ABD TRUSTS

Legal Authority: Deficit Reduction Act of 2005; State Medicaid Manual 45 § 3259

1. Overview

A trust is a right of funds or property held by an individual (the trustee) for the benefit of another (the beneficiary) or for self-benefit. A trust is composed of the initial amount used to create the trust (the principal) and any income (usually interest) it may produce. The trustee holds legal title to the trust and manages it for the benefit or use of the beneficiary. Determine whether a trust is a countable or excluded resource when a household member is either the trust's trustee or beneficiary.

2. Definitions

Legal Instrument or Device Similar to a Trust: Any financial instrument that resembles a trust which includes, but is not limited to: escrow accounts, pension funds, annuities and other similar entities managed by an individual or entity with fiduciary responsibilities.

Grantor Trust: A trust in which the grantor of the trust is the sole beneficiary of the trust (i.e. the grantor establishes a trust for himself or herself).

Mandatory Trust: Requires the trustee to pay to or for the beneficiary's benefit, the trust's earnings and/or principal at certain times in specified amounts or for a specified type of care. The trustee has no discretion on distribution from the trust.

Discretionary Trust: The trustee has discretion to use the trust for the beneficiary's needs as he or she deems appropriate. The beneficiary has no control over the trust.

Trustee: An individual who holds the legal title to funds for the benefit or use of another individual.

Beneficiary: The person for whose benefit the trust is created.

Grantor/Trustor: The person who creates a trust, including a court or administrative body with legal authority to act in place of, on behalf of, or at the request or direction of the individual or spouse.

Totten Trust: A tentative trust in which the grantor is trustee of his or her own funds for the benefit of another. The trustee or grantor can revoke the trust at any time. If the trustee dies before revoking the trust, the beneficiary becomes owner of the trust. The terms of the trust will indicate how the trust is to be used or what limits are in place for the use of the funds by the trustee.

3. Accessibility

Trusts must be evaluated for accessibility. If a trust is accessible, and verification is received that only a portion of the trust is available to the individual, only the available portion will be considered in the resource determination. If such verification is not received, the full value of the trust will be considered available to each beneficiary.

a. Revocable Trust

A revocable trust is a trust or similar legal device, which can be modified or terminated by the grantor or someone else according to the terms of the trust. A trust may be considered revocable if proof is provided that it can only be modified or terminated by a court. An irrevocable trust which terminates if some action is taken by the grantor is considered a revocable trust.

For revocable trusts created prior to 8/11/1993, the full amount of the trust is a countable resource. Interest which accrues to the account is counted as unearned income. Withdrawals from the trust are not considered income, as they are a conversion of a resource.

Revocable trusts created on or after 8/11/1993 which was established by the individual, a spouse, or a person/entity with legal authority to act on behalf of, at the direction of or by request of the individual or spouse, and the trust contains an individual's assets (assets form part or all of the trust), the following policy applies:

- The principal of the trust is considered an available resource for all TennCare Medicaid categories;
- Any payments from the trust to or for the benefit of the individual are considered income to the individual in all TennCare Medicaid categories; and
- Any other payments from the trust for any other purpose must be considered under the *Transfer of Assets and Penalty Periods* policy (institutionalized TennCare Medicaid categories only).

b. Irrevocable Trust

An irrevocable trust is a trust or similar device which the grantor cannot revoke or modify in any way or under any circumstances.

Irrevocable trusts created prior to 8/11/1993 are excluded as resources if:

- The trust is legally irrevocable;
- The beneficiary is not a financially responsible relative (FRR) or one for whom the individual is financially responsible; and
- The individual does not have access to the funds, unless he or she is also a beneficiary.

Review the terms of an irrevocable account, the principal amount and the income generated by such trust at every redetermination.

Irrevocable Trust and Similar Devices Established on or after 8/11/1993:

An irrevocable trust or similar device which contains an individual's own assets, forms all or part of the principal of a trust and is established (other than by will) by the individual or spouse, or by a person/entity with legal authority to act on behalf of or at the direction of the individual or spouse is subject to the policy outlined below. This policy applies to that portion of the trust which includes the assets of the individual regardless of the purpose of the trust, whether the trustees have or exercise any discretion under the trust, or any restrictions on distributions or the use of distributions:

- Any payments from the trust paid to or for the benefit of the individual for any purpose are considered income to the individual, unless payment is made for medical care or other purposes in which it is not considered income under Supplemental Security Income (SSI) policy; and
- Income on the corpus (principal) of the trust or any portion of corpus which could be paid to or for the benefit of the individual is considered an available resource to the individual.

For institutionalized individuals, the following additional policy requirements apply:

- Any other payments from the trust for any other purpose will be considered a transfer of assets for individuals subject to the transfer of assets policy;
- If any portion of the trust containing the individual's assets cannot be considered as income or a resource, it is considered a transfer of assets from the date the trust is established or payment to the individual is foreclosed.
- The look-back period for trust transfers of assets is 60 months if no payment can be made to or for the benefit of the individual, or 36 months if payment can be made to or for the benefit of the individual.
- The corpus (principal) of the trust is the value of the transferred asset. Any additions to the irrevocable trust in which no payments can be made will be considered a transfer of assets at the point the addition is made.

c. Value of an Accessible Trust

If a trust is accessible, and verification is received that only a portion of the trust is available to the individual, only that portion will be considered in the resource determination. If such verification is not received, the full value of the trust will be considered available to each beneficiary.

4. Trust Types

a. Burial

A burial trust is a trust established by an individual for purposes of setting aside funds for payment of burial expenses for the individual or someone else (typically a spouse or family member). Burial trusts under this provision are not the same as funds held in trust by a funeral home in conjunction with a prepaid funeral agreement/burial contract.

All funds in a burial trust, established by an individual, including interest payments, are excluded if the value of the trust does not exceed $6,000 per individual. Interest payments and cost of transport which cause the trust value to exceed $6,000 are also excluded.

A burial trust, established by an individual, with funds in excess of $6,000 will be treated under the normal trust provisions.

The owner of the trust is the individual whose assets were used to create the trust. Verify ownership by securing a copy of the burial trust. The current value of the trust is the sum of the amount of the initial deposits, any subsequent deposits and accrued interest.

b. Testamentary Trust (Trust created by a will)

The countable value of a testamentary trust depends upon the terms of the will. The terms of the will may specify that only the income or both the income and principal are available to the beneficiary. In addition, the terms may specify that the beneficiary has limited access to the funds or that only the trustee and the court has access to the trust. The principal of the trust is a countable asset, if it is accessible to the beneficiary.

If the trustee has the discretion to use the trust principal for the individual's support and maintenance or medical needs, the value of the trust is an unavailable asset, but the trust itself is a third party medical resource and must be reported to HCFA. Send a copy of the trust document and a brief written summary of the circumstances to the HCFA Third Party Liability Unit.

c. Living Trust

A living trust is usually a revocable, self-settled trust often created for tax and estate planning purposes. The principal of a living trust is a countable resource.

d. Self-Settled Trust

A self-settled trust is a trust created by a person with his or her own funds for his or her primary benefit. A self-settled trust is a countable resource.

e. Special Needs Trust

A Special Needs Trust is a trust:

1. Established for the sole benefit of a disabled individual (as defined by the Social Security Act) who is under age 65 by:

- The disabled individual;
- A parent;
- A grandparent;
- A legal guardian; or
- The court.

2. Established with assets of the disabled individual under age 65; and

3. Provides that upon the death of the disabled individual, the State of Tennessee will receive all amounts remaining in the trust up to the total amount of medical assistance paid on behalf of the individual during his or her lifetime.

   Note: This trust exclusion continues after the individual reaches age 65. However, the trust cannot be added to or otherwise augmented after the beneficiary reaches age 65.

   Funds contained in a Special Needs Trust are excluded as resources. Income of a Special Needs Trust is not counted as income to the disabled individual (beneficiary of the trust) unless actually distributed in the form of cash or in-kind payments for food or shelter.

   The Estate Recovery Unit must be notified of the existence of a Special Needs Trust, as well as when a TennCare Medicaid individual with a Special Needs Trust passes away. When the individual passes away, the closure notice will remind the family to contact the Estate Recovery Unit.

f. Pooled Trust

A pooled trust is a trust:

1. Established for the sole benefit of a disabled person (as defined by the Social Security Administration (SSA)) by:

   a. The disabled individual;
   b. A parent;
   c. A grandparent;
   d. A legal guardian; or
   e. The court.

2. Established with assets of the disabled individual;

3. Established and managed by a non-profit association with a separate account maintained for each trust beneficiary, but multiple trust accounts are pooled for investment purposes and management of funds; and

4. Provides that upon the death of the disabled individual, any amount remaining in the account that is not retained by the trust will be paid to HCFA, up to the total amount of medical assistance paid on behalf of the individual during his or her lifetime.

Pooled trust established or modified by individuals age 65 or older must be evaluated for a potential transfer of assets. See *Transfer of Assets and Penalty Periods* policy.

g. Income-Producing Trusts (Applies to trusts created on or after 8/11/1993)

- If a trust fund is producing regular income for the beneficiary and the terms of the trust specify that the beneficiary does not have access to the trust principal or income, that such access is limited to the trustee or court, and the trust does not contain any of the beneficiary's own assets, then the value of the trust is an excluded asset. Any payments the individual receives from the trust are considered unearned income.

- Dividends, interest, rents and other income generated by a trust fund, unless otherwise excluded, that can be paid to or for the benefit of the beneficiary are considered countable income to the beneficiary in the month they become available, regardless of whether the income is actually paid out to the beneficiary.

- Income earned by a trust that can be distributed, but is not distributed to the beneficiary and is instead retained in the trust becomes a countable resource to the beneficiary in the months following the month the income was available for distribution.

- Funds withdrawn from the principal of an inaccessible or excluded trust, unless otherwise excluded, are considered countable income in the month received.

- Funds withdrawn from the principal of an accessible or countable trust fund are excluded as income because an accessible trust fund is a countable resource. Money cannot be considered as income and a resource in the same month.

- If an individual is receiving regular payments from an inaccessible trust fund, and the trustee has the discretion to use the trust principal for the beneficiary's support and maintenance or medical needs, the value of the trust is an unavailable asset, but the trust itself is a third party medical resource and must be reported to the HCFA Third Party Liability Unit.

h. Qualified Income Trust (QIT) or Miller Trust

A QIT is a trust that is created specifically for the purpose of becoming eligible for TennCare Long-Term Services and Supports (LTSS). For individuals seeking LTSS whose gross income is over the Medicaid Income Cap (MIC) (300% of the SSI Federal Benefit Rate), the state allows the individual to create a QIT into which he or she directs income. This may enable an individual to qualify financially for Institutional Medicaid.

i. QIT Defined

A QIT is a trust consisting of the individual's income. Any type of income may be directed into the QIT, although Social Security income and pension income are among the more common types. A QIT is created for the purpose of establishing income eligibility for TennCare Medicaid in order to receive Medicaid coverage when an individual is or soon will be confined to a nursing facility or Home and Community Based Services (HCBS) Waiver program.

ii. QIT Policy

Individuals applying for or receiving TennCare Medicaid LTSS, whose income is over the MIC, may still qualify for Medicaid coverage if some or all of his or her income is placed in a valid QIT. This applies to both individuals who are or who will be confined to a nursing facility or enrolled in an HCBS waiver. Individuals who are eligible to create a QIT must also meet all other TennCare Medicaid and CHOICES eligibility requirements.

Income placed in a valid QIT will be treated as unavailable in accordance with federal standards. For the QIT to be considered valid, the individual's gross monthly income must be above the MIC. Any income that is not placed in the QIT must be below the MIC. If income not placed in the QIT is over the MIC, the individual is not financially eligible regardless of the income placed in the QIT. An individual whose income is placed in a QIT and who is subsequently found to be eligible for Medicaid will be considered eligible on the first day of the month in which eligibility is established, or the date of admission to the nursing home or HCBS program, whichever is later.

iii. Income Test

The amount of income placed in a QIT cannot be limited nor can it be counted when testing income against the MIC. However, it is used in determining patient liability during post-eligibility treatment of income. Income that is not placed in the QIT is tested against the MIC. If the individual's income that is not placed in a QIT is over the MIC, the individual is not income-eligible for nursing home Medicaid.

iv. Criteria for a Valid Trust

The Trust must be irrevocable and cannot be modified or amended in whole or in part by the grantor at any time. However, the trustee or a court of competent jurisdiction shall have the right and jurisdiction to modify any provision of the Trust to the extent necessary to maintain the eligibility of the grantor for medical assistance.

Each month the trustee shall distribute the entire amount of income transferred into the Trust except for an amount not to exceed $20 for expenses of the Trust.

The sole beneficiaries of the Trust are the individual for whose benefit the Trust is established and the State of Tennessee. The Trust terminates upon the death of the individual, or when the Trust is no longer required to establish TennCare Medicaid eligibility in the State of Tennessee, or if nursing facility care or HCBS is no longer medically necessary for the individual, or if the individual is no longer receiving such services.

The Trust must provide that upon the death of the individual or termination of the Trust, whichever occurs sooner, the State of Tennessee shall receive all amounts remaining in the Trust up to the total amount of medical assistance paid by the State on behalf of the individual.

Amounts remaining in the Trust that are owed to the State must be paid to HCFA within three months after the death of the individual or termination of the Trust, whichever is sooner, along with an accounting of the payments from the Trust. HCFA may grant an extension if a written request is submitted within two months of the termination of the Trust.

This policy applies to an income trust established on or after July 1, 2005, and under hardship provision in Section 1613 (e) of the Social Security Act. Hardship may be considered to exist when the institutionalized individual or his or her spouse would have resources in excess of the resource limit, is otherwise eligible, and for whom TennCare Medicaid ineligibility would result in loss of essential nursing care which is not available.

v. Allowable Monthly Payments for Long-Term Care Facilities

Allowable payments from the Trust include:

- Personal Needs Allowance (PNA) the amount the individual is allowed to retain for his or her personal needs under Tennessee's TennCare Medicaid policies. As of January 1, 2005, this amount is $50 for confinement in a nursing facility or ICF/MR and 300% of the SSI-FBR for HCBS enrollees and Self-Determination Waiver; and 200% for the Arlington and Statewide Waivers.
- A deduction of up to $20 for expenses necessary for managing the trust (i.e. bank charges).
- Community Spouse Income Maintenance Allowance/Dependent Income Maintenance Allowance, if applicable.
- Health Insurance Premiums – allowed when the individual has health insurance other than TennCare Medicaid (for example, Medicare premium or a Medicare supplement policy).
- Item D deductions - payment for types of medical or remedial care recognized under state law, but not covered as medical assistance under TennCare Medicaid.

vi. Payment for Nursing Facility Care, HCBS, and other TennCare Medicaid-Covered Services

Any available income not placed in the QIT and any Trust income remaining after allowable deductions are made shall be paid monthly to the facility by the individual or from the Trust in an amount not to exceed the Medicaid reimbursement rate. Any excess income not distributed from the Trust shall accumulate in the Trust monthly.

vii. Restrictions on Other Expenses

No other deductions or expenses may be paid from the Trust. Expenses which cannot be paid from the Trust, except as specifically provided herein include, but are not limited to, trustee fees, attorney fees and costs (including attorney fees and costs incurred in establishing the trust), accountant fees, court fees and costs, fees for guardians ad litem, funeral expenses, past due medical bills and other debts.

viii. Home and Community Based Services (HCBS)

For an individual with a valid Trust receiving HCBS, the following methodology will be used to determine the financial liability of the individual for the cost of care.

1. Determine the amount of the individual's gross monthly income. Based on federal regulations and guidance, all of the individual's income is counted, including the amount placed in the Trust.
2. Deduct the individual's Personal Needs Allowance (PNA). The PNA for HCBS is 300% of the SSI/FBR for HCBS enrollees and Self-Determination Waiver; and 200% for the Arlington and Statewide Waivers.
3. A deduction up to $20 for trust expenses, i.e. bank charges is allowed.
4. A deduction may be made for spousal allocation, health insurance or any approved non-covered medical or remedial care expense (Item D). Approved non-covered services are listed in HCFA State Rules.
5. The remainder, after the above deductions, is the individual's financial liability amount.

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