

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-14-26
Baltimore, Maryland 21244-1850



Center for Medicaid and State Operations
Disabled and Elderly Health Programs Group (DEHPG)

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Ms. Mary E. O'Byrne
Attorney at Law
1400 Front Avenue
Suite 101
Lutherville, MD 21093

Dear Ms. O'Byrne:

This is in response to your letter seeking clarification of Medicaid policies pertaining to transfers of assets to trusts for the sole benefit of an individual's child pursuant to Section 1917(c)(2)(B)(iii) of the Social Security Act (42 U.S.C. 1396p(c)(2)(B)(iii)), or for the sole benefit of an individual under 65 years of age who is disabled pursuant to Section 1917(c)(2)(B)(iv) of the Act (42 U.S.C. 1396p(c)(2)(B)(iv)). You ask whether there is a legal requirement that the trusts must provide for reimbursement to the State Medicaid program for the benefits provided over the beneficiary's lifetime, before any remaining trust funds are distributed to contingent beneficiaries.

The sections of the Medicaid statute to which you refer are exceptions to the overall requirement of Section 1917(c)(1) of the Act that states must impose periods of ineligibility on certain individuals making transfers of assets for less than fair market value. The statute provides that certain transfers of assets will not result in a period of ineligibility for the transferor/Medicaid applicant. These include transfers to a disabled child of the Medicaid applicant and transfers to a trust for an individual with a disability under age 65, whatever the relationship of such an individual to the applicant. You question whether these exceptions to the transfer of assets penalties are met where a trust is "actuarially sound" but still provides the potential for distributing remainder amounts after the death of the disabled child or disabled individual to contingent beneficiaries. You further ask whether there is a legal requirement that such trusts provide for reimbursement to the state Medicaid program prior to distribution of remainder amounts to contingent beneficiaries.

It is important to understand that the statutory provisions pertaining to "sole benefit" transfers recognize that the transferor has different options for conveying his or her funds. The transferor may simply give the funds directly to his or her disabled child, or may transfer them into trust. The transferor may also place funds into a trust for the sole

benefit of an individual who is under 65 and disabled. Two different types of trusts are referenced under the statute: those specifically defined under Section 1917(d)(4) of the Act, and all others.

For trusts that are *not* defined under 1917(d)(4), CMS policy provides that in order for a transfer to a trust to be considered to be for the sole benefit of the disabled child or disabled individual under 65, the trust instrument must provide for the spending of the funds for the benefit of the individual on a basis that is actuarially sound based on the individual's life expectancy, and must benefit no one but the disabled individual at any time. Therefore, there should be no contingent or remainder beneficiaries. At the death of the beneficiary any remainder could be payable to the beneficiary's estate. This would, as you suggest, permit the State Medicaid program to enforce a claim for reimbursement of amounts it has paid out to the individual, if any. We find nothing "inconsistent" in this result.

Trusts defined under subsection (d)(4) include so-called "special needs trusts," "Miller" or qualified income trusts, (which do not appear to be relevant to your questions) and "pooled trusts." The statutory exceptions to the transfer of assets rules under 1917(c)(2)(B)(iii) and 1917(c)(2)(B)(iv) permit, but do not require, "sole benefit" transfers to (d)(4) trusts. Thus, transfers to (d)(4) trusts may be thought of as a subset of "sole benefit" transfers to trusts. If the Medicaid applicant has chosen to make a sole benefit transfer into a special needs trust or pooled trust, all requirements for those particular trusts must be met, whether or not the trusts are actuarially sound. This includes the requirement that the trust instrument provide that any funds remaining in the trust upon the death of the individual, i.e. the disabled trust beneficiary, not the original transferor, must go to the State up to the amount of Medicaid benefits paid on the individual's behalf. However, in Section 3257(B(6) of the State Medicaid Manual, we have stated that for (d)(4) trusts the restrictions applicable to sole benefit transfers generally do not apply. Thus, (d)(4) trusts do not need to include provisions for the spending of the funds for the benefit of the individual on a basis that is actuarially sound based on the individual's life expectancy, and they may include provisions for disbursement of funds to other beneficiaries provided that such distributions are not made prior to satisfaction of the State's claim for reimbursement.

I hope that this information is helpful to you.

Sincerely,



Gihni Hain
Director

Division of Eligibility, Enrollment and Outreach