she is not the sole beneficiary of the Trust. *See* Restatement (Second) of Trusts, § 339 (1959) ("If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust...."); *Henderson v. Sherman*, 11 N.W. 153, 156 (Mich. 1882). The Trust provides that, if Peggy Jo does not exercise her limited power of appointment, any remaining residue from the Trust upon Peggy Jo's death after the state is reimbursed and her last expenses are paid, shall be distributed to a limited class of beneficiaries-specifically, to Peggy Jo's children. *See* POMS SI CHI01120.200(D)(3) (remainder of trust assets paid to "heirs at law" presumed, under Michigan law, to create residual beneficiaries). Because the Trust creates a contingent interest in Peggy Jo's children, Peggy Jo is not the sole beneficiary of the Trust and therefore cannot terminate the Trust unilaterally. Secondly, Peggy Jo cannot compel the trustee to use the Trust funds for her support and maintenance. *See* POMS SI CHI01120.200(D)(2) ("If an individual does not have the legal authority to revoke the trust or direct the use of the trust assets . . . the trust principal is not the individual's resource for SSI purposes."). Finally, Peggy Jo could not sell her interest in the Trust, as it would have no market value because the trustee is not obligated to make any payments. *See* Restatement (Third) of Trusts, § 60 and comments c, f.

The next issue is whether the pension benefits from Peggy Jo's ex-husband constitute income for SSI purposes. Under the Qualified Domestic Relations Order (QDRO) entered August 8, 2006, 50% of Peggy Jo's ex-husband's retirement benefits were awarded to Peggy Jo, named as the alternate payee on the retirement plan. Under a severable provision of the QDRO, Peggy Jo's share of the retirement benefits are to be paid to the Trustee of Peggy Jo's special needs trust and not directly to Peggy Jo. However, if the

terms of the severable provision are deemed to be in violation of federal or state law, the severable provision shall be deemed null and void, such that Peggy Jo would again be eligible to receive her portion of the retirement benefits directly.

Under the POMS, retirement benefits are not assignable by law, and therefore are to be considered income. *See* POMS SI 01120.201(J)(1)(c) (Certain payments are not assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. Examples of such non-assignable payments include private pensions under the Employee Retirement Income Security Act (ERISA)). The ERISA statute dictates that benefits under the plan may not be assigned or alienated. 29 U.S.C. § 1056(d)(1). There is only one express exception to this anti-assignment provision: assignment of benefits by a QDRO. *See* 29 U.S.C. § 1056(d)(3)(A).

Peggy Jo's attorney concedes that retirement benefits received by Peggy Jo's husband, as the plan's beneficiary, would constitute income under the SSI rules. However, he argues that the anti-assignment provision of ERISA does not apply to Peggy Jo because she was not the actual employee. Peggy Jo's position is not supported by the ERISA statute or federal case law. Under the ERISA statute, a person who is an alternate payee under a QDRO shall be considered a beneficiary under a retirement plan and, therefore, is subject to the same anti-assignment provision as her husband. *See* 29 U.S.C. § 1056(d)(3)(J). As a beneficiary, Peggy Jo is precluded from assigning her benefits to anyone other than persons specifically defined in the ERISA statute as "alternate payee." The term "alternate payee" is limited to any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of the benefits payable under a plan with respect to such a participant. *See* 29 U.S.C. § 1056(d)(3)(K). There is no provision in ERISA allowing a beneficiary to assign her benefits to a special needs trust, and the Supreme Court has made clear that the QDRO exception to section 1056(d)(1) is to be narrowly construed and is "not subject to judicial expansion." *See Boggs v. Boggs*, 520 U.S. 833 (1997). Although Plaintiff's attorney has argued that the retirement benefits are construed under Michigan state law as an asset of the marriage, ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Therefore, the pension benefits paid to Peggy Jo constitute income to Peggy Jo. POMS SI 00830.160, 01120.020; *see also* POMS SI CHI 01140.215(B)(3).

CONCLUSION

For the foregoing reasons, we conclude that the Trust is not a resource to Peggy Jo, but that the pension payments into the Trust are income to Peggy Jo.

C. PS 07-166 SSI-Review of the Sub-Account of Ricky H~, in the Synod Pooled Disability Trust - REPLY Your Ref: S2D5G6 (H~) Our Ref: 07-0141-NC

DATE: July 2, 2007

1. SYLLABUS

This opinion addresses whether or not the Synod Pooled Disability trust is a resource for SSI purposes. In order to meet the special needs pooled trust exception, a trust must satisfy several criteria. One of those criteria is that the individual trust account be established for the sole benefit of the disabled individual. In this case, there are circumstances where the trustee, during the disabled individual's lifetime, may terminate the trust account and distribute the assets as if the disabled individual had died. This early termination provision violates the requirement that the trust account be established for the sole benefit of the disabled individual. However, the trust contains a savings clause that renders the early termination provision ineffective. For this reason, the trust satisfies all of the special needs exception criteria and is not a countable resource for SSI purposes.

2. OPINION

You asked whether Ricky H~'s sub-account in the Synod Pooled Disability Trust is a resource for purposes of eligibility for Supplemental Security Income (SSI). We have concluded that the trust is not a resource. However, Ricky and the trustee should be advised that we consider certain trust provisions, which could benefit other individuals during Ricky's lifetime, to be void.

BACKGROUND

Synod Residential Services, Inc., which is apparently a non-profit corporation, established the Synod Residential Services Disability Pooled Trust. The trust was intended to be established consistent with 42 U.S.C. § 1396p as a supplemental needs trust. Pooled Trust Agreement § 3.2. The trustee has discretion to expend trust funds for each beneficiary's supplemental needs and has no obligation to provide for any beneficiary's basic support and maintenance. Pooled Trust Agreement Art. III; Joinder Agreement § 1.2.

A sub-account is created in the pooled trust when an individual signs a joinder agreement and contributes funds. Ricky signed an agreement and established a sub-account with his own funds.

Contributions to the trust are irrevocable. Pooled Trust Agreement § 5.1; Joinder Agreement §§ 1.1, 5.4(e). Only the trustee can amend the trust, primarily to ensure that the trust is consistent with the requirements of 42 U.S.C. § 1396p.

The trust recognizes that, if a sub-account in the pooled trust is funded with a beneficiary's own money, federal law requires that, unless the pooled trust retains the funds, any unspent amounts remaining in the sub-account on the death of that beneficiary must be used to reimburse the State for medical services received. Pooled Trust Agreement § 12.2; Joinder Agreement § 3.7. The trust provides that, if the sub-account is funded by the beneficiary, on his or her death, all amounts remaining in the sub-account shall be retained by the pooled trust to benefit other indigent disabled persons. Pooled Trust Agreement § 12.2(b); Joinder Agreement § 3.7.

If the assets in a sub-account are or will become liable for basic maintenance, support, or care that has been provided by a government or agency, the trustee may terminate the sub-account and distribute the assets as if the individual had died. *See* Pooled Trust Agreement § 12.1(a). Under some circumstances the trustee also has discretion to

terminate the trust and to distribute any funds contributed by the beneficiary back to the beneficiary. Pooled Trust Agreement § 12.3.

The tryst states that, notwithstanding the discretionary payments allowable under the trust, trust assets shall not be used in any way that would result in a manner that would result in the reduction or denial of government benefits. Pooled Trust Agreement § 3.5(a). The Joinder Agreement further provides that the trust is "governed by the laws of Michigan, in conformity with the provisions of 42 U.S.C. § 1396p" and that "[t]o the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control." Joinder Agreement § 5.3. The trust provides that if any portion of the trust is held invalid, other provisions of the trust will remain valid and enforceable. Pooled Trust Agreement § 15.2.

DISCUSSION

Under the Social Security Act, a trust established for the benefit of an individual with the assets of that individual on or after January 1, 2000 generally is a resource to the individual, even if the trust is irrevocable, unless a statutory exception applies. 42 U.S.C. § 1382b(e); POMS SI 01120.201(D). There is an exception for pooled trusts, like this one, if certain criteria are met. *See* 42 U.S.C. §§ 1382(b)(e), 1396p(d)(4)(C). However, even if the trust meets an exception to counting it as a resource under the statute, it will still be a resource under the regular resource rules if it is revocable; if the individual can compel the trustee to provide for his support and maintenance; or if there are mandatory disbursements and the individual could sell his beneficial interest in the trust. *See* POMS SI 01120.200(A), (D). Here, the pooled trust meets the pooled trust exception to counting it under the statute, but only because it has a savings clause that renders ineffective any provision that is inconsistent with the statute. The trust is not a resource under the regular resource rules.

To meet the pooled trust exception to counting a trust account under the statute for a disabled person the following conditions must be met:

The trust must be established and maintained by a non-profit association;

The trust must have separate accounts for each beneficiary, although assets may be pooled for investing and management purposes;

The sub-account must be established solely for the benefit of the disabled individual;

The sub-account must be established by the individual, a parent, grandparent, legal guardian or a court; and

The trust must provide that, on the death of the beneficiary, any funds not retained by the trust must be used to reimburse any state for Medicaid payments made for the benefit of the beneficiary during his lifetime.

42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2). Here the only potential problem with the trust appears to be with the third requirement, in that there are some circumstances under which funds in a sub-account could be used other than for the sole benefit of the disabled individual during his lifetime. Specifically, under some circumstances the trustee may, during the disabled individual's lifetime, terminate a sub-account and distribute the assets as if the disabled individual had died. *See* Pooled Trust Agreement § 12.1. In that case, all amounts remaining in the sub-account would be retained by the pooled trust to benefit other indigent disabled persons. Pooled Trust Agreement § 12.2(b); see also Joinder Agreement § 3.7. We have previously advised that

this type of provision is inconsistent with the requirement that the pooled trust account be established solely for the benefit of the disabled individual during that individual's lifetime. *See* POMS PS 01825.039 Ohio (L) (PS 04-003 SSI-Ohio-Review of the Sub-Account of Mary T~, in the Community Fund Management Foundation Pooled Medicaid Payback Trust Your Reference: S2D5G6 OH) (Sept. 23, 2003).

However, the trust also provides that it is governed by the laws of Michigan in conformity with the provisions of 42 U.S.C. § 1396p, and that to the extent that there is a conflict between the terms of the trust and the governing law, the law and regulations shall control. Joinder Agreement at § 5.3; see generally Pooled Trust Agreement § 3.5(a). We have previously advised that this type of provision, if valid under State law, essentially voids any provisions in the trust that are inconsistent with the statutory requirements of 42 U.S.C. § 1396p. *See* POMS PS 01825.016(E) Illinois (PS 05-225 SSI Review of the Sub-Account of Jesus C ~ (~) in the Illinois Disability Pooled Trust). We have also advised that nothing in Michigan law appears to prohibit this type of provision. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI-Michigan-Review of the Sub-Account of Michael J~, ~, in the Elder Law of Michigan, Inc., Pooled Account Trust (Jan. 31, 2007); *see also In re Estate of Butter F v. Page*, 341 N.W.2d 453, 259-60 (Mich. 1983) (courts look to the trust instrument to determine intent regarding the purpose and operation of the trust); RESTATEMENT (THIRD) OF TRUSTS § 4, comment d (2003) (settlor can incorporate terms of statute in a trust). We found no new developments in Michigan law that suggest otherwise. In this case, the trust also provides that, to the extent any provisions are held void, the remainder of the trust provisions will remain valid and enforceable. Pooled Trust Agreement § 15.2. This provides further support for our conclusion that certain trust provisions may be considered void, and that the trust will, nevertheless, continue to operate. Therefore, we can reasonably assume that the termination provision in § 12.1(a) of the trust is void, such that the trust meets the exception to counting it under the statute.

The trust also is not a resource under the regular resource rules. The trust states that it is irrevocable, and there are other remainder beneficiaries to the trust (i.e., the pooled trust beneficiaries) whose consent would be required to revoke the trust. Furthermore, the trustee cannot be compelled to provide for Ricky's support and maintenance, and there are no mandatory disbursements under the trust.

CONCLUSION

For these reasons, we conclude that Ricky's trust account is not a resource under the regular resource rules, and that the trust meets the pooled trust exception to counting it under the statute because the early termination clause, which might otherwise permit other pooled trust beneficiaries to benefit from the funds in his trust during his lifetime, should be considered void. We recommend, however, that you advise Ricky and the trustee that the Agency considers Section 12.1(a) of the pooled trust agreement to be void.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Suzanne L~ D~
Assistant Regional Counsel

D. PS 07-135 SSI-Michigan-Review of the Trust Agreement for the Benefit of Elaine M~, ~ REPLY Your Reference: S2D5G6, SI 2-1-3 MI (M~) Our Reference: 07-0191/561673

DATE: May 15, 2007

1. SYLLABUS

This precedent is included because of the changes made in Michigan law in 1998 and effective in 04/2000. The change in Michigan's law retroactively opens the door for creating a contingent remainder in an individual's estate and, therefore, the individual is no longer the sole beneficiary of the trust. This specific Trust was created in 1993 with only references to distributions upon death to "those persons entitled to a share in her estate" the new Michigan law "expressly abolished the doctrine of worthier title, both as a rule of law and as a rule of construction." Hence, this Trust is considered irrevocable and meeting all other criteria it is not a countable resource.

2. OPINION

You have request an opinion whether a Trust Agreement is a resource of Elaine M~ for purposes of determining her SSI eligibility. We have reviewed the documents that you provided and concluded that, for the reasons stated below, the Trust Agreement is not a resource of Elaine M~.

BACKGROUND

According to the Declaration of Trust and Trust Agreement ("Trust Agreement"), Elaine M~ attorney and another attorney made the trust agreement on December 7, 1993, and named themselves as Trustees. Trust Agreement, p.1. Funds belonging to Ms. M~ from the settlement of a lawsuit established the trust. Trust Agreement, p. 1. The Trust Agreement states that because the trust is intended for the primary benefit of Ms. M~, it is only incidentally for the benefit of those to receive the balance of the trust upon her death. Trust Agreement, Art. Five, A(3), p. 5.

The trust declaration provides that its express intention is to provide benefits to supplement those which may otherwise be available to Ms. M~ form various sources, including insurance benefits and governmentally sponsored programs. Trust Agreement, p. 2. It further states that it is intended to benefit Ms. M~ by providing for her extra and supplemental needs, over and above benefits which she may otherwise be entitled to receive from any governmental or private programs as a result of her disabilities. Trust Agreement, Art. Five, A, p. 4. The trust document provides that, during Ms. M~ lifetime, any portion of the net income or principal of the Trust may, at the sole discretion of the Trustee, be paid for her benefit, or for the benefit of her issue, if any, and any and all discretionary distributions shall be based primarily upon the needs of Ms. M~. Trust Agreement, Art. Five, p. 4. The trust provides that no trust income or principal shall be paid or expended if the Trustee determines there are sufficient resources available to her

for her care, comfort, and welfare from any governmental or private programs. Trust Agreement, Art. Five, A(2), p. 5. The Trust Agreement states that, under no circumstances, shall Ms. M~ have the power or authority to demand any distribution from the Trustee, who is under no obligation, implied or otherwise, to make any distributions to her. Trust Agreement, Art. Five, C(2), p. 6. The trust declaration contains a spendthrift provision that protects the trust assets from claims by a beneficiary's creditors and forbids any beneficiary from selling or in any other manner disposing of her interest in the trust principal or income. Trust Agreement, Art. Seven, p. 10-11.

The Trust Agreement provides that, during Ms. M~ lifetime, the trust may be amended, provided that any modification shall always be in Ms. M~ best interest and subject to the prior approval of the probate court having jurisdiction over her estate. Trust Agreement, Art. Three, p.3.

At Ms. M~ death, if funds remain in the trust, the Trustee is authorized, but not required, to pay all estate, inheritance or other similar taxes which may be imposed on Ms. M~ estate, together with the expenses of her last illness, funeral and burial costs, enforceable debts and reasonable administrative expenses. Trust Agreement, Art. Six, A, p. 9-10. The trust further provides that all of the rest of the trust estate shall be distributed to the estate of Ms. M~, deceased, and distributed to those persons who are determined to be entitled to share in her estate by the court having jurisdiction over her estate. Trust Agreement, Art. Six, B, p. 10.

DISCUSSION

The pertinent SSI regulations provide at 20 C.F.R. § 416.1201 that:

resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. . . .

Therefore, if an individual is able to obtain funds or convert property to cash to be used for her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility determinations. Trust assets are a resource to the individual if he or she can revoke the trust and use the assets to meet his or her needs for food, clothing, and shelter or if the individual can direct the use of the trust principle for his or her support and maintenance under the terms of the trust or sell her beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a).

The spendthrift provision would not prevent Ms. M~ from selling her beneficial interest in the Trust since she is the Grantor of the Trust. *See Restatement (Third) of Trusts* § 58(2). However, her interest in the Trust would have no market value, since it is a discretionary trust for her benefit. Under the terms of the Trust, Ms. M~ also does not have any authority to direct the payment of Trust principal for her support and maintenance. Rather, the Trustee has the discretion to make payments from the Trust and Ms. M~ does not have the power or authority to demand any distribution from the Trustee. *See* Trust Agreement, Art. Five, p. 4; Art. Five, C, p. 6. Further, the Trust Agreement explicitly precludes the Trustee from using any of the trust funds for Ms. M~ basic support, which would otherwise be provided for at public expense. *See* Trust Agreement, Art. Five, A(2), C(2)-(3), p. 6-7. Ms. M~ does not have any power to direct

payment from the Trust, and the Trustee cannot use funds for Ms. M~ basic support. Therefore, the Trust should not be considered a countable resource for this reason. *See* 20 C.F.R. § 416.1201; POMS SI 01120.200(D)(1)(a).

As stated above, the Trust may also be considered a resource if Ms. M~ can revoke it and use the funds for her support and maintenance. The Trust does not provide whether it is revocable, but states that it may be amended, provided that any modification shall always be in Ms. M~ best interest and subject to the prior approval of the probate court having jurisdiction over her estate. See Trust Agreement, Art. Three, p. 3. Therefore, while it might appear that Ms. M~ has the power to amend the Trust, she cannot do so unilaterally, and the probate court would approve a request for amendment only if it concluded it was in her best interest. In determining Ms. M~ best interests, the court might consider the intent and purpose of the Trust to protect her eligibility for benefits.

Nor is the Trust otherwise revocable. Because the Trust was funded with the proceeds of a lawsuit settlement brought on Ms. M~ behalf, she is the Grantor. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm.-MOS, Chicago, *Review of Trust for Stephanie Sue E~* (9/27/99) ("E~ Review"); *In re J~* Trust, 479 N.W. 2d 25, 30 (Mich. App. 1991). In general, where a grantor is also the sole beneficiary of the trust, she can revoke or compel termination of the trust. *See Restatement (Second) of Trusts* § 339, comment a (1959); POMS SI 01120.200(D)(3). The issue then becomes whether Ms. M~ is the sole beneficiary of the trust. If a grantor who is also a beneficiary manifests an intention to create a vested or contingent interest in someone other than herself, she is not the sole beneficiary. *See Restatement (Second) of Trusts* § 339, comment b. Where a grantor is not the sole beneficiary, she cannot revoke the trust without the consent of other beneficiaries. We have previously advised that these general trust principles apply in Michigan. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm. - MOS, Chicago, *Six State Synopsis of Trust Laws* (2/26/92); *E~ Review*; *H~ v. H~*, 543 N.W.2d 19, 20 (Mich. App. 1995) (even irrevocable trust may be terminated with consent of grantor and all beneficiaries).

In the past, the law has presumed that no additional beneficiaries were intended when a grantor transfers property in trust to himself for life and, upon her death, to her heirs or next of kin (doctrine of worthier title). *See Restatement (Second) of Trusts* § 127, comment b (1959). However, in 1998, the Michigan legislature expressly abolished the doctrine of worthier title, both as a rule of law and as a rule of construction. Mich. Comp. Laws § 700.2719 (2000); Uniform Probate Code § 2-710. Michigan law now provides that language in a governing instrument describing the beneficiaries of a disposition as the transferor's "'heirs', 'heirs at law', 'next of kin', 'distributees', 'relatives', or 'family' or language of similar import, does not create or presumptively create a reversionary interest in the transferor." Mich. Comp. Laws § 700.2719 (2000). These provisions took effect on April 1, 2000, but the effective date provision states, "a rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent." *Id.* at § 700.8101(e). We have found no reported case law interpreting these provisions. While this is a close case, we believe that under this rule of construction, a court would likely find that the Trust creates a contingent remainder in the distributees of Ms. M~ estate. Ms. M~, therefore, is not the sole beneficiary of the trust. Therefore, she alone cannot revoke the trust.

CONCLUSION

Under current Michigan law, Ms. M~ would not be considered the sole beneficiary of the Trust. Therefore, she does not have the power to revoke the Trust. While it might appear that Ms. M~ has the power to amend the Trust, it does not seem that she would be able to amend it unilaterally. Finally, Ms. M~ does not have any power to compel the Trustee to use Trust principal or income for her support and maintenance and her beneficial interest in the trust would not have any marketable value. Therefore, the Trust is not a countable resource for SSI purposes. Distributions to Ms. M~ or for her benefit, however, may constitute unearned income in the month in which they are received, *see* 20 C.F.R. §§ 416.1121-416.1124, or cause the "presumed value rule" or "one-third reduction rule" to reduce Ms. M~ benefits. *See* 20 C.F.R. §§ 416.1130-1141; *see also* POMS SI 01120.200.

E. PS 06-142 SSI - Michigan - Review of the Life Insurance Funded Burial Trust for Barbara V~ D~ - REPLY Our Ref: 05-0199 Your Ref: S2D5G6, SI 2-1-4 MI (V~ D~)

DATE: May 24, 2006

1. SYLLABUS

This opinion evaluates whether a life insurance funded burial trust is a countable resource to an SSI beneficiary. In January, 2005 the beneficiary purchased a single premium life insurance policy that was subsequently assigned to a funeral home and transferred to a burial trust by the funeral home. A burial trust is not considered to be a countable resource if an individual irrevocably contracts with a provider of funeral services, funds the contract by prepaying for the goods and services, and the funeral provider places the funds in trust. The transaction ultimately resulting in formation of the trust is deemed to be a purchase of goods and services in those instances. In the case evaluated in this opinion the contract between the beneficiary and the funeral home fails to satisfy three of the Michigan state statutory requirements. As such, a Michigan court would likely find the assignment of proceeds is void. In the absence of a valid contract between the beneficiary and the funeral home, none of the burial trust exceptions can apply and the trust is determined to be a countable resource.

2. OPINION

You have asked whether the above-captioned, life insurance funded burial trust is a resource to Marilyn V~ D~ for SSI purposes. We have concluded that the burial trust would be considered a resource.

BACKGROUND

The National Guardian Life (“NGL”) Insurance Policy (“policy”), purchased on January 21, 2005, identifies Barbara J. V~ D~ as the insured and Virginia K~ as the owner. The “Statement of Insured's Incapacity,” signed by Ms. K~ (Ms. V~ D~'s sister), informs that

Ms. V~ D~ is not capable of signing the application for insurance due to mental incompetence and that Ms. K~ has full authority to use the funds tendered as a premium for the policy. The policy has a single premium of $6,653.00 and does not state the minimum death benefit.

In the "Revocable Assignment of Life Insurance Policy and Death Benefit Proceeds," ("Assignment") executed on the same day, Ms. K~ assigned the proceeds of the life insurance policy to the Matthysse-Kuiper-DeGraaf Funeral Directors (Grandeville) to be used to pay for funeral goods and services upon the death of the insured, Ms. V~ D~. The Assignment specified that Ms. K~ could "cancel this assignment by writing to the Insurer any time before the funeral merchandise and services are provided by the Funeral Provider." Ms. K~ also entered into a funeral arrangement agreement with the funeral home.

Also on January 21, 2005, Ms. K~ signed an "Irrevocable Transfer of Ownership." In this document, Ms. K~ "transfer[red] ownership" of the life insurance policy to the funeral home "in return for the promise to deliver funeral services and merchandise," and for the promise "to immediately transfer ownership of the policy to the [National Guardian Life] American Trust." The document specified that Ms. K~ waived "all rights under the policy to surrender it for cash and to obtain a loan against the policy," and that the change in ownership was "permanent."

Under the Trust provisions, Ms. K~, as owner, retains the right to change the funeral provider before the funeral provider delivers the funeral services or merchandise. The Trust clarifies that this right should not be construed as meaning that the owner may regain ownership of the Policy's cash value or to permit the owner to transfer ownership of the Policy from the Trust (*See* 7).

DISCUSSION

As an initial matter, we note that Ms. K~ appears to be acting under a power of attorney on behalf of Ms. V~ D~. Therefore, any actions that Ms. K~ took with respect to the matter at hand should be attributed to Ms. V~ D~.

A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. § 416.1230. Michigan law provides that all life insurance policies must contain notice that the policyholder may cancel the policy and receive prompt refund of any premiums paid during a period of not less than ten days after the date the policyholder receives the policy. Mich. Comp. Laws 500.4015. As part of her application for the policy, Ms. K~ executed a "Notice of Cancellation" which provides that she may cancel the transaction within three business days after the date of the transaction. The statue, however, probably trumps the contrary policy language, and thus, pursuant to state law, the policy should be considered a resource for the first 10 days.

Next, we must determine whether the trust to which the policy was assigned was a resource after the initial, 10-day cancellation period. A trust established by an individual on or after January 1, 2000, as this one was, will be considered a resource, under federal law, if it is revocable, or even if it is irrevocable, to the extent that payments from the trust could be made to or for the benefit of the individual unless certain exceptions are satisfied. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(1)-(2). This rule applies

if payments can be made for the benefit of the individual "under any circumstance, no matter how unlikely or distant in the future." POMS SI 011020.201(D)(2)(b).

But these provisions do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral goods and services and the individual funds the contract by prepaying for the goods and services, and either (1) the funeral provider subsequently places the funds in a trust, or (2) the individual establishes an irrevocable trust, naming the funeral provider as the beneficiary. POMS SI 01120.201(H)(1). The POMS explains that such a transaction is a "purchase of goods and services by the individual" and that the funeral home is considered to have established the trust. *Id.*

In addition, recent guidance from the Office of Income Security Program (OISP) indicates that when an individual irrevocably assigns ownership of a life insurance policy to purchase a revocable burial contract from a funeral provider and the provider places the policy in trust, the transaction constitutes a purchase of goods and services by the individual and not the establishment of a trust by the individual. *See* POMS SI 01120.201(H)(2) (third category of cases where "an individual enters into a revocable funeral contract with a funeral provider, even if the funeral provider places the money in a trust"). The subsequent trust created by the funeral provider is considered to be established by the funeral provider and not the individual, and the trust would then fall under the exceptions of POMS SI 01120.201(H)(1).

Significantly, for purposes of assessing Ms. V~ D~'s burial trust, each of these burial-trust exceptions requires that a valid contract exist between the individual and a funeral home. In this case, however, it appears that the Ms. V~ D~'s pre-need funeral arrangement does not meet all the state statutory criteria for a valid "pre-death assignment of the proceeds of a life insurance policy or annuity contract as payment for cemetery or funeral services or goods." Under Michigan law, each requirement must be met or the assignment will be deemed "void." Mich. Comp. Law 500.2080(6). The assignment here does not meet the following three conditions under Mich. Comp. Law 500.2080(6): the assignment does not contain the bold-faced language described in subsection (6)(d); the assignment does not describe the dispute resolution rights required by subsection 6(h); and the assignment does not contain certification that the insured has not contracted with any other funeral home for funeral goods or services, as required by subsection 6(l). *See* Mich. Comp. Law 500.2080(6)(d), (h), (l).

Because these statutory criteria are not met, a Michigan court would almost certainly find the assignment of insurance proceeds was void and, in the absence of an assignment of proceeds, the funeral home could never be paid for any services. Thus, there is no contractual relationship between Ms. V~ D~ and the funeral home. Without a valid contract between Ms. V~ D~ and the funeral home, the burial trust does not meet any of the statutory exceptions in POMS SI 01120.201(H)(1). As such, the statutory trust resource rules apply and the burial trust would be considered a resource to Ms. V~ D~ under 42 U.S.C. § 1382b(e)(3)(B).

CONCLUSION

We advise that the burial trust would be considered a resource to Ms. V~ D~ for SSI purposes. Under Michigan statutory law, an assignment of insurance proceeds as payment for cemetery or funeral services or goods is void unless a variety of criteria are met. In this case, because the funeral contract fails to satisfy three of the statutory

requirements, a Michigan court would likely find the assignment of proceeds void. Because the funeral home could never be paid under such an arrangement, there is no valid contract between Ms. V~ D~ and the funeral home. In the absence of a valid contract, the trust cannot meet any of the burial-trust exceptions outlined in POMS SI 01120.201(H)(1). As such, the trust is a resource to Ms. V~ D~ under the statutory trust resource rules. POMS SI01120.201(D)(2)(a).

F. PS 06-060 SSI-Michigan-Review of Irrevocable Trust Agreement and Assignment of Annuity for Julia Z~ - REPLY Our Ref: 05-0194 Your Ref: S2D5G6, SI 2-1-3 MI (Z~)

DATE: February 3, 2006

1. SYLLABUS

A trust was established on 2/16/05 as a result of a personal injury settlement received by an SSI beneficiary. The settlement resulted in an annuity being purchased from an insurance company and the subsequent annuity payments being irrevocably assigned to the court-ordered trust. The trust language provides that the SSI beneficiary has no access to the trust and cannot direct use of the funds found therein. Language found in the trust dictates that, upon the beneficiary's death, any funds remaining in the trust will be distributed to applicable State Medicaid agencies for reimbursement prior to any payments to the SSI beneficiary's “heirs at law”. A change in Michigan state law effective 4/1/00 establishes that “heirs at law” or similar language constitutes creation of a beneficial, or remainder, interest. Thus, the trust is irrevocable and meets the Medicaid Trust Exception. As such, the trust itself is excluded from countable resources, and the annuity payments irrevocably assigned to the trust are excluded from countable income.

2. OPINION

You asked whether the Julia Z~ Trust, dated February 16, 2005, is a resource to Julia and whether her annuity payments have been irrevocably assigned to the Trust (and thus would not be income) for purposes of determining eligibility for Supplemental Security Income (SSI). We conclude that the trust is not a resource and that the annuity payments have been irrevocably assigned for purposes of SSI eligibility.

BACKGROUND

On November 9, 2004, a settlement was reached in a certain personal injury lawsuit filed on behalf of Julia by her mother and plenary guardian of the person, Della Z~. To effect the settlement agreement, an annuity was purchased from an insurance company providing for a monthly life annuity for Julia in the amount of $637.61 per month, commencing on January 1, 2005. The payee for the annuity is listed as the “Julia K. Z~ Irrevocable Trust.”

After a hearing on February 16, 2005, a Michigan probate court, upon the request of Della, entered an order on March 9, 2005, calling for the establishment of the Julia Z~ Irrevocable Trust, and further ordering that Della, as guardian, should execute the trust for and on behalf of the court. The court also ordered that the net proceeds from a certain personal injury lawsuit filed by Julia, including all future annuity payments, should be paid over to the trust. The court indicated that its order was made after hearing testimony and after reviewing a favorable report from a guardian at litem.

On February 16, 2005, Della, as grantor and trustee, executed the "Irrevocable Declaration of Trust and Trust Agreement for the benefit of Julia Z~." The Trust provides that the trustee, in her sole and uncontrolled discretion, may make payments for Julia's benefit during Julia's lifetime. Article V. Julia has no power to demand distributions. Article V(B)(2). Upon Julia's death, the Trustee will first reimburse all states where Julia has received medical assistance payments for their proportionate share of Medicaid benefits, and will then make certain other payments for taxes, funeral expenses and other debts. Article VI(A). After that, the trustee will pay the residue as Julia appoints in her will, and in default of such an appointment, to Julia's heirs at law.

DISCUSSION

The Trust Is Not a Resource.

Generally, a grantor of a trust (and Julia should be considered the true grantor since she provided the funds for the Trust) can revoke her contributions to the trust if she is also the sole beneficiary of the trust, even if the trust purports to be irrevocable. See POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200; RESTATEMENT (THIRD) OF TRUSTS § 65 & comment a & Reporter's Note (2003). In this case, however, Julia is not the sole beneficiary of the Trust, and she could not unilaterally revoke her contributions to the Trust and recover those assets to use for her support and maintenance. Specifically, the Trust indicates that Julia can appoint the Trust residue by will, and that, in default, the residue goes to her heirs at law. Although it is unclear whether the power of appointment creates a beneficial trust interest, RESTATEMENT (THIRD) OF TRUSTS §§ 44, 46 (2003), the designation of heirs at law clearly does, POMS SI CHI01120.200(D)(3). Accordingly the Trust is irrevocable.

Pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since Julia is the sole beneficiary during her lifetime), unless one of the exceptions in POMS SI 01120.203 applies.

Here, the exception in POMS SI 01120.203(B)(1) (Section 1917(d)(4)(A) of the Act) applies. This exception requires (1) that the trust be established with the assets of an individual under age 65 who is disabled; (2) that the trust be established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) that the trust provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made on behalf of the individual. These elements are satisfied since Julia is under age 65 and disabled; the Trust was established for her benefit by a court; and the Trust provides for reimbursement to Medicaid. We note that the Trust was actually established prior to entry of the court's order, but it was clearly established pursuant to the court's oral directive (on February 15, 2005), which

was later memorialized in the March 2005 written order. And, state law permits a probate court to direct the creation of a trust, so long as certain preliminary findings are made, which we assume was the case here even though the probate court order did not explicitly articulate the findings (e.g., the Trust preamble indicates that the court determined the Trust to be in Julia's best interests). See MICH. COMP. LAWS ANN. §§ 700.5401(3), 700.5407(2)(c)(v), 700.5408(2) (West 2006) (requiring finding that individual is unable to manage property effectively and that trust is in individual's best interests).

However, even if a trust is not a resource under POMS SI 01120.201(D)(2), the Agency applies regular resource counting rules to determine if it is a resource. POMS SI 01120.200, SI 01120.203(B)(1). Under the ordinary resource rules, the trust principal will be a resource if (1) the claimant can revoke the trust and use the assets for her support and maintenance, or (2) the claimant can direct the trustee to pay her the funds or use the funds for his support and maintenance. POMS SI 01120.200(D). In addition, the claimant's interest in the Trust is a resource if it can be sold. POMS SI01120.200(D).

As we have indicated, the Trust is not revocable. Nor does Julia have the power or authority to direct the use of the Trust property for her support and maintenance. Under the terms of the Trust, the Trustee has sole discretion to determine when payments will be made for her benefit. Finally, even if Julia could sell her beneficial interest in the Trust, that interest would have little or no value because the trustee is not required to make any payments for her benefit. See RESTATEMENT (THIRD) OF TRUSTS § 60 & comments e, f. Thus, the Trust is also not a resource under the regular resource rules.

B. The Annuity Payments Paid Directly to the Trust Pursuant to the Court Order Are Not Income to Julia.

Because the Trust is not a resource, the annuity payments made to the trust are not income to Julia if she has irrevocably assigned them to the Trust. POMS SI 01120.200(G)(1)(d). Although the court order states that the annuity payments will be made directly to Della, as trustee, if Julia could ask the court to modify the order so that the payments would be made directly to her, the annuity payments should be considered income to her. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Review of the Marital Settlement Agreement for Patricia J. and Floyd A. H~ and the Patricia J. H~ Special Needs Trust*, at 3-4 (Dec. 4, 2003).

It appears, however, that, as with the creation of the Trust, the court's order with respect to the annuity would have to be based on a finding that, among other things, the annuity assignment was in the best interests of Julia. MICH. COMP. LAWS ANN. § 700.5408(2) (West 2006) (probate court may direct transaction related to protected individual's property and business affairs only if court determines that transaction is in individual's best interests). Indeed, the court appointed a guardian ad litem for Julia, and indicated that it had reviewed the guardian's favorable report before issuing its order (thus indicating careful consideration of Julia's best interests). Accordingly, for Julia to convince the court to redirect the annuity payments to her, she (or Della, her guardian) would have to show that such a change was in her best interests. *Id.* This, however, is unlikely since we are not aware of any change of circumstance since the probate court hearing that would cause the court to reconsider its finding that assigning the annuity payments to the Trust is in Julia's best interests. Therefore, the annuity payments are, at this time, irrevocably assigned to the trust, and thus are not income under POMS SI 01120.200(G)(1).

CONCLUSION

For these reasons, we conclude that the trust is not a resource, and the annuity payments are not income.

PS 01825.026 Minnesota

A. PS 07-125 SSI-Minnesota-Review of 3 versions of the David Lee H~ Special Needs Trust SSN: ~ -REPLY Your Reference: S2D5G6, SI-2-1-3 MN (H~) Our Reference: 07-0117-NC

Date: April 30, 2007

1. SYLLABUS

This opinion evaluates whether a father's use of a minor's UTMA account to establish a trust satisfies the requirements to meet the Medicaid Trust Exception found in Section 1917(d)(4)(A) of the Act. The trust states that the minor beneficiary established the trust with his own funds. However, since the funds originated from an UTMA account to which the minor had ownership, but not legal access, his father is determined to have established the trust for the beneficiary's benefit in his capacity as UTMA custodian. Since an UTMA custodian is analogous to a guardian acting in a financial capacity, there is no requirement to establish a "seed" trust when the beneficiary of the UTMA has no legal right to access the funds. Moreover, the trust meets all other requirements for exclusion under the Medicaid trust exception. As such, the trust is an excluded resource for SSI purposes.

2. OPINION

You have asked us to review and determine whether any of the three trusts entitled "The David Lee H~ Special Needs Trust," which were all established for the benefit of David Lee H~ (David), were resources for purposes of determining David's eligibility for SSI. For the reasons explained below, we conclude none of the trusts were resources to David.

BACKGROUND

On October 24, 2005, "The David Lee H~ Special Needs Trust" was created for the benefit of David. After reviewing this trust, on September 25, 2006, the Agency concluded that the trust was a resource to David because it did not meet one of the Medicaid Trust Exceptions. After the H~'s attorney was advised that the trust was a resource, on November 3, 2006, a revised trust named "The David Lee H~ Special Needs Trust" was created for the benefit of David. And less than two weeks later, on November

16, 2006, the H~'s attorney submitted what appears to be a third version of the trust named "The David Lee H~ Special Needs Trust." We describe all three trusts, in turn.

I. Initial October 24, 2005 Trust

On October 24, 2005, "The David Lee H~ Special Needs Trust" (trust) was established. David was named the settlor while his father, Lee H. H~, was named as the trustee. *See* Art. I, § 1. This special needs trust was funded solely by David's assets, which amounted to $4,000.00 in cash. *See* Schedule A of the October 24, 2005 trust. Thereafter, you advised us that Claims Representative Mary P~ spoke to David's father, Lee H. H~, to clarify how the trust was funded. Mr. H~ stated that the trust was "entirely funded from UTMA accounts." He explained that the UTMA accounts were converted to checks payable to Lee H~, Custodian for David L. H~, and then directly deposited into the trust. For purposes of our analysis, we presume that the information Mr. H~ gave Ms. P~ is accurate.

The trust stated that its purpose was to supplement, but not to supplant, whatever benefits and services David might receive as a result of his disability from any local, state, or federal government or any other private agency. Trust Art. 2 § 7.

The trust provided that it was irrevocable, except upon approval by the District Court specifically authorized by the trust (in Hennepin County, Minnesota). Trust Art. 7 § 1. The trust also provided that the trustee had sole and absolute discretion to make distributions from the trust. Trust Art. 2 § 1. The trust did not provide for any mandatory periodic payments; rather, the trust indicated that it would be used for David's special needs, from time to time. Trust Art. 2 § 1. The special needs were described as referring to David's reasonable living expenses for maintaining his good health, safety, and welfare when such requisites were not being provided by any governmental agency. Trust Art. 2 § 1.

The trust provided that it would terminate upon David's death. Trust Art. 3 § 1. Upon the trust's termination, the assets would be used to repay the Minnesota Department of Human Services in an amount equal to the total medical assistance paid on behalf of David. Trust Art. 3 § 1 A. If any assets remained after reimbursement to the state of Minnesota, the assets would then be used to pay reasonable administrative expenses, attorney's fees, and trustee's fees, with a provision that administrative expenses, attorney's fees, and trustee's fees could be paid prior to reimbursing the state if approved by the Department of Human Services or a probate court (with advance notice to the Department of Human Services). Trust Art. 3 § 1 B & C. Any remaining assets would be used to pay for David's funeral expenses, last bills, taxes, and valid debts and then to David's heirs (as determined by Minnesota state law). Trust Art. 3 § 1 D & E.

The trust indicated that its terms were to be construed under Minnesota law. Trust Art. 2 § 2; Art 3 § 1 E; Art 4 § 8.

After reviewing this trust, on September 25, 2006, the Agency concluded that the trust was a resource to David because the trust did not meet one of the Medicaid Trust Exceptions, namely, the trust was established by David, himself, and not by a parent, grandparent, legal guardian, or court-as required by the Social Security Act. *See* 42 U.S.C. § 1396p(d)(4)(A), POMS SI 01120.203.

II. Revised November 3, 2006 Trust

On November 3, 2006, David's father Lee H. H~ created a second version of "The David Lee H~ Special Needs Trust." This November 3, 2006 trust differed from the October 24, 2005 trust of the same name in only one way. In the November 3, 2006 trust, David's father was named the sole settlor (instead of only David). See Art. I, § 1 of November 3, 2006 trust. All other provisions of the November 3, 2006 were identical to the October 24, 2005 trust. Mr. H~ submitted this revised November 3, 2006 trust to the Agency for approval, but before obtaining any opinion as to the validity of the November 3, 2006 trust, he created and submitted to the Agency another revised trust in its place: the trust dated November 16, 2006.

III. Revised November 16, 2006 Trust

On November 16, 2006, David's father, Lee H. H~, created a third version of "The David Lee H~ Special Needs Trust." This November 16, 2006 trust differed from the October 24, 2005 trust in two ways. Like the November 3, 2006 trust, the November 16, 2006 trust named David's father as the sole settlor. See Art. I, § 1 of November 16, 2006 trust. The second difference between the trusts was that the November 16, 2006 trust was no longer funded solely by David's assets. In this trust, David's father had added $100.00 of his own funds into the trust. See Schedule A of the November 16, 2006. All other provisions of the November 16, 2006 were identical to the October 24, 2005 trust.

DISCUSSION

Here, the trust funds for all three trusts came from David's UTMA account. The records you provided us show that David had not yet reached the age of majority pursuant to the Minnesota UTMA statute; he would turn 21 on November 30, 2007. See MN UTMA § 527.21. However, even though David had not yet reached the age of majority when David's father transferred his UTMA funds into the three trusts, the portion of the trust corpus (of each trust) stemming from David's UTMA account should nevertheless be considered as established with David's assets since the UTMA account was held by a custodian-his father-with legal authority to act on David's behalf with regard to the money. *See* POMS SI 01120.201B.2 ("asset" includes "any other payment or property to which the individual . . . is entitled, but does not receive or have access to because of action by . . . a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse . . ..)." As such, the trusts, which originated from David's UTMA account, were established with David's assets. *See* POMS SI 01120.201B.7.

I. October 24, 2005 Trust

As explained below, we believe that the October 24, 2005 trust should not be considered a resource to David under the Medicaid Trust exception. POMS SI 01120.203.

Specifically, the Medicaid trust exception for irrevocable individual trusts applies where the trust is:

(1) established with the assets of an individual under age 65 who is disabled;

(2) established for the sole benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

POMS SI 01120.203(B)(1).

As an initial matter, for the Medicaid trust exception to apply, the trust must be irrevocable. POMS SI 01120.203(B)(1)(a). Here, the trust states that it is irrevocable. Trust Art. 7 § 1. Notwithstanding the language that indicates the trust is irrevocable, another provision of the trust further establishes that the trust is indeed irrevocable. Specifically, despite David being named as the settlor of the trust, he is not the sole beneficiary of the trust; rather, the trust named residual beneficiaries-his heirs per Minnesota statute-to receive the remaining trust assets after David's death. Trust Art. 3 § 1 (E); POMS SI CHI 01120.200 (C) & (D)(4). Accordingly, the trust is irrevocable.

Next, regarding the three core requirements of the Medicaid Trust exception, we find that the trust meets all three requirements. The trust meets the first requirement as David is under age 65 (born November 30, 1986) and is disabled. The trust meets the third requirement as the trust provides that, upon David's death, any remaining funds would be used to reimburse the State for medical assistance paid on his behalf during his lifetime. Trust Art. 3 § 1(A).

Regarding the second requirement-that the trust be established for the benefit of David by a parent, grandparent, legal guardian or a court, we believe that although the trust states that David created this trust, David could not have legally established the trust himself. Since the trust funds originated from David's UTMA account and he had not attained the age of majority when this trust was created, David would not legally be able to access the UTMA funds. Only the account custodian, David's father, had access to David's UTMA account. Our interpretation is supported by David's father's statements and documents submitted to CR Mary P~. Specifically, after submitting this October 24, 2005 trust for the Agency's approval, David's father advised the CR that he had converted the funds from David's UTMA account into checks payable to Lee H~, Custodian for David H~ pursuant the Minnesota UTMA statute and then deposited those checks directly into the trust. As such, David's father, as his UTMA custodian, established the trust for the benefit of David.

Next, we do not believe it was necessary for David's father to "seed" the trust with his own money. Here, David's father transferred David's UTMA funds in his capacity as custodian of David's UTMA funds. And while pursuant to the UTMA, the account belonged to David, since he had not reached the age of majority, he had no legal right to access or transfer those funds. Thus, David's father did not merely transfer assets which David could have transferred himself. *See* POMS SI 01120.010 referring to: SI 01110.100 (Despite having an ownership interest, property cannot be a resource if the owner lacks the legal ability to access funds for spending or to convert noncash property into cash). Accordingly, we believe that this situation is akin to a situation where a legal guardian establishes a trust on behalf of an incompetent adult or child. Both a legal guardian and an UTMA custodian are entrusted with the possession and management of the minor or incompetent adult's assets, which the minor or incompetent adult have no legal right to access or transfer. Since we believe that an UTMA custodian is akin to a guardian and since we do not require a guardian to "seed" a trust, an UTMA custodian should also not be required to "seed" a trust when the beneficiary of the UTMA funds has not reached the age of majority and has no legal right to access those funds. Accordingly, we believe that the October 24, 2005 trust met the Medicaid Trust exceptions pursuant to POMS SI 01120.203, and thus the Trust should not be considered David's resource under the statutory trust rules.

Finally, the trust would not be a resource under the regular resource rules because, as noted above, David cannot revoke the trust, and David has no right to direct principal or receive mandatory payments from the trust. POMS SI 01120.200(D).

II. November 3, 2006 Trust

The only difference between the October 24, 2005 trust and the November 3, 2006 trust that replaced it is that the November 3, 2006 trust named David's father, Lee H~ as the settlor of the trust instead of David-as provided by the October 24, 2005 trust. *See* Art. I, § 1 of November 3, 2006 trust. This change in naming the settlor was of no consequence. While David was no longer named the settlor, he should still be considered the true settlor of the trust since the trust was established with funds that legally belonged to him even though he did not have a legal right to access the funds. Thus, for the same reasons the October 24, 2005 trust should not be considered a resource, the November 3, 2006 trust also should not be considered a resource for purposes of David's SSI eligibility.

III. November 16, 2006 Trust

This November 16, 2006 trust differed from the October 24, 2005 trust in only two ways. Like the November 3, 2006 trust, the November 16, 2006 trust named David's father as the sole settlor. *See* Art. I, § 1 of the November 16, 2006 trust. However, as we indicated regarding the November 3, 2006 trust, this change in naming the settlor to someone other than David was of no consequence, as David was the true settlor since the trust was established with funds that legally belonged to David.

The second difference was that the November 16, 2006 trust was no longer funded solely by David's assets; in this trust, David's father had added $100.00 of his own funds into the trust. *See* Schedule A of the November 16, 2006. However, it would not be a resource whether it was seeded or not. For the reasons we stated regarding the October 24, 2005 trust, we do not believe it was necessary for the father to "seed" the trust.

Conclusion

For the reasons discussed above, we conclude that all three versions of the David Lee H~ trust should not be considered David's resources.

B. PS 07-102 Opinion Request Transfer; Treatment of Trust for SSI Resource Purposes (James S~) - REPLY Our Ref: 07-0169

DATE: March 26, 2007

1. SYLLABUS

Note: This trust was established in 1998 and thus was evaluated under the trust rules in place prior to 1/1/00. This precedent may not apply to trusts established after 1/1/00.

This opinion provides an analysis of a special needs trust established for an SSI beneficiary with the proceeds of a court-approved personal injury settlement. Because the trust was established prior to January 1, 2000, the regular trust resource rules found at POMS SI 01120.200 govern the determination of whether the trust is a resource to the

SSI beneficiary. The trust principal would be a countable resource if the SSI beneficiary: (1) has legal authority to revoke or terminate the trust and use the funds to meet food or shelter needs; (2) can direct use of the trust principal for support and maintenance; or (3) can sell beneficial interest in the trust, and the trust provides for mandatory disbursements. Under the provisions of the trust, the SSI beneficiary does not have the authority to effectuate any of the disqualifying provisions listed above and thus the trust is not a countable resource for SSI purposes.

2. OPINION

You asked whether a supplemental needs trust established for the benefit of SSI beneficiary James S~ ("James') is a resource to James, a disabled individual, for SSI purposes. For the reasons discussed below, we conclude that the Trust is not a resource.

Facts

On July 28, 1998, when James was 10 years old, Michael S~, the father of James S~, established the James S~ Irrevocable Supplemental Trust (hereinafter "Trust"). Prior to this, on July 8, 1998, a Minnesota state court apparently "approved" the establishment of the Trust. Trust, at 1, introductory paragraph. According to the information provided by you, it was funded pursuant to a personal injury settlement James received as a minor. Michael S~ was named as Trustee. Trust, at 5, Par. 4.1. The Trustee holds the Trust estate "solely for the benefit" of James to provide reasonable expenses and needs that are not covered by benefits from publicly funded programs. *Id.* at 3, 3.1. But, the Trustee is under no obligation to make any such expenditures. *Id.* at 4, Par. 3.4. Further, the Trustee cannot make distributions for James' food, shelter, clothing, medical care, or other basic necessities that are provided by, or would be provided by, any governmental unit, to the extent that such distributions would supplant publicly funded benefits or render James ineligible for publicly-funded benefits. *Id.* at 4, Par. 3.8. In addition, the Trustee is forbidden from making distributions directly to James, or to any person with legal authority to act on James' behalf with respect to financial matters. *Id.* at 3.5. The Trustee is also required to obtain court permission prior to spending more than $1,000 on a single item or group of related items. *Id.* at 4, Par. 3.4.

Upon James's death, the Trustee shall first pay, subject to approval by the Minnesota Department of Human Services, administrative expenses, attorney fees, and trustee fees related to the administration and termination of the trust. *Id.* at 3, Par. 3.9.1. The Trustee is then required to pay the State of Minnesota a sum equal to the total Medicaid benefits paid on James's behalf. *Id.* at 5, Par. 3.9.2. The Trustee may then pay James's funeral expenses, last bills, taxes, and valid debts. *Id.* at 5, Par. 3.9.3. After paying the above-mentioned expenses and reimbursements, the Trust Agreement terminates, and the residue of the Trust corpus is distributed according to the last will of James, if any; if no will exists, the remainder is distributed according to the laws of intestacy of the State of Minnesota in effect at that time. *Id.* at 5, Par. 3.9.4.

The purpose of the Trust is to supplement all financial and service benefits to which James might become eligible as a result of his disability from any local, county, state or federal agency, or through any corporations, entities or agencies. Trust, at 1, Par. 1.1. The Trust Agreement states that it is "irrevocable" and that James does not have the right, either alone or in conjunction with anyone else, to alter, amend, revoke or terminate the

Trust Agreement. *Id.* at 2, Par. 1.3. The Trust Agreement provides that at no time will the estate of the Trust become available to James, or be placed in his possession. *Id.* at 2, Par. 2.1. The Trustee's ability to amend the Trust Agreement is limited to making changes, with approval of a court of competent jurisdiction, in order to conform to any changes in law or regulation "relating to 42 U.S.C. § 1396, Minn. Stat. § 501B.89, or related statutes, including state and federal statutes that are consistent with the provisions and purposes of the Omnibus Budget Reconciliation Act of 1993 and amendments of such Act, and so that it conforms with any amendment to relevant state or federal laws." *Id.* at 2, Par. 1.4.

Discussion

Because the Trust was established prior to January 1, 2000, the regular trust resource rules found at POMS SI 01120.200 govern the determination of whether the Trust is a resource to James. Specifically, the Trust principal would constitute a resource if James: (1) has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs; (2) can direct the use of the trust principal for his support and maintenance under the terms of the trust; or (3) can sell his beneficial interest in the trust, and the Trust provides for mandatory disbursements. POMS SI 01120.200(D)(1)(a).

A. James cannot revoke or terminate the Trust.

The Trust Agreement expressly provides that James does not have the right, either alone or in conjunction with anyone else, to alter, amend, revoke or terminate the Trust Agreement. *Id.* at 2, Par. 1.3. However, although James' father, Michael, is named as the Settlor in the Trust Agreement, James is in fact the settlor (or grantor) of the trust, since it is his personal injury settlement award that comprises the trust fund. POMS SI 01120.200(B)(2); SICHI01120.200(B). And, if James were both the grantor of the trust and its sole beneficiary, the trust would be revocable even if it states otherwise. POMS SI CHI01120.200(C).

However, James is not the sole beneficiary of the Trust. The Trust Agreement provides that, upon James's death, after payment of various debts and expenses, the Trust terminates. Trust at 3, Par. 3.9.1; 3.9.2; 3.9.3. The remainder of the Trust corpus is then distributed according to the last will of James, and if no will exists, according to the laws of intestacy of the State of Minnesota in effect at that time. *Id.* at 5, Par. 3.9.4. The act of naming heirs at law or persons who would be entitled to inherit via intestacy or through a statute of descent and distribution is sufficient to create residual beneficiaries, and thus the grantor (James) could not unilaterally revoke the Trust. POMS SI CHI01120.200(D)(4); RESTATEMENT (THIRD) OF TRUSTS § 49, comment a(1) (2003) ("[t]here remains only a question of construction, with the presumption that language expressing an apparent intention to create a remainder in someone's heirs is so intended and is to be given that effect.").

B. James cannot direct the use of the Trust assets.

The Trust Agreement expressly provides that at no time will the estate of the Trust become available to James, or be placed in his possession. Trust at 2, Par. 2.1. In addition, the Trustee is forbidden from making distributions directly to James, or to any person with legal authority to act on James' behalf with respect to financial matters. *Id.* at 3.5. Most significantly, the Trustee has complete discretion and is not required to make any particular expenditures. *Id.* at 3, Par. 3.4. Thus, James is unable to direct the use of the Trust assets. *See* POMS SI 01120.200(D)(1)(a).

C. James cannot sell his beneficial interest in the trust.

As noted above, the Trust could also be a resource to James, if the Trust provided for mandatory disbursements to James, and if he were able to sell his beneficial interest in the trust. *See* POMS SI01120.200(D)(1)(a). Here, however, the Trustee's ability to expend sums from the Trust principal is entirely discretionary; therefore, the trustee has no obligation to make any payments to James. Trust at 3, Par. 3.4. In fact, as outlined above, the Trustee is prohibited from making distributions of any kind directly to James or any person with the authority to act on his behalf in financial matters. *Id.* at 3.5. Accordingly, there are no mandatory disbursements, even if James has an alienable interest in the Trust which could be sold.

Conclusion

The principal of James S~ Special Needs Trust should not be considered a resource. Because this self-settled trust was established before January 2000, the regular trust resource rules apply. Under these rules, James cannot terminate or revoke the trust and gain access to the trust property. He cannot direct the use of the assets for his food or shelter needs. Finally, he cannot sell his beneficial interest in the trust. Therefore, the property held in the trust is not a resource for SSI purposes.

C. PS 07-045 SSI-Minnesota-Review of the Jennifer T~ Special Needs Trust, ~, - REPLY Your Ref: SI 2-1-3 MN Our Ref: 06-0056

DATE: January 11, 2007

1. SYLLABUS

This opinion provides detailed analysis of a special needs trust established for an SSI beneficiary with the proceeds of a court-approved personal injury settlement. While the trust purports itself to be irrevocable, the SSI beneficiary is both the settler (grantor) and sole beneficiary of the trust. Since the settler of the trust is also the sole beneficiary, the trust is revocable and, thus, a countable resource for SSI purposes. This remains true despite that fact that the trust otherwise meets the requirements to be excluded under the special needs trust provisions. Naming a residual beneficiary would likely have the effect of making the trust irrevocable, but the deemed death provision would then allow for the residual beneficiary to potentially benefit from the trust during the lifetime of the beneficiary. In that instance, the trust no longer meets the special needs trust requirement dictating that the trust must be for the sole benefit of the beneficiary during their lifetime.

2. OPINION

You asked whether a supplemental needs trust established for the benefit of SSI beneficiary Jennifer ~ (Jennifer) is a resource to Jennifer, a disabled individual, for SSI purposes. For the reasons discussed below, we conclude that the Trust is a resource for purposes of SSI eligibility.

Background

The Jennifer T~ Special Needs Trust was established on June 7, 2004. Trust, at 1, paragraph 1. It was funded with $6,233,872.31, which constitutes the proceeds of a court-approved settlement of a personal injury lawsuit filed on Jennifer's behalf. Trust, at 1, paragraphs 3- 4; Trust, at Appendix A. The named settlors of the Trust are Jennifer's parents, Kyle and Lori T~, and the trustees are Lee H~ and Comerica Bank and Trust, National Association. Trust, at 1, paragraph 1.

The stated purpose of the Trust is to provide for Jennifer's supplemental needs and supplement all financial and service benefits to which Jennifer might become eligible to receive as a result of her disability from any local, county, state or federal agency, or through any corporations, entities or agencies. Trust, at 1, paragraph 6; Article Three, Paragraph 3.1. The Trust Agreement states that it is "irrevocable" and that neither Jennifer nor her parents have the right to alter, amend, revoke or terminate the Trust Agreement. Trust, Article Two, paragraph 2.1. The trustees retain the right to amend the Trust Agreement, with approval of the court, in order to conform to any rule or regulation "relating to 42 U.S.C. § 1396 or related statues, including state statutes which are consistent with the provisions and purposes of the Omnibus Budget Reconciliation Action of 1993 and any amendments of such Act, so that this Trust Agreement conforms with any amendments to relevant state or federal laws." Trust, Article Two, paragraph 2.1. The Trust incorporates, by reference, the provisions of 42 U.S.C. §1396p(c)(2)(B) and "the United States Department of Health and Human Services, Health Care Financing Administration, State Medicaid Manual, Part 3, § 3257.6" (hereafter the Medicaid Manual) "regarding required language or any other requirement for 'special needs trusts.'" Trust, Article Two, paragraph 2.2.1. The Trust Agreement further states:

If this Trust Agreement is deficient in any regard or if any provision in the Trust Agreement is inconsistent with any provision of those sections or any other provision of federal law that establishes requirements for 'special needs' trusts, the required language or other requirement of § 1396p(c)(2)(B) or Section 3257.6 or other applicable federal law shall be deemed to be included in this Trust Agreement and shall prevail to the extent necessary to conform this Trust Agreement to the requirements for 'special needs' trusts, and this Trust Agreement shall be deemed to be amended accordingly, without need for court approval of an amendment pursuant to Article Two of this Trust Agreement

Trust, Article Two, paragraph 2.2.1 The Trust Agreement also contains a similar paragraph, purporting to allow for a deemed amendment of the Trust Agreement so as to conform the Trust Agreement to Chapter 256B, Section 501B.89 of the Minnesota Statutes. Trust, Article Two, paragraph 2.2.2.

The trustees have "sole and absolute discretion" to make distributions from the Trust principal to pay for Jennifer's supplemental needs. Trust, Article Three, paragraphs 3.1, 3.2.2. The trustees shall not make distributions for Jennifer's food, shelter, medical care or other basic necessities that are provided by, or to be provided by, any governmental unit, to the extent that such distributions would replace, reduce or substitute for publicly-funded benefits available to Jennifer or render her ineligible for publicly-funded benefits. Trust, Article Three, paragraph 3.2.3. The trustees may, in their sole and absolute discretion, provide in-kind support and maintenance to her as long as Jennifer remains eligible to receive SSI, Medicaid or other government benefits and her monthly SSI benefit amount is not reduced below $1.00. Trust, Article Three, paragraph 3.2.5. The

Trust assets cannot be assigned or alienated by Jennifer, are not subject to garnishment, attachment, levy or other legal process by Jennifer's creditors, and are not considered an asset of Jennifer's in a bankruptcy proceeding. Trust, Article Three, paragraph 3.2.4.

The Trust shall terminate upon Jennifer's death, or upon the first of the following to occur: (1) a court finds that the Trust renders Jennifer ineligible for benefits from any governmental unit or agency; or (2) the trustees determine that the Trust is or may be subject to garnishment, attachment, execution or bankruptcy proceedings by a creditor of Jennifer. Trust, Article Three, paragraphs 3.2.7, 3.3. If the Trust is terminated prior to Jennifer's death, the Trust assets shall be distributed as if Jennifer were deceased. Trust, Article Three, paragraph 3.2.7. Upon Jennifer's death, the trustees shall pay to the State of Minnesota or other State sums equal to the total Medicaid benefits paid on Jennifer's behalf. If Trust assets remain, the trustees may then pay expenses of Jennifer's funeral and last illness. The trustees shall also pay all reasonable and necessary administrative expenses relating to the termination of the Trust, and these may be paid prior to the sums paid to the State of Minnesota or other State. Trust, Article Three, paragraphs 3.3-3.3.1. After paying the above-mentioned expenses and reimbursements, any assets remaining in the Trust shall be distributed to Jennifer's estate. Trust, Article Three, paragraph 3.3.2.

If any provision of the Trust Agreement is invalid or unenforceable, the remaining provisions shall continue to be fully effective. Trust, Article 5, paragraph 5.2.3. In addition, a court may "modify any provision of this trust to the extent necessary to maintain the eligibility of Jennifer T~ for Medical Assistance or other public benefits." Trust, Article 5, paragraph 6.34.

Discussion

The Trust is Revocable

A trust established by an individual after January 1, 2000 will be considered a resource to her if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1)(a). Although a trust agreement may contain language stating that the trust is irrevocable, see Trust, Article Two, paragraph 2.1, a trust is revocable where the grantor or settlor of the trust is also the sole beneficiary. Restatement (Second) of Trusts § 339, comment a (1959); Restatement (Third) of Trusts § 65 and comment a and Reporter's Note (2003). Here, the Trust Agreement identifies Kyle and Lori T~ as the settlors, but Jennifer is the true settlor of the Trust because the Trust was formed with her assets. POMS SI 1120.200(L)(3).

Jennifer is also the sole beneficiary of the Trust. Jennifer is the only named beneficiary of the Trust during and after her lifetime. On termination of the Trust, and after the State is reimbursed for Medicaid benefits paid to Jennifer, administrative expenses for terminating the Trust are paid, and Jennifer's funeral and last illness expenses are paid, any remaining Trust assets are to be distributed to Jennifer's estate. Trust, Article Three, paragraphs 3.2.7, 3.3.1, 3.3.2. Under *Scott on Trusts*, a settlor is the sole beneficiary when she conveys property in trust to pay the income to her for life, and on her death the trust property is conveyed to her estate. William F. F~, *Scott on Trusts*, § 127.1 (1987). Likewise, under the Restatement (Second) of Trusts, a settlor is the sole beneficiary when she transfers the property in the trust to pay the income to herself for life and on her death the trust principal is transferred to her estate. *See* Restatement (Second) of Trusts, § 127, comment b. Here, the assets are distributed to Jennifer's estate (after the Medicaid

benefits are reimbursed and administrative, funeral and last illness expenses are paid) upon the Trust's termination. Thus, Jennifer is the sole beneficiary of the Trust. Because Jennifer is both the sole beneficiary and the settlor of the Trust, the Trust is revocable and should be considered a resource.

The Trust Modification Provisions Do Not Render The Trust Irrevocable.

The Trust Agreement purports to self-correct certain deficiencies. The Trust provides that, if any provision of the Trust Agreement is inconsistent with the provisions of 42 U.S.C. §1396p(c)(2) (B) or Part 3 § 3257.6 of the Medicaid Manual regarding required language "*and any other requirement for special needs trusts*," the Trust Agreement "shall be deemed to be amended accordingly, without need for court approval" to "conform this Trust to the requirements for 'special needs' trusts." Trust, Article Two, paragraph 2.2.1 (emphasis added). The Trust also allows court-ordered modifications "to the extent necessary" to maintain Jennifer's eligibility for "Medical Assistance or other public benefits." Trust, Article 5, paragraph 6.34. Based on our review, we do not believe that either of these modification provisions can be invoked to make the Trust irrevocable.

As an initial matter, we note that the Trust Agreement is consistent with 42 U.S.C. § 1396p(c)(2) (B) and Part 3, § 3257.6 of the Medicaid Manual. More specifically, 42 U.S.C. § 1396p(c)(2)(B) provides, in pertinent part, that "[a]n individual shall not be ineligible for medical assistance … to the extent that … assets were transferred to a trust established solely for the benefit of an individual under 65 years of age who is disabled." *See* 42 U.S.C. § 1396p(c)(2)(B). Because the Trust was established for Jennifer's sole benefit, the Trust Agreement is consistent with this provision. Part 3, § 3257.6 of the Medicaid Manual provides that, "[i]n order for a trust to be considered for the sole benefit of a disabled individual, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the State, up to the amount of Medicaid benefits paid on the individual's behalf." *See* U.S. Dept. of Health and Human Servs., Health Care Financing Administration State Medicaid Manual, Part 3, § 3257.6. The Manual further states that the trust may provide for disbursal of funds to other beneficiaries, so long as the trust does not permit such disbursals until the State's claim is satisfied. *Id.* Here, the Trust Agreement states that the trustees shall pay the State "sums equal to the total Medicaid benefits paid on Jennifer's behalf" before paying administrative, funeral and last illness expenses and distributing any remaining assets to Jennifer's estate. Trust Article Three, paragraphs 3.3.1, 3.3.2. Consequently, the Trust Agreement is consistent with Part 3, § 3257.6 of the Medicaid Manual and includes the "required language" for special needs trusts. *See* POMS SI 01120.203.

This Trust Would Not Be Considered A Resource If A Residual Beneficiary Were Added.

This Trust is currently revocable. Although the Trust could be made irrevocable by adding a residual beneficiary, this has not yet occurred. Moreover, we do not believe that this task could be accomplished under the Trust Agreement's "self-correction" provisions. The provisions relate to the requirements for special needs trusts and Medicaid benefits. They do not concern irrevocability or residual beneficiaries. Furthermore, we could find no legal authority that would allow a "self-correcting" trust provision to substitute for the settlor's intent to name beneficiaries to the trust. *See* Restatement (Third) of Trusts § 48 ("A person is a beneficiary of a trust if the settler manifests an intention to give the person a beneficial interest…"); *see also Id.* § 44, comment a ("The interests of some

beneficiaries may be valid although the intended interests of others are not, including invalidity for indefiniteness…."). Until a residual beneficiary is added, the Trust remains a resource to Jennifer. I

We caution, however, that if additional residual beneficiaries are added to the Trust, the Trust would not satisfy the Medicaid payback provisions of the statutes, due to the inclusion of the deemed death provision of the Trust in Section 3.2.7. The statute provides that a trust will qualify for the Medicaid payback exception only if it is established for the benefit of the individual. 42 U.S.C. § 1396p(d)(4)(A). The Agency has reasonably interpreted 42 U.S.C. § 1396p(d)(4)(A) to require that the trust be established for the sole benefit of the individual during her lifetime. *See* POMS SI01120.201(F)(2) (defining established for the sole benefit of the individual); Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Illinois-Michigan-Review of the Brian Vasquez Irrevocable OBRA Pay Back Trust, (Nov. 22, 2004). Under paragraph 3.2.7 of the Trust Agreement, Trust assets may, under some circumstances, be distributed to residual beneficiaries of the Trust during Jennifer's lifetime as if she had died. Thus, if residual beneficiaries were added to the Trust, the Trust would not longer be for Jennifer's sole benefit during her lifetime, as required to meet the Medicaid payback provisions of the statute.

Conclusion

Jennifer is the settler and sole beneficiary of the Trust, rendering the Trust revocable and making it a resource to Jennifer, even though it complies with the requirements of special needs trusts. The self-correction provision cannot be used to add a residual beneficiary. Until such time as a residual beneficiary is named, this Trust will constitute a resource to Jennifer. Furthermore, even if a residual beneficiary is named, the Trust will still be a resource unless Paragraph 3.2.7 is removed from the Trust Agreement or otherwise modified so that no other beneficiary could benefit from the Trust during Jennifer's lifetime.

D. PS 06-091 Opinion Request Transfer; Treatment of Trust for SSI Resource Purposes (Ryan A. S~)-Reply Your Reference: S2D8B51:RLM Our Reference: 06-0012

DATE: March 9, 2006

1. SYLLABUS

This opinion involves a transfer by a beneficiary's parents of Uniform Transfer to Minors Act (UTMA) funds to newly established trusts for the beneficiary prior to his attainment of the age of majority. Two issues arose. First, does State law permit the transfer of UTMA funds into a trust and, second, are the trusts resources for SSI purposes? Regional counsel determined that Minnesota law did permit the parents to transfer the UTMA funds and that such action was not a breach of their fiduciary responsibilities. However, because each trust contained a discretionary termination clause in the event of the

beneficiary's noneligibility for public assistance (e.g., SSI), the trusts created a contingent interest in third parties. Because neither trusts would be for the sole benefit of the beneficiary during his lifetime, the statutory trust exceptions discussed at POMS SI 00120.203B.1.d would not apply and the trusts would be resources for SSI purposes (also see SI 01120.201F.2 for a discussion of sole lifetime beneficiary).

2. OPINION

You have asked whether Minnesota state law allows the custodian of a Uniform Transfers to Minors Act (UTMA) account to transfer the funds into a trust, and whether the custodian had legal authority to make the transaction. If so, you have further asked whether the resulting trusts are a resource for the purposes of determining Ryan S~'s (Ryan's) eligibility for Supplemental Security Income. We believe, for the reasons stated below, that the custodians had authority to transfer the UTMA funds, but that the trusts are a resource to Ryan.

FACTS

Ryan, born October 17, 1986, is a resident of Minnesota. According to the information provided, when he was a minor, he received an inheritance from his grandparents, which was placed in a Uniform Transfers to Minors Act (UTMA) account governed by Minnesota law. On October 8, 2004, prior to Ryan's eighteenth birthday, his parents established the “Ryan A. S~ Irrevocable Special Needs Trust” (“Trust”) with $5,980.35 in UTMA funds.

The Trust states that it is irrevocable. Trust, Article One. The Trust's purpose is to supplement Ryan's care which is provided by public assistance. Trust, Article Three. The Trust provides that the Trust shall terminate upon Ryan's death. Trust, Article Three, subsection 7. When Ryan dies, all amounts remaining in the Trust are to be distributed to the State up to the amount of medical assistance paid by the State on his behalf. Trust, Article Three, subsection 8(a). The Trustee may then use the remaining Trust assets for funeral expenses, applicable taxes, and certain fees. Trust, Article Three, subsection 8(b). After these payments, the Trustee is directed to pay the remaining undistributed principal equally to Ryan's issue. Trust, Article Three, subsection 8(c).

The Trust also contains provisions for terminating the Trust prior to Ryan's death. The Trust provides that the Trust shall be terminated “if as a matter of law or regulation, the principal of this trust would ever be deemed to be an available asset for the purpose of determining eligibility for any publicly funded program which our Trustee deems essential to Ryan's well being.” Trust, Article Three, subsection 7(a). In addition, “if a federal, state, county or local administrative or legislative body or court shall determine that this trust disqualifies Ryan from receiving benefits from any publicly funded benefit program which our Trustee deems essential to his well being,” the Trust is terminated. Trust, Article Three, subsection 7(b). Upon such termination, the Trust is to be distributed in the same manner as though Ryan died. Trust, Article Three, subsection 7.

In addition to this main Trust, Ryan's parents also established a second trust with UTMA funds in the amount of $100.01, called the “Ryan A. S~ Irrevocable Supplemental Needs Trust” (“Supplemental Trust”). The provisions of the Supplemental Trust largely mirror the main Trust except that, upon termination of the trust, after the State is reimbursed for

medical assistance, and funeral expenses, applicable taxes and other fees are paid, the remainder will go to the Special Olympics, Saint Paul's Lutheran Church of Perham, and the Boy Scouts of America, in equal amounts. Supplemental Trust, Article Three, subsection 8.

DISCUSSION

1. Transfer of Funds from the UTMA Account to the Trusts Was Proper.

Under Minnesota law, the custodian of an UTMA account "has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property. . . ." Minn. Stat. Ann. § 527.33. However, that power is subject to the limitation that "a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another . . . ." Minn. Stat. Ann § 527.32. The statute further empowers the custodian to "deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor. . . ." Minn. Stat. Ann § 527.34.

These statutory provisions allow the custodian of an UTMA account to transfer funds into a trust account so long as it is not a breach of fiduciary duty. Here, it appears that Ryan's parents, the custodians with the legal authority to act on his behalf, were acting consistent with these statutory provisions and did not breach their fiduciary duty when they transferred the UTMA funds to an irrevocable trust. If Ryan's parents had not so acted, the UTMA funds would have been available to Ryan when he reached the age of majority, which would have affected his eligibility for public assistance programs, including Supplemental Security Income. POMS SI CHI01120.205(A). By placing the UTMA funds in a trust that they anticipated would not count as a resource, Ryan's parents were attempting to maintain his eligibility for public assistance programs and thereby conserve his funds. Although, as discussed below, it appears that their attempt failed, there does not appear to be any indication that they were not observing a reasonable standard of care in creating the trusts. *See In re Estate of King*, 668 N.W.2d 6, 9 (Minn. App. 2003) (no breach of fiduciary duty as long as acting in good faith, from proper motives, and within the bounds of reasonable judgment); *see also Matter of Irrevocable Inter Vivos Trust Established by R.R. Kemske by Trust Agreement Dated October 24, 1969*, 305 N.W.2d 755, 761 (Minn. 1981) (quoting Restatement (Second) of Trusts and noting that whether fiduciary acted prudently depends upon circumstances as they reasonably appeared to him at the time he acted and not at some subsequent time when the conduct may be questioned). Thus, we conclude that Minnesota law allows the transfer of UTMA funds into a trust and that Ryan's parents acted with proper legal authority in making this transfer.

Trusts Are Resources Under Statutory Resource Rules.

Under SSA's statutory trust resource rules, an irrevocable special needs trust established by an individual after January 2000 generally will be considered a resource to him, unless it meets certain exceptions. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2). If the trust is irrevocable, the trust is still a resource if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. The value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a).

As explained above, the Trust document states that it is irrevocable. Trust, Article One. Moreover, even though Ryan should be considered the true settlor of the Trust (since the Trust was established with funds that belonged to him), he is not the sole beneficiary under the Trust or the Supplemental Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200. Specifically, both trusts create contingent remainder interests in third parties (Ryan's issue and various charitable groups). POMS SI CHI01120.200(D)(4). Accordingly, the trusts are irrevocable. POMS SI CHI01120.200(C) ("[I]f the Trust names a residual beneficiary to receive the benefit of the Trust interest after a specific event, usually the death of the primary beneficiary, the Trust is irrevocable. The primary beneficiary cannot unilaterally revoke the Trust; he needs the consent of the residual beneficiary.").

However, pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since Ryan is a beneficiary), unless one of the exceptions in POMS SI 01120.203 applies. However, it does not appear that any of the exceptions in POMS SI 01120.203 are applicable.

In particular, the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), which requires that the trust be established for the *benefit of an individual* by a parent, grandparent, legal guardian or court, would be unavailable. We have been advised by the Office of Program Law that this provision should be interpreted to require that the trust be established for the *sole benefit* of the individual during his or her lifetime. *See* POMS PS 01825.016(D), *PS 05-033 SSI-Illinois-Review of the Brian V~Irrevocable OBRA Pay Back Trust* (termination clause that created contingent interests in third parties rendered the exception under Section 1917(d)(4)(A) of the Act unavailable). Here, however, the Termination provision in Article Three creates contingent interests that could benefit third parties *during the lifetime* of the claimant. Specifically, if the trustee decides to terminate the Trust because it disqualifies Ryan from public benefits, the trust assets might go to Ryan's issue. Because of this contingent interests in third parties, the Trust would not be considered for the sole benefit of Ryan during his lifetime, and thus the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), as well as any other exceptions, would be unavailable. Therefore, the Trust should be considered a resource to Ryan under POMS SI 01120.201(D)(2). For the same reason, the Supplemental Trust would also be considered a resource.

CONCLUSION

We conclude that Minnesota law allows the transfer of UTMA funds into a trust and that Ryan's parents acted with proper legal authority in making this transfer. However, the discretionary termination provisions of the Trusts create contingent interests in third parties. Accordingly, the Trusts would not be for the sole benefit of Ryan during his lifetime, and thus the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), as well as any other exceptions, would be unavailable. Therefore, we believe that the trusts are a resource to Ryan.

PS 01825.039 Ohio

A. PS 08-159 SSI-Review of the Trust and Annuity for Dustin J. E~, ~ - REPLY; Your Ref: S2D5G6, SI 2-1-3 OH (E~); Our Ref: 08-0142-NC

DATE: July 28, 2008

1. SYLLABUS

This opinion evaluates a trust established for a disabled child in 1993. The trust was established by the Probate Court of Crawford County, Ohio, and funded with the proceeds from a personal injury settlement. The terms of the settlement included lump sum deposits to the trust and periodic annuity payments that are irrevocably assigned to the trust. Because the trust was established prior to January 1, 2000, it is evaluated only under regular SSI resource rules. That is, the trust principal is a countable resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. In this case, the trust is irrevocable as stated. Moreover, the individual cannot direct usage of the trust assets because a trustee-appointed Trust Advisory Committee has absolute discretion to make distributions. The periodic annuity payments are not considered countable income because the annuity payments are determined to have been irrevocably assigned under Ohio state law.

CAUTION: Due to a change in Social Security law this precedent may only be applicable for trusts established prior to January 1, 2000.

2. OPINION

You asked (1) whether the Dustin J. E~ Trust is a resource for SSI purposes, and (2) whether the periodic annuity payments are irrevocably assigned to the trust, such that they would not be income to Dustin. For the reasons discussed below, we conclude that the trust is not a resource, and that the periodic annuity payments are not income.

BACKGROUND

I. Creation and Funding of the Trust

On August 25, 1993, the Probate Court of Crawford County, Ohio approved the first of two settlements in a claim by Dustin J. E~, a minor. The Probate Court approved a $200,000 settlement, which included $87,500 to be held in trust for Dustin's benefit. On the same date as it approved the settlement, the Probate Court approved the "Trust Agreement for the Dustin J. E~ Trust" and directed that proceeds of the settlement in the amount of $87,500 be paid to Mid-American National Bank and Trust Company ("Mid-American Bank"), as Trustee of the trust.

On October 13, 1993, the Probate Court approved a second settlement, which included a lump sum of $525,000 as well as periodic payments. As part of the settlement, $100,000 was paid to Mid-American Bank, as Trustee of the trust. Also, the defendant's insurer agreed to make certain periodic payments to Mid-American Bank, as Trustee of the trust. The defendant's insurer assigned its obligation to make these payments to Jamestown Life Insurance Company.

Jamestown Life Insurance Company, in turn, purchased an annuity policy from First Colony Life Insurance Company. Jamestown Life Insurance Company is named as the Owner of the annuity, Dustin is named as the "Measuring Life," and Mid-American Bank, as Trustee of the trust, is named as the Payee. According to the annuity contract, the scheduled payments to Mid-American Bank are as follows: $2,250/month from November 1993 to October 2003; $2,450/month from November 2003 to October 2013; and $2,650/month from November 2013 to October 2023 and as long thereafter as Dustin lives.

The annuity contract further provides that the Owner (*i.e.*, Jamestown Life Insurance Company) may change the Payee, subject to the written consent of any irrevocable Payee. Also, any payments made to the Payee may not be transferred, commuted, or encumbered.

II. Trust Agreement

As noted above, the Dustin J. E~ Trust was established on August 25, 1993, with approval by the Probate Court. According to the trust agreement, Dustin is severely disabled as a result of brain injuries suffered during childbirth, and needs assistance for all his activities of daily living. The purpose of the trust is to provide for management of the funds from the settlements and to provide for Dustin's supplemental care and support. *Trust Agreement,* pp. 3, 6-7. The trust is not intended to replace, interfere with, or reduce other benefits (state, federal, or private) to which Dustin is otherwise entitled. *Trust Agreement,* pp. 3, 4-5, 7.

The trust was funded with the proceeds of Dustin's two court settlements. The trust states that additions may be made to the trust from any source at any time, and shall include the periodic payments set forth in the court approved settlement. *Trust Agreement,* p. 6.

The trust agreement names Mid-American Bank as Trustee. *Trust Agreement,* p. 1. It also names a Trust Advisory Committee, comprised of three individuals. *Trust Agreement,* pp. 1, 11. The Trust Advisory Committee is responsible for determining what discretionary distributions shall be made from the trust, and the Trustee is responsible for the investment and management of the trust estate. *Trust Agreement,* pp. 5-6, 11.

The trust states that it is irrevocable, except as provided in Paragraph III. *Trust Agreement,* p. 4. Paragraph III(B) states that, upon reaching the age of majority or any time thereafter, if a court of competent jurisdiction determines that Dustin is "fully competent and without any legal disability," he has the right to terminate the trust and withdraw its assets for 30 days after receiving written notice of this right. *Trust Agreement,* p. 10.

The Trustee and Trust Advisory Committee have authority to amend the terms of the trust, with court approval, to carry out the intention of the court and the parties in the event that the laws or regulations concerning benefit programs subsequently change. *Trust Agreement,* p. 4.

The Trust Advisory Committee has "absolute and unfettered" discretion with regard to disbursements from the trust. *Trust Agreement*, p. 7. Such disbursement from the trust principal or income shall be made upon agreement of the majority of the Trust Advisory Committee. *Trust Agreement*, p. 17. Moreover, the trust states that Dustin has no interest in either the principal or the income of the trust. *Trust Agreement*, p. 9.

The trust also contains a spendthrift provision, which states that the assets of the trust are not assignable or alienable, and are not subject to any creditor's claims. *Trust Agreement*, p. 9.

The trust terminates upon Dustin's death. After reimbursement to the Trustee and the Trust Advisory Committee for all fees and expenses, any remaining trust assets will be distributed according to the terms of a valid will, if there is one. Otherwise, the remaining assets will be distributed to Dustin's "heirs at law," in accordance with the intestacy laws of the State in which he is residing at the time of his death. *Trust Agreement*, p. 11.

III. April 2008 Probate Court Action

In response to a petition by Dustin's parents for a judgment declaring the intention and meaning of various conflicting language of the trust, the Probate Court issued a judgment entry on April 2, 2008. The court judgment indicated that Huntington National Bank succeeded Mid-American Bank as Trustee.

The court judgment also added a Medicaid payback requirement to the trust. The Probate Court noted the intent of the trust to supplement, and not to interfere with, any public or private benefits Dustin may qualify for as a result of his disabilities. Thus, the Court added a requirement that, if any funds remain in the trust at the time of Dustin's death, and if the State of Ohio has provided any Medicaid or other public program benefits to Dustin that require repayment, then repayment must be made to the State of Ohio up to the level of benefit actually received by him. With this addition, the Probate Court found that the trust meets the requirements of a Medicaid Qualifying Trust pursuant to Ohio Administrative Code § 5101:1-39-27.1(C)(3).

DISCUSSION

I. The Trust is not a Resource

Because the trust was established prior to January 1, 2000, it is evaluated only under the regular resource rules set forth in POMS SI 01120.200. Under the regular resource rules, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the current value of the individual's future interest in mandatory disbursements, if any, may be a resource if it can be sold. *See id.* Applying these rules, the trust is not a resource to Dustin.

First, Dustin cannot revoke the trust. Whether a trust can be revoked or terminated depends on the terms of the trust and the applicable state law. *See* POMS SI 01120.200(D)(2). Here, the trust agreement states that it is irrevocable, with one exception that appears unlikely to ever occur and which is, to a large extent, beyond Dustin's control. *Trust Agreement*, p. 4. Under the exception, upon reaching the age of majority or any time thereafter, Dustin has right to terminate the trust and withdraw its assets if and only if a court of competent jurisdiction determines that he is "fully competent and without any legal disability." *Trust Agreement*, p. 10. However, based on

the information provided to us, it appears that Dustin's disabilities, which include severe mental retardation, are lifelong and will not improve significantly. Thus, it is unlikely that Dustin would ever be declared "fully competent and without any legal disability" by any court.

Nor would Dustin otherwise have authority to revoke the trust. Under the original terms of the trust, any amounts remaining on Dustin's death would be paid to his heirs at law, unless he established a will. Therefore, Dustin could not revoke the trust without the consent of his heirs. *See* Restatement (Third) of Trusts § 49, cmt. a(1) (2003) (presuming that language leaving assets to the grantor's heirs is intended to create a remainder interest in those heirs); *see also* Ohio Rev. Code Ann. § 5804.11 (irrevocable trust generally can be terminated if grantor and all beneficiaries agree). This provision of the trust does not appear to have been reformed or amended by the 2008 judgment by the probate court, since that judgment provided that only those provisions in the original trust that conflicted with the requirements of the state Medicaid payback trust provisions would be considered to have been reformed or amended. Furthermore, assuming the amendment to the trust is valid, the State of Ohio would also likely be considered a beneficiary of the trust, under Ohio law, whose consent would be required to revoke the trust. *See Quinchett v. Massanari*, 185 F. Supp. 2d 845 (S.D. Ohio 2001) (finding State to be an intended beneficiary of trust where trust stated it was "irrevocable," and State law did not require that Medicaid Payback trusts be irrevocable); *In re Rosenbaum*, No. 81213, 2003 WL 1849141 (Ohio Ct. App. 2003) (denying motion to amend trust to list residual beneficiaries in order to qualify for SSI because this would effectively be establishing a will for a ward, which guardians lack authority to do under State law). Therefore, it appears that Dustin lacks the authority to revoke the trust unilaterally.

Second, Dustin cannot direct the use of the trust assets for his support and maintenance. Here, the trust states that the Trust Advisory Committee has absolute discretion to make distributions, and that William has no interest in the trust principal or income. *Trust Agreement*, pp. 7, 9. This language would preclude William from directing the use of the trust assets. Therefore, the trust principal is not a resource. And finally, the trust does not provide for any mandatory disbursements to Dustin, other than the disbursement he could demand at the age of majority if a court has declared him competent. However, it appears unlikely that he could sell this future payment, under Ohio law, since the trust has a spendthrift provision. Moreover, even if he could sell it, it would have little or no current value, given that it is highly unlikely a court will find him competent in the future.

II. The Annuity Payments Are Not Income

Under the resource rules, a legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. *See* POMS SI 01120.200(G)(1)(d). Here, the terms of the October 1993 settlement agreement state that the defendant's insurer would make periodic payments to Mid-American Bank, as Trustee of the trust. Similarly, the annuity contract names Mid-American Bank as the Payee. Moreover, the annuity contract provides that only the Owner of the annuity (*i.e.*, Jamestown Life Insurance Company) has the right to change the Payee. Thus, the annuity payments have been irrevocably assigned to the trust. As such, the annuity payments are not income to Dustin.

CONCLUSION

For the reasons discussed above, we conclude that the Dustin J. E~ Trust is not a resource, and that the periodic annuity payments are not income.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Cristine B~
Assistant Regional Counsel

B. PS 08-150 SSI - Ohio -- Review of Ashley E. D~ Irrevocable Special Needs Trust, ~ - REPLY; Your Reference: SI-2-1-3-OH (D~); Our Reference: 08-0138

DATE: July 8, 2008

1. SYLLABUS

This decision clarifies the issue of the extent of the Medicaid reimbursement. This Trust fails to meet the criteria of a Special Needs Trust because it would limit the amount to be reimbursed to Medicaid at the death of the beneficiary to only the Medicaid paid from the establishment of the Trust. The law requires reimbursement of all the Medicaid funds without regard to any limits on time.

2. OPINION

You asked whether the Ashley D~ Irrevocable Special Needs Trust (trust) is a resource for SSI purposes. We conclude that the trust is a resource because it does not meet the requirements for the statutory Medicaid special needs trust exception.

Background

Ashley inherited $5,000.00 from her aunt several years ago. The inheritance was held in an account in Ashley's name until she attained age 18. On June 23, 2003, Ashley's parents created the trust, depositing into the trust $5,000.00, previously held in Ashley's account, and naming Ashley as the trust beneficiary and Ashley's mother as the trustee. Agreement of Trust, Art. 1.1. The trust is governed by Ohio law. Agreement of Trust, Art. 6. The trust is expressly irrevocable. Agreement of Trust, Art. 2.1. The trust assets are to be used only for Ashley's supplemental services, as defined in the Ohio Admin. Code, § 5123:2-18-01, and are to be distributed consistent with the provisions of the trust and the Ohio Admin. Code, § 5123:2-18-01. Agreement of Trust, Art. 3.2. Trust assets may not be used for any item or service which is provided by any private or governmental agency or organization. Agreement of Trust, Art. 3.2. The trustee is directed to purchase the supplemental services on Ashley's behalf, and the trustee is to make no cash distribution to Ashley, except as otherwise permitted under the Ohio Administrative Code. Agreement of Trust, Art. 3.5.

The trust beneficiary has no right to compel the trustee to make any distribution for maintenance support, make any payment from income or principal, or convert any part of the principal to cash. Agreement of Trust, Art. 3.3. The trust also includes a spendthrift clause, prohibiting the beneficiary from anticipating, assigning, transferring, selling, or encumbering any of the trust assets or making them subject to any creditors' claims or legal process prior to actual receipt by the beneficiary. Agreement of Trust, Art. 3.4.

The Agreement of Trust provides that, upon Ashley's death, the trust terminates and the assets remaining in the trust are to be distributed first for Medicaid payback, to the extent that Medicaid benefits were paid on Ashley's behalf by any state during the existence of the trust. Where more than one state paid Medicaid benefits on Ashley's behalf, payment is to be made to each state, based on the proportionate share of the amount of Medicaid benefits paid by that state to the total amount of Medicaid benefits paid by all states. Agreement of Trust, Art. 3.5(a). Any assets remaining after such Medicaid payback are to be distributed to Ashley's parents. Agreement of Trust, Art. 3.5(b).

The trustee has the power to amend the trust, but only to conform to subsequent changes in Federal or state law and to better effect the purposes of the trust. Agreement of Trust, Art. 4.7.

Discussion

The Social Security Act (the Act) provides that an individual is not eligible for SSI if she has resources that exceed $2,000.00. *See* 42 U.S.C. § 1382(a)(1)(B)(ii), (a), (3)(B). A resource is cash or other liquid assets or real or personal property that an individual, or her spouse, owns and can convert to cash to be used for support and maintenance. 20 C.F.R. § 416.1201(a). Trust property may be a resource for SSI purposes. *See* 20 C.F.R. 42 U.S.C. § 1382b(e); Program Operations Manual System (POMS) SI 01120.200A. This trust is also subject to the statutory provision of Section 1613(e) of the Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e), POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual are considered resources for SSI purposes, even if they are irrevocable. However, there is an exception for certain trusts that comply with 42 U.S.C. § 1396p(d)(4)(A), i.e., the Medicaid special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must: (1) be established with the assets of a disabled individual under age 65; (2) be established for the benefit of the individual by a parent, grandparent, legal guardian, or court; and (3) provide that the state 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 the individual's behalf under a state Medicaid plan. POMS SI 01120.203B.1.a.

Assuming that Ashley is a disabled person under age 65, the first requirement is met because the trust was established with Ashley's funds, i.e., $5,000.00 that Ashley previously inherited from her aunt. The second requirement is also met because the trust was established for Ashley's benefit by her parents. Agreement of Trust, Preamble.

Regarding the third requirement, we note that Article 3.2 of the Agreement of Trust states that the assets shall be distributed consistent with the provisions of Ohio Admin. Code § 5123:2-18-01. That section of the Ohio Administrative Code, dealing with trusts for supplemental services for individuals with mental retardation and developmental disabilities, includes standards for distribution of trust assets both during the beneficiary's

lifetime and upon the death of the beneficiary. Ohio Admin. Code § 5123:2-18-01(E). The standards for distribution upon the death of a beneficiary of a trust governed by that provision require a trustee to disburse the remaining assets of the trust in the following order: (1) for burial expenses for the beneficiary, up to a limit of $5,000.00; (2) a portion equal to at least 50% of the remaining trust assets "pursuant to the terms of the trust" to the state treasurer for deposit into a supplemental services fund for individuals with mental retardation or other developmental disabilities; and (3) the remainder pursuant to the terms of the trust and the direction of the court if a court has jurisdiction over the trust. Ohio Admin. Code § 5123:2-18-01. Thus, Section 5123:2-18-01 does not provide that the first priority for distribution at death is reimbursement for all Medicaid benefits paid by the state. We note, however, that Article 3.2 of the Agreement of Trust, which references Ohio Admin. Code § 5123:2-18-01, refers to use of the trust assets for supplemental services and, thus, it appears to pertain only to distributions from the trust during Ashley's lifetime. We also note that the same paragraph of the Agreement of Trust provides that the assets shall be distributed "consistent with the provisions of 5123:2-18-01 *and this Trust* and shall not be used for any item or service which is provided by any private or government agency or organization. Agreement of Trust, Art. 3.2 (emphasis added). The provisions for termination of the trust and distribution of the assets remaining in the trust at the beneficiary's death are contained in a separate article. Agreement of Trust, Art. 3.5. Therefore, we think it reasonable to conclude that the more specific terms of Article 3.5 of the Agreement of Trust, rather than the general reference to Ohio Admin. Code § 5123:2-18-01 contained in the section dealing with lifetime distributions, more accurately reflect the settlor's intent regarding distribution upon termination of the trust and, therefore, the terms of Article 3.5 of the Agreement of Trust govern the distribution of the trust assets upon Ashley's death.

We conclude, however, that even under Article 3.5 of the Agreement of Trust, the trust does not meet the third requirement for the Medicaid special needs trust exception because Article 3.5 of the Agreement of Trust provides that, at Ashley's death, the trust is to terminate and the remaining assets are to be distributed first to any states that provided Medicaid benefits to Ashley during the existence of the trust. Agreement of Trust, Art. 3.5(a). Because the Agreement of Trust does not contain specific language providing for reimbursement of Medicaid payments made throughout Ashley's lifetime, rather than merely during the existence of the trust, the trust does not comply with the Medicaid special needs trust exception requirements. *See* 42 U.S.C. § 1396p(d)(4)(A) (trust must provide that Medicaid is reimbursed for "the total medical assistance paid"); POMS PS 01825.039 A., PS 08-075 SSI-Ohio: Review of Sub-Account of Nathan H~ in the Ohio Community Pooled Flexible Spending Trust (provision for reimbursement for Medicaid assistance since establishment of trust did not comply with special needs trust exception requirements); Memorandum from Regional Chief Counsel, Reg. V, Chicago to Asst. Reg. Comm'r-MOS, Chicago, Reg. V, *SSI-Ohio Review of Reconsideration Request on the Joanne F. M. Trust Agreement* at 5 (same). Therefore, the trust is a resource under the statutory trust provisions.

If the Agreement of Trust were amended to require reimbursement of all Medicaid benefits paid during Ashley's lifetime, rather than merely the Medicaid benefits paid during the existence of the trust, the trust would not be considered a resource, either under the statutory trust provisions or under the regular resource rules. Under the regular

resource rules, a trust is a resource if the individual can revoke or terminate the trust and obtain unrestricted access to the trust assets, or if the individual can direct the use of the trust principal for her support and maintenance. Also, if there are mandatory disbursements, and the individual can sell the right to these payments, their current value may be a resource. POMS SI 01120.201. We conclude that the trust would not be resource to Ashley under the regular resource rules. The terms of the Agreement of Trust do not give Ashley the power to revoke this trust, as the trust is expressly irrevocable. Agreement of Trust, Art. 2.1. Under Ohio law, a trust that meets the Medicaid special needs trust exception provisions of 42 U.S.C. § 13960(d)(4) is irrevocable if the terms of the trust prohibit the grantor from revoking it, whether or not the settlor's estate or the settlor's heirs are named as the remainder beneficiary or beneficiaries of the trust upon the settlor's death. OHIO REV. CODE ANN. § 5804.18. Nor can Ashley compel the trustee to use the trust funds for her support and maintenance. Agreement of Trust, Art. 3.2 (assets to be used only for supplemental services), Art. 3.3 (beneficiary has no right to compel the Trustee to furnish maintenance support, make payments from principal or income or convert any portion of the principal into cash). Finally, regardless of whether Ashley could sell her interest in the trust, it would have no market value, because the trustee is not obligated to make any payments. Therefore, the trust would not be a resource under the regular resource rules.

Conclusion

We conclude that the trust is a resource for SSI purposes because it does not meet the Medicaid special needs trust exception requirements. If the Agreement of Trust were amended to require reimbursement to the states for all Medicaid payments made during Ashley's lifetime, however, the trust would not be considered a resource, although clarification as to the applicability of the Ohio Admin. Code § 5128:2-18-01 with regard to distributions at Ashley's death would be desirable.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Nancy L. B~
Assistant Regional Counsel

C. PS 08-075 SSI-Ohio: Review of Sub-Account of Nathan H~, ~, in the Ohio Community Pooled Flexible Spending Trust -- Reply Our Reference: 08-060 Your Reference: SI 2-1-3 OH (Ohio Community)

DATE: March 11, 2008

1. SYLLABUS

The opinion in this case examines whether or not the pooled trust account in question is a countable resource for SSI purposes. There is an exception to counting a pooled trust as a resource if certain criteria are met. One of the requirements is that to the extent any

amounts remaining in the beneficiary's account upon the death are not retained by the trust, the trust will pay to the State the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan. The pooled trust in this case frustrates the Medicaid payback requirement in two respects. First, the trust allows for payment of unallowable taxes, fees, and expenses before Medicaid reimbursement. Second, the trust limits Medicaid reimbursement to the time period after the establishment of the individual's trust account. For these reasons the trust does qualify for the pooled trust exception and is a countable resource for SSI purposes.

2. OPINION

You asked whether the account, established for the benefit of Nathan H~ (Nathan) in the Ohio Pooled Flexible-Spending Trust is a resource for SSI purposes. We conclude that it is a resource because the terms of the trust do not meet the Medicaid payback requirements.

BACKGROUND

In March 2007, the Probate Court of Auglaize County, Ohio approved a settlement in which Nathan, a minor, was awarded $33,000.00. Entry Approving Court Settlement (Settlement). The Court ordered that, out of the settlement amount, $3,841.96 would be paid to the Treasurer of the State of Ohio for a subrogation claim for medical and other expenses and $13,741.78 would be paid for Nathan's benefit, to be structured "as set forth in the documents attached to the application." Settlement. Although the documents to which the Court referred were not submitted to us, we assume they provided that the money for Nathan's benefit be placed in trust, as you submitted an affidavit, signed by an attorney, reciting that a check for $13,741.78 was provided to the Disability Foundation to fund a flexible-spending trust for Nathan.

You submitted a copy of an Account Agreement, executed by Nathan's mother and legal guardian on December 28, 2006. The Account Agreement establishes an account for Nathan within the Ohio Community Pooled Flexible-Spending Trust and lists Nathan as a "qualified donor" and as an "individual with disabilities" who is receiving SSI. Account Agreement at 1. Nathan's mother is listed as his personal representative. Account Agreement at 2. The Agreement recites that $12,991.78 was transferred by the qualified donor. Account Agreement at 3. Section 7 acknowledges that, at Nathan's death, 25% of any funds remaining in Nathan's account will be retained by the Disability Foundation, Inc., for Disability Programs and Services. It further states that 100% of any funds remaining in the account be "retained by the Trust, for Disability Programs and Services." Account Agreement at 3.

You also submitted a copy of the Agreement of Trust (Trust Agreement) between the Disability Foundation, Inc., as Settlor and Distribution Trustee, and an Ohio bank, as Trustee, creating the Ohio Community Pooled Flexible-Spending Trust ("the Trust"), to be managed pursuant to 42 U.S.C. § 1396p(d)(4)(C), the Ohio Revised Code Annotated § 5111.151(F)(3), and the Ohio Administrative Code § 5101:1-39-27.1(c)(3)(c). Trust Agreement at § 1. The purpose of the Trust is to provide for the supplemental needs of individuals with disabilities, without supplanting benefits or services otherwise provided by local, state, or federal entities. Trust Agreement at § 1. The Trust Agreement provides

for the establishment of an Account for each individual with disabilities, by completion of an account agreement. Trust Agreement at §§ 1(D), 2. The trustee is empowered to place property from the accounts in one or more common funds for investment purposes, assigning the appropriate interest in the common funds to each separate account. Trust Agreement at § 9.

Until termination of the Account, the trustee is directed to use the income and principal of the Account solely for the supplemental needs of the individual, making distributions only where the Distribution Trustee deems them advisable. Trust Agreement at § 2(A). Distributions may be made directly to the individual, to his personal representative, legal guardian, or custodian, or directly in payment of expenses incurred for supplemental needs. Trust Agreement at § 8. The Account is terminated at the death of the individual, at which time the Trustee is to pay "fees, taxes, or expenses properly chargeable to the Account of the Individual with Disabilities" and then distribute any remaining property attributable to the Account as follows:

a. 25% is to be retained by the Trust to be used for Disability Programs and Services, as the Distribution Trustee may deem advisable;
b. 75% is to be distributed by one or both of following methods, as designated in the Account Agreement:
    a. to each State that has provided medical assistance to the individual "during the existence of the Account since the Account was established" a proportionate share of the assets remaining in the Account up to an amount equal to the total assistance paid on the disabled individual's behalf under a State Plan pursuant to 42 U.S.C. §1396 et seq., to the extent permitted by law and required by law; and/or
    b. to a separate share of the trust to be used for Disability Programs and Services;
c. If the qualified donor does not make a designation in the Account Agreement, the remaining property in the Account is distributed to a separate account to be used for Disability Programs and Services as the Distribution Trustee from time to time may deem advisable.

Trust Agreement at §2(B).

The Trust is explicitly irrevocable. Trust Agreement at § 12. The Settlor, i.e., the Disability Foundation, Inc., may amend the provisions of the Trust only to further the purposes of the trust, but the Settlor has no power to terminate the Trust, unless no Account is established. Trust Agreement at § 12. The Trust Agreement provides that the disabled individual cannot assign, anticipate, alienate, or otherwise transfer any right or interest in the Account Agreement. Trust Agreement at § 8. No right of termination or amendment is given to the disabled individual. *See* Trust Agreement at § 12.

DISCUSSION

The Social Security Act (the Act) provides that an individual is not eligible for SSI if he has resources that exceed $2,000. *See* 42 U.S.C. § 1382(a)(1)(B)(ii), (a), (3)(B). A resource is cash or other liquid assets or real or personal property that an individual, or his spouse, owns and can convert to cash to be used for support and maintenance. 20 C.F.R. § 416.1201(a). Trust property may be a resource for SSI purposes. *See* 42 U.S.C. § 1382b(e); Program Operations Manual System (POMS) SI 01120.200A. Under the Act,

a trust created for the benefit of an individual with the assets of that individual on or before January 1, 2000 generally is a resource, even if the trust is irrevocable, as it is in this case, unless a statutory exception applies. *See* 42 U.S.C. §§ 1382b(e); POMS SI 01120.201D. *See* Trust Agreement § 12. There is an exception for pooled trusts, such as the trust involved here, but only if certain criteria are met. *See* 42 U.S.C. §§ 1382b(e), 1396p(d)(4)(C). Even if a trust meets an exception under the statute, however, it may still be a resource under the regular resource rules if the trust is revocable, or if the trust is irrevocable and the individual can compel the trustee to provide for his support and maintenance, or if there are mandatory disbursements and the individual could sell his beneficial interest in the trust. *See* POMS SI 01120.200A, D.

To meet the statutory pooled trust exception to counting a trust as a resource, the individual whose assets are contained in the trust must be disabled under the Act, and the following conditions must be met:

a. The trust must be established and maintained by a non-profit association;
b. The trust must have separate accounts for each beneficiary, although assets may be pooled for investment and management purposes;
c. The separate account in the trust must be established solely for the benefit of the disabled individual;
d. The separate account must be established by the individual, by the individual's parent, grandparent, or legal guardian, or by a court; and
e. The trust must provide that, on the death of the beneficiary, any funds not retained by the trust must be used to reimburse any state for Medicaid payments made for the benefit of the beneficiary during his lifetime.

42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203B.2.

Here, the Trust is irrevocable. We assume, for purposes of this memorandum, that Nathan meets the Act's SSI disability requirements. The trust was established by the Disability Foundation, Inc., which is a non-profit organization. Trust Agreement at Preamble. The trust has separate accounts for each beneficiary, although the property of those separate accounts can be pooled into a common fund for investment and management purposes. Trust Agreement at §§ 1(D), 2, 9. Therefore, the first two requirements for the pooled trust exception are met. The third and fourth requirements are also met, as Nathan's mother established the Account for Nathan, and there is no provision by which any distributions can be made during Nathan's lifetime, except for Nathan's supplemental needs. Trust Agreement at § 2(A).

The Trust Agreement, however, does not meet the fifth requirement for the pooled trust exception. As an initial matter, we note that the Trust Agreement provides for "payment of fees, taxes, or expenses properly chargeable to the Account of the Individual with Disabilities" prior to reimbursement of the State for medical assistance provided. Trust Agreement at §2(B). It is allowable, prior to reimbursement of the State, to pay State and Federal taxes due from the trust because of the death of a beneficiary, as well as reasonable fees for administration of the trust estate, such as a trust accounting to a court and completion and filing of documents or other required actions associated with terminating or wrapping up the trust account. *See* POMS SI 01120.203B.3.a. However, it is not entirely clear from the language in Section 2(B) of the Trust Agreement that payment prior to reimbursing the State for medical assistance would be limited to those

payments permitted under the POMS. The term "fees, taxes, and expenses" in Section 2(B) might be interpreted to include expenses not allowable under the pooled trust exception, such as debts owed to third parties by the trust or funeral expenses, as well as taxes "chargeable to the Account" for reasons other than the individual's death. *See* POMS SI 01120.203B.3.b.

In addition, Section 2(B)(2)(a) of the Trust Agreement requires the trustee to:

distribute to each State, which has provided medical assistance through Title XIX of the Social Security Act, to the Individual with Disabilities *during the existence of the Account since the Account was established* a proportionate share of the assets remaining in the Account of the Individual with Disabilities, up to an amount equal to the total assistance paid on his behalf by such State under a State Plan pursuant to 42 U.S.C. § 1396, *et seq.*, to the extent permitted and required by law.

Trust Agreement at § 2(b)(2)(a) (emphasis added). Thus, under the Trust Agreement, the Trustee need not reimburse a State for medical assistance supplied to the individual before the establishment of the individual's Account in the Trust. Because the Trust Agreement does not contain specific language providing that, to the extent amounts remaining in the Account are not retained by the Trust, each state will receive an amount equal to the total amount of medical assistance paid on behalf of the individual throughout his lifetime, the Trust Agreement does not comply with the Medicaid payback requirement of the pooled trust exception. *See Memorandum from Regional Chief Counsel, Reg. V, Chicago to Asst. Reg. Comm'r-MOS, Reg. V, SSI-Ohio Review of Reconsideration Request on the Joanne F. M. Trust Agreement* at 5 (provision for reimbursement for Medicaid assistance since establishment of trust did not comply with special needs trust exception requirements).

We recognize that, in this particular case, Nathan, by his Account Agreement, provided that all amounts remaining in his Account at his death should be retained by the Trust. This provision does not cure the defect, however. Because the Trust Agreement does not comply with the pooled trust exception, none of the Accounts established under that Trust Agreement can meet the exception. *See* POMS SI 01120.203B.2.g (trust must contain specific language stating Medicaid reimbursement provision). Therefore, we conclude that Nathan's Account does not meet the pooled trust exception, and, therefore, it is a resource.

CONCLUSION

The Ohio Pooled Flexible-Spending Trust does not meet the Medicaid payback provision requirement for the statutory pooled trust exception to counting a trust as a resource. Therefore, Nathan's account in the Ohio Pooled Flexible-Spending Trust is a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V

By: /s/ Nancy L. B~
Nancy L. B~
Assistant Regional Counsel

D. PS 07-161 SSI-Ohio-Review of the Rodney S. H~ Irrevocable Special Needs Trust,~ - ACTION Your Reference: S2D5G6, SI 2-1-3 OH (H~) Our Reference: 07-0268

DATE: June 26, 2007

1. SYLLABUS

This case involved a special needs trust established by court order. It involves the purchase of an annuity to fund the Trust. In order to meet the requirements of the special needs trust language was included that assures the state will be reimbursed for the medical assistance given the claimant during the time he was eligible for Supplemental Security Income. The term "minimum" was added when applied to the medical assistance reimbursement but this has no affect on the amount that Medicaid may demand. The precedent that is established is that the term "minimum" has no effect on what the state determines it is owed or will accept. There is no range of acceptable payments only what the state demands.

2. OPINION

You asked us whether Rodney S. H~ trust is a resource for SSI purposes and whether the annuity payments made to the trust are income. You specifically expressed concern about Article 3.1(b) of the Trust, which provides that the trustee will pay the "minimum" amount of the remaining principal to the state when Rodney dies. Also, you questioned whether the trustee would be required to use any annuity payments that were received after Rodney's death to satisfy the obligation owed to the state for medical assistance paid on Rodney's behalf. For the reasons discussed below, we conclude that the trust is not a resource for SSI purposes and that the annuity payments are not income. We further conclude that paying the "minimum" amount of the remaining principal to the state complies with the special needs trust exception. Finally, we conclude that the trustee would be required to use all annuity payments to satisfy the obligation owed to the state.

Background

In December 2006, the Franklin County, Ohio Probate Court approved a settlement for Rodney S. H~, a minor. The court ordered that $2,000,000 of the settlement be used to purchase annuities for the benefit of Rodney. The annuities were to produce payments of $8,239 per month, commencing March 21, 2007, and continuing for fifteen years, increasing at a rate of 2% compounded yearly. Then, starting on March 21, 2022, the monthly payments would increase to $11,089 per month, increasing at a rate of 2% compounded yearly, and continuing for life with fifteen years certain. The court ordered that, until it issued a subsequent order, no payments could be made from the annuities. Also, the court noted that the payee on each annuity would be determined by the court at a later date. The remaining proceeds from the settlement ($437.393.90) were ordered to be held by a law firm in an escrow account until further order.

After a hearing on January 17, 2007, the probate court accepted jurisdiction over the "Rodney S. H~ Irrevocable Special Needs Trust" ("Trust") created by Lisa G. W~ (Rodney's guardian and grandmother). The court ordered that the Trust be funded with the proceeds of the settlement and that all monthly payments from the annuities be deposited into a custodial account established for the Trust. The court designated the Trust as the contingent beneficiary should Rodney not survive the guaranteed payment period. The court indicated that its order was in the best interest of Rodney.

The Trust was established for the benefit of Rodney and provides that, during the term of the Trust, Rodney's interests and welfare shall be paramount. Trust, Article 2.1. The Trust named Ms. W~ as trustee of the Trust, Rodney as primary beneficiary, and the State of Ohio as residual beneficiary. Trust, Introductory Paragraph; Article 1.1. The Trust states that it is irrevocable, subject to the right of the trustee to amend it for the limited purpose of ensuring that it complies with the applicable laws governing Rodney's eligibility for assistance under available governmental programs. Trust, Article 1.3; Trust, Article 4.4. The Trust indicates that all net income of the Trust shall be added to the principal upon receipt. Trust, Article 2.1. The Trust provides that the trustee has, upon approval of the probate court, absolute discretion from time to time to distribute or apply for the benefit of Rodney portions or all of the principal as the trustee considers advisable, provided the distribution would not render Rodney ineligible for a government assistance program for which he is otherwise qualified. Trust, Article 2.1. The Trust provides that Rodney has no right to compel the trustee to make a distribution to him or for his benefit. Trust, Article 2.1. The Trust indicates that no interest in the income from or principal of the Trust shall be subject to any form of alienation or hypothecation by any beneficiary, without the express consent of the Trustee. Trust, Article 2.3.

The Trust provides that, upon Rodney's death, the trustee shall pay, in the following order:

(a) any final costs and expenses of the administration of the Trust, provided it is not contrary to the requirements for exemption of this Trust under Title 42 of the United States Code;

(b) The minimum amount of the remaining principal that under applicable law must be distributed to any state or states of the United States in respect of the amount of the total of medical assistance paid on behalf of Rodney by such state or states under any state plan established under Title 42 of the United States Code in order to qualify this Trust for exemption pursuant to Section 1396p(d)(4)(A) of such title; and(c) the balance of the Trust principal to Rodney's estate.

Trust, Article 3.1.

DISCUSSION

A. The Trust Is Not a Resource

This Trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual are considered resources for SSI purposes even if they are irrevocable. However, there is an exception for certain trusts that are established under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must be:

(1) Established with the assets of a disabled individual under age 65;

(2) Established for the benefit of the individual by a parent, grandparent, legal guardian, or court; and

(3) Provide that the state 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.

POMS SI 01120.203B1a. Assuming Rodney is found disabled, the Trust would meet the first and second requirements. Rodney, born in 2004, is under the age of 65, and the Trust was established for his benefit by his grandmother. The Trust was further funded with Rodney's assets - namely, money a W~ as a settlement of a lawsuit.

The trust also meets the third requirement for the special needs trust exception. The Trust's termination clause provides that the trustee will pay the "minimum" amount of the remaining principal to the state when Rodney dies. Due to the Trust's use of the word "minimum," we contacted the Office of Income Security Program's Trust Team for guidance. We were advised that, while use of the word "minimum" was not ideal, it nonetheless complied with the special needs trust exception. The Trust Team explained that the dollar amount requested by the state will be an absolute figure rather than a range of figures, and thus the "minimum" amount will be what the state is owed or is willing to accept. As such, the word "minimum" would not have any practical impact on the state's ability to seek full reimbursement of the amount owed.

Furthermore, the trustee would be required to use any annuity payments that were received after Rodney's death to satisfy the obligation owed to the state for medical assistance paid on Rodney's behalf. The Trust specifically provides that all income of the Trust shall be added to the principal upon receipt. Trust, Article 2.1. The court order further names the Trust as contingent beneficiary should Rodney not survive the guaranteed payment period of the annuities, and the Trust names the State of Ohio as residual beneficiary. Upon Rodney's death, the right to any income accrued but not received will be added to the principal of the Trust, and the Trust will terminate. Trust, Article 3.1. Thus, all of the annuity payments, whether accrued or received, will be added to the principal of the Trust, and the Trust will terminate. Accordingly, the trustee would be required to use any annuity payments received after Rodney's death to satisfy the obligation owed to the state for medical assistance paid on Rodney's behalf. In sum, the Trust satisfies the Medicaid Trust exception requirements, and it is not a countable resource under the statute. Therefore, the regular resource rules apply.

Under these rules, a trust will be a resource if it is revocable, or if the individual can direct the use of trust principal for his support. Also, if there are mandatory disbursements, and the individual can sell the right to these payments, their current value may be a resource. The Trust would not be a resource under these rules. First, the Trust is irrevocable. The Trust specifically states that it is irrevocable. Trust, Article 1.3. While Rodney is the true grantor of the Trust (since the Trust was established with funds that belonged to him), see POMS SI 01120.200(B)(2), he is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). *See* POMS SI 01120.200(D)(3). The Trust names the State of Ohio as residual beneficiary. Trust, Article 1.1. And indeed, in Ohio, the state is recognized as a residual beneficiary, provided the Trust cannot be unilaterally revoked and meets the

Medicaid payback provision. *See* POMS SI CHI01120.200(D)(5) ("Effective June 25, 2004, the Social Security Administration recognizes the State as a residual beneficiary of Ohio trusts, if the language of the trust specifies that it is irrevocable, it does not appear that the trust can be unilaterally revoked, and the trust meets the Medicaid payback provisions."); *see also* Memorandum from Reg. Chief Counsel, Chicago, to Assistant Reg. Comm. - MOS, Chicago, *Ohio Treatment of the State as a Beneficiary in a Medicaid Payback Trust*, at 4-5 (March 19, 2004). Accordingly, the Trust is irrevocable.

Secondly, Rodney cannot compel the trustee to use the trust funds for his support and maintenance. Trust, Article 2.1. And finally, irrespective of whether Rodney could sell his interest in the Trust, it would have no market value, because the trustee is not obligated to make any payments. *See* Restatement (Third) of Trusts, § 60 and comments c, f. Therefore, the Trust is not a resource under the regular resource rules.

B. The Annuity Payments Are Not Income

Because the Trust is not a resource, the annuity payments made to the Trust are not income to Rodney if he has irrevocably assigned them to the Trust. POMS SI 01120.200(G)(1)(d). Although the court order states that the annuity payments will be made directly to the Trust, if Rodney could ask the court to modify the order so that the payments would be made directly to him, the annuity payments should be considered income to him. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Review of the Marital Settlement Agreement for Patricia J. H~ and Floyd A. H~ and the Patricia J. H~ Special Needs Trust*, at 3-4 (Dec. 4, 2003).

However, it appears that, as with the creation of the Trust, the court's order with respect to the annuity would have to be based on a finding that, among other things, the annuity assignment was in the best interests of Rodney. Ohio Rev. Code Ann. § 2111.50(C)(1) (2006) (all powers of the probate court shall be exercised in the best interest of the minor subject to guardianship). Indeed, the court appointed a guardian for Rodney and indicated that it had carefully considered Rodney's best interests before issuing its order. Accordingly, for Rodney to convince the court to redirect the annuity payments to him, he (or Ms. W~ his guardian) would have to show that such a change was in his best interests. *Id.* This, however, is unlikely since we are not aware of any change of circumstance since the probate court hearing that would cause the court to reconsider its finding that assigning the annuity payments to the Trust is in Rodney's best interests. Therefore, the annuity payments are, at this time, irrevocably assigned to the trust, and thus are not income under POMS SI 01120.200(G)(1).

CONCLUSION

In sum, the trust is not a resource for SSI purposes and the annuity payments are not income. Also, paying the "minimum" amount of the remaining principal to the state after Rodney's death complies with the special needs trust exception. Finally, the trustee would be required to use all annuity payments to satisfy the obligation owed to the state.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Karen S~
Assistant Regional Counsel

E. PS 07-120 SSI- Ohio Review of the Jennifer C. S~ Special Needs Trust, ~ - REPLY Your Ref: S2D5G6 SI 02-1-3 OH (S~) Our Ref: 07-0008

DATE: April 24, 2007

1. SYLLABUS

This opinion addresses whether or not the special needs trust in question is a resource for SSI purposes. The special needs trust satisfies all of the criteria found in SI 001120.203B. in order to be excluded from resource counting, however, the trust does provide for payment of taxes that would fall outside the scope of allowable expenses as outlined in SI 01120.203B.3. The trust does contain a limiting clause stating, "to the extent permitted by applicable Medicaid or SSI, regulation or policy at the time of death." The limiting clause as written is acceptable, provided that the field office properly documents the fact that the non-permissible taxes cannot be paid before the State Medicaid Agency is reimbursed. For these reasons, the trust is not a countable resource for SSI purposes.

2. OPINION

You have requested an opinion regarding whether the Jennifer C. S~ Special Needs Trust (Trust) would be a resource to Jennifer C. S~ (Jennifer) in determining her eligibility for Supplemental Security Income (SSI). For the reasons discussed below, we believe that the Trust should not be considered a resource.

Background

On December 29, 2005, the Trust was established by order of the Franklin County Ohio Probate Court (Court), Case No. 510324. *See* Trust, Art. 1.1, Trust Ex. A. Barbara J. S~ was named guardian of Jennifer's estate (Grantor) and Trustee of the Trust (Trustee). The Trust agreement named Jennifer as a beneficiary, as well as the State Medicaid plans. *See* Trust, Art. 1.2. The Trust was funded with the proceeds from a personal injury settlement that Jennifer received. *See* Trust, Art. 1.4. The Trust provides that it is to be administered to protect Jennifer's long-term interests and to provide for her supplemental care and special needs, in addition to government assistance programs for which she is qualified, and is intended to conform with the requirements of 42 U.S.C. § 1396p(d)(4)(A) and Ohio state trust law, Rev. Code §5111.151(F)(1) and O.A.C. §5101:1-39-27.1(C)(3). *See* Trust, Art. 1.3.

The Trust states that it is irrevocable. *See* Trust, Art. 1.5. The Trust, however, provides that the Trustee may amend the Trust, if, due to changes in governing law or legal interpretations concerning Jennifer's eligibility for available government assistance programs, the Trustee believes that it is in Jennifer's best interest and reasonably necessary to maintain or achieve such eligibility. *See* Trust, Art. 1.5, Art. 2.3(D). The Trust also provides that the Trustee has sole discretion to make distributions of principal to or for the benefit of Jennifer to provide supplemental services. *See* Trust, Art. 2.1. At the same time, Jennifer has no right to compel the Trustee to make a distribution of

principal to her or for her benefit. *Id.* The Trust, in a spendthrift provision, further provides that no interest in the Trust is subject to any form of alienation. *See* Trust, Art. 4.3.

Unless earlier exhausted, the Trust will terminate upon Jennifer's death, at which time any amount remaining in the Trust will first be used to pay all final expenses and costs for the administration of the Trust, as well as all taxes arising as a result of her death. *See* Trust, Art. 3.4 (A), (B). Next, any remaining amount shall be paid to the states as reimbursement for medical assistance provided to Jennifer. *See* Trust, Art. 3.3. Finally, after paying any remaining obligations of the Trust, the trustee will distribute the remainder to Jennifer's estate. *See* Trust, Art. 3.5, 3.6. The Trust does not name any specific residual beneficiaries. *See* Trust, Art. 3.6.

DISCUSSION

Pursuant to 42 U.S.C. § 1382b(e) (the "statutory trust resource rules"), the principal of a trust created on or after January 1, 2000, with the assets of an individual will be considered a resource to the extent that the trust is revocable or, in the case of an irrevocable trust, to the extent that any payments from the trust could be made to or for the benefit of the individual (or the individual's spouse), with certain exceptions. *See also* POMS SI 01120.201(D). However, even if an exception applies, all trusts are still subject to the regular resource rules.

This Trust is Irrevocable

The Trust document states that it is irrevocable. *See* Trust, Art. 1.5. While Jennifer is the true grantor of the Trust (since the Trust was established with funds that belonged to her), *see* POMS SI 01120.200(B)(2), she is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). *See* POMS SI 01120.200(D)(3). In Ohio, the state is recognized as a residual beneficiary, provided the Trust cannot be unilaterally revoked and meets the Medicaid payback provision. *See* POMS SI CHI01120.200(D)(6) ("Effective June 25, 2004, the Social Security Administration recognizes the State as a residual beneficiary of Ohio trusts, if the language of the trust specifies that it is irrevocable, it does not appear that the trust can be unilaterally revoked, and the trust meets the Medicaid payback provisions."); *see also* Memorandum from Reg. Chief Counsel, Chicago, to Assistant Reg. Comm. - MOS, Chicago, *Ohio Treatment of the State as a Beneficiary in a Medicaid Payback Trust*, at 4-5 (March 19, 2004). Here, the trust states that it is irrevocable, and, as discussed below, it meets the Medicaid Payback provisions, so the state is a residual beneficiary. Accordingly, the Trust is irrevocable.

The Trust Satisfies the Medicaid Trust Exception for Individual Trusts

The statutory trust resource rules are not applicable to this irrevocable trust because an exception applies. The exception under 42 U.S.C. § 1396p(d)(4)(A) applies to a trust which: (1) is established with the assets of an individual under age 65 who is disabled; (2) is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) provides that on the death of the individual, any funds remaining in the trust will be used to reimburse the State for Medicaid payments made on behalf of the individual. *See also* 42 U.S.C. § 1382b(e)(5); POMS SI 01120.203(B)(1). These elements are satisfied here. Jennifer is under age 65 and disabled, and the Trust was established for Jennifer's benefit by her guardian. Finally, the Trust explicitly provides

for reimbursement to the states for medical assistance to Jennifer, after allowing the trustee to first pay final costs for the administration of the Trust. *See* Trust, Art. 3.4(A), (B); *see* POMS SI 01120.203(B)(3)(a).

Of note, the Trust's payback provision states:

3.4 Payment of Final Administrative Costs and Taxes. Prior to reimbursing any state plan under Section 3.3 hereof, to the extent permitted by applicable Medicaid or SSI law, regulation or policy at the time of JENNIFER's death, the Trustee shall pay:

A. all final administrative costs of this trust; and

B. all taxes arising as the result of JENNIFER's death, including estate, gift, generation-skipping, and inheritance taxes, whether federal, state, or local.

All or most of the taxes described in section 3.4(B) would fall outside the scope of allowable expenses. *See* POMS SI 01120.203(B)(3). Indeed, the only permissible tax would be estate taxes due by reason of inclusion of the trust corpus in the claimant's estate. However, the Trust contains a limiting clause, "to the extent permitted by applicable Medicaid or SSI law, regulation or policy at the time of JENNIFER's death," *see* Trust, Art. 3.4(B), suggesting that payment of prohibited taxes would not be allowed under the Trust.

Ideally, references to taxes, which would be non-permissible payments, should be removed from the Trust. However prohibited, the limiting clause would be acceptable as written, provided that the Field Office documents that we have accepted the Trust based on the limiting language and that the non-permissible payments (e.g. inheritance, gift, generation-skipping taxes, and non-trust related estate taxes) cannot be paid before the State Medicaid Agency is reimbursed. Further, the beneficiary and trustee should be notified in writing to explain that, while we accept the Trust as written based on the limiting language, it is with the understanding that the non-permissible payments listed in section 3.4 may not be paid before the State Medicaid Agency is reimbursed. *See* Memorandum from Reg. Chief Counsel, Chicago, to Assistant Reg. Comm. - MOS, Chicago, *Review of Special Needs Trust and Periodic Payments for Tamara H~*, at 3-4 (March 27, 2007).

Thus, since the Trust meets the requirements of the Medicaid Trust exception under 42 U.S.C. § 1396p(d)(4)(A), it is not considered a countable resource under 42 U.S.C. § 1382b(e). However, the Trust is still subject to the regular resource rules. *See* POMS SI 01120.200(D)(1). Under these rules, a trust will be a resource if it is revocable, or if the individual can direct the use of trust principal for her support. Also, if there are mandatory disbursements, and the individual can sell the right to these payments, their current value may be a resource. But, as stated earlier, the Trust is not revocable. And, the individual cannot direct the use of Trust assets. Finally, there are no mandatory distributions. Therefore, the trust if not a resource under the regular resource rules either.

CONCLUSION

For the reasons discussed above, we conclude that the Trust is not a resource to Jennifer for SSI purposes. However, we recommend that the Agency provides written notification to the Trustee and Beneficiary, advising that we have accepted the Trust based on its limiting language and that non-permissible payments may not be paid before the State Medicaid Agency is reimbursed.

F. PS 07-091 SSI-Ohio-Review of the Anthony P. C~, Sr. Special Needs Trust for Anthony P. C~ Jr., ~ Your Reference: S2D5G6, SI-2-1-3 OH (C~) Our Reference: 06-00143

DATE: March 13, 2007

1. SYLLABUS

This opinion addresses whether or not the trust in question is considered a resource for SSI purposes. Trust assets established with funds of a third party are a resource if the individual: (1) can terminate the trust and obtain unrestricted access to the trust assets; (2) has access to the trust assets and can direct the use of the trust assets to meet his/her need for food or shelter; or (3) can sell his/her beneficial interest in the trust. In this case, the SSI claimant does not have the authority to terminate the trust. In addition, the claimant cannot assign interest in the trust or direct use of the trust assets. For these reasons, the trust is not a resource for SSI purposes.

2. OPINION

You have asked whether the Anthony P. C~, Sr., Special Needs Trust for Anthony P. C~, Jr., (Trust) is a resource for purposes of determining Anthony P. C~, Jr's eligibility for SSI. Based on the information provided, the Trust would not be a resource to Anthony P. C~, Jr.

Background

On March 27, 2001, parents Anthony C~, Sr., (Anthony, Sr.) and Linda C~ entered into a Settlement Agreement and Full and Final Release with Golden Rule Insurance Company and United Healthcare d/b/a Healthcare. In the settlement agreement, Anthony C~, Sr. received $15,000, Linda C~ received $45,000, Children's Hospital of Cincinnati received $154,530.70, and Anthony, Sr., as Trustee of the Special Needs Trust for the benefit of Anthony P. C~, Jr. (Anthony, Jr.) received $95,000 (less legal fees of $38,000) as settlement of nonpayment of Children's Hospital of Cincinnati bills incurred on behalf of Anthony, Jr.

The C~s' attorney advised that the settlement was the result of a lawsuit filed against the insurance company on behalf of Anthony, Jr.'s parents in relation to a dispute for unpaid hospital bills for Anthony, Jr.'s care. As part of the settlement, the parents received compensation, above and beyond the unpaid bills, for the insurance company's "bad faith" in failing to pay the hospital at the time services were incurred. The attorney advised that there was no malpractice or personal injury settlement involved. Apparently, the settlement funds were for the parents only, not for Anthony, Jr., but Anthony Sr. chose to place some of the settlement funds in a trust for the benefit of Anthony, Jr.

On March 25, 2001, Golden Rule issued a check in the amount of $95,000 to Anthony, Sr., as Trustee of the Special Needs Trust for the benefits of Anthony, Jr. After attorney's fees were paid, $57,000 was placed in the Trust for the benefit of Anthony, Jr.

The Special Needs Trust for Anthony, Jr. was created on May 31, 2001, by Grantor Anthony, Sr., with Linda C~ as Trustee. The Trust provides, in Section 2, that the Trust is irrevocable and the Grantor expressly waived and surrendered the power to alter, amend, revoke, or terminate the agreement. Sections 3.1. and 3.1.1 state that any assets of the trust estate shall be held for the benefit of the Grantor's son, Anthony, Jr., (Beneficiary) and the Trustee is not to make any payments or distributions from the principal or income which cause the Beneficiary to incur a reduction or increase in the cost of benefits otherwise available to him from any local, state or federal government agency or entity or any private agency. Under Section 3.1.2, the Trustee is instructed to not make any payments or distributions of income or principal from this Trust to reimburse or supplant any local, state or federal government agency which provides necessities (e.g., food, lodging, medical care). However, the Trustee may from time to time apply amounts from the income and principal for the Beneficiary's Special Needs (defined in the Trust as cost of home, medical costs, personal items, etc., in Section 3.1.4). The Beneficiary is not considered to have access to the principal of this Trust. Section 3.1.5. Under Section 3.1.7, the Beneficiary's interest in the Trust cannot be assigned.

DISCUSSION

POMS SI 001120.00(B)(17) defines a third party trust as a trust established by someone other than the beneficiary as the grantor. This same POMS provision cautions, however, that agency decision-makers are to be "alert for situations where a trust is allegedly established by a third party, but in reality is created with the beneficiary's property," in which case the trust would be a "self-settled" or "grantor" trust, rather than a "third party" trust. *See* POMS SI 01120.200(B)(8), (B)(17); POMS SI 01120.201(A)(1) (providing that assets held in self-settled trusts established on or after 1/1/00 will generally be considered resources for SSI purposes unless an exception applies).

Here, the C~s' attorney advised that the settlement funds placed in Trust belonged to Anthony, Jr.'s parents, not to Anthony, Jr. Assuming this is true, the Trust is a third party trust and should not be considered a resource to Anthony, Jr. [1]

For purposes of SSI eligibility, "resources" are cash or other liquid assets or any other real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. 20 C.F.R. § 416.1201(a); POMS SI 01110.100(B)(1). If an individual has the right, authority, or power to liquidate the property, it is considered a resource. *Id.* Trust assets established with funds of a third party are a resource if the individual: (1) can terminate the trust and obtain unrestricted access to the trust assets; (2) has access to the trust assets and can direct the use of the trust assets to meet his need for food or shelter; or (3) can sell his beneficial interest in the trust. POMS SI 01120.200(D)(1)-(3).

Here, Anthony, Jr., does not have the right to terminate the Trust. Nor can he direct the Trustee to provide for his support and maintenance. And, he cannot assign his beneficial interest in the Trust. Accordingly, the Trust is not a resource to Anthony, Jr.

CONCLUSION

For the reasons discussed above, we conclude that the Trust is not a resource to Anthony, Jr.

[1] If you receive additional information that suggests that any funds in the Trust may be attributable to Anthony, Jr., that portion of the Trust would need to be evaluated separately. *See* POMS SI 01120.201.

G. PS 07-086 SSI - Ohio - Review of the Gwen M. F~ Special Needs Trust, ~- REPLY OGC Ref: 070177 Your Ref: SI 2-1-3 OH (F~)

DATE: March 12, 2007

1. SYLLABUS

This case represents a distinction between trust funds originating from different sources. The funds coming from a 3rd party are not countable, but the funds originating from the grantor are countable. The grantor funds did not follow the strict guidelines for the order of payment for the Medicaid reimbursement making it countable.

2. OPINION

You asked us to review a trust dated February 5, 2005, to determine whether the assets placed in trust would be a countable resource to Gwen M. F~ ("Gwen"). For the reasons discussed below, we conclude that any portion of the trust funded with Gwen's assets is a countable resource, but any portion of the trust funded with assets of a third party is not a resource.

Background

We base our opinion on our review of the trust instruments you provided to us. *The Gwen M. F~ Special Needs Trust* (hereinafter "Trust") was established by Gwen's mother, Janice F~.

On February 5, 2005, the Trust was established solely for Gwen's benefit, and provided that the agreement could be neither amended nor revoked. *See* Trust, Preamble, Article II. In addition, the Trust refers to Gwen as a "disabled individual." *See* Preamble.

The Trust gives the trustee unfettered discretion to distribute Trust assets and income. *See* Article III. The Trust further provides that the Trustee "shall not be obligated or compelled to make" distributions of the income or principal. *See* Article III(6). Thus, Gwen does not appear to have any rights of withdrawal. The Trust also contains a "spendthrift provision:" "No beneficial interest (including any beneficial interest held by GWEN M. F~) in the principal or income of this Trust shall be anticipated, assigned, or encumbered, or shall be subject to any creditor's claim or legal process, prior to its actual receipt by the Beneficiary." *See* Article V.

Article IV of the Trust provides that the Trust shall terminate upon cessation of Gwen's disability or, in the alternative, Gwen's death. Upon Gwen's death "the Trustee shall pay the attorney's fees and other properly allowable costs incurred in administering and

wrapping up the Trust." Article IV(B)(1). Allowable costs are described as "accounting of the Trust to a court, completion and filing of documents, or other required actions, but not payments of GWEN's debts owed to third parties or funeral expenses." *Id.* The Trust also provides that, upon Gwen's death, "the Trustee shall pay out of the principal included in the gross estate of GWEN for estate tax purposes, any federal or state estate tax or other inheritance tax (including interest or penalties thereon) arising by reason of GWEN's death and attributable to the Trust property included in the gross estate of GWEN for purposes of such tax." Article (IV)(B)(2).

The Trust next provides that the Trustee "shall notify the appropriate agency or agencies for each state from which the Beneficiary may have received medical assistance under a State Plan pursuant to 42 U.S.C. sec 1396, *et seq.*," and pay all claims for Medicaid services rendered to Gwen from assets remaining in the Trust. *See* Article IV(B)(3). The Trust specifically excludes from this repayment provision third-party funds contributed to the Trust, which did not first pass in title to Gwen, and which were not commingled with other Trust assets. *Id.*

Any remaining assets in the Trust Estate may be used to pay for Gwen's funeral and burial expenses to the extent they were not prepaid, and then distributed to Gwen's issue, or if she was not survived by issue, to her mother, or if she was not survived by her mother, Gwen's sister Emily F~, per stirpes. Article IV(B)(4), (5).

DISCUSSION

The Trust was established on February 5, 2005, and was originally funded by $10.00 received from Janice F~, Gwen's mother. Accordingly, it appears on the surface that the Trust is a third-party Trust because it contained only assets of a third party, i.e., Gwen's mother, on creation. *See* POMS SI 01120.200(B) (17).

The information you provided shows that, as of March 2005, the Trust was valued at $2,900.00, but does not show the source of the $2,900.00. If the remainder of the principal of the Trust was funded by Gwen's own assets, then this portion of the Trust should be considered self-settled. *See* 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.200(B)(8); POMS SI 01120.201 (C)(1), (C)(2)(c), (D). This portion of the Trust must be assessed to determine whether it meets the Medicaid payback exception. *See* 42 U.S.C §1396p(d)(2)(B).

1. To the extent that the Trust is a third party trust, it is not a resource to Gwen.

For purposes of SSI eligibility, "resources" are "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). If an individual has the right, authority or power to liquidate the property, it is considered a resource. *See* 20 C.F.R. § 416.1201(a)(1). When a trust is created for the benefit of an individual with the assets of a third party, the trust constitutes a resource if: (1) the SSI beneficiary can terminate the trust and use the assets for her support and maintenance; (2) the SSI beneficiary can direct the trustee to pay her the funds or use the funds for her support and maintenance; or (3) if the individual can sell her beneficial interest in the trust. *See* POMS SI 01120.200(D). If the Trust did not contain any of Gwen's assets, and to the extent it was a third party trust, the Trust would not be a resource under any of these tests.

First, to the extent that the Trust is a third party trust, it is clear that Gwen does not have the power to terminate the Trust and use the assets for support and maintenance. Whether a trust can be terminated by a beneficiary depends on the terms of the trust and/or applicable state law. *See* POMS SI 01120.200(D)(2). Gwen does not have the right to terminate the Trust under its own terms or the terms of Ohio state law. Article II specifically provides that the agreement shall not be revoked or terminated "by the Settlor or any other person."

Although Gwen does not have legal authority to revoke or terminate the Trust agreement, the Trust may be counted as a resource in determining SSI eligibility if she has the ability to direct the use of Trust assets. *See* POMS SI 01120.200(D)(1)(a). Such authority may be included specifically in a trust provision allowing the beneficiary to act on her own, or in a provision allowing her to order actions by the trustee. *See* POMS SI 01120.200(D)(1)(b). The Trust includes no provision allowing Gwen to direct any actions by the trustee or to act on her own behalf. Indeed, Article III specifically provides that "[i]n making any distribution, the Trustee . . . [s]hall not be obligated to or compelled to make such payments." Thus, Gwen does not have any rights of withdrawal. Instead, the Trustee has to sole discretion to make distributions and payments as she deems appropriate. According to the terms of the Trust, Gwen does not have the right to direct the use of the Trust assets to meet her food, clothing and shelter needs.

Finally, because the Trust contains a spendthrift provision, it does not appear that Gwen has the power to sell her beneficial interest in the Trust. In general, a spendthrift trust is a trust which by its terms provides that a "beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors." Restatement (Third) of Trusts § 58(1). Absent such a restraint, a beneficiary of a trust would generally be free to assign his rights to a third party in exchange for consideration. Here, the Trust provides that "No beneficial interest . . . in the principal or income of this Trust shall be anticipated, assigned, or encumbered, or shall be subject to any creditor's claim or legal process, prior to its actual receipt by the Beneficiary." *See* Article V. Thus, it is evident that Gwen does not have the power to transfer her interest in the Trust and use those proceeds for support and maintenance.

In sum, under the ordinary resource rules applicable to third party trusts, Gwen does not have the legal authority to revoke the Trust, direct the use of the Trust assets for her own support and maintenance, or transfer her interest in the Trust. Accordingly, to the extent that the Trust is a third party trust, the assets in Trust are not a countable resource for SSI purposes.

2 The Trust is a resource to the extent it was funded with Gwen's own assets because it does not qualify for the Medicaid payback exception.

If any of the assets in the Trust are attributable to Gwen, i.e., if any part of the Trust is self-settled, the same resource analysis applied to the third party portion of the analysis would apply to the self-settled amounts to determine if they are resources. Any self-settled portion of the trust would not be a resource to Gwen under the regular resource rules.

In the State of Ohio, a trust, like this one, that purports to be irrevocable can be revoked if the settler (grantor) of the trust is also the sole beneficiary. *See* POMS SI 01120.200(D)(3); POMS SI CHI 01120.200C. However, in Ohio, if a trust "names a

residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable." POMS SI CHI 01120.200C. Here, the Trust names the state and Gwen's issue as residual beneficiaries and her mother and sister as contingent residual beneficiaries. *See* Article IV(B)(5). Thus, even if a portion of the Trust were self-settled, it remains irrevocable. *See* POMS SI CHI 01120.200D(5). Nor can Gwen direct the trustee to use any funds she has contributed for her support and maintenance. And, even if she could sell her beneficial interest, it would have no market value.

In addition to the regular rules for determining whether trusts are resources, additional statutory rules would apply to any self-settled portions of the trust. *See* 42 U.S.C. § 1382b(e) (providing that assets held in self-settled trusts established on or after January 1, 2000, will generally be considered resources for SSI purposes); POMS SI 01120.201. Trust assets that were originally Gwen's would be considered a resource unless the Trust qualifies for the Medicaid payback exception. *See* 42 U.S.C. § 1382b(e)(5); POMS SI 01120.203.

The Medicaid payback trust exception applies where the trust is: (1) established with the assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. *See* 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.201(B)(1).

Here, the first two requirements are met because Gwen is under age 65, she is apparently disabled, and the Trust was established for her benefit by her mother. We have previously advised that a parent may establish a Special Needs Trust for an adult, competent child, in Ohio, where state law recognizes the existence of a dry or empty trust. *See* Memorandum from Reg. Chief Counsel, Region V, to Ass't Reg. Comm.-MOS, Chicago, *SSI-Ohio Review of the Request for Reconsideration of the Review of the Charles C. G~ Trust* (April 22, 2005). In any event, the trust appears to have been seeded by the mother's own funds before any of Gwen's assets were added.

However, even though the first two requirements for the Medicaid payback trust exception are met, the trust does not qualify for the exception because it does not meet the third requirement-that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. Here, upon termination, the Trust does not list the State as the first payee and give it priority over payment of other debts and administrative expenses. Article IV(B). We further note that, prior to reimbursement of medical assistance to the state, the Trust allows for payment of "any federal or state estate tax or other inheritance tax (including interest or penalties thereon) arising by reason of GWEN's death and attributable to the Trust property included in the gross estate of GWEN for purposes of such tax." Article (IV)(B)(2). Generally, inheritance taxes are paid by the heir who receives estate property, and not by the estate of the deceased individual. It would be inappropriate for the Trust to provide for the payment of inheritance taxes owed by heirs of the estate or Trust prior to reimbursing the State for Medicaid payments.[1] POMS SI 01120.203(B)(3)(b); *See* Memorandum from Reg. Chief Counsel, Region V, to Ass't Reg. Comm.-MOS, Chicago, *SSI-Ohio Review of the Request for Reconsideration of the Review of the James J. S~ Trust Agreement*

(November 30, 2006). Therefore, the Trust does not come within the special needs exception to counting it as a resource under the Social Security Act.

CONCLUSION

In sum, any Trust assets contributed by third parties are not resources. However, trust assets attributable to Gwen are countable resources for purposes of determining SSI eligibility because they do not meet the Medicaid payback exception.

[1] The trust also permits payment of "attorney's fees and other properly allowable costs incurred in administering and wrapping up the Trust" before the State is reimbursed. Article IV(B)(1). However, the POMS allows payment of "[r]easonable fees for administration of the trust estate . . . associated with termination and wrapping up of the trust," prior to reimbursement of medical assistance to the state. POMS SI 01120.203(B)(3)(a). Thus, this Trust provision is allowable under the Medicaid payback exception.

H. PS 07-024 SSI-Ohio-Review of Request for Reconsideration on the James J. S~ Trust Agreement, ~-Action Your Reference: S2D5G6, SI 2-1-3 OH (S~) Our Reference: 06-0054

November 30, 2006

1. SYLLABUS

This opinion concludes that a trust established with the proceeds of an inheritance is a countable resource to the SSI beneficiary because it cannot be excluded under the Medicaid payback trust exception. The trust in question meets the first requirement of a Medicaid payback trust because it was established by a court with the assets of a disabled individual under the age of 65. However, the trust fails to meet the second statutory requirement because it creates contingent interests that could benefit third parties during the lifetime of the SSI beneficiary. The trust also does not meet the third requirement to qualify under the Medicaid trust exception due to language permitting prohibited payments to be made prior to Medicaid reimbursement.

2. OPINION

The Agency previously determined that the James J.S~ Trust Agreement (hereinafter "Trust") was a resource to James J.S~, an SSI beneficiary. Mr. S~, through his attorney representative, Richard F. M~, requested reconsideration. Mr. M~ asserts that the trust is not a resource, and you asked us to address Mr. M~'s argument. For the reasons discussed below, we agree with the initial determination that the Trust is a resource.

FACTS

The John J.S~ Trust was established for the benefit of James J.S~ to hold the proceeds ($74,000.00) from an inheritance. Judge Lawrence A. B~, of the Probate Court of

Franklin County, Ohio, established the Trust by order of the court on May 21, 2002. Richard F. M~, Esq., as Conservator of James J.S~, is names as the Grantor, and Mr. M~ is the Trustee. The Trust states that it "is established for the benefit of James J.S~."

Item I of the Trust provides that the inheritance property was irrevocably transferred to the Trustee and that the Trust may be revised only by court order. The Trust notes that "[r]evisions may be needed due to legislative changes, court cases, changes in health care, or other events which would cause the Conservator or Trustee to consider revisions."

Under Item II, Dispositive Provisions, section (A), the Trustee is "authorized to expend, on a monthly basis, income and principal as the Trustee deems appropriate for the needs and miscellaneous expenses of" Mr. S~, "considering all other resources and income available to him, and as approved by the" court. Item II(B) of the Trust limits the amounts which may be paid each month for Mr. S~ basic living needs so as not to exceed the monthly income eligibility standard for Medicaid or any other program for which Mr. S~ may be eligible, and the Trust directs that any other distributions must not render Mr. S~ ineligible for Medicaid nursing home benefits.

Item II(C) of the Trust directs that, should the State of Ohio fail to honor its Terms or if the purpose of the Trust is otherwise frustrated, the Trustee will distribute the Trust to beneficiaries designated in the Trust. Item II(D) of the Trust provides, in pertinent part, that, upon the death of Mr. S~, all principal and accumulated income in the Trust will be distributed as follows: (1) to pay for general expenses, to reimburse any party for advances for Mr. S~ burial, for payment of any taxes, and for payment of any administrative expenses to terminate the trust; (2) to reimburse the State of Ohio for assistance paid on Mr. S~ behalf under the Medicaid program; and (3) to an heir as designated in Mr. S~ will or according to intestacy provisions. Each of the second and third distribution is specifically subject to the previous enumerated distribution.

Item III, Definitions, section (C), defines beneficiary as including only Mr. S~. Item V, Restriction Against Alienation, states that "[i]f a beneficiary alienates or attempts to alienate any interest or right to receive payments" under the trust, then Mr. S~ interest in and right to receive the payments will cease and the payments thereafter will be applied "as determined by the Trustee in . . . [his] uncontrolled discretion to the use of any other beneficiary or beneficiaries." Furthermore, if the trust is terminated after such an attempt at alienation, the trustee will distribute the beneficiary's share to those who would be entitled to receive it as if the beneficiary had died the day before the termination.

Item VI, Termination Procedure, directs distribution of the Trust, upon termination of Medicaid or government benefits due to existence of the trust, to a charitable remainder trust which shall pay to Mr. S~ eight percent (8%) of the assets of the Trust yearly. The charitable remainder trust also provides for Mr. S~ estate to furnish funds for payment of any estate and death taxes owing from the Trust, and for trust distribution to certain charities upon Mr. S~ death.

DISCUSSION

Pursuant to POMS SI 001120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual, unless one of the exceptions applies in POMS SI 01120.203 (listing Medicaid trust exceptions for

individuals and pooled trusts, and the waiver for undue hardship). The Agency previously determined that the Trust in this case is a countable resource for Mr. S~ because the Trust does not meet an exception for self-funded Medicaid payback trusts established after January 1, 2000.

Mr. M~ argues on behalf of Mr. S~ that the relevant issue is whether the trust is revocable. Mr. M~ asserts that the trust is not a resource because Mr. S~ cannot terminate the trust. He states that Mr. S~ has never accessed or used the trust's property for his support and maintenance, and that the trust principal has been an unavailable resource to him at all times. He therefore concludes that the trust is not a countable resource. Mr. M~'s conclusion, however, is not correct. The Trust in this case is irrevocable, but, nonetheless, its principal is a countable resource to Mr. S~ because he payments can be made form the trust to Mr. S~ or for his benefit, and because the Medicaid payback trust exception does not apply.

Under the plain language of the statute, trusts established on or after January 1, 2000, with the assets of an individual are a countable resource if payments from the trust principal could be made to or for the benefit of the individual unless one of the exceptions in POMS applies, including the exception for a Medicaid payback, or "special-needs" trust. 42 U.S.C. § 1382b(e)(3)(B), (e)(5); *see also* POMS SI 01120.201(D)(2), SI 01120.203. Here, payments can be made from the trust principal to Mr. S~ or for his benefit. The Dispositive Provisions of Item II of the Trust direct that the Trustee may expend principal, as he deems appropriate, for the needs and miscellaneous expenses of Mr. S~, with consideration of all other resources available to him as approved by the Court. Monthly payments for Mr. S~ basic living needs are restricted so as to prevent Mr. S~ from surpassing the monthly income eligibility threshold set by the State of Ohio's Medicaid program. This restriction on monthly payments applies only with regards to Mr. S~ basic living needs, however, and does not appear to restrict the Trustee's general discretion to make other payments from the Trust principal for Mr. S~ other needs or miscellaneous expenses. *See* POMS SI 01120.201(D)(2)(b). Thus, the Trust specifically provides for payments from the trust principal to or for the benefit of Mr. S~, and, therefore, it would constitute a countable resource unless one of the exceptions - in particular, the Medicaid payback trust exception - of 42 U.S.C. § 1396p(d)(4) applies. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.203.

We agree, however, with the Agency's earlier determination that the Trust here does not meet the requirements to qualify for a Medicaid payback trust exception. The Medicaid trust exception for individual trusts applies where the trust is: (1) established with assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. 42 U.S.C.§ 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

The S~ Trust satisfies the first requirement of a Medicaid payback trust because it was established with assets of an individual under age 65, who is disabled, and a court established the Trust for his benefit. As the Agency determined, however, the Trust does not satisfy the second and third requirements under the Medicaid trust exception.

Regarding the second requirement, the Trust was not established for the sole benefit of Mr. S~ as it creates contingent interests that could benefit third parties during Mr. S~ lifetime. Regarding the third requirement, the Trust allows for payments which are prohibited under the Medicaid trust exception.

The statute provides that a trust will qualify for the Medicaid payback exception only if it is "established for the benefit" of the individual . 42 U.S.C. § 1396p(d)(4)(A). The Agency has reasonably interpreted 42 U.S.C. § 1396p(d)(4)(A) to require that the trust be established for the sole benefit of the individual during his lifetime. *See* POMS SI 01120.201(F)(2) (defining "established for the sole benefit of the individual"); Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Illinois-Michigan-Review of the Brian V~ Irrevocable OBRA Pay Back Trust, (Nov. 22, 2004). As Mr. M~ points out, it is not clear that the early termination provision creates a contingent interest that could benefit third parties during Mr. S~ lifetime, as the Agency previously determined. The charitable remainder trust specifies payments only to Mr. S~ during his lifetime and then to third parties after his death. In the event such a trust were established, portions of the principal made available to Mr. S~ could be a countable resource under the regular trust counting rules, but any such trust would require separate evaluation. However, the Frustration of Trust Purpose provision in Item II(C), and the Restriction Against Alienation provision in Item V do create contingent interests that could benefit third parties during the lifetime of the claimant. The Frustration of Trust Purpose provision appears to allow the Trustee to terminate the trust and distribute the proceeds to "the beneficiaries" (apparently Mr. S~ heirs) if the State of Ohio fails to honor the trust or if the Trustee otherwise determines that its purpose has been frustrated. The Restriction Against Alienation provision directs that, upon attempted alienation of interest or right to receive payments by Mr. S~, during his lifetime, his right or interest to those payments ceases and terminates. The Trust directs that the Trustee shall then apply such payments, in his discretion, to any other beneficiary, as he determines. The provision further provides that if the trust itself is terminated, after any such attempts at alienation, the trustee will distribute the beneficiary's share to those who would be entitled to receive the share as if the beneficiary had died the day before the termination. Thus, the Trust allows for termination with distribution of assets to Mr. S~ heirs during his lifetime, or for payments to other beneficiaries during Mr. S~ lifetime upon his attempted alienation.

Mr. M~ argues that the only beneficiary of the Trust is Mr. S~. Mr. M~ urges construction of Item V of the Trust to read the phrase "any other beneficiary or beneficiaries" means "the beneficiary," i.e., Mr. S~. This is not sensible given the contrast of the two clauses in the same sentence and elsewhere in Item V. Regardless, Item II(C) of the trust unequivocally creates third party contingent interests who may benefit during Mr. S~ lifetime. Given these contingent interests in third parties, the Trust is not for the sole benefit of the Mr. S~ during his lifetime. Thus, the Trust does not meet the second requirement of a Medicaid payback trust.

The Trust also does not meet the third requirement of a Medicaid payback trust, because the Dispositive Provision of Item II, and the Termination Procedure of Item VI of the Trust, allow for prohibited payments before Medicaid is reimbursed. The statute provides that a trust is excepted only "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance

paid on behalf of the individual under a State [Medicaid] plan . . . ." 42 U.S.C. § 1396p(d)(4)(A) (emphasis added). POMS SI 01120.203 (B)(1)(f) explains that, "[t]o qualify for the special-needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State 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. This State must be listed as the first payee and have priority over payment of other debts and administrative expenses," subject to specific exceptions. The POMS directs that the trust at issue "must contain language substantially similar to" the above-quoted language. POMS SI 001120.203(B)(1)(f).

The Trust in this case allows for payments, prior to the reimbursement to the State for Medicaid expenses, which are not allowable expenses. Contrary to Mr. M~'s assertion, the Dispositive Provisions of Item II directs that after Mr. S~ death, the Trust shall be distributed first for payment of general expenses, for reimbursements for burial expenses, and for payment of any taxes, as well as payment for administrative expenses to terminate the trust. Yet, only taxes due from the trust and fees for trust administration may be paid prior to reimbursing the State Medicaid expenses. POMS SI 001120.203(B)(3)(a). Further, payments of debts to third parties and of funeral expenses prior to Medicaid reimbursement are specifically prohibited. POMS SI 001120.203(B)(3)(b). Mr. M~ argues that the Trustee has approved the purchase of an irrevocable burial arrangement for Mr. S~ that he claims will not be considered a resource under the statute. However, even if the Trustee makes such a purchase, the plain language of the Trust still would allow the Trustee to reimburse any party that makes advancements for Mr. S~ funeral. Given the provisions allowing prohibited payments (of any taxes, of burial fees, and of general expenses and corresponding reimbursements to third parties) prior to reimbursing Medicaid, the Trust fails to satisfy the third requirement of a Medicaid payback trust.

CONCLUSION

For the above reasons, we conclude that Trust is a countable resource and does not meet the purpose of the special needs trust exception. Specifically, the trust does not meet the requirements of a Medicaid payback trust because it is not for Mr. S~ sole benefit during his lifetime and because the trust allows inappropriate payments from the trust after Mr. S~ death before Medicaid is reimbursed. It thus is considered a resource.

I. PS 06-356 SSI-Ohio-Review of the Sub-Account of Jackie R~, ~ in the Ohio Pooled Trust-REPLY Your Reference: S2D5G6, SI 2-1-3 OH (R~) Our Reference: 06-0014

DATE: October 2, 2006

1. SYLLABUS

Trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary is considered a resource to the extent that the trust is revocable or the extent any payments can be made from the trust for the benefit of the individual. However, certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under § 1917(d)(4)(C) of the Act. In order to qualify for the Medicaid pooled trust exception, the trust must contain the assets of a disabled individual and satisfy the following conditions: 1) It must trust be established and maintained by a nonprofit association; 2) Separate accounts be maintained for each beneficiary, but assets are pooled for investing and management purposes; 3) Accounts are established solely for the benefit of the disabled individual; 4) Accounts in the trust must be established by the individual, a parent, grandparent, legal guardian, or a court; and 5) The trust must provide that to the extent any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust will pay to the State the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan.

In this case, the trust contains a provision that might allow other individuals to benefit from the trust during the beneficiary's lifetime which is contrary to requirement three listed above. However, the trust contains a void clause which nullifies the offending provision which permits the trust to meet the Medicaid pooled trust exception and thus be excluded from resources for SSI purposes.

2. OPINION

You asked us whether Jackie R~sub-account in the pooled trust is a resource for SSI purposes. For the reasons discussed below, we conclude that the trust is not a resource

BACKGROUND

A trust sub-account to the Ohio Pooled Trust was established for the benefit of Jackie R~ to hold the proceeds from a personal injury settlement. The Center for Special Needs Trust Administration, Inc., is the trustee. Joinder Agreement for the Ohio Pooled Trust, Art. I, § 1.01. The trust provides that it is irrevocable and shall be established with resources, including assets and/or income, belonging solely and exclusively to the beneficiary (Jackie R~). Joinder Agreement for the Ohio Pooled Trust, introductory paragraph; Declaration of Trust Art. 1, § 1.4

The Center for Special Needs Trust Administration, Inc., is a non-profit corporation, which established the National Pooled Trust on February 5, 2002. *See* Declaration of Trust at 1. The trust defines beneficiaries as disabled individuals consistent with § 1614(a)(3) of the Social Security Act. Declaration of Trust at Art. 2, § 2.4. The purpose of the trust is to hold assets of individuals who are disabled and provide for their supplemental care and needs. Declaration of Trust at Art. 3, § 3.1; Art. 5, § 5.3.

Within the trust, individual trust accounts, called "sub-accounts," are created and managed for each beneficiary. Declaration of Trust at Art. 2, § 2.8; Art. 8, § 8.1. The funds from each sub-account are pooled for investment and management of the funds. Declaration of Trust at Art. 8, § 8.1. The trust is activated for an individual beneficiary when the trustee accepts a joinder agreement signed by a grantor, who according to the trust may be the individual with a disability, a parent, a grandparent, a guardian, a

conservator, or a court. Declaration of Trust at Art. 4, § 4.2; Art. 2, §§ 2.3, 2.4. A sub-account is established upon receipt, by the trustee, of any assets transferred on behalf of a person with a disability. Declaration of Trust at Art. 4, § 4.2. Under the terms of the trust, the trustee has sole discretion to determine when payments will be made to the beneficiary. Declaration of Trust at Art. 5, §§ 5.1, 5.2. The trust states that it is irrevocable (Declaration of Trust at Art. 4, § 4.2), and spendthrift provisions provide that the beneficiary does not have the power to anticipate, assign, attach, or compel a distribution from the trust sub-account or any other part of the trust estate. Declaration of Trust at Art 3, §§ 3.1, 3.2.

Upon the death of a beneficiary, any amounts that remain in the beneficiary's trust sub-account shall be retained by the trust and, in the trustee's sole discretion used for the benefit of other beneficiaries enrolled in the pooled trust, or to add disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), who are indigent, to the trust as beneficiaries; orto provide disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), with equipment, medication, or such other services deemed suitable for such persons by the trustee.

Declaration of Trust at Art. 6; Joinder Agreement for the Ohio Pooled Trust at Art. III, § 3.2.

The trust also contains the following provision:

If the trustee has reasonable cause to believe that principal and/or income in any trust sub-account maintained for any beneficiary will be required to be used for the care of a beneficiary that has been, or would otherwise be, provided by local, state, or federal government, or an agency or department thereof, the trustee may, in its sole and absolute discretion, exercise one of the following provisions:

terminate the affected beneficiary's trust sub-account as though that beneficiary had died and treat the property in the sub-account according to the provisions in Article 6; or, continue to administer the affected beneficiary's trust sub-account under separate arrangement with the affected beneficiary or such beneficiary's legal representative.

Before making any distribution under this paragraph 7.1, the trustee should consider the tax, Medicaid, and other public benefit consequences to the beneficiary of any particular distribution. Declaration of Trust, Art. 7, § 7.1.

Any provision of the trust that may disqualify the beneficiary for government assistance shall be automatically, *ab initio*, amended, limited or void, to avoid that disqualification. Declaration of Trust, Art. 10, § 10.4.

DISCUSSION

Under the Social Security Act, trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary will be considered a resource to the extent that the trust is revocable or to the extent that any payments can be made from the trust for the benefit of the individual. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. In the present trust, the trustee has the discretion to use the income and the principal in the trust sub-account for the benefit of the beneficiary for whom the sub-account was established. *See* Declaration of Trust Art. 3, § 3.1; Art. 5, § 5.3; Art. 7, § 7. Therefore, the trust would be a resource to the beneficiary under these provisions. *See* 42 U.S.C. § 1382b(e)(3)(B).

However, certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of § 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). In order to qualify for

the Medicaid payback trust exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

It must be established and managed by a nonprofit association.

A separate account must be maintained for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.

The trust must provide that to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust will pay to the state from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

See POMS SI 01120.203(B)(2).

The Trust Does Not Qualify For the Medicaid Payback Exception, Unless the Offending Provision is Removed from the Trust under Article 10, § 10.4.

According to the terms of the Trust,

If the trustee has reasonable cause to believe that principal and/or income in any trust sub-account maintained for any beneficiary will be required to be used for the care of a beneficiary that has been, or would otherwise be, provided by local, state, or federal government, or an agency or department thereof, the trustee may, in its sole and absolute discretion, exercise one of the following provisions:

terminate the affected beneficiary's trust sub-account as though that beneficiary had died and treat the property in the sub-account according to the provisions in Article 6; or,

continue to administer the affected beneficiary's trust sub-account under separate arrangement with the affected beneficiary or such beneficiary's legal representative.

Before making any distribution under this paragraph 7.1, the trustee should consider the tax, Medicaid, and other public benefit consequences to the beneficiary of any particular distribution.

Declaration of Trust, Art. 7, § 7.1.

Section 1917(d)(4)(C)(iii) of the Social Security Act, 42 U.S.C. § 1396(d)(4)(C), states, in relevant part, "Accounts in the trust are established solely for the benefit of individuals who are disabled . . . ." The implementing POMS provide that one should "[c]onsider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." (emphasis in original). *See* POMS SI 01120.201(F)(2). Since terminating the beneficiary's trust sub-account under the fiction "as though that beneficiary had died" would create the possibility that other individuals could benefit from the trust during the beneficiary's lifetime, the trust fails to meet the resource exception for Medicaid payback trusts under the Social Security Act. Therefore, under this provision, a beneficiary's sub-account in the trust would be a resource to the beneficiary. *See* 42 U.S.C. § 1382b(e)(3)(B).

Exclusion of the "as though that Beneficiary had died" Provision May Allow Trust to Qualify for the Medicaid Payback Trust Exception

However, if the foregoing offending provision were removed from the trust, it appears that, based on the remaining language of the trust, the trust would qualify for the

Medicaid payback trust exception. Article 10, § 10.4 provides that if any provision of the trust disqualifies a beneficiary for government assistance, that provision may be voided to avoid such disqualification. This clause appears to void the offending language, which permits the trust to meet the Medicaid payback trust exception.

If the "as though that beneficiary had died" provision (§ 7.1(a)), were removed from the trust, it seems that based on the remaining language of the trust, without any additional alternations, the trust may qualify for the Medicaid payback exception.

The trust provides that it intends to create a self-funded, irrevocable trust. Declaration of Trust at Art. 4, §§ 4.1, 4.2. The trust defines the beneficiaries of the trust as disabled individuals pursuant to section 1614(a)(3) of the Social Security Act. *See* Declaration of Trust at Art. 2, §2.4. The Center for Special Needs Trust Administration, Inc., which is the organization that proposes to establish the trust, is identified as a non-profit corporation. *See* Declaration of Trust at 1. Next, the trust maintains a separate account for each beneficiary, but pools the accounts for purposes of investment and management of funds. *See* Declaration of Trust Art. 8, § 8.1. The trust further states that the trust is established by a grantor, which is defined as the individual with a disability, parents, grandparents, guardian, or conservator of a court and the trust is established solely for the purpose of providing a service to individuals with disabilities who qualify and wish to participate. Declaration of Trust at Art. 4, § 4.2; Art. 2, §§ 2.3, 2.4. And, finally the trust provides that upon the death of a beneficiary, any amounts that remain in the beneficiary's trust sub-account shall be distributed to each state in which the beneficiary received government assistance. Any remaining assets in the beneficiary's sub-account shall be retained by the trust and, in the trustee's sole discretion used for the benefit of other beneficiaries enrolled in the pooled trust, or to add disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), who are indigent, to the trust as beneficiaries; or to provide disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), with equipment, medication, or such other services deemed suitable for such persons by the trustee.

Declaration of Trust at Art. 6; Joinder Agreement for the Ohio Pooled Trust at Art. III, § 3.2. Therefore, if § 7.1(a) were excluded from the trust, it appears that the Medicaid payback exception would apply.

Furthermore, according to the regular resource rules, *see* POMS SI 01120.200(D), the trust will be considered a resource only if: (1) Ms. R~ can terminate or revoke the trust or her interest in the trust and obtain the assets; (2) Ms. R~ can compel the trustee to pay for her support and maintenance; or (3) Ms. R~ can sell her beneficial interest in the trust. *See* POMS SI 01120.200(A)(1)(a), (D)(1). Ms. R~ is the "grantor" of the trust to the extent the trust contains assets and/or income that belonged to her. *See* POMS SI 01120.200(B)(2). Generally, a grantor of a trust can revoke her contributions to the trust if she is also the sole beneficiary of the trust, even if the trust purports to be irrevocable. *See* POMS SI 01120.200(D)(3); POMS SI ATL01120.201(B), (C)(2); RESTATEMENT (THIRD) OF TRUSTS § 65 & comment a & Reporter's Note (2003). In this case, however, Ms. R~ is not the sole beneficiary of the trust, since the trust itself is a residual beneficiary of the trust sub-account, whose consent would be necessary to revoke the trust (Declaration of Trust Art. 6), and thus she could not unilaterally revoke her contributions to the trust and recover those assets to use for her support and maintenance. Declaration of Trust, Art. 4, § 4.2. Nor would Ms. R~ have the power or authority to direct the use of the trust property for her support and maintenance. Under

the terms of the trust, the trustee has sole discretion to determine when payments will be made for her benefit. Declaration of Trust at Art. 5, §§ 5.1, 5.2. Finally, even if Ms. R~ could sell her beneficial interest in the trust, that interest would have little or no value because the trustee is not required to make any payments for her benefit. *See* RESTATEMENT (THIRD) OF TRUSTS § 60 & comments e, f (Tentative Draft No. 2, Mar. 10, 1999).

CONCLUSION

For the foregoing reasons, we conclude that a sub-account in the proposed pooled trust would not be a resource. In particular, we conclude that, after application of the Art. 10, § 10.4 "void clause," the trust meets the Medicaid payback trust exception, and would not be a resource under the regular resource rules. However, the trustees should be advised that SSA regards the Art. 7, § 7.1(a) provisions of the trust as being no longer of any legal effect.

J. PS 06-113 SSI-Ohio-Review of the Agreement of Trust for Nicole R. R~, ~ -REPLY Your Reference: S2D5G6, SI-2-1-3 OH (R~)

DATE: April 10, 2006

1. SYLLABUS

A trust agreement executed on September 28,2004 created two special needs trusts for the benefit of an SSI beneficiary. The first trust (the Zoom Trust) was funded solely with the beneficiary's assets and named the parents as grantors. The second trust (the N.R.R Trust) was funded solely with the assets of a third party and also names the parents as grantors. The Zoom Trust contains a provision stating that the Trust can be terminated if it interferes with Medicaid eligibility and, at that time, the Trust assets shift to the second Trust (the N.R.R Trust). Due to language contained in the second Trust, the assets of the Zoom Trust could potentially be used for the benefit of contingent beneficiaries during the SSI beneficiary's lifetime.

Therefore, the Zoom Trust is not for the sole benefit of the beneficiary and does not qualify for the Medicaid trust exception. The second Trust, funded solely with the assets of a third party, is not subject to examination under the Medicaid trust exception policy. As such, it is excluded from resource counting since the Trust is irrevocable, contains a spendthrift clause, and the beneficiary cannot direct use of the funds to meet basic needs.

2. OPINION

You have asked whether the two trusts created by the Agreement of Trust for Nicole R. R~ (Nicole), known as "The Zoom Trust" and "The N.R. R~ Trust," are resources for purposes of determining Nicole's eligibility for SSI. For the reasons explained below, we believe that the Zoom Trust is a resource to Nicole but the N.R. R~ Trust is not a resource to her.

Background

On September 28, 2004, Theodore C. R~ and Wanda A. R~ (Nicole's parents) created the "Agreement of Trust for Nicole R. R~" (Agreement) for Nicole's benefit. Trust Preamble & Trust § 1.5. The Agreement indicates that Nicole is a disabled person under the age of 65. Trust Preamble. This Agreement created two special needs trusts for Nicole's benefit. Trust § 1.1. The first trust was named "The Zoom Trust" while the second trust was named "The N.R. R~ Trust." Trust §§ 1.1, 2.1, & 3.1. The Agreement indicates that these trusts are to be construed under Ohio law. Trust Preamble, Trust § 9.1.1.

A. **The Zoom Trust**

The Zoom Trust is a special needs trust which was funded solely from Nicole's assets. Trust § 2.1. The amount or origin of the assets is not stated in the trust agreement. Nicole's parents were named as grantors of the Trust and Nicole's father, Theodore R~, was named as the trustee of the Trust. Trust Preamble & Trust § 5.1. The Agreement provides that the Trust is revocable during the lifetime of either grantor but is not revocable by the beneficiary, Nicole. Trust §§ 1.3, 1.6.

The Trust declares that its purpose is to supplement, but not to supplant, whatever benefits and services Nicole may receive as a result of her disability from federal, state, and local government or from any other private or public profit or non-profit organizations. Trust §§ 1.2, 2.2.

The Trust provides that it may terminate during Nicole's lifetime if a court of competent jurisdiction finds that Nicole is (1) fully competent without any legal disability and (2) does not meet the requirements of the federal and state disability criteria. Trust § 2.3. The Trust also provides that it will terminate upon Nicole's death. Trust § 2.4. Upon Nicole's death, the Trust's assets would be distributed in the following order:

1. To pay for Nicole's trustee fees, attorney fees, final taxes, and other trust estate administration costs, including costs related to accounting of the trust to a court, completion of filing of documents, or other required actions associated with the termination and wrapping up of the trust;
2. To repay each state which had provided medical assistance (Medicaid) to Nicole during her lifetime; and
3. Any remaining assets would then be distributed to the grantors, or the survivors of them. If neither grantor survived, then the Trust assets would be distributed to Sarah R. R~. And if none of these beneficiaries survived Nicole, the remaining trust assets would be distributed to certain named family members, *per capita.*

Trust §§ 2.4, 2.4.1, 2.4.2.

Finally, the Agreement provides that if the Zoom Trust is terminated due to a determination that its income or principal constitutes a resource which would interfere with or prevent Nicole's Medicaid benefits, the Trustee may elect to have all, or any part, of the Trust funds converted to "The Special Needs Trust of Nicole R. R~," subject to an amendment that upon Nicole's death, the R~ trust assets would first be used repay each state which has provided Medicaid to Nicole during her lifetime. Trust § 8.3.1.

B. **The N.R. R~ Trust**

The N.R. R~ Trust is also a special needs trust but this trust was funded by a third party; the assets are not (and were never) Nicole's assets. Trust § 3.1. The Trust declares that its

purpose is to supplement, but not to supplant, whatever benefits and services Nicole may receive as a result of her disability from federal, state, and local governments or from any other private or public profit or non-profit organizations. Trust § 3.2. The amount or origin of the assets is not stated in the trust agreement. Nicole's parents were both named as grantors of the Trust and Nicole's father, Theodore R~, was named as the trustee of the Trust. Trust Preamble & Trust § 5.1. The trust would be revocable during the lifetime of either grantor but is not revocable by Nicole. Trust §§ 1.3, 1.6.

The Trust provides that the trustee may, but is not required to, establish a regular monthly amount to be paid as a supplement for Nicole to provide for services she needs as a direct result of her disability. Trust § 3.2.2. The Trust further provides that Nicole would be restricted from transferring, selling, or assigning any beneficial interest (whether it be income or principal) she receives. Trust § 3.2.5.

The Trust provides that it may be terminated during Nicole's lifetime if a court of competent jurisdiction finds that Nicole is (1) fully competent without any legal disability and (2) does not meet the requirements of the federal and state disability criteria. Trust § 3.3. If so terminated, trust assets either go to Nicole or stay in the trust. The Trust also provides that it may be terminated if it is determined that the income or principal of this Trust constituted a resource which would interrupt, prevent, or interfere with Nicole's Medicaid benefits. Trust § 3.4. In the event that the Trust is terminated due to its interference with Medicaid benefits, the Trust assets would be distributed first to the Grantors, or their survivors, then to Sarah R. R~, and then to certain named family members, *per capita.* Trust §§ 3.4.1. Finally, the Trust would also terminate upon Nicole's death. Trust § 3.5. Upon Nicole's death, the Trust assets would be distributed as follows:

a. To pay for Nicole's trustee fees, attorney fees, final taxes, and other trust estate administration costs, including costs related to the accounting of the Trust to a court, completion of filing of documents, or other required actions associated with the termination and wrapping up of the trust.
b. Then to the grantors, or their survivors. If neither grantor survived, then the Trust assets would be distributed to Sarah R. R~. And if none of these beneficiaries survived Nicole, the remaining trust assets would be distributed to certain named family members, *per capita.*

Trust §§ 3.5, 3.5.2.

DISCUSSION

For the reasons explained in the following discussion, we believe the Zoom Trust is a resource to Nicole, while the N.R. R~ Trust is not a resource to her.

A. The Zoom Trust

Under federal law, a trust established by an individual after January 2000 generally will be considered a resource to her if the trust is irrevocable, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. In that case, the value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a). However, certain exceptions may apply.

Here, while the Trust indicates that either grantor could revoke the trust, Nicole is explicitly prohibited from revoking the Trust. Trust §§ 1.3, 1.6. Moreover, even though

Nicole should be considered the true grantor of the Trust (since the Trust was established with funds that belonged to her), she is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). Trust § 2.1., POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200. Specifically, the Trust creates contingent remainder interests in certain named family members. Trust § 2.4.2, POMS SI CHI01120.200(D)(1). Accordingly, the Trust is irrevocable. POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary.").

Pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual (which is the case here, since Nicole is a beneficiary), unless the Trust meets the requirements of the Medicaid trust exception in POMS SI 01120.203(B).

The Medicaid trust exception for individual trusts applies where the trust:

a. contains the assets of an individual who is under age 65 and disabled;
b. is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and
c. provides that, upon the death of the individual, the State will receive all amounts remaining in the trust, equal to the total medical assistance (Medicaid) paid for the individual's benefit.

POMS SI 01120.203(B).

Here, the Trust satisfies two out of the three requirements, namely requirements (1) and (3). Specifically, the Trust provides that Nicole is under 65 and disabled and that upon her death, any medical assistance agencies would be reimbursed for Medicaid benefits Nicole received during her lifetime. Trust Preamble, Trust § 2.4.1. However, due to the termination provision in Section 8, the Trust fails to satisfy the second requirement, which requires that the Trust be established *for the benefit of an individual* by a parent, grandparent, legal guardian, or court. Trust § 8.1. We have previously opined that the second requirement should be interpreted to necessitate that the trust be established for the *sole benefit* of the individual during his or her lifetime. *See* POMS PS 01825.016(D), *PS 05-033 SSI-Illinois-Review of the Brian V~Irrevocable OBRA Pay Back Trust* (termination clause that created contingent interests in third parties rendered the exception under Section 1917(d)(4)(A) of the Act unavailable).

Here, one of the Zoom Trust termination provisions creates contingent interests that could potentially benefit third parties *during* Nicole's lifetime. Specifically, if the trustee decides to terminate the Trust because it disqualifies Nicole from Medicaid benefits, the Trust assets may be shifted into the N.R. R~ Trust, and the R~ Trust contains a termination provision that creates contingent interests in individuals other than Nicole. Trust § 3.4.1. This contingent interest in third parties causes the Zoom Trust to not be for the sole benefit of Nicole during her lifetime. Accordingly, the exception under Section 1917(d)(4)(A) of the Social Security Act (POMS SI 1120.203(B)), as well as any other exceptions, would not be available. Therefore, the Zoom Trust should be considered a resource to Nicole under POMS SI 01120.201(D)(2).

A. The N.R. R~ Trust

In contrast to the Zoom trust, since the N.R. R~ Trust was funded solely by assets that were not Nicole's, it is a third party trust. Trust § 3.1. Trusts established by third parties are resources if an individual (Nicole) has the legal authority to revoke the trust and then use the funds to meet her food, clothing, and shelter needs, or if the individual can direct the use of the trust principal for her support and maintenance. SI 01120.200(D)(1)(a). Additionally, if the trust provides mandatory disbursements to the beneficiary and the beneficiary is not prohibited from anticipating, assigning, or selling the right to future payments, the current value of these payments may be a resource to the beneficiary. SI 01120.200(D)(1)(a). Here, neither situation exists. The Trust provides that Nicole cannot terminate or revoke the Trust. Trust § 1.3. And only the trustee, not Nicole, is authorized to invade the Trust principal if the net income is not sufficient to make appropriate distributions. Trust § 3.2.4. In addition, the Trust provides that the trustee may establish a regular monthly amount to be paid as a supplement for Nicole to provide for services she needs as a direct result of her disability. Trust § 3.2.2. The Trust further provides that Nicole is restricted from transferring, selling, or assigning any beneficial interest (whether it be income or principal) she receives. Trust § 3.2.5. As such, we believe that the N.R. R~ Trust should not be considered a resource to Nicole.

Conclusion

For the reasons discussed above, we conclude that The Zoom Trust is a resource to Nicole, but the N.R. R~ Trust is not.

K. PS 06-053 SSI-Ohio-Review of the Gift Annuity Account for Janalyn M. H~ in the Ohio Community Pooled Trust, ~ - REPLY Your Ref: S2D5G6 SI 2-1-3 OH (H~) Our Ref: 05-0174

DATE: January 30, 2006

1. SYLLABUS

The Ohio Community Pooled Trust was amended on September 16, 2005 to incorporate changes to the Master Trust that would permit all sub-accounts to be excluded from countable resources for SSI purposes. The amendments to the Master Trust Agreement bring the Trust into compliance with the Medicaid payback provisions such that the subaccounts are now excluded under provisions found at 42 U.S.C.1396p(d)(4)(c). Amendments incorporated September 16,2005 modified the original Trust. This means that the changes to the Master Trust, and the subaccounts found therein, are effective September 16,2005 and not for any time prior to execution of the amendments.

2. OPINION

In May 2005, the Agency determined that the Gift Annuity Account established for Janalyn M. H~ (Janalyn) in the Ohio Community Pooled Trust was a resource to Janalyn

for purposes of determining her eligibility for Supplemental Security Income (SSI). *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't. Reg. Comm. - MOS, Chicago, *SSI - Ohio - Review of the Gift Annuity Account for Janalyn M. H~ in the Ohio Community Pooled* Trust (May 16, 2005) (hereinafter, H~ memo). We also explained that, with certain changes to the trust, Janalyn's subaccount would no longer be considered a resource.

On September 16, 2005, a new Trust Agreement was drafted which incorporated the changes discussed in the H~ memo. A representative of the Trustee now requests written confirmation that the new Trust Agreement eliminates the Agency's previous concerns and complies with the Medicaid payback trust provisions at 42 U.S.C. § 1396p(d)(4)(C). For the reasons discussed in the H~ memo, we conclude that the new Trust Agreement complies with the Medicaid payback provisions and that Janalyn's subaccount would n o longer be a resource. However, as discussed below, the new Trust Agreement became effective on September 16, 2005 and Janalyn's subaccount would be a resource prior to that date.

The Restatement (Third) of Trusts distinguishes between two types of alteration of a trust document. A "'reformation' involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain - and properly restate - the true, legally effective intent of a settler with respect to the original terms of trusts they have created." *Restatement (Third) of Trusts,* § 62, Reporter's Notes. In contrast, a "modification involves a change in - a departure from - the true, original terms of the trust, whether the modification is done by a court [cites omitted] or by the beneficiaries." *Id.*

We believe that the September 2005 amendment modified, or changed, the original Trust. *Restatement (Third) of Trusts*, § 62, Reporter's Notes (defining "modification"). With its statement that the new trust Agreement is to be "generally effective as of the 25th day of August, 1998 but specifically effective with respect to the duties and responsibilities of the Trustees as of the date of this Agreement," the Dayton Foundation and the Trustees attempt to retroactively apply modified Trust terms. But such retroactive application is inconsistent with modification, which, unlike reformation, does not give effect to original intention. *See Restatement (Third) of Property,* § 12.1, Reporter's Notes 7 on Comment f (contrasting modification and reformation to explain the fact that a reformation order operates to alter the text as of the date of execution rather than as of the date of the order). Rather, because the modification is a "departure from the true original terms of the trust," the amendment here became effective upon its execution, September 16, 2005. *Restatement (Third) of Trusts*, § 62, Reporter's Notes.

CONCLUSION

We believe that the terms of the new Trust Agreement meet the Medicaid payback exception criteria. However, the new Trust Agreement would be effective as of September 16, 2005. Thus, as of that date, Janalyn's sub-account under the new Trust Agreement would not be a resource to her.

PS 01825.042 Pennsylvania

A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~

DATE: August 27, 2003

1. SYLLABUS

Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

2. OPINION

INTRODUCTION

You requested our advice on whether under the laws of the jurisdictions withinRegion III, a parent or grandparent can establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. In further conversations with your staff, we were instructed to assume that the trust agreements that you wish us to consider satisfy the requirements of 42 U.S.C. '1382b(e)(5).

SUMMARY

We believe that based on court precedent, every jurisdiction within Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establishes an empty trust or a seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

BACKGROUND

To qualify for supplemental security income (SSI), an individual must not have resources that total more than $2,000. 20 C.F.R. ' 416.1205 (2003). In addition, as a general rule, a trust established with the assets of an individual (or spouse) will be considered a resource for SSI eligibility purposes. 42 U.S.C. '1382b(e)(3). There is, however, an exception to these resource rovisions. Under 42 U.S.C. '1382b(e)(5) of the Social Security Act, if any agreement satisfies the criteria found in 42 U.S.C. ' 1396p(d)(4), it is not counted as a resource. Section 1396p(d)(4) provides an exception for counting a trust as a resource if it is a:

trust containing assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

DISCUSSION

Within the state jurisdictions in Region III (including the District of Columbia), neither the courts nor the lawmakers define a trust. Rather, each jurisdiction sets out in court precedent its own test for finding a valid trust. Below is a breakdown by jurisdiction of the applicable case law as applied to your inquiry.

VirginiaAccording to Virginia precedent:

express trust is created when the parties affirmatively manifest an intention that certain property be held in trust for the benefit of a third party. *See Peal v. Luther*, 199 Va. 35, 97 S.E.2d 668, 669 (1957); *Broaddus v. Gresham*, 181 Va. 725, 26 S.E.2d 33,35 (1943). An express trust may be created A without the use of technical words.@ Broaddus, 26 S.E.2d at 35. All that is necessary are words, see id. at 35 (citation omitted), or circumstances, see Woods v. Stull, 182 Va. 888, 30 S.E.2d 675, 682 (1944) (citation omitted), A which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . .,@ Broaddus, 26 S.E.2d at 35; see also Schloss v. Powell, 93 F.2d 518, 519 (4th Cir. 1938).

Old Republic Nat. Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998).

When an agreement satisfies 42 U.S.C. '1382b(e)(5), there will always be a corpus. It is irrelevant that a parent or grandparent sets up an agreement that has little or no funds, because ultimately the disabled individual for whom the trust is established will provide the assets. In addition, in these agreements, the disabled individual will be the settlor. 76 Am. Jur. 2d Trusts (1992) (stating that under general trust principles, the person who provides consideration for the trust is the settlor, even though in form the trust is created by another person). Further, the disabled individual will also be a beneficiary, as the trust is established for his/her benefit. Moreover, the essential purpose of the agreement will be to ensure that a trust established with the assets of the settlor is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. In short, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), circumstances unequivocally show an intention that the legal estate be vested in one person, to be held in some manner or some purpose on behalf of another. *Id*. Therefore, Virginia courts will recognize agreements that satisfy 42 U.S.C. ' 1382b(e)(5) as valid trusts.

Delaware

Delaware precedent states that:

No particular words or form are required in order to create an express trust. All that is required is that the parties intended that a relationship, which equity would describe as a trust, exist. “When a question arises as to whether or not an agreement creates a trust, the courts look objectively at the result to determine the matter. . . . The question in each instance is whether the kind of relationship known to the law as a trust has been created. ” It is the intent of the settlor as expressed in the agreement itself which is controlling as to whether a trust has been created. It is immaterial that the parties did not know they were creating a trust.

Cravero v. Holleger, Del. Ch., 566 A.2d 8, 13 (1989) (citations omitted).

When an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the settlor's intent will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed.

Because the settlor's expressed intent in such an agreement is to establish a trust, a Delaware court would find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5) is a valid trust.

District of Columbia

The District of Columbia Court of Appeals noted that “there must be proof of the settlor's intention to create a trust, which may be manifested by written or spoken language or by conduct, in light of all surrounding circumstances.” *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983)). The court also added that “[n]o particular form of words or conduct is necessary to manifest an intention to create a trust.” *Id*. at 1136. Rather, the courts in the District of Columbia look to several “evidentiary factors” in determining that intent:

(1) the imperative, as distinguished from precatory, nature of the words used by the settlor to create a trust; (2) the definiteness of the trust property; (3) the certainty of the identity of the trust beneficiaries; (4) the relationship between and financial position of the parties; (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and (6) whether the result reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.

Id.

In an agreement that satisfies the requirements of 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five provides the assets and is the settlor and a beneficiary. The state Medicaid provider(s) will be reimbursed. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI. Logically, the settlor would desire having the agreement construed as a trust. Consequently, when a court within the District of Columbia scrutinizes an agreement established pursuant to 42 U.S.C. '1382b(e)(5) under the evidentiary factors discussed in *Duggan*, it will find a valid trust.

MarylandThe Maryland Supreme Court has stated that:

From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002) (citations omitted).

In an agreement established pursuant to 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five, provides the assets and is the settlor. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because under Maryland law the settlor's intent ultimately determines whether a valid trust exists, a court within that jurisdiction will find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5), which has a clear intent, is a valid trust.

PennsylvaniaThe Pennsylvania Supreme Court has discussed the criteria for a valid trust using the following language:

[N]o particular form of words or conduct is necessary to create a trust. Neither the presence nor the absence of words “trust,” “trustee,” or “beneficiary” is determinative of an intention to create a trust. The question is whether the agreements taken as a whole evidence an intent by [the settlors] “to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another.” “To determine

whether there is a trust we are to look, not at the title given, but at the powers and duties conferred."

* * *

'A trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefits of the other. The term 'trust' is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee….'

Buchanan v. Brentwood Federal Savings & Loan Association, 457 Pa. 135, 143, 20 A.2d 117, 122 (1974); *R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Development Inc*., 334 Pa.Super. 72, 77-78, 482 A.2d 1086, 1089 (1984) (quoting *Buchanan*) (citations omitted).

As mentioned in the discussion of Virginia law, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the property, the settlor, a beneficiary, and the purpose will be known. In other words, an agreement that satisfies the requirements established in 42 U.S.C. '1382b(e)(5) would evidence intent by a settlor to impose upon a transferee of property equitable duties to deal with the property for the benefit of another. *Id*. Therefore, under Pennsylvania law such an agreement amounts to a valid trust.

West Virginia

In West Virginia, courts will determine whether a valid trust is created based upon the intent of the parties. *Bowne v. Lamb*, 119 W.Va. 370, 193 S.E. 563, 565 (1937). Further, "[w]hether the parties intended to create a trust is determined not solely from the wording of the agreement but also from their actions under it and the way the fund is handled." *Id*. When an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), the parties unquestionably intend to create a trust to ensure that the settlor does not have his/her assets in the agreement counted as a resource for purposes of SSI and that the state will be reimbursed for medical assistance that it paid to the settlor. Because the parties' intent will be apparent when an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), a West Virginia court will find that such an agreement is a valid trust.

CONCLUSION

It is our opinion that every jurisdiction within Region III would recognize as a valid trust any agreement established pursuant to 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

James A. W~
Regional Chief Counsel

By:_____
Andrew C. L~
Assistant Regional Counsel

PS 01825.048 Texas

A. PS 05-166 SSI-Review of the D~ R~ Trust, ~-REPLYYour Ref.: S2D5G6, SI 2-1-3 (R~) Our Ref.: 05-0097

DATE: May 31, 2005

1. SYLLABUS

A special needs trust was established for the benefit of an SSI eligible child on January 11, 2005. The trust was executed and approved by a court and the corpus was formed with a lump sum malpractice award. Trust language restricted the use of the funds by the third party trustee and contained a spendthrift provision preventing anticipation or transfer of the beneficiary's interest in the trust. Terms of the trust stated that termination of the trust would provide that any remaining assets be used for reimbursement of Medicaid expenses incurred after the establishment of the trust. Since the trust was established in Texas, state law dictates that Medicaid agencies are considered residual beneficiaries, resulting in an irrevocable trust. The trust meets the special needs trust requirements of age, disability, and being court-established. However, the third requirement is not met. The trust only provides that Medicaid expenses incurred after the trust was established will be reimbursed. Regulations require that the trust language provide for repayment of all incurred medical expenses, regardless of occurrence before or after trust establishment. Since the special needs trust exemption requirements are not met, the trust is determined to be a countable resource. An additional question regarding child support deposited into the trust is not evaluated due to a lack of sufficient information.

2. OPINION

You have asked whether D~ R~'s trust account is a resource to D~ for purposes of Supplemental Security Income (SSI) eligibility and whether child support payments into the trust should be considered income. We believe that the trust is a resource to D~. We do not have sufficient information to render an opinion regarding the child support payments.

FACTS

As we understand the facts, a Trust Agreement ("trust") was executed and approved by the A-14th District Court ("court") of Dallas County, Texas, on January 11, 2005. The trust was established as a result of a settlement agreement in a medical malpractice case, which resulted in the payment of $2,109,561.45 for the benefit of D~. An "SSID" query print-out included in the materials you provided indicates that D~ SSI benefits have been suspended as a result of his receipt of the settlement, pending establishment and approval of a special needs trust. The same SSID printout shows D~ date of birth as February 3,

1994, which places him at the age of five on his application date. D~ is a minor and an incapacitated person, as defined in section 142.007 of the Texas Property Code, and a disabled person, as defined in section 1614(a)(3) of the Social Security Act. The trustee is Morgan Chase Trust Company.

The agreement indicates that it is intended to comply with the requirements of a special needs trust pursuant to 42 U.S.C. § 1396p (d)(4)(A), as amended August 10, 1993, by the Revenue Reconciliation Act of 1993, Pub. L. 103-66. The agreement further indicates that the settlement proceeds are transferred and assigned to the trustee by the court to be held, invested, administered, and distributed by the trustee for D~ benefit, but that the funds shall at no time become available to or placed in D~ possession or come within the control of his guardians, except as provided by the agreement. No transfer or ownership of the settlement funds has been made to D~ or his legal guardians. The agreement also specifies that the court may amend, modify, or revoke the trust, but neither D~ nor the guardian of his estate may do so.

The primary purpose of the trust is to provide a system for management, investment, and disbursement of the settlement proceeds for D~ benefit. The secondary intention is to provide for the continuing conservation and enhancement of the proceeds to supplement any benefits that D~ might receive from any governmental or non-governmental agency. The agreement specifies that the trust is explicitly intended to be a discretionary trust and not a basic support trust, and that the intent is to provide benefits to D~ without interfering with any other benefits he might receive or excusing the obligations of any person to provide for D~ continuing maintenance and support. The trustee has complete discretion to pay or use so much or all of the net income and/or corpus of the trust as it deems appropriate, and any undistributed income shall be accumulated and added to the corpus of the trust.

The express purpose of the trust is to provide for D~ "extra and supplemental needs, over and above the benefits he otherwise receives" from other sources. The court provided a non-exclusive itemization of the types of needs the trustee may meet through the trust funds. These include: dental care; unreimbursed medical expenses; ophthalmic and auditory care; psychological support services; recreational and cultural experiences; expenditures for persons to accompany D~ on vacations and transportation of persons visiting him; expenditures related to D~ hobbies and interests; personal property and services that will enhance D~ life without defeating his eligibility for public assistance; funeral and burial costs; personal care needs and companionship; supplemental nursing care; physical therapy or rehabilitation; private room costs; entertainment items; nutritional and similar services; and payment for D~ care and the training of caregivers.

The trustee has complete discretion as to expenditures during times when D~ is neither receiving nor applying for public assistance. The court, however, imposed a specific prohibition against use of the trust assets or income for any property or services that would be available from any governmental or insurance source during periods of time that D~ has applied for or is receiving means-tested governmental public assistance benefits. At the same time, the trust allows that there may be circumstances during the existence of this trust "wherein it may be in the best interests of the Beneficiary to forfeit or forego the receipt of means-tested governmental public assistance benefits."

The trust is to terminate on the earlier of the date of D~ death or the date the court determines that D~ has regained capacity and is no longer an incapacitated person, except

that if D~ regains capacity before age 25, the trust will not terminate until he is age 25. Upon termination of the trust, the trustee shall distribute the remaining trust assets to the State of Illinois or any other State that provides Medicaid benefits to D~, up to an amount equal to the total medical assistance paid on D~ behalf under the state's Medicaid plan for services furnished after the establishment of the trust. Any remaining assets shall be distributed to D~ if he is living, otherwise to the personal representative of his estate to be administered as part of his general probate estate.

The agreement contains provisions for changes of trustees, compensation of trustees, and accountings. It also contains provisions describing various types of investments and describing the powers and liabilities of the trustee. Among the general trust provisions is a spendthrift provision, which specifies that D~ shall not have the power to anticipate, encumber, or transfer his interest in the corpus of the trust in any manner and that neither the income nor the corpus of the trust shall be liable for or charged with any obligations incurred by D~.

The materials you provided include an "SSID" query print-out, which indicates that D~ is receiving child support, apparently in the sum of $300 per month. Your memorandum requesting our opinion indicates that the child support payments are made into the trust. We have no information as to the State of residence of D~ father or whether the child support payments are court-ordered and, if so, in what State the order was issued or the terms of the court order.

DISCUSSION

The trust provides that it is governed by Texas law. In a suit in Texas in which a minor without a legal guardian or an incapacitated person is represented by a next friend or guardian ad litem, the court may, on application of the next friend or guardian ad litem, and on a finding that a creation of a trust would represent the individual's best interests, order delivery of funds accruing to the individual under the judgment to a trust company or bank having trust powers in Texas. Tex. Prop. Code Ann. § 142.005(a) (West 2005). The decree shall provide for the creation of a trust for the benefit of the individual, in which the individual is the sole beneficiary and the trustee has sole discretion with regard to disbursements for the individual's benefit. Tex. Prop. Code Ann. § 142.005(b)(1), (2). If the individual is a minor, the trust terminates on his death, attainment of an age stated in the trust, or age 25, whichever is earlier. If the individual is an incapacitated person, the trust terminates on his death or when he regains capacity. Tex. Prop. Code Ann. § 142.005(b)(4). A trust created under this section may be amended, modified, or revoked by the court at any time, but is not subject to revocation by the individual or the guardian of his estate. Tex. Prop. Code Ann. § 142.005(d). If the court finds that it would be in the best interests of the individual to do so, the trust may contain provisions determined by the court to be necessary to establish a special needs trust pursuant to 42 U.S.C. § 1396p(d)(4)(A). Tex. Prop. Code Ann. § 142.005(g).

An incapacitated person is a person who is impaired because of mental illness or deficiency, physical illness or disability, advanced age, chronic drug use or intoxication, or any other cause except status as a minor to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person. Tex. Prop. Code Ann. § 142.007.

The trust created for D~ meets the requirements of the Texas Property Code. The court determined that D~ is a minor and an incapacitated person and that creation of the trust would be in his best interest. The trustee has sole discretion with regard to expenditures from the trust funds. The trust terminates upon D~ death or his regaining capacity, but not earlier than age 25. Only the court may amend, modify, or revoke the trust. Further, the court found that it would be in D~ best interest to establish the trust as a special needs trust pursuant to 42 U.S.C. § 1396p(d)(4)(A). Tex. Prop. Code Ann. § 142.005.

Turning to the resource issue, the trust indicates that it is irrevocable. Article II. However, despite the terms of a trust, if an individual is both the settlor and the sole beneficiary, he can revoke the trust. The settlor is one who creates a trust or furnishes the consideration for the creation of a trust, which, in this case, would be D~. Restatement (Third) Trusts, § 3(1). D~, however, is not the sole beneficiary, since, pursuant to POMS SI DAL01120.200, State Medicaid agencies are considered residual beneficiaries in Texas. Accordingly, the Trust is irrevocable.

Pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since D~ is a beneficiary), unless one of the exceptions in POMS SI 01120.203 (listing Medicaid trust exceptions for individual and pooled trusts, and the waiver for undue hardship) applies. Here, however, it does not appear that any exception applies.

Specifically, the trust is not a pooled trust, so POMS SI01120.203(B)(2) (Medicaid pooled trust exception) would not apply, and the undue hardship waiver would not be applicable because the trust does not prohibit disbursements for D~ support and maintenance, when no other source of funds is available, POMS SI 01120.203(C)(2)(a). The final exception, the Medicaid trust exception for individual trusts, applies where the trust is: (1) established with the assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the State for Medicaid payments made for the benefit of the individual during his lifetime. POMS SI 01120.203(B)(1). Here, it appears that D~ is under age 65 and disabled, and the trust was established for his benefit by the Court, when the funds were ordered transferred. However, the third element is not satisfied, since the trust only provides for reimbursement of Medicaid for services furnished after the establishment of the trust. POMS SI 01120.203(B)(1)(a), (f) (State must 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."). Accordingly, it does not appear that any of the exceptions in POMS SI 01120.203 apply, and thus the trust should be considered a resource under POMS SI 01120.201(D)(2).

We do not have sufficient information to offer an opinion regarding the child support payments raised in your request. We do not know whether the child support payments made to D~ are made directly into the trust, what the terms are of any court order regarding the child support, or in what State the payments are made. Therefore, more detailed information as to the child support payments appears necessary before we can issue an opinion on this matter.

CONCLUSION

We believe that the trust in this case is a resource because it does not meet any of the exceptions under the statutory trust resource rules, as discussed above. Further development is needed regarding child support payments that may be made into D~ trust before their treatment as possible income can be determined, pursuant to the law of the pertinent State, depending on the State in which the payments are made or court ordered.

PS 01825.055 Wisconsin

A. PS 08-156 SSI- Wisconsin-Review of the Trust for Brian G~, ~ Our Reference: 08-0168-NC

DATE: July 23, 2008

1. SYLLABUS

This opinion examines a third-party trust and whether or not it is a countable resource for SSI purposes. The trust in this case is not a resource because the claimant cannot revoke the trust and obtain the assets, nor does he have the authority to direct use of the trust principal for his support and maintenance. Moreover, under the terms of the trust, the claimant cannot assign or sell his right to future payments. It should be noted that the trust may be terminated when the claimant reaches age 60 and thus the trust should be re-evaluated at that time to determine whether it should be counted as income or a resource.

2. OPINION

You asked whether the trust for Brian G~ ("Brian") is a resource for SSI purposes. Specifically, you inquired as to whether Brian can sell his right to the trust, which can terminate on his sixtieth birthday in 2025. We conclude that the trust is not currently a resource to Brian because a spendthrift clause prevents him from selling his right to receive the trust assets on his sixtieth birthday. However, the trust funds should be re-examined when Brian reaches age sixty (or before that if the trustee terminates the trust) to determine whether, after that time, it is income or a resource to Brian.

BACKGROUND

Gerald D. G~ ("Mr. G~") established a revocable Living Trust with his property on March 12, 2003. Mr. G~ was the beneficiary of the trust during his lifetime, and he retained the power, personally, to use, possess, enjoy, and withdraw any or all of the trust property, principal or income for his own benefit. Trust at I(B), XI. Mr. G~ also retained the power to revoke or amend the trust at any time. Trust at VII, X.

On January 12, 2004, Mr. G~ amended the trust, specifically replacing the section which designated beneficiaries and provided for distribution of the trust upon his death. The amended trust now names Brian as the main residual beneficiary. Trust Amendment at

II(C). After payment of Mr. G~'s death expenses, the remaining trust corpus is to remain in trust for Brian's benefit. Trust Amendment at II(C).The trustee has "sole and complete discretion" to "make any distributions to the Beneficiary from the Trust that the Trustee deems appropriate for the support, health, welfare and education of the Beneficiary." Trust Amendment at II(D). But, the Trustee is restricted from taking action which jeopardizes Brian's eligibility for Social Security or Medicare benefits. Trust Amendment at II(D).

Brian's trust terminates when he reaches age 60, but may be extended upon mutual agreement of Brian and the trustee, if termination will negatively affect Brian's eligibility for public benefits. Trust Amendment at II(F). Upon termination, the remaining trust corpus would be distributed to Brian. Id.

Under the terms of the trust (which were not amended), the trustee also has the power to terminate the trust if its value is insufficient to carry out its purposes. Trust at V(8).

The trust includes a spendthrift clause, stating that "[n]o interest under this agreement shall be assignable by any beneficiary, or be subject to claims of his or her creditors . . . ." Trust at IV. And the trust states that it is governed exclusively by Wisconsin law. Trust at IX.

Mr. G~ died on January 24, 2004 (just ten days after amending the trust). The value of the corpus of the trust is currently about $101,040.

DISCUSSION

The Social Security Act provides that an individual is not eligible for SSI if his resources exceed $2,000.00. *See* 42 U.S.C. § 1382(a)(1)(B)(ii), (3)(B) (designating allowable resource cap for an individual not living with a spouse). A resource is cash or other liquid assets or real or personal property that an individual owns and can convert to cash to be used for support and maintenance. 20 C.F.R. § 416.1201(a). Trust property may be a resource for SSI purposes. POMS SI 01120.200(A)(1).

Because this is a third party funded trust of which Brian is a beneficiary, only the regular resource rules apply in determining whether the trust is a resource to Brian. POMS SI 01120.200(A)(1), (2)(b). Under these rules, a trust is a resource to an individual if he has the right to revoke or terminate the trust and use the funds for his food or shelter; if he can direct the use of the trust principal for his support and maintenance; or if the trust provides for mandatory disbursements to the individual and he is not prohibited from anticipating, assigning, or selling his right to those future payments. 20 C.F.R. § 416.1201(a); POMS SI 01120.200(A)(2)(b), (D)(1)-(2). Brian's trust is not a resource under these rules.

First, Brian cannot revoke or terminate the trust and obtain the assets. Although the trust permitted the grantor, Mr. G~, to revoke the trust during his lifetime, there is no provision in the trust permitting Brian to terminate the trust and obtain the assets. The trustee has a limited power to terminate the trust if he determines that the value of the trust assets is insufficient to carry out the purpose of the trust. Trust at V(8). If the trustee terminates the trust pursuant to this provision, the trust corpus and certain income would be distributed to Brian. However, Brian does not have the power or authority to terminate the trust under this provision.

Second, Brian does not have the power to direct the use of trust principal for his support and maintenance. The trust does not give Brian, as the beneficiary, any direct power to

act with regard to the trust principal or any power to order the trustee to distribute the trust principal on his behalf. *See* POMS SI 01120.200(D)(1)(b). The trust gives the trustee "sole and complete discretion" with regard to distributions. Trust Amendment at II(D). The trust also provides that the trustee is prohibited from taking any actions which could "jeopardize or negatively affect" Brian's eligibility for other resources, including, particularly, any Social Security or other public benefits. Id. Thus, if Brian were to challenge the trustee with regard to a request that the trustee distribute trust principal on his behalf while he is receiving or otherwise eligible for public benefits, it is likely that the Wisconsin courts would construe the trust according to the settlor's intent and not allow any distributions by the trustee that would jeopardize Brian's Social Security or Medicare benefits. *See* In re *Catherine H. Bowen Charitable Trust*, 622 N.W.2d 471, 474 (Wis. App. 2000) (settlor's intent controls, especially as expressed in trust document where settlor is deceased). Thus, so long as Brian is receiving or may be eligible for SSI or other public benefits, such as Medicare, he cannot compel the trustee to use the funds in a manner that would make him ineligible for benefits.

Finally, the trust did not provide for any mandatory distributions to Brian which he could anticipate and assign, due to the trust's valid spendthrift provision. *See* POMS SI 01120.200(A)(2)(b), (B)(16), (D)(1)(a). Wisconsin law upholds the validity of a trust settlor's expressly provided-for spendthrift provision imposed upon the trust's beneficiary. Wis. Stat. Ann. § 701.06(1)-(2). However, after Brian reaches age sixty, the trust should be evaluated to determine whether the funds should be considered income or a resource to him at that time.

Conclusion

In sum, until it is terminated - either on Brian's sixtieth birthday or pursuant to the trustee's limited power to terminate based on insufficient value - the trust corpus is not a resource to Brian because he cannot terminate the trust and obtain the assets; he cannot compel the trustee to provide for his support and maintenance; and he cannot assign his interest in the trust. After Brian reaches age 60, however (and before that if the trustee terminates the trust), the trust should be re-evaluated to determine whether it should be counted as income or a resource.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Sara E. Z~
Assistant Regional Counsel

B. PS 08-133 SSI- Wisconsin-Review of the Irrevocable Life Insurance Trust Agreement for Nancy S~, ~ Our Reference: 08-108-NC

DATE: June 18, 2008

1. SYLLABUS

This decision highlights the fact that a life insurance policy purchased under the auspices of a revocable trust can also be revoked and, therefore is countable. Unlike many life insurance policies which are the basis of burial contract funding, this revocable policy has no connection to any funeral home.

2. OPINION

BACKGROUND

On December 26, 2007, the Nancy J. S~ Irrevocable Trust (the Trust) entered into a contract with National Mutual Benefit, a life insurance company (National), for a Simple Premium Whole Life insurance policy. The Trust is the policy owner, and Nancy J. S~ (Ms. S~), is the insured. *See* Sections I, III. Also, on November 7, 2007, Ms. S~ executed an Irrevocable Assignment which purports to make an irrevocable assignment of ownership of the policy to the Trust, with Thomas P. S~ acting as trustee (but with the option of assigning his duties to a third party administrator other than National). Thomas accepted the assignment on behalf of the Trust, and an officer of National consented to the assignment on December 26, 2007. Ms. S~ funded the policy with a cash surrender from a policy with Prudential Financial, who issued a check on December 20, 2007, payable to National. The surrender was a "1035 exchange," surrender date November 26, 2007.

The life insurance policy is to pay death benefits upon the death of Ms. S~. Section I. The single premium paid for the policy was $3,982.56, and the death benefit amount is $4,127.00. Death benefit proceeds would consist of the face amount less any indebtedness, plus any insurance additions or dividends left on deposit. Section IV § 1.

The policy states on its face that it could be cancelled it within twenty days of receipt of the policy. The policy also has a cash surrender value that can be obtained at any time, although National may defer payment for up to six months. Section VI § 4. The beneficiary will receive the proceeds when Ms. S~ dies. Section VIII §§ 17-18.

The Trust Agreement was dated November 7, 2007, with Ms. S~ listed as the Grantor and Insured and the Trust listed as Owner and Beneficiary of the life insurance policy. Ms. S~'s estate is listed as the secondary Beneficiary of the Trust. The Trust directs that the policy and the proceeds payable thereunder are the "Trust Estate" and shall be held until Ms. S~'s death and distributed in accordance with the Trust Agreement, by the Trustee for the purposes of paying for the "property …and … services for the final disposition of the insured's body." If the policy proceeds exceed the funeral and burial costs, the excess shall be paid to Ms. S~'s estate. The Trust Agreement directs the Trustee not to surrender the policy, take a loan against the proceeds, change the beneficiaries, or act other than in accordance with the Agreement.

The Agreement includes Spendthrift Provisions which state that (1) no title in the Trust Estate or income therefrom shall vest in Ms. S~'s heirs; (2) no principal or income of the Trust shall be liable to be reached by Ms. S~'s creditors or her heirs creditors; (3) neither Ms. S~ nor her heirs may alienate, encumber, anticipate, or dispose of any interest in the Trust Estate or income therefrom except for the purpose of arranging for the final disposition of Ms. S~'s body.

The Trust and Agreement are stated to be irrevocable, with Ms. S~ as Grantor having "no power to alter, amend, or modify this agreement in any way," and with Ms. S~ further irrevocably assigning the Trustee all rights under the policy. The Trust Agreement was executed in, and is governed by, the laws of Wisconsin. The Trust states it is effective and valid as of November 7, 2007. Ms. S~ signed the Agreement, as did an officer of National and a witness, with a date of December 26, 2007.

DISCUSSION

In general, assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate property, it is a resource. *Id.* A life insurance policy constitutes a resource if the individual can surrender it for cash or recover premiums paid. *See* 20 C.F.R. § 416.1230. Trusts may also constitute a resource under these rules. *See* POMS SI 01120.200. And for trusts established after January 1, 2000, trusts must also be evaluated under special rules. *See* 42 U.S.C. § 1382b(e) (addressing trusts created on or after January 1, 2000); POMS SI 01120.203.

We note that the policy here does not appear to be a "funeral policy" under Wisconsin law, *see* Wis. Stat. Ann. § 632.415(2), since Ms. S~ has not entered into a prearranged funeral plan. *See id.* at 23.30(1)(g); POMS SI CHI 011-30.426(C)(5). Indeed, no funeral home has been identified in any of the documents submitted. *see also* Wis. Stat. Ann. § 632.415. Therefore, it must be evaluated as an ordinary insurance policy.

Here, the policy is a resource for the first 20 days after it was issued. During this time Ms. S~ could have cancelled the policy and recovered the $3.982.56 initial premium paid for the policy. Thereafter, the cash surrender value of the policy is a resource to Ms. S~ unless she effectively and irrevocably assigned it to a trust that is not a resource. In this case, however, the trust is a resource.

Under the regular resource rules, a trust is a resource if the individual has the legal authority to revoke a trust and then use the funds to meet her food and shelter needs; if the individual can direct the use of the trust principle for her support and maintenance under the terms of the trust; or if the individual is entitled to mandatory disbursements and can sell the right to receive future disbursements. 42 U.S.C. § 1382b(e); POMS SI 01120.201(D)(1)(a)-(2)(a). Ms. S~'s trust is a resource under these rules because it is revocable, despite language indicating that the trust is irrevocable.

Ms. S~ is the grantor of the trust, since she provided the consideration by assigning the life insurance policy. Ms. S~ named the trust as the beneficiary, and her estate as secondary beneficiary. Since Ms. S~ will receive the benefit of the funeral goods and services and named no other beneficiary, she is the sole beneficiary of the trust as well. As grantor and sole beneficiary of the trust, Ms. S~ generally would have the power to revoke the trust at will, despite any language in the trust suggesting otherwise. *See* Wis. Stat. Ann. § 710.12(1); POMS SI CHI 01130.427(B)(1) confirms this, stating that "the funds held in a burial trust meet the definition of a resource, unless the trust names a beneficiary in addition to the SSI applicant or beneficiary." This renders the policy a resource, even after the right to cancel expires, since Ms. S~ could revoke the trust and access the cash surrender value of the policy.

Even if Ms. S~ were to identify an additional beneficiary, such that the trust would not be revocable unilaterally, this trust would still be a resource under the special statutory rules for trusts. *See* 42 U.S.C. § 1382b(e). These provisions do not apply to certain burial trusts where, among other things, the individual irrevocably contracts with a provider of funeral goods and services. POMS SI 01120.201(H)(1). Here, however, as noted, Ms. S~ did not enter into any contract with a provider of funeral goods and services. Thus, this burial trust exception does not apply. *See* POMS SI 01120.201(H)(2). Under the statutory rules, a self-settled trust will be considered a resource, even if it is irrevocable, unless certain exceptions are met. To meet these exceptions the trust must, among other things, provide that any remaining funds in the trust at the death of the individual will be used first to reimburse the state(s) or Medicaid payments. *See* 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4). This trust would not meet an exception to counting it under the statute.

Conclusion

In sum, the policy was a resource, valued at $3,982.56 for the first twenty days after it was issued, and it continued to be a resource thereafter, with a value of the cash surrender value of the policy, because the trust to which it was assigned is revocable and also would be counted as a resource under the special statutory trust rules.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Sara E. Z~
Assistant Regional Counsel

C. PS 08-081 SSI-Review of the William S~ Irrevocable Trust, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 WI (S~) Our Ref: 08-059-NC

DATE: March 17, 2008

1. SYLLABUS

This decision illustrates that a pre-01/01/00 countable Trust can be reformed under its own terms and Wisconsin law to be made non-countable. The court in Wisconsin restated and replaced the older trust framework within the body of a new trust that retained enough of the original to allow it to remain under our pre-01/01/00 rules. This restated Special Needs Trust now contains all the elements to be a non-countable trust.

2. OPINION

You asked whether the William S~ Irrevocable Trust is a resource for SSI purposes. For the reasons discussed below, we conclude that the trust is not a resource.

BACKGROUND

In June 1995, the William M. S~ Trust was created with proceeds from the settlement of a lawsuit filed on his behalf. The trust named William's parents, Elizabeth H~ and Scott

S~, as grantors, and First Bank, N.A., as trustee. In September 2007, we advised that this trust was a resource to William because of his right to future payments under the mandatory distribution provisions of the trust and because of his unlimited right to change any administrative or ministerial provision of the trust. *See Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI-Wisconsin-Review of the William S~ Trust* (September 24, 2007) [hereinafter *William S~ Trust*].

Subsequently, Elizabeth H~, through her attorney, obtained a court order authorizing the establishment of the William S~ Irrevocable Trust as a restatement of, and replacement for, the William M. S~ Trust. The court order also directed U.S. Bank, N.A., to transfer the funds held in the William M. S~ Trust to the William S~ Irrevocable Trust.

On November 30, 2007, the same date as the court order, the William S~ Irrevocable Trust was created. The trust names Elizabeth H~ as grantor and U.S. Bank, N.A., as trustee. *See* Trust Preamble. The trust provides that it is to be held, administered, and distributed for William's benefit. *See* Art. III. Property may be added to the trust from any source. *See* Art. I § 2.

The trust is a special need trust, with its purpose to provide for William's supplemental care, and "not to displace public or private financial assistance that may otherwise be provided to him." *See* Art. III § 1. The trust is governed by Wisconsin law. *See* Art. VIII § 2.

The trust provides that it is irrevocable. *See* Art. II. However, the trustee has power to amend the administrative provisions of the trust under certain circumstances. *See* Art. V § 2.

The trustee has sole and absolute discretion in making distributions. *See* Art. III §§ 1, 3; Art. V § 12. Moreover, William does not have the right to liquidate the trust or compel distributions from the trust. *See* Art. III §§ 3, 7.

The trust contains a spendthrift provision which states that no interest in the principal or income shall be anticipated, assigned, or encumbered or subject to any creditor's claims or any legal process prior to the actual receipt by or on behalf of William. *See* Art. III § 7.

The trust terminates upon William's death. After payment of allowable expenses (i.e., death taxes and fees for administration of the trust estate) and reimbursement to the State for Medicaid benefits, any remaining trust assets shall be distributed to William's then living siblings or their surviving issue per stirpes. *See* Art. III § 5.

DISCUSSION

Initially, we must determine the legal relationship between the William M. S~ Trust ("1995 Trust") and the William S~ Irrevocable Trust ("2007 Trust"). According to the court order, the 2007 Trust is considered to be merely a restatement of the 1995 Trust, with all assets in the 1995 Trust transferred to the 2007 Trust on the date the latter was created--November 30, 2007. Based on the court order, we believe that the 2007 Trust is a modification of the original 1995 Trust. This modification appears to be valid, both under the terms of the original 1995 Trust and under Wisconsin law. As noted in our previous memorandum, the 1995 Trust gave William the unlimited right to change any "administrative or ministerial" term. *See William S~ Trust* at 4. Interpreted broadly, this provision could allow the types of changes reflected in the 2007 Trust. Such a modification is permitted by statute in Wisconsin. *See* Wis. Stat. Ann. § 701.12(3)

(revocation, modification, and termination of a trust is permitted pursuant to its terms or otherwise in accordance with law); *see also* Restatement (Third) of Trusts § 64(1) (2003).

Because we do not consider the 2007 Trust to be a new trust but, rather, a continuation of the 1995 Trust, it is considered to be a trust established prior to January 1, 2000, and is evaluated under the regular resource rules in POMS SI 01120.200. Under the regular resource rules, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter; or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the individual's interest in the trust will be a resource if he is entitled to mandatory disbursements from the trust and he can sell the right to future disbursements. *See id.*

Here, the 2007 Trust document states that it is irrevocable. *See* Art. II. Under Wisconsin law, however, an otherwise irrevocable trust may be revoked by written consent of the settlor and all beneficiaries. *See* Wis. Stat. Ann. § 701.12; *see also* Restatement (Third) of Trusts § 65 & comment a & Reporter's Note (2003). While the 2007 Trust names Ms. H~ as the settlor, it appears that William is the true settlor of the trust since it was initially funded in 1995 with the proceeds of the settlement of his personal injury lawsuit. Thus, William is the settlor and beneficiary of the 2007 Trust. However, William is not the sole beneficiary, since residual beneficiaries are also named in the trust. Specifically, the trust creates contingent remainder interests in his living siblings or their surviving issue per stirpes. Since there are residual beneficiaries, William cannot unilaterally revoke the trust. *See* Art. III § 5; *see also* POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary."). Accordingly, the 2007 Trust is irrevocable.

The 2007 Trust can also be resource to William if he can direct the use of the trust assets for his support and maintenance under the terms of the trust. Here, the trust states repeatedly that the trustee has absolute discretion to make distributions, and that William has no right to compel the trustee to make a distribution of principal or income to him or for his benefit. *See* Art. III §§ 1, 3, 7; Art. V § 12. This language would preclude William from directing the use of the trust assets. Therefore, the trust principal is not a resource. In addition, the trust does not provide for mandatory disbursements to William.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Cristine B~
Assistant Regional Counsel

D. PS 08-060 SSI-Wisconsin-Review of the Amended Testamentary Trust for the Benefit of Sharon C~, ~ - Reply Your Reference: S2D5G6, SI 2-1-3 WI (C~) Our Reference: 08-053-nc

DATE: February 11, 2008

1. SYLLABUS

This opinion evaluates whether the amended third party testamentary trust in question is a countable resource for SSI purposes. The original trust was created and funded solely with third party funds upon the grantor's death in 2006. The original terms mandated regular distributions of trust interest and principal to the SSI beneficiary. The trust was subsequently amended such that the trustee was prohibited from making distributions that would make the beneficiary ineligible for SSI and/or Medicaid benefits.

The trust cannot be terminated by the beneficiary due to the presence of a residual beneficiary. Additionally, the SSI beneficiary cannot direct the trustee to make distributions, and a spendthrift provision prevents the beneficiary from anticipating or otherwise encumbering the future distributions. For these reasons, the amended trust is not a countable resource for SSI purposes.

2. OPINION

You asked us whether the amended testamentary trust for the benefit of Sharon C~ would be a resource for SSI purposes. For the reasons discussed below, we conclude that the amended testamentary trust is not a resource.

BACKGROUND

In July 1984, Alice M. C~ executed her Last Will and Testament. The third section of Ms. C~ will concerned Sharon P. C~, the SSA beneficiary and Ms. C~'s niece. This section of the will provided that, in the event that Bernard C~, Ms. C~'s husband, predeceased her, fifty percent of her estate would be given to her trustee to be held in trust for the purpose of providing maintenance and support for Ms. C~. Will, Third Section, Paragraph B. The will instructed the trustee to pay all of the interest income plus the sum of $5,000 per year from the principal to Ms. C~ until she died or the trust proceeds were expended. Will, Third Section, Paragraph B1a. The will further provided that income and principal distributions would be made at least quarterly, and that if Ms. C~ died before the trust proceeds were expended, then the trust would terminate and the remaining trust assets would be distributed to Ms. C~'s nieces, Mary A. W~ and Alice C. W~, or the survivor. Will, Third Section, Paragraph B1b, B2. The will indicated that the interest of any beneficiary shall not be subject to claims, creditors, or legal process, and may not be alienated or encumbered. Will, Third Section, Paragraph B3.

Ms. C~ died on July 1, 2006; she was predeceased by her husband. Upon Ms. C~ death, the Sharon P. C~ Trust was created and funded with approximately $83,000 from Ms. C~'s estate. In April 2007, an attorney for Ms. C~'s estate filed a Motion to Amend the Testamentary Trust. In this Motion, the trustee and Ms. C~ expressed concern that Ms. C~ will mandated distributions that would render Ms. C~ ineligible for SSI and Medicaid benefits. The trustee and Ms. C~ argued that this result would be inconsistent with Ms. C~ intent to provide supplementary assistance to Ms. C~. In an effort to resolve this controversy, the trustee and all of the beneficiaries of the Trust asked the court to amend the Trust.

Later that month, the Court entered an Order, amending the Trust. The order explained that the Trust should be reformed to operate as a special needs trust, prohibiting distributions which would make Ms. C~ ineligible for SSI benefits. The Order added the following language in italics to the Trust:

1. The trustee shall retain the principal; manage, invest and reinvest, collect all income; and make distributions to or for the benefit of my niece, SHARON P. C~.

a. The trustee shall pay all of the interest income plus the sum of $5,000 per year from the principal to or on behalf of SHARON P. C~ for as long as she lives or until the trust proceeds have been expended.

b. *Income and principal distributions shall be made at least quarterly. However, the Trustee may make no distribution regardless of the age of the beneficiary if such distribution would make the beneficiary ineligible for benefits available from any public or private means tested benefit program, including, without restriction, Supplemental Security Income (SSI) or Medicaid.*

See Order. The Order did not alter any other language in the Trust.

DISCUSSION

As an initial matter, we note that the amendment to the Trust was permitted under Wisconsin law. In the Motion to Amend the Testamentary Trust, the trustee and Ms. C~ argued that the language in Ms. C~'s will would render Ms. C~ ineligible for SSI benefits - a result which would be inconsistent with the intent of Ms. C~ to provide supplementary assistance to Ms. C~. Since the trustees and all affected beneficiaries agreed to the amendment, the Court properly "reformed" the trust in order to operate as a special needs trust, prohibiting distributions that would make Ms. C~ ineligible for SSI benefits. *See* Wis. Stat. Ann. § 879.59(1); *Estate of McCoy v. Wis. Academy of Sciences*, 345 N.W.2d 519 (Ct.App. 1984).

The Amended Trust is a third party trust, under POMS SI 01120.200(A)(2)(b), because it was established by a third party, with only assets of the third party. Therefore, the Amended Trust is not subject to the statutory provisions of Section 1613(e) of the Social Security Act for special needs trusts, because it was not established with the proceeds of the disabled individual. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. Since the Amended Trust is not evaluated under § 1613(e) of the Act, we consider only whether it is a resource under the regular resource rules. *See* POMS SI 01120.203(B)(1)(a).

Under the regular resource rules, a trust is a resource if (1) the SSI beneficiary can revoke or terminate the trust and use the assets for her support and maintenance; (2) the SSI beneficiary can direct the trustee to pay her the funds or use the funds for her support and maintenance; or (3) the SSI beneficiary is entitled to mandatory disbursements and can sell the right to future disbursements. POMS SI 01120.200(D).

Under these rules, the Amended Trust is not a resource. First, Ms. C~ does not have the power to terminate the Amended Trust and use the assets for support and maintenance. Whether a trust can be terminated by a beneficiary depends on the terms of the trust and/or applicable state law. *See* POMS SI 01120.200(D)(2). Here, Ms. C~ does not have the right to terminate the Amended Trust under its own terms or under the terms of Wisconsin state law. The Fifth Section of Ms. C~ will (which was not amended by the court) only permits the trustee to terminate the trust. Under Wisconsin law, a trust may be revoked, terminated or modified by written consent of the grantor and all beneficiaries.

See Wis. Stat. Ann. § 701.12. Ms. C~ (the grantor) is deceased and thus she cannot consent to the termination of the trust. *See* POMS PS 01825.055 (EE. PS 00-247) (Wisconsin); *see also* Restatement (Second) of Trusts, § 338 and comment a. In addition, there are other beneficiaries whose consent would need to be obtained in order for the Amended Trust to be terminated. POMS SI CHI01120.200(D) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary.").

Second, Ms. C~ cannot direct the trustee to pay her the funds or use the funds for her support and maintenance. Under the terms of the Amended Trust, the trustee cannot make any distribution if the distribution would make Ms. C~ ineligible for SSI or Medicaid benefits. Amended Trust, Third Section, B(1)(b). This language would preclude Ms. C~ from directing the trustee to pay her funds or use the funds for her support and maintenance.

Finally, under the terms of the Amended Trust, Ms. C~ is entitled to at least quarterly distributions of income and principal, provided such distribution would not make her ineligible for SSI or Medicaid benefits. Amended Trust, Third Section, B1b. However, a spendthrift provision prevents Ms. C~ from alienating or encumbering her interests in those payments. Will, Third Section, Paragraph B3. Accordingly, the Amended Trust is not a resource to Ms. C~.

CONCLUSION

In sum, under the ordinary resource rules applicable to third party trusts, the Amended Trust is not a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Karen S~
Assistant Regional Counsel

E. PS 07-118 SSI-WISH-Review of Treatment of Rental Arrangements in the Wisconsin Initiatives in Sustainable Housing Trust - REPLY Your Ref: SI 2-1-3 WI (WISH)Our Ref: 06-0087

DATE: April 24, 2007

1. SYLLABUS

This opinion discusses changes to the Wisconsin Initiatives in Sustainable Housing ("WISH") Pooled Trust and the Asset Contribution Agreements ("ACA") pertinent thereto. SSA previously advised that self-settled sub-accounts in the WISH trust were countable resources due to failure to meet the Medicaid payback requirements of Section

1917(d)(4)(C) of the Act. WISH, Inc. has now modified the ACA for a self-settled account and provides that after termination of the trust and payment of allowable death expenses, amounts not retained by the trust will be used to reimburse Medicaid. This modified language resolves the prior defect and sub-accounts with the new language meet the requirements for the pooled trust exception. The opinion further concludes that home property transferred to a sub-account establishes an equitable ownership interest for the beneficiary. As a result, distributions from the sub-account to pay the mortgage or other household bills would constitute ISM in the form of shelter, though limited by the presumed maximum value (PMV).

2. OPINION

You asked us to review proposed revisions to the Asset Contribution Agreements ("ACA") to the Wisconsin Initiatives in Sustainable Housing ("WISH") Trust and provide a response to the arguments of Mr. F~, attorney for the Trust. We previously advised that self-settled sub-accounts in the WISH Trust did not qualify for the pooled trust exception for counting the sub-accounts as resources under the Social Security Act. *See* POMS PS 01825.055 [hereinafter "WISH Trust I Opinion"]. We also advised that certain trust distributions would be income to the beneficiary. For the reasons discussed below, we conclude that neither self-settled nor third party sub-accounts in the WISH Trust would be resources if the proposed revised language in the ACA is used. However, consistent with our previous opinion, certain trust distributions would still be considered income to the beneficiary.

DISCUSSION

Mr. F~ has submitted legal arguments and two revised proposed ACAs (one for self-settled sub-accounts and one for third party sub-accounts) in support of his request for reconsideration of the WISH Trust I Opinion. In his letter, Mr. F~ raises two issues. First, he addresses our conclusion that a self-settled sub-account in the WISH Trust would not qualify for the pooled trust exception under 42 U.S.C. § 1396(d)(4)(C) because it did not contain the required language regarding reimbursement to the State for Medicaid, and would thus be considered a resource. *See* WISH Trust I Opinion at 4. We assume that the version of the Declaration submitted in connection with the WISH Trust I Opinion has not been amended, since no new Declaration was submitted with Mr. F~'s reconsideration request. That document still states that the ACA "shall provide that all Assets remaining in the Sub-account beyond the lifetime of the Sub-account Beneficiary, after payment of allowable expenses, shall be applied to the charitable purposes of the Trust." Decl. Art. 5.3. However, WISH, Inc. has modified the relevant provision in the ACA for a self-settled sub-account. Article XIII now provides that the sub-account terminates upon the death of the sub-account beneficiary ("SB") and that, after payment of allowable expenses of death taxes due from the trust to the State or Federal government and reasonable fees for the administration of the trust estate, any amount remaining in the sub-account that is not retained by the trust will be paid to the State up to an amount equal to the total amount of medical assistance paid on behalf of the SB under the State Medicaid plan. *See* ACA (self-settled) Art. XIII. This modified language sufficiently cures the defect noted in our previous opinion that the WISH Trust did not meet the fourth requirement for the pooled trust exception. *See* POMS SI 01120.203(B)(2)(g).

In the second issue Mr. F~ raises, he seeks reconsideration of our conclusion that, when the SB lives in a home in which title to the home was transferred to the SB's sub-account (either by the SB or a third party) or that was purchased by the Trust out of the SB's sub-account assets, the SB is considered to have an equitable ownership interest in that home and that any mortgage payments paid by the Trust (minus the SB's monthly occupancy fee) would be in-kind support and maintenance ("ISM") up to the presumed maximum value ("PMV"). WISH Trust I Opinion at 7. Mr. F~ requests "modification of this opinion to find that the relationship between the Trust and sub-account beneficiaries is a landlord-tenant relationship, and that the beneficiary has no ownership interest of the kind that would or should cause him or her to be considered a homeowner for purposes of determining whether or not a business relationship exists between the WISH Trust and the beneficiary." F~ Letter at 2.

Here, the ACA provides that the creator of a sub-account may transfer title to his/her house, which may be subject to a mortgage, to the SB's sub-account. *See* ACA Art. 3.1(a). The ACA also provides that sub-account assets may be used to purchase housing for the SB. *See* ACA Art. 8.12(a) (second sentence). The POMS states that when a trust purchases and holds title to a house as a home for the beneficiary, the beneficiary is considered to be living in his/her own home based on having an "equitable ownership under a trust." *See* POMS SI 01120.200(F)(1). In other words, the purchase of a house by a trust for the beneficiary establishes an equitable ownership interest for the beneficiary of the trust. Accordingly, we apply POMS SI 01120.200(F), which sets forth trust resource and income rules pertaining to the ownership of a home. As we explained in our previous opinion, we believe POMS SI 01120.200(F) also applies when a sub-account creator transfers title to his/her house to the SB's sub-account, as the SB would retain an equitable ownership interest in the home in that case. *See* WISH Trust I Opinion at 7 n.4.

Mr. F~ challenges the "blanket provision that a trust beneficiary has an equitable ownership interest in all property held in the trust." F~ Letter at 5. However, the creation of a trust inherently gives rise to a beneficial (i.e., equitable) interest for the beneficiary. It is a fundamental principle of trust law that a trust beneficiary holds equitable title to the trust property, while the trustee generally holds legal title. *See* Restatement (Third) of Trusts §§ 2 comt. d, 43 cmt. a (2003). The Agency's policy set forth in the POMS recognizes this principle. *See* POMS SI 01110.515(C)(2) (in a trustee-beneficiary relationship, beneficiary does not have legal title to trust property but does have equitable ownership interest), SI 01120.200(B)(4) ("A beneficiary does not hold legal title to trust property but does have an equitable ownership interest in it….The beneficiary owns the benefits of the trust while the trustee holds the title and duties."). Mr. F~ argues that the intention of the donor governs the nature of a property interest. In support, he cites Restatement (Third) of Property § 10.1 (2003). However, this provision, concerning donative documents, deals with the disposition of property by gift and not by trust. *See id.* § 6.1 cmt. a ("The creation of a trust, however, is within the province of the Restatement of Trusts."). Mr. F~ also cites Restatement (Third) of Trusts § 49, which states: "Except as limited by law or public policy…the extent of the interest of a trust beneficiary depends upon the intention manifested by the settlor." This section is consistent with other sections of the Restatement which state that a trust beneficiary has an equitable interest in trust property. The settlor's intention may determine the extent of the

beneficiary's interest, but that presupposes that the beneficiary in fact has an equitable interest. Mr. F~ further argues that an SB does not have an ownership interest in a house held in his/her sub-account because the SB's beneficial interest lacks the "incidents" of ownership. However, in listing the "incidents" of ownership, Mr. F~ describes the characteristics of fee simple ownership, not equitable ownership under a trust. *See* POMS SI 01110.515(A) (fee simple ownership is "absolute and unqualified legal title to real property," whereas equitable ownership is "a form of ownership that exists without legal title to property").

Thus, we conclude that there is no legal basis for granting Mr. F~'s request to treat an SB who is living in a house that is held in his/her own sub-account as a renter with no ownership interest. We strongly disagree with Mr. F~'s assertion that "[t]he beneficiary's situation is the same as that of any renter attempting to rent property from a homeowner." F~ Letter at 7. As discussed above, this position is directly contrary to general trust principles and the POMS, which establish that such an SB does in fact have an equitable ownership interest in the house and is not merely a renter. A renter does not have any ownership interest in the home that is provided to him by the Trust because the home is not held in trust for him. As such, it would not be appropriate to consider the renter as equal to an SB whose sub-account assets do include a house. WISH, Inc. has made revisions to the ACA, such as stating that the SB has no equitable ownership interest, labeling the provision of every home as a rental arrangement, and changing the term "monthly occupancy fee" to "monthly rent." *See* ACA Art. 8.1, 8.2, 8.11. However, merely changing the wording of the document does not alter the inherent beneficial interest a beneficiary has in the trust property.

Even if we agreed with Mr. F~ that an SB does not have an equitable ownership interest in a home held in his sub-account, we still would not find that the J~ business arrangement exception applies to the SB, as he suggests. Based on the Seventh Circuit's holding in J~ v. S~, 683 F.2d 107 (7th Cir. 1982), the Agency amended 20 C.F.R. § 416.1130(b), which provides in relevant part:

You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly rent required to be paid equals the current market rental value (*see* § 416.1101). Exception: In the States in the Seventh Circuit (Illinois, Indiana, and Wisconsin), a business arrangement exists when the amount of monthly rent required to be paid equals or exceeds the presumed maximum value described in § 416.1140(a)(1).

See also 51 Fed. Reg. 13487 (1986). This regulation explicitly states that the business arrangement rule and the J~ exception apply only to "room or rent." However, in the case of a house that is subject to a mortgage, the applicable shelter expense is mortgage payments, not rent. Mr. F~ contends that J~ applied to all forms of shelter, but that the regulation limited the ruling only to rental situations. To the contrary, we believe that the Agency's interpretation of J~ is correct. J~ dealt only with rental situations and did not go so far as to apply to mortgage payments. As the court stated in the first paragraph of the decision, "The specific issue presented by this appeal concerns the validity of the Secretary's regulations governing SSI eligibility which impute as unearned income to SSI recipients the difference between the fair market rental value and the rent actually paid for shelter." J~, 683 F.2d at 1077. Moreover, an analysis of current market rental value is

only appropriate in the context of rent, not mortgage payments. For these reasons, Mr. F~'s arguments are not persuasive and do not provide any basis for changing the Agency's longstanding policy.

Thus, consistent with our previous opinion, we conclude that when the Trust provides to the SB as a primary residence a house in which title to the house was transferred to the SB's sub-account (either by the SB or a third party) or that was purchased by the Trust out of the SB's sub-account assets, the SB is considered to have an equitable ownership interest in that house. Accordingly, in determining whether certain distributions from the sub-account (ACA Art. 9.2) would constitute ISM in the form of shelter, we apply the rules in POMS SI 01120.200(F) pertaining to home ownership, and not the J~ exception in 20 C.F.R. § 416.1130(b), which applies only to rental arrangements. Specifically, the purchase of a home would be ISM up to the PMV in the month of purchase, if the SB lives in the home that month. *See* POMS SI 01120.200(F)(3). And if there is a mortgage, each monthly mortgage payment would be ISM up to the PMV. *See* POMS SI 01120.200(F)(3)(b); 20 C.F.R. § 416.1130(b) (ISM includes shelter in form of mortgage payments). But since the SB is required to pay a "monthly rent" for using the home (ACA Art. 8.2), for purposes of determining ISM, the amount of this rent would serve as an offset for the mortgage payment made by the trustee (but this offset would not have any effect on the ISM if the resulting net mortgage payment equals or exceeds the PMV). Moreover, to the extent that the trustee pays for the SB's additional shelter expenses including property taxes, heating fuel, gas, electricity, water, sewer, and garbage removal, such expenses would be considered ISM in the month payment is made (but the total ISM will not be more than the PMV). *See* POMS SI 00835.350, 00835.465(D), 01120.200(F)(3)(c); 20 C.F.R. §§ 416.1130(b), 416.1140. And if the monthly rent is not used up in offsetting a mortgage payment, the remainder would serve as an offset for any other shelter expense distributions.

CONCLUSION

For the reasons discussed above, we conclude that neither self-settled nor third party sub-accounts in the WISH Trust would be resources. However, consistent with our previous opinion, certain trust distributions would still be considered income to the beneficiary.

F. PS 06-104 SSI-Wisconsin-Review of the Request for Reconsideration on the Sub-Account of Robert G~, ~ , in the WisPACT Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3-WI (G~) Our Ref: 06-0003

DATE: March 29, 2006

1. SYLLABUS

In August, 2005 an SSI beneficiary's parents created a sub-account in the WisPACT II Trust for the benefit of the SSI eligible individual.

The sub-account was created with an unspecified transfer of cash to the WisPACT II pooled trust. The WisPACT II Master Trust has been previously evaluated and it has

been determined that sub-accounts created after May 17, 2004 can be excluded as a resource if either Medicaid trust exception is met. This opinion discusses that the sub-account in question does not meet the criteria to be excluded under 42 USC 1396p(d)(4)(A) because the parents established the sub-account with the beneficiary's own funds. They failed to establish a "seed trust" and the state of Wisconsin does not recognize "dry" or "empty" trusts.

However, the sub-account does meet the criteria to be excluded under the pooled trust exception described at SI 01120.203(B)(2).

Additionally, the sub-account is irrevocable since the SSI beneficiary is not the sole beneficiary of the sub-account. Since the trust meets the criteria of the pooled trust exception and is irrevocable it is not a resource for SSI purposes.

2. OPINION

You asked whether Robert G~ sub-account in the WisPACT Trust II is a resource to Robert for SSI purposes. We conclude that the sub-account is not a resource.

BACKGROUND

The WisPACT Trust II ("the Master Trust") is a pooled trust containing individual sub-accounts for individual beneficiaries. We have previously reviewed this Master Trust in detail, and therefore do not revisit the details here. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI - Wisconsin - *Review of the WisPACT II Trust*" (March 4, 2005).

On August 5, 2005, Robert's parents, Bernard and Barbara G~, signed several documents to establish the "Robert L. G~ Self-Funded Sub-Account in the WisPACT Trust II" (the "sub-account"). The documents included an "Application to Establish Sub-Account," a "Contribution Agreement" and an "Asset Transfer and Designation of Sub-Account Record." Bernard and Barbara G~ are identified in the Contribution Agreement as the account's "creator[s]." According to the Asset Transfer document, the trust was funded with an unspecified transfer of "cash."

Upon Robert's death, any remaining trust assets will be distributed first to any state to repay Medicaid benefits. Contribution Agreement ("CA") Article V(A). Any trust assets remaining after such repayment may, in the trustee's discretion, be used to pay funeral, burial and related expenses and inheritance or estate taxes, and will thereafter be distributed to Robert's heirs at law or other beneficiaries (limited to immediate family; relatives by blood, marriage or adoption; or charities) as appointed by will or trust. CA Article V(B), V(C), V(D). The Application specifies Robert's heirs by name, Bernard and Barbara G~.

On August 9, 2005, Robert signed a "Durable Power of Attorney - Financial of Robert L. G~," in which he named his parents as co-agents authorized to "perform . . . any act in the management, supervision, and care of my estate and affairs that I personally have authority to perform." According to Robert's attorney, Bernard G~ endorsed a check (issued to him as custodian for Robert) which was used to fund the sub-account. The attorney further indicates that the funds were accepted by the trustee (Associated Bank) on August 23, 2005.

The sub-account was previously determined to be a resource and Robert has requested reconsideration.

DISCUSSION

A trust established with the assets of an individual (on or after January 1, 2000) is a resource if it is revocable or if payments from the trust could be made to or for the benefit of the individual, unless an exception applies. *See* POMS SI 01120.201(D)(1)-(2); 42 U.S.C. § 1382b(e)(2)-(3). Two exceptions are those outlined in 42 U.S.C. §§ 1396p(d)(4)(A) and (d)(4)(C), commonly referred to as "Medicaid trust exceptions." *See also* POMS SI 01120.203. We address these exceptions in turn.

A. Robert's Sub-Account Does Not Meet the Criteria for an Exception Under 42 U.S.C. § 1396p(d)(4)(A).

A trust is not counted as a resource if it meets the criteria outlined in 42 U.S.C. § 1396p(d)(4)(A). These criteria are as follows:

(1) the trust contains the assets of an individual under age 65 who is disabled;

(2) the trust is established for the benefit of the individual by a parent, grandparent, legal guardian or court; and

(3) the trust provides that any funds remaining in the trust upon the death of the individual will be first used to reimburse any state having paid medical assistance on behalf of the individual during his lifetime.

42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

Here, the WisPACT II Master Trust is "intended [to] comply with all requirements of 42 U.S.C. § 1382b(e)(5) and 42 U.S.C. § 1396p(d)(4)(A)." Master Trust, Article V(D). We previously reviewed the Master Trust document and concluded that sub-accounts created after May 17, 2004, could be excluded as a resource under 42 U.S.C. § 1396p(d)(4)(A). *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Wisconsin - Review of the WisPACT II Trust*" (March 4, 2005).

After reviewing Robert's sub-account, however, the Agency concluded in October 2005 that it did not meet all of the criteria outlined in 42 U.S.C. § 1396p(d)(4)(A). Specifically, the trust did not satisfy the second requirement, i.e., that the trust be established by a parent, grandparent, legal guardian or court. Although Robert's parents are identified as the sub-account creators, the trust was funded with Robert's own funds (and we assume Robert is a competent adult since there is no evidence of guardianship proceedings). And, we have advised that, where a parent creates a trust with a competent adult's funds, the parent must either (1) create a "seed trust," i.e., contribute some amount of funds not belonging to the individual prior to transferring the individual's funds to the trust; or (2) the state must recognize the existence of a "dry" or "empty" trust, i.e., a trust containing no property. Further, we have advised that Wisconsin does not recognize the existence of "dry" or "empty" trust. Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Six State Survey on "Dry" or "Empty" Trusts*, (November 30, 2004). We reaffirmed this opinion in August 2005. Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Wisconsin - Review of the Reconsideration Request on Dean D. Irrevocable Trust Agreement*, (August 19, 2005). Because Robert's parents did not create a seed trust prior to funding the sub-account with Robert's own assets, the sub-account was not "established . . . by a parent" and did not qualify as an excepted trust pursuant to 42 U.S.C. § 1396p(d)(4)(A).

Robert's attorney, Mark R~, disputes our position regarding empty trusts in Wisconsin. Mr. R~ contends that unfunded trusts are considered valid trusts under Wisconsin law "[a]s long as there is an expectancy that the trust will be funded at some later time." R~ letter at [unpaginated] 2. In support of this contention, Mr. R~ cites several sources of authority, including (1) various Wisconsin statutes; (2) a comment to the 2003 Uniform Trust Code; and (3) a Wisconsin workbook for estate planners. We find Mr. R~'s arguments unpersuasive.

First, Mr. R~'s citation to various Wisconsin statutes do not support his position. Wisconsin statute defines a "trust" as "an express living or testamentary, private or charitable trust in property which arises as a result of a manifestation of intention to create it." Wis. Stat. Ann. § 701.01(7) (West 2001). Focusing on the second clause of this definition ("which arises as a result of a manifestation of intention to create it"), Mr. R~ contends that an empty trust could be created if Robert's parents had the intention to create it. *See* R~ letter at [unpaginated] 4. Mr. R~'s interpretation overlooks the first and equally salient clause requiring a "trust *in property*." *Id.* (emphasis added). As we have advised in the above-referenced opinions, the Wisconsin statute plainly requires the existence of property to create a valid trust. Wisconsin caselaw is in accord. For example, in *McMahon v. Standard Bank and Trust Co.*, 202 Wis.2d 564, 550 N.W.2d 727 (Wis. Ct. App. 1996), a Wisconsin appellate court reviewed several basic principles of trust law. The court observed that "[a] trust is a fiduciary relationship *involving property*," and that a trust has three elements: a trustee, a beneficiary and *trust property. McMahon*, 202 Wis.2d at 568, 550 N.W.2d at 729 (emphasis added). Because both statute and caselaw clearly identify property as an essential element of a trust, we continue to believe that Wisconsin will not recognize as valid a trust that contains no property.

Mr. R~ also cites Wis. Stat. Ann. § 701.07(1)(a) as evidence that Wisconsin recognizes trusts with no property. This section states:

A living trust, otherwise valid, shall not be held invalid as an attempted testamentary disposition, a passive trust under § 701.03, or a trust lacking a sufficient principal because:

(a) It contains any or all of the following powers, whether exercisable by the settlor, another person or both: * * *

5. To add property . . . to the trust at any time.

(b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will, employee benefit plan, life insurance policy or otherwise; or

(c) the principal consists of assets of nominal value.

Mr. R~ does not clearly explain why he believes this section authorizes a trust with no property, but in any event we are not persuaded. In fact, this section reinforces our conclusion that Wisconsin does not recognize an empty trust. This section explains that an otherwise valid living trust "shall not be held invalid as . . . a trust lacking a sufficient principal because . . . (c) The principal consists of assets of nominal value." Wisc. Stat. Ann. § 701.07(1)(c). This provision indicates that the Wisconsin legislature considered the issue of what constituted a sufficient trust principal; and had the legislature intended to validate empty trusts, we think this section would read differently. Mr. R~'s

interpretation would supplant "nominal value" with "no value," contrary to the legislature's intent.

Mr. R~ also cites the statutory definition of "settlor" (a person who directly or indirectly creates a trust or adds property to an existing trust) as further evidence that Wisconsin would consider a trust valid even where it contains no property. *See* Wis. Stat. Ann. § 701.01(5). Because the definition recognizes the settlor as someone who "creates a . . . trust" or "adds property to an existing trust," Mr. R~ suggests that Robert's parents could create an empty trust to which Robert later added property. *See* R~ letter at [unpaginated] 4. Mr. R~'s logic is faulty because, as we have explained, Wisconsin statute and caselaw plainly require the existence of property to "create" a valid trust. The definition of settlor does not alter this plain law.

In addition to statutory language, Mr. R~ also cites from "commentary to the Uniform Trust Code," as amended in 2003. This authority is not persuasive for two reasons. First, Wisconsin has not adopted the Uniform Trust Code. Second, to the extent the Uniform Trust Code's commentary can be considered persuasive authority regarding the interpretation of trust law, the cited provision does not support Mr. R~'s argument. Mr. R~ cites a section of the "Comment" to § 401, which explains that a self-funded trust can be created by declaring the trust and attaching a list of assets subject to the trust, without expressly transferring those assets to the trust. This comment does not indicate, however, that a trust can be created with no assets at all. In fact, the Uniform Trust Code clearly indicates the opposite: "[u]nder the methods specified for creating a trust in this section, a trust is not created until it receives property" or an adequate property interest. Uniform Trust Code (Last Revised or Amended in 2005), § 401, comment, available at http://www.law.upenn.edu/bll/ulc/uta/2005final.htm.

Finally, Mr. R~ cites a Wisconsin estate planning workbook, which does seem to support his position. Citing Wis. Stat. § 701.07(1)(b)-(c), the workbook states that trusts "may be funded or unfunded . . . The principal of an unfunded trust may consist of assets of nominal value (e.g., $10 in cash), an insurance policy, or merely the expectancy of transfers during the settlor's life or at death." Ch. 7, pg. 5. Further, in a section discussing trust funding and "minimum corpus," this workbook states that "the expectancy of a later transfer during the settlor's lifetime or at death is sufficient to satisfy the requirements of a valid trust." Ch. 7, pg. 21.

The guidance in this workbook does not alter our conclusion that Wisconsin does not recognize as valid a trust with no property. As explained, the above-referenced statutes and caselaw plainly and unambiguously indicate that an identifiable property interest is a required element of a trust. In suggesting that a trust may funded by "merely the expectancy" of later transfers, we think the workbook interprets the Wisconsin statute too broadly. The statute does recognize that a trust is valid if the principal consists only of a future or contingent property interest (such as naming the trustee as beneficiary under a will, employee benefit plan, life insurance policy "or otherwise"). Wis. Stat. Ann. § 701.07(1)(b). This statute merely recognizes that property can take many forms, including intangible, contingent and future interests (such as the expectancy of payment as the beneficiary of a will). These types of property interests may never materialize (and may thus be mere expectancies), but they are nonetheless identifiable property interests that can form the corpus of a trust. And when read in conjunction with the statutory

provisions previously discussed, we do not think the legislature intended to recognize trusts with no identifiable property interests whatsoever.

In sum, we are unconvinced by Mr. R~'s arguments, and maintain our position that Wisconsin does not recognize a trust with no property. Thus, Robert's sub-account was not "established . . . by a parent" and does not qualify as an excepted Medicaid trust pursuant to 42 U.S.C. § 1396p(d)(4)(A).

B. Robert's Sub-Account Meets the Criteria for an Exception Under 42 U.S.C. § 1396p(d)(4)(C).

Pooled trusts established under 42 U.S.C. § 1396p(d)(4)(C) are also excluded as a resource. To be excluded, pooled trusts must meet the following criteria:

(1) the pooled trust must be established and maintained by a nonprofit association;

(2) separate accounts are maintained for each beneficiary, but assets are pooled for investing and management purposes;

(3) accounts are established solely for the benefit of the disabled individual;

(4) accounts are established by the individual, a parent, grandparent, legal guardian or a court; and

(5) upon death of the beneficiary, any funds not retained by the trust will be used to reimburse any state for Medicaid payments made for the benefit of the beneficiary during his lifetime.

42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2). Here, Robert's Sub-Account meets each of these criteria.

1. Established and maintained by a non-profit association

First, the WisPACT II Trust was established on August 13, 2003, by WisPACT, Inc., a non-stock, not-for-profit corporation organized under Wisconsin law. The WisPACT Inc. Articles of Incorporation were filed with the state of Wisconsin on August 22, 2002. On June 9, 2004, the IRS determined that WisPACT is exempt from federal income tax under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3). This exemption is effective retroactive to the date of organization, i.e, August 22, 2002. Thus, the WisPACT II Trust was established and is maintained by a nonprofit organization. *See* POMS SI 01120.203(B)(2)(c) (nonprofit association is an organization defined in section 501(c) of the Internal Revenue Code and that also has tax-exempt status under section 501(a) of the Code).

2. Separate accounts maintained

Second, the WisPACT II Trust maintains separate accounts for each beneficiary, although the trustee may pool individual sub-account assets for purposes of investment and management. Master Trust, Article V(D).

3. Established solely for the benefit of the disabled individual

Third, as we previously advised, self-funded sub-accounts in the WisPACT II Trust that were created after the May 2004 amendment are "solely for the benefit of the disabled individual." *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Wisconsin - Review of the WisPACT II Trust*" (March 4, 2005). Because the check was accepted by the trustee on August 23, 2005, Robert's sub-account was created after the May 2004 amendment.

4. Established by the disabled individual

Fourth, the sub-account was "established by the individual," i.e., Robert himself. As explained, the Contribution Agreement lists Robert's parents as the sub-account creators, but (we assume) Robert is a competent adult and the trust was funded with his own assets. As such, Robert's parents acted as his agent and established the sub-account on his behalf.

We initially questioned whether Robert's parents had the authority to establish the sub-account and transfer funds on his behalf. *See* POMS SI 01120.203(B)(2)(f) ("[a] third party establishing the trust account on behalf of the individual must have legal authority to act with regard to the assets of the individual . . . [otherwise the transaction] may result in an invalid trust."). On August 9, 2005, Robert signed a "Durable Power of Attorney - Financial" naming his parents as agents with authority to "perform . . . on my behalf any act in the management, supervision, and care of my estate and affairs that I personally have authority to perform." The power of attorney enumerates powers that the agents may exercise, "which are intended to illustrate, and not to limit, the scope of this power." Among the specifically enumerated powers, the agents may transfer Robert's assets to a revocable trust already in existence (or created by Robert at a later date), provided that the trust agreement contains certain provisions. This enumerated power does not authorize creation of the WisPACT II sub-account, as it allows a transfer or assets to an existing trust that is revocable; the WisPACT II sub-account was not existing and is irrevocable. Although the power of attorney states that the enumerated powers are only intended to illustrate (and not limit) the agent's powers, Wisconsin courts have held that an agent's powers should be strictly construed, and limited only to those powers that are clearly delineated or specified. *See Losee v. Marine Bank*, 703 N.W.2d 751, 755 (Wis. App. 2005). The courts have typically applied this rule in cases where the agent cited broad powers as a defense to the agent's self-dealing (e.g., where agent used the power to make a gift to himself or to secure a mortgage for himself using principal's property as collateral). Here, because Robert's parents are potential residual beneficiaries of the trust, we think a court might find that creating the sub-account involved an element of self-dealing not authorized by the power of attorney.

We need not definitely answer this question, however, because we are satisfied that Robert gave his parents oral authority to create the WisPACT II sub-account. According to Mr. R~, Robert and his parents jointly met with the attorney in early August 2005 to discuss his financial affairs in general and more specifically to create the WisPACT II sub-account. Mr. R~ indicated that Robert was present when his parents signed the Contribution Agreement and transfer of funds document and assented to their doing so. We have no reason to doubt the accuracy of Mr. R~'s account, and thus conclude that Robert's parents had express oral authority to create the WisPACT II sub-account on his behalf. And Wisconsin courts have recognized the validity of transactions based on oral authority. *E.g., Krause v. Holand*, 147 N.W.2d 33 (1967) (recognizing that parol authority may create an agency relationship permitting agent to bind principal, but in the case of realty such parol authority must be clear and express); *Zuhak v. Rose*, 58 N.W. 2d 693, 697 (Wis. 1953) (enforcing contract for land sale negotiated by agent even though agent's authority was not in writing).

5. Contains Medicaid payback provision

Finally, both the Master Trust and Robert's Contribution Agreement direct that, upon Robert's death, any amounts remaining in the sub-account (after payment of

administration fees and taxes) shall be first distributed to any State which provided Medicaid benefits to Robert, up to an amount equal to the total amount of benefits paid on his behalf. Master Trust, Article XIV(A)(1); Contribution Agreement Article V(A).

In sum, the sub-account meets all of the criteria outlined in 42 U.S.C. § 1396p(d)(4)(C). As such, the sub-account should be excluded as a resource if it is irrevocable, or evaluated under the regular resource rules if it is revocable. *See* POMS SI 01120.203(B)(2)(a) and (D)(2)(steps 7-8)

C. Robert's Sub-Account is Irrevocable and Therefore Is Not a Resource.

The Master Trust agreement indicates that sub-accounts are irrevocable unless specifically stated otherwise in a contribution agreement. Master Trust agreement, Article VI, § A(2). Robert's Contribution Agreement also provides that the sub-account is irrevocable, and Robert is not the sole beneficiary of the sub-account because there are contingent remainder beneficiaries. Upon Robert's death, any remaining trust assets (after reimbursement to any state having paid Medicaid and payment of fees, taxes and certain expenses) will be distributed to his heirs at law (Robert's current heirs are identified by name as Bernard and Barbara G~) or other beneficiaries as appointed by will or trust. CA Article V(B), V(C), V(D). Absent a contrary intent, a residual interest in heirs at law creates a contingent remainder interest in those heirs, and thus the settlor is not the sole beneficiary of the trust. *See* POMS SI CHI01120.200. Thus, Robert is not the sole beneficiary of the sub-account and does not have the power to revoke the sub-account. (We further note that Robert has no right to direct the use of trust principal for his support, and that Robert has no right to mandatory disbursements from the trust. *See* POMS SI 01120.200(D)(1).)

Because the trust meets the criteria of a Medicaid trust exception and is irrevocable, it is not a resource. *See* POMS SI 01120.203(B)(2)(a) and (D)(2)(step 7). Of course, any disbursements from the trust should be evaluated to determine whether or not such payments should be counted as income.

CONCLUSION

Wisconsin does not recognize the validity of a dry or empty trust, i.e., a trust with no property. Because Robert's parents did not create a seed trust, the sub-account was not "established by a parent" and does not qualify as an excepted Medicaid trust under 42 U.S.C. § 1396p(d)(4)(A). However, the sub-account meets all of the criteria to be an excepted Medicaid trust under 42 U.S.C. § 1396p(d)(4)(C), and the sub-account is irrevocable. Therefore, the sub-account is not a resource.

G. PS 06-081 SSI-Wisconsin-Review of the Declaration of the Wisconsin Initiatives in Sustainable Housing Trust - REPLY Your Ref: SI 2-1-3 WI (WISH) Our Ref: 06-0004

DATE: February 28, 2006

1. SYLLABUS

The Wisconsin Initiatives in Sustainable Housing Trust (WISH) and the subaccounts contained therein are discussed in this opinion. The WISH Trust is a pooled trust established and managed by a nonprofit organization. The Trust is designed to hold assets for the purpose of meeting the housing and other supplemental needs of subaccount beneficiaries. The Trustee has sole discretion regarding disbursements from the Trust, but is required to make a home available for subaccount beneficiaries as a primary residence. The subaccounts are irrevocable, contain a spendthrift clause, and cannot be amended or revoked by the subaccount beneficiary.

The current language contained in the Trust permits that initial post-mortem disbursements from the Trust may be made to creditors other than the State Medicaid agency. As such, self-settled subaccounts contained in the WISH Trust do not meet the pooled trust exception. Subaccounts established solely with the assets of third parties are determined to be excluded from resource counting. Still, disbursements made from the Trust may be countable income in the form of cash unearned income or ISM depending on the circumstances surrounding the disbursement. Whether the subaccount beneficiary has an equitable ownership interest in the home being held by the Trust is also a controlling factor in determining whether ISM in the form of shelter may be received by the beneficiary.

2. OPINION

You asked us whether a sub-account in the Wisconsin Initiatives in Sustainable Housing Trust would be considered a resource for an SSI recipient or applicant. For the reasons discussed below, we conclude that under the current version of the Trust documents, a self-settled sub-account would not qualify for the pooled trust exception and would be a resource for SSI purposes. However, assuming that WISH, Inc. cures the disqualifying defects, neither self-settled nor third party sub-accounts would be resources. However, certain trust distributions would be considered income to the beneficiary.

BACKGROUND

Wisconsin Initiatives in Sustainable Housing ("WISH"), Inc., a Wisconsin nonprofit organization, has established the WISH Housing Trust ("Trust"), which is a pooled trust designed to hold assets for the purpose of meeting the housing and other supplemental needs of disabled persons. WISH has submitted the WISH Housing Trust Declaration ("Declaration") and a sample Asset Contribution Agreement ("ACA") for our review.

Trust Declaration

The Declaration provides that the Trustee, with the consent of WISH, Inc., may accept a contribution of property to be held in a sub-account for the use and benefit of a particular sub-account beneficiary ("SB") during his lifetime consistent with the charitable purpose of the Trust, "provided that each Asset Contribution Agreement shall provide that all Assets remaining in the Sub-account beyond the lifetime of the Sub-account Beneficiary, after payment of allowable expenses, shall be applied to the charitable purposes of the Trust." Decl. Art. 5.3.

For self-settled sub-accounts (i.e., sub-account funded with assets of the SB), the Trust is intended to comply with the requirements of 42 U.S.C. §§ 1382b(e)(5) and 1396p(d)(4)(C) and Wis. Stat. § 49.454(4) (pooled trust exception). Decl. Art. 15.2.

Within the Trust, separate sub-accounts are maintained for each SB, but the assets of the sub-accounts are pooled for investment and management purposes, consistent with 42 U.S.C. § 1396p(d)(4)(C)(ii). Decl. Art. 9.4.

The Declaration states that it is irrevocable, except that it may be amended by agreement of the Trustee and WISH, Inc. or by court order pursuant to Wis. Stat. § 701.10 if, due to changes in the law or other reasons, amendment is necessary to accomplish the purposes of the Trust. Decl. Art. XII.

The Declaration is governed by the laws of the State of Wisconsin. Decl. Art. 15.1.

Asset Contribution Agreement

The ACA declares that the primary purpose of the sub-account is "to provide safe, decent, accessible, stable and sustainable housing for *SB* at affordable rental rates." ACA Art. 6.1.

Also, the Trust is intended to supplement, and not replace or make unnecessary, any public benefits the SB is qualified to receive. ACA Art. 6.2. In the case of a self-settled sub-account, language is inserted that the sub-account is intended to comply with the requirements of 42 U.S.C. §§ 1382b(e)(5) and 1396p(d)(4)(C) and Wis. Stat. § 49.454(4). *Id.*

The ACA provides that the Trustee shall make a home available to the SB as a primary residence. ACA Art. 8.1. The SB, in turn, must pay a monthly occupancy fee which does not exceed the larger of the presumed maximum value or another amount based on the anticipated total annual expenses of owning and maintaining the home. ACA Art. 5.8, 8.2.

Upon the acceptance of property by the Trustee, the ACA and the sub-account created by it are irrevocable and may not be amended or revoked by the sub-account creator, and the property is nonrefundable. ACA Art. II, 3.3. Once they become irrevocable, WISH, Inc. and the Trustee may amend or terminate the ACA and the sub-account only in certain circumstances. ACA Art. II, XI, XII.

During the SB's lifetime, the Trustee must hold all contributed assets and income earned from such assets in a sub-account used for the benefit of the SB (or, in the case of a self-settled sub-account, for the sole benefit of the SB). ACA Art. 4.1. An individual sub-account shall be maintained for the SB, but assets other than the home will be pooled with assets of other individual sub-accounts for purposes of investment and management. ACA Art. 4.3.

The ACA states that the Trustee has absolute discretion regarding all use and distribution of sub-account property on the SB's behalf. ACA Art. 6.3, 9.1. Any payment in cash and any use of income or principal to provide or pay for food or clothing or to supplement housing costs rests in the sole discretion of the Trustee. ACA Art. 9.1. No beneficiary or other person has authority to require a payment in cash or use of income or principal to provide or pay for food, clothing, or supplementation of shelter costs. *Id.*

The Trustee may make payment from the sub-account for all expenses of providing housing to the SB and for all expenses of owning, renting, and maintaining home. ACA Art. 9.1. The Trustee may also make payment for the SB's supplemental needs. ACA Art. 9.5.

The ACA contains a spendthrift provision in which the SB may not anticipate, sell, assign, or otherwise encumber any part of his interest in the assets of the Trust. ACA Art. 6.3.

The ACA provides that the sub-account terminates upon the SB's death, after payment of expenses incurred prior to the SB's death, including funeral and burial expenses, and fees and expenses connected with closing the sub-account. ACA Art. XIII. The remaining assets of the sub-account shall be retained by the Trust and shall be applied to the charitable purposes of the Trust as provided in the Declaration. *Id.*

The ACA is governed by the laws of the State of Wisconsin. ACA Art. 14.1.

DISCUSSION

WISH, Inc. has indicated that sub-accounts within the Trust may be self-settled or established with the assets of a third party. We will discuss each situation in turn.

Self-settled Sub-account

Pursuant to 42 U.S.C. § 1382b(e), the principal of a trust created on or after January 1, 2000, with the assets of an individual will be considered a resource to the extent that the trust is revocable or, in the case of an irrevocable trust, to the extent that any payments from the trust could be made to or for the benefit of the individual (or the individual's spouse), with certain exceptions. *See also* POMS SI 01120.201(D).

Our first inquiry is whether the SB of a self-settled sub-account would have the legal authority to revoke his sub-account. Whether a trust can be revoked depends on the terms of the trust and applicable state law--here Wisconsin. *See* POMS SI 01120.200(D)(2). The Declaration states that it is irrevocable. Decl. Art. XII. Likewise, the ACA states that it and the sub-account created by it are irrevocable. ACA Art. II, 3.3. Despite these provisions, the SB's sub-account would still be considered revocable if he were the sole beneficiary. *See* Restatement (Third) of Trusts § 65 Reporter's Notes (2003) (if grantor is also sole beneficiary of trust, trust is considered revocable regardless of contrary language in trust); POMS SI 01120.200(D)(3). In this case, however, the SB would not be the sole beneficiary. Rather, the Trust creates a contingent remainder interest in WISH, Inc. The Declaration and the ACA both specify that, upon the SB's death, after payment of allowable expenses, the remaining assets are to be retained by the Trust. Decl. Art. 5.3; ACA Art. XIII. Since there is a residual beneficiary, the SB could not revoke his sub-account unilaterally, but would need to obtain the consent of the residual beneficiary. *See* Wis. Stat. § 701.12 (trust may be revoked, modified, or terminated by written consent of settlor and all beneficiaries); POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary."). Because we do not presume that WISH, Inc. would consent to a revocation, we would consider a self-settled sub-account irrevocable. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Update on the Law Regarding Grantor Trusts* (July 23, 2003).

As stated above, in the case of an irrevocable trust, the principal will be considered a resource to the extent that any payments could be made to or for the benefit of the individual (or the individual's spouse), with certain exceptions. Here, payments from the sub-account could be made to or for the benefit of the SB, since he would be the sole

beneficiary during his lifetime. ACA Art. 4.1. Therefore, a self-settled sub-account within the Trust would be considered a resource, unless an exception applies.

One exception is for a trust that is established under section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C), commonly referred to as a pooled trust. In order to qualify for this exception, the trust must contain the assets of a disabled individual and meet the following conditions:

- The trust is established and managed by a nonprofit association.
- The trust maintains a separate account for each beneficiary, but pools these accounts for purposes of investment and management of funds.
- Accounts in the trust are established solely for the benefit of the disabled individual by the individual or a parent, grandparent, legal guardian, or court.
- To the extent that amounts remaining in the beneficiary's account upon his or her death are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2).

Here, the Trust does not meet all of the conditions of the pooled trust exception. Specifically, the Trust fails to meet the last condition. The POMS unequivocally states that "[t]o qualify for the pooled trust exception, the trust *must contain* specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust pays to the State 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." POMS SI 01120.203(B)(2)(g) (emphasis added). Under the terms of the Declaration and the ACA, upon the SB's death, the Trustee first pays any expenses listed in ACA Art. IX incurred prior to the SB's death, including funeral and burial expenses, and fees and expenses connected with closing the sub-account. Decl. Art. 5.3; ACA Art. XIII. Only after payment of these allowable expenses does the Trust retain the remaining assets of the sub-account. *Id.* Thus, the Trust does not qualify for the pooled trust exception under 42 U.S.C. § 1396p(d)(4)(C), and a self-settled sub-account within the Trust would be considered a resource under 42 U.S.C. § 1382b(e).

If WISH, Inc. is able to cure the above defects and qualify for the pooled trust exception, the Agency would still need to apply the regular resource rules set forth in POMS SI 01120.200 to determine whether a self-settled sub-account would be a resource. *See* 42 U.S.C. § 1382b(e)(1); SI 01120.200(A)(2)(c). Under the regular resource rules, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the current value of the individual's future interest in mandatory disbursements, if any, may be a resource if it can be sold. *See id.*

Applying these rules, a self-settled sub-account would not be a resource. As discussed above, the sub-account would be considered irrevocable because the SB would not be able to revoke it without the consent of WISH, Inc., the residual beneficiary. Moreover, the ACA provides that the SB does not have authority to require a payment in cash or use of income or principal to provide or pay for food, clothing, or supplementation of shelter

costs. ACA Art. 9.1. Rather, the Trustee has "absolute discretion" in making all distributions. ACA Art. 6.3, 9.1. Thus, the SB could not direct the use of the sub-account assets for his support and maintenance. Consequently, the SB's sub-account principal would not be a resource. Additionally, neither the Declaration nor the ACA provides for mandatory disbursements to the SB.

With respect to the SB's power to otherwise sell his beneficial interest in the Trust, the ACA contains a spendthrift provision in which the SB's interest in the assets of the Trust is not subject to alienation. ACA Art. 6.3. However, since the SB is also the settlor of the sub-account, a Wisconsin court may decline to give effect to this spendthrift provision. *See* Wis. Stat. § 701.06(6) (where settlor is beneficiary, court may, upon request of judgment creditor, order satisfaction of judgment to extent of settlor's proportionate contribution to trust). In any event, since the sub-account is a discretionary trust and the Trustee could not be compelled to make any distributions, the SB's beneficial interest in the Trust would have no significant market value. *See* Restatement (Third) of Trusts § 60 & cmt. e, f (2003). Accordingly, the SB's beneficial interest in a self-settled sub-account would not be considered a resource.

Third Party Sub-account

In the case of a trust established solely with the assets of a third party, the regular resource rules set forth in POMS SI 01120.200 apply to determine whether the assets in the trust are a resource. As noted above, under this provision, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the current value of the individual's future interest in mandatory disbursements, if any, may be a resource if it can be sold. *See id.*

As with a self-settled sub-account, a third party sub-account would not be a resource under the regular resource rules. Here, the terms of the ACA do not give the SB the right to terminate a third party sub-account. Morever, under Wisconsin law, the SB would not be able to unilaterally terminate his sub-account, but would need the consent of the settlor and WISH, Inc., the residual beneficiary. *See* Wis. Stat. § 701.12. The ACA also gives the Trustee "absolute discretion" in making all distributions and provides that the SB does not have authority to require the use of the sub-account assets for his support and maintenance. ACA Art. 6.3, 9.1. Consequently, the SB's sub-account principal would not be a resource. Additionally, neither the Declaration nor the ACA provides for mandatory disbursements to the SB.

With respect to the SB's power to otherwise sell his beneficial interest in the Trust, the ACA contains a spendthrift provision in which the SB's interest in the assets of the Trust is not subject to alienation. ACA Art. 6.3. Spendthrift trusts are allowed in Wisconsin. *See* Wis. Stat. § 701.06 (applies to both principal and income). Accordingly, the SB's beneficial interest in a third party sub-account would not be considered a resource.

Sub-account Distributions

Assuming WISH, Inc. cures the defects that would disqualify its self-settled sub-accounts from the pooled trust exception, neither self-settled nor third party sub-accounts would be considered resources under the regular resource rules. However, certain distributions from the sub-accounts would be considered income. For example, any disbursements of

cash made directly to the SB would be considered unearned income for SSI purposes. ACA Art. 9.5(a); *see* 20 C.F.R. § 416.1102; POMS SI 01120.200(E)(1)(a). In addition, any disbursements made to a third party resulting in the SB's receipt of food or shelter would be considered income in the form of in-kind support and maintenance ("ISM") up to the presumed maximum value ("PMV"). ACA Art. 9.5(b)(xiii); *see* 20 C.F.R. §§ 416.1102, 416.1130, 416.1140; POMS SI 01120.200(E)(1)(b), SI 02210.201(I)(1).

Because the Trust provides a home to the SB to use as a primary residence (ACA Art. 8.1) and pays for certain housing expenses (ACA Art. 9.1[2]), we must consider whether and the extent to which these provisions would be considered ISM in the form of shelter. This, in turn, depends on the type of housing arrangement that is formed. The first category is where the sub-account creator (either the SB or a third party) transfers title to his home to the sub-account (ACA Art. 3.1(a)), or the Trust purchases a home for the SB out of the SB's sub-account assets (ACA Art. 8.14(a)), and the SB lives in that home. In that case, the Trust holds legal title to the home for the benefit of the SB, who has an equitable ownership interest, and the SB is considered to be living in his own home. *See* POMS SI 00835.110, 01110.515(C)(2), 01120.200(F)(1). Accordingly, we apply POMS SI 01120.200(F), which sets forth resource and income rules pertaining to a home. Because the SB has an equitable ownership interest, he does not receive ISM in the form of rent-free shelter while living in the home. *See* POMS SI 01120.200(F)(2). (Consequently, it is unnecessary for the SB to pay rent.) However, the purchase of a home or the payment of any monthly mortgage by the Trustee would constitute a disbursement from the Trust that results in the receipt of ISM to the SB. *See* POMS SI 01120.200(F)(3). Specifically, the purchase of a home would be ISM up to the PMV in the month of purchase, if the SB lives in the home that month. *See id.* And if there is a mortgage, each monthly mortgage payment would be ISM up to the PMV. *See* 20 C.F.R. § 416.1130(b); POMS SI 01120.200(F)(3)(b). However, since the SB is required to pay a monthly occupancy fee for using the home (ACA Art. 8.2), for purposes of determining ISM, the amount of this fee would serve as an offset for the mortgage payment made by the Trustee (but this offset would not have any effect on the ISM if the resulting net mortgage payment equals or exceeds the PMV). Moreover, to the extent that the Trustee pays for the SB's additional shelter expenses including property taxes, heating fuel, gas, electricity, water, sewer, and garbage removal, such expenses would be considered ISM in the month payment is made (but the total ISM will not be more than the PMV). *See* 20 C.F.R. §§ 416.1130(b), 416.1140; POMS SI 00835.350, 00835.465(D), 01120.200(F)(3)(c). Again, for purposes of determining ISM, if the monthly occupancy fee is not used up in offsetting a mortgage payment, the remainder would serve as an offset for any other shelter expense distributions.

The second category is where the SB lives in a home that is rented or owned by the Trust (separate from the SB's sub-account), i.e., the SB does not have an equitable ownership interest. ACA Art. 8.14(a). Under the ACA, the Trustee sets the monthly occupancy fee which shall not exceed the larger of the PMV or another amount based on the anticipated total annual expenses of owning and maintaining the home. ACA Art. 8.2. As long as the SB's monthly occupancy fee exceeds or equals the PMV, he would not be receiving ISM in the form of room or rent. *See* 20 C.F.R. § 416.1130(b). However, if the SB's monthly occupancy fee is less than the PMV, the lesser of the difference between the monthly fee and either the PMV or the current market value would be imputed as ISM. *See id.*

Moreover, to the extent that the Trustee pays for the SB's additional shelter expenses including heating fuel, gas, electricity, water, sewer, and garbage removal, such expenses would be considered ISM in the month payment is made (but the total ISM will not be more than the PMV). *See* 20 C.F.R. §§ 416.1130(b), 416.1140; POMS SI 00835.350, 00835.465(D).

CONCLUSION

For the reasons discussed above, we conclude that under the current version of the Trust documents, a self-settled sub-account would not qualify for the pooled trust exception and would be a resource for SSI purposes. However, assuming that WISH, Inc. cures the disqualifying defects, neither self-settled nor third party sub-accounts would be resources. However, as discussed above, certain trust distributions would be considered income to the SB.
