

HCH PROGRAM ISSUANCE
Transmittal Notice
REGION IV

COPY

DATE: JANUARY 13, 1995

PROGRAM IDENTIFIER: MCD-86-94

TO: All Title XIX Agencies and Welfare
Agencies in AL, GA, KY, MS, SC, TN

SUBJECT: Policy Clarification on the Treatment of Income in
Trusts for the Disabled

The following are responses to questions regarding the treatment of income in trusts for the disabled.

There are three trusts that are exempted from the trust provisions (trusts for the disabled under age 65, Miller trusts, and pooled income trusts). These trusts are treated differently from other trusts in determining an individual's eligibility for Medicaid.

Question: 1. If an individual places income in a disabled trust but has not alienated the ownership of the income, is the income counted in determining eligibility? Is the income counted in the post-eligibility treatment of income?

Answer: In situations in which the right to receive income is transferred to a trust, this income is said to be "alienated". If income is alienated, the income would not count as having been received by the individual. By contrast, if the individual continues to retain the right to receive the income, but an income payment is placed in a trust, the income payment is considered a transfer of assets, but is not regarded as "alienated income".

Counting income that is placed in a disabled trust but has not been alienated would have the effect of rendering many individuals ineligible for Medicaid, thus nullifying the intent of excluding disabled trusts from

the trust provisions. Therefore, for purposes of determining Medicaid eligibility, income placed in a disabled trust (as described in §1917(d)(4)(A) or §1917(d)(4)(C)) without being alienated will not be counted in determining the individual's eligibility.

However, although disabled trusts are exempt from the trust provisions, funds entering and leaving an exempt trust are not exempt from the rules of the cash assistance programs, or a State's more restrictive rules under §1902(g), or more liberal rules under §1902(r)(2), as applicable. Therefore, for determining the amount of income an eligible person is expected to contribute to the cost of their care in an institution (post-eligibility), the income placed in a disabled trust continues to be defined as income under the rules of the appropriate cash assistance program and is counted as available to the individual for computation of the post-eligibility contribution to cost of care.

Question: 2. It is our interpretation that the legislation in 42 USC 1396p (d)(4) was intended for institutional care clients only. Please confirm this understanding.

Answer: An exempt trust can be created for the benefit of an institutionalized individual. However, nothing in the statute limits use of these trusts exclusively to institutionalized individuals.

Question: 3. If the individual alienates ownership of the income and the income goes directly to the trust, please confirm that this income is not counted in determining eligibility or in the post-eligibility treatment of income.

Answer: If an individual transfers his or her ownership of income to a trust by assigning the rights of the income to that trust, the individual releases any legal claim to that income. Under SSI rules, this income would no longer be considered the individual's income, and the income would not count as income received by the individual. However, the alienation of the ownership of the income may subject the individual to a penalty for transferring assets for less than fair market value under the transfer of assets provisions.

However, the situation is slightly different for Miller trusts which must be composed only of pension, Social Security, and other income to the individual. If the individual has irrevocably transferred his or her right

to receive income to the trust, this income is no longer considered to be the individual's income. Therefore, a trust established with income which has been transferred to the trust does not meet the requirements for exemption as a Miller trust.

Question: 4. If income and/or resources are placed in a trust for the disabled or pooled trust, is it considered a transfer of assets without fair compensation? If the trust is a special needs trust, is it considered fair compensation? We have not been applying the transfer of assets provisions to the resources or income placed in either of these types of trusts. Please confirm our understanding.

Answer: Income and resources placed in an exempt disabled trust (often referred to as a "special needs" trust) or pooled trust are not subject to the transfer of assets provisions provided the trust is established solely for the benefit of the disabled child or the disabled individual under 65 years of age per the exemptions from the transfer of assets provisions at section 1917(c)(2)(B) of the Act. In addition, income and resources placed in a trust that are used to benefit the individual will not be subject to transfer of assets penalties, provided the trust purchases items and services for the individual at fair market value. In instances where assets placed in a disabled or a pooled trust are not used for the sole benefit of the disabled individual, transfer of assets penalties must be applied.

Question: 5. It is our understanding that the income earned on the corpus of the trust is not counted in determining eligibility or in the posteligibility determination. Please confirm this understanding.

Answer: Income earned on the corpus of an exempt trust is not counted in making eligibility or posteligibility determinations unless the income earned by the trust is paid to or for the individual, and can be used for food, clothing, or shelter.

Question: 6. If a trust allows for payment of medical expenses, it is referred to Medicaid third party recovery to determine if it is a liable third party resource. Since you have previously advised that exculpatory language is recognized in these trusts, please confirm our understanding that they are not treated as a liable third party for Medicaid.

As these trusts are exempt from the trust provisions, and exculpatory language is dealt with in the context of the trust provisions, third party liability is not an issue here. However, if the trust provides that medical expenses can be paid for from the trust, it is a potential third party source.

If you have any questions, please contact Donna Cross at (404) 331-0069, Carol Langford at (404) 331-0079, or Sandy Staiano at (404) 730-2722.

Wilma Cooper
for
Eugene A. Grasser
Associate Regional Administrator
Division of Medicaid