

## **Title 23: Medicaid**

### **Part 103: Resources**

#### **Part 103 Chapter 5: Trust Provisions**

##### *Rule 5.1: Classification of Trusts*

The three classifications of trusts are as follows:

A. OBRA-93 Trusts:

1. Are trusts established on or after August 11, 1993, the date mandated by OBRA-93 Federal legislation.
2. Must meet certain criteria. If OBRA-93 criteria are not met, another trust policy applies.
3. Rules were amended by The Deficit Reduction Act of 2005 (DRA) which provides current operating procedures for trust issues.

B. Medicaid Qualifying Trusts (MQT) are trusts established on or after March 1, 1987, through August 10, 1993, that meet MQT criteria. If MQT criteria are not met, defer to Miss. Admin. Code Part 103, Rule 5.1.C.

C. Standard Trusts are trusts established prior to March 1, 1987, and/or trusts that do not meet the criteria of OBRA-93 or MQT trusts, regardless of the date established.

Source: 42 CFR § 435.601(b); Social Security Act § 1902 (r)(2); Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006); Consolidated Omnibus Reconciliation Act of 1985 § 9506 (Rev. 1985).

History: Revised eff. 11/01/2014.

##### *Rule 5.2: Clearing Trusts, Guardianships, and Conservatorships*

A. Trusts, guardianships/conservatorships are often complex documents involving state law and legal principles.

B. Trust documents must be referred to the state office for clearance whenever an individual or spouse either creates a trust or is the beneficiary of one.

1. Pertinent materials needed to evaluate the terms of the trust include a copy of the trust agreement and applicable material.

2. The terms of the trust will be evaluated based on the trust provisions described in this chapter. Trusts are subject to income, resource and/or transfer of assets rules, as appropriate.

Source: Miss. Code Ann. §43-13-121.1.

History: Revised eff. 11/01/2014.

### *Rule 5.3: General Trust Definitions*

#### A. Introduction.

1. The definitions in this rule apply to any/all types of trusts.
2. Each type of trust has definitions which are specific to that trust classification that are discussed under other rules.

#### B. Trust Definitions

1. A trust is a property interest whereby property is held by an individual (trustee) subject to a fiduciary duty to use the property for the benefit of another (the beneficiary).
2. A grantor (also called a settlor or trustor) is a person who creates a trust. An individual may be a grantor if an agent, or other individual legally empowered to act on his/her behalf (e.g., a legal guardian, person acting under a power of attorney or conservator), establishes the trust with funds or property that belong to the individual. The terms grantor, trustor, and settlor may be used interchangeably.
3. A trustee is a person or entity who holds legal title to property for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for his/her own benefit.
4. A trust beneficiary is a person for whose benefit a trust exists. A beneficiary does not hold legal title to trust property but does have an equitable ownership interest in it.
  - a) Primary Beneficiary is the first person or class of persons to receive the benefits of a trust.
  - b) Secondary Beneficiary is a person or class of persons who will receive the benefits of the trust after the primary beneficiary has died.
  - c) Contingent Beneficiary is a person or class of persons who will receive benefits only if a stated event occurs in the future.

5. The trust principal (corpus) is the property placed in trust by the grantor which the trustee holds, subject to the rights of the beneficiary plus any trust earnings paid into the trust and left to accumulate.
6. Trust earnings (or income) are amounts earned by trust principal. They may take such forms as interest, dividends, royalties, rents, etc. These amounts are unearned income to the person (if any) legally able to use them for personal support and maintenance.
7. A Totten trust is a tentative trust in which a grantor makes himself trustee of his own funds for the benefit of another. The trustee can revoke a Totten trust at any time. Should the trustee die without revoking the trust, ownership of the money passes to the beneficiary.
8. A grantor trust is a trust in which the grantor of the trust is also the sole beneficiary of the trust.
9. A mandatory trust is a trust which requires the trustee to pay trust earnings or principal to or for the benefit of the beneficiary at certain times. The trust may require disbursement of a specified percentage or dollar amount of the trust earnings or may obligate the trustee to spend income and principal, as necessary, to provide a specified standard of care. The trustee has no discretion as to the amount of the payment or to whom it will be distributed.
10. A discretionary trust is a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions. The trustee may pay to or for the benefit of the beneficiary, all or none of the trust as he or she considers appropriate. The beneficiary has no control over the trust.
11. A testamentary trust is a trust that is an integral part of a will and takes effect upon the death of the individual making the will.

Source: 42 CFR § 435.601(b); Social Security Act § 1902 (r)(2).

History: Revised eff. 11/01/2014.

*Rule 5.4: General Trust Definitions - OBRA-93 and DRA Trust Policy*

A. Introduction.

1. Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) amended Section 1917(d) of the Social Security Act to revise the treatment of trusts effective with trusts established after the date of enactment of OBRA-93, which was August 11, 1993. Trusts established before this date, but added to or otherwise augmented after this date, are treated under OBRA-93 Trust rules.

2. OBRA-93 Transfer of Assets policy is used in conjunction with OBRA-93 Trust policy and provisions of the Deficit Reduction Act of 2005 (DRA), which amended rules on transfer of assets for less than fair market value by broadening the spectrum of what is considered a transfer, the length of the penalty period, the look back period for transfers, the definition of assets and how penalty periods run consecutively rather than concurrently.

B. Trust Definitions (OBRA-93 and DRA).

1. For purposes of this rule, a trust is any arrangement in which a grantor transfers property to a trustee or trustees with the intention that it be held, managed, or administered by the trustee(s) for the benefit of the grantor or certain designated individuals (beneficiaries). The trust must be valid under State law and manifested by a valid trust instrument or agreement. A trustee holds a fiduciary responsibility to hold or manage the trust's corpus and income for the benefit of the beneficiaries. The term "trust" also includes any legal instrument or device that is similar to a trust. It does not cover trusts established by will. Such trusts must be dealt with using Standard Trust policy.
2. A Legal Instrument or Device Similar to Trust is any legal instrument, device, or arrangement which may not be called a trust under State law but which is similar to a trust. That is, it involves a grantor who transfers property to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section). The grantor makes the transfer with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligations.
3. A trustee is any individual, individuals, or entity (such as an insurance company or bank) that manages a trust or similar device and has fiduciary responsibilities.
4. A grantor is any individual who creates a trust. For purposes of this rule, the term "grantor" includes:
  - a) The individual;
  - b) The individual's spouse;
  - c) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; and
  - d) A person, including a court or administrative body, acting at the direction or upon the request of the individual, or the individual's spouse.
5. A revocable trust is a trust which can under State law be revoked by the grantor. A trust which provides that the trust can only be modified or terminated by a court is considered to be a revocable trust, since the grantor (or his/her representative) can petition the court

to terminate the trust. Also, a trust which is called irrevocable but which terminates if some action is taken by the grantor is a revocable trust for purposes of this instruction.

6. An irrevocable trust is a trust which cannot, in any way, be amended or revoked by the grantor. Being irrevocable does not make the trust unavailable as a resource for Medicaid purposes.
7. A beneficiary is any individual or individuals designated in the trust instrument as benefiting in some way from the trust, excluding the trustee or any other individual whose benefit consists only of reasonable fees or payments for managing or administering the trust. The beneficiary can be the grantor himself, another individual or individuals, or a combination of any of these parties. For purposes of this rule, the beneficiary of a trust must be the applicant or Medicaid beneficiary or another allowable person, as described in the trust and transfer of assets rules, and under specified conditions. A transfer of assets will result if the trust beneficiary named is not an allowable person and the trust is funded with assets belonging to an applicant or Medicaid beneficiary and/or spouse.
8. For purposes of this rule, a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property.

Source: Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.5: Medicaid Trust Provision*

The following apply to any individual who establishes a trust, and who is an applicant for or recipient of Medicaid:

- A. An individual is considered to have established a trust if his or her assets (regardless of how little) were used to form part or all the corpus of the trust and if any of the parties described as a grantor established the trust, other than by will;
- B. When a trust corpus includes assets of another person or persons as well as assets of the individual, the rules apply only to the portion of the trust attributable to the assets of the individual. Thus, in determining countable income and resources in the trust for eligibility and post-eligibility purposes, any amounts of income and resources will be prorated, based on the proportion of the individual's assets in the trust to those of other persons. This general rule, however, is subject to the provisions of Miss. Admin. Code Part 103, Rule 5.7.A.
- C. This rule applies to trusts without regard to:

1. The purpose for which the trust is established;
  2. Whether the trustee(s), has or exercises any discretion under the trust;
  3. Any restrictions on when or whether distributions can be made from the trust; or
  4. Any restrictions on the use of distributions from the trust.
- D. Any trust which meets the basic definition of a trust can be counted in determining eligibility for Medicaid. No clause or requirement in the trust, no matter how specifically it applies to Medicaid or other Federal or State programs (i.e., an exculpatory clause), precludes a trust from being considered under these rules.
- E. Exceptions to the countability of trusts as a resource do exist and are discussed in Rule 5.13.
- F. Trust assets includes both resources and income the individual or individual's spouse own or that would have become the individual's or spouse's resources or income but for actions taken to direct the assets elsewhere.
- G. All assets held in a trust must be verified and the value of the assets established.

Source: Omnibus Reconciliation Act of 1993 (OBRA-93) § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.6: Treatment of Revocable Trusts*

- A. The entire corpus of a revocable trust is counted as an available resource to the individual. Any income earned by the trust and paid into the trust is also an available resource.
- B. Any payments from the trust made to or for the benefit of the individual are counted as income to the individual, provided the payment is counted as income under SSI cash assistance rules.
- C. Any payments from the trust which are not made to or for the benefit of the individual are considered assets disposed of for less than fair market value. [Refer to Miss. Admin. Code Part 103, Chapter 7]
- D. Home property placed in a revocable trust loses its excluded status if the client is in an institution.
- E. Changes made to a revocable trust that restrict or limit its use for the individual or spouse may be a transfer of assets. [Refer to Miss. Admin. Code Part 103, Chapter 7]

Source: 42 CFR § 435.601(b); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.7: Treatment of Irrevocable Trusts*

- A. In the case of an irrevocable trust, where there are any circumstances under which payment can be made to or for the benefit of the individual from all or a portion of the trust, the following rules apply to that portion.
1. Payments from income or from the corpus made to or for the benefit of the individual are treated as income to the individual, provided the payment is counted as income under SSI cash assistance rules.
  2. Income received by the trust which could be paid to or for the benefit of the individual is treated as a resource available to the individual.
  3. The portion of the corpus that could be paid to or for the benefit of the individual is treated as a resource available to the individual; and,
  4. Payments from income or from the corpus that are made, but not to or for the benefit of the individual, are treated as a transfer of assets for less than fair market value. [Refer to Miss. Admin. Code Part 103, Chapter 7]
- B. If no payment can be made to or for the benefit of the individual from either all of the trust or from some portion of the trust, treat the trust or the unavailable portion as a transfer of assets. The value of the trust or the value of the unavailable portion is not an available resource if it is treated as a transfer of assets. [Refer to Miss. Admin. Part 103, Chapter 7]
1. The sixty (60) month look back period for transfer of assets applies. When all or portion of the corpus or income on the corpus of a trust cannot be paid to the individual, treat all or any such portion or income as a transfer of assets under OBRA-93 transfer policy.
  2. In treating these portions as a transfer of assets, the date of the transfer is considered to be either the date the trust was established or, if later, the date on which payment to the individual was foreclosed.
  3. In determining for transfer of assets purposes the value of the portion of the trust which cannot be paid to the individual, do not subtract from the value of the trust any payments made, for whatever purposes, after the date the trust was established or, if later, the date payment to the individual was foreclosed. The value of the transferred amount is no less than its value on the date the trust is established or payment is foreclosed.
  4. If the trustee or the grantor adds funds to that portion of the trust which cannot be paid to the individual after these dates, the addition of those funds is considered to be a new

transfer of assets, effective on the date the funds are added to that portion of the trust which cannot be paid to the individual.

Source: 42 CFR § 435.601(b) (Rev 1994); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 §13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.8: Payments Made From Revocable or Irrevocable Trusts*

- A. Payments are considered to be made to the individual when any amount from the trust, including an amount from the corpus or income produced by the corpus, is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative.
- B. Payments made for the benefit of the individual are payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment.
- C. A payment to or for the benefit of the individual is counted under this provision only if such a payment is ordinarily counted as income under the SSI program.

Source: 42 CFR § 435.601(b); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.9: Circumstances Under Which Payments Can/Cannot Be Made.*

In determining whether payments can or cannot be made from a trust to or for an individual, any restrictions on payments must be taken into account, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust.

- A. Example: If an irrevocable trust provides that the trustee can disburse only \$1,000 to or for the individual out of a \$20,000 trust, only the \$1,000 is treated as a payment that could be made. The remaining \$19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual.
- B. On the other hand, if a trust contains \$50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly, if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances.

Source: Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).



History: Revised eff. 11/01/2014.

*Rule 5.10: Placement of Excluded Assets in Trust*

- A. Section 1917 of the Act provides that, for trust and transfer purposes, assets include both income and resources.
- B. Section 1917 of the Act further provides that income has the meaning given that term in Section 1612 of the Act and resources has the meaning given that term in Section 1613 of the Act (income and resources as defined in SSI policy).
- C. Transferring an excluded asset (either income or a resource, with the exception of the home of an institutionalized individual) for less than fair market value does not result in a penalty under the transfer provisions because the excluded asset is not an asset for transfer purposes. Similarly, placement of an excluded asset in a trust does not change the excluded nature of that asset; it remains excluded, except for the home property of an institutionalized individual.
- D. Transfer of title to the home of an institutionalized individual in a revocable trust results in the home becoming a countable resource. Transfer of title to the home property of an institutionalized individual in an irrevocable trust results in the home either being treated as a countable resource or shall be considered a transfer of assets. However, if there are circumstances where payment from the irrevocable trust could be made to or for the benefit of the individual, those payments shall be treated as a countable resource for the individual. The Division will look to the terms of the trust to make this determination.

Source: Social Security Act §§ 1612, 1613 and 1917; Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.11: Undue Hardship Provision*

When application of the Trust provisions would work an undue hardship, the provisions will not apply.

- A. Undue hardship exists when:
  - 1. Application of the trust provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered.
  - 2. Application of the trust provisions would deprive the individual of food, clothing shelter, or other necessities of life causing severe deprivation.

3. The applicant or spouse or representative has exhausted all legal action to have the transferred assets that caused the penalty returned.

B. Undue hardship does not exist when:

1. Application of the trust provisions merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him or her at risk of serious deprivation.
2. The resource was transferred to a person (spouse, child, or other person) who was handling the financial affairs of the client or to the spouse or children of a person handling the financial affairs of the client unless it is established that the transferred funds cannot be recovered even through exhaustive legal measures.

C. Each case situation must be reviewed individually to determine if undue hardship exists.

D. Generally, this provision is limited to financially and medically needy individuals with no possible means of accessing funds placed in a trust.

Source: Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.12: Reviewing Trust Documents*

In reviewing a trust:

- A. Trust documents, including amendments and the required number of accountings must be obtained;
- B. The type of trust, i.e., OBRA-93 Trust, Medicaid Qualifying Trust, or Standard Trust, is must be determined;
- C. The trust must be determined to be revocable or irrevocable; and
- D. Establish whether any income is released from the trust; and
- E. The applicable policy and procedural requirements for clearing the trust and the treatment of the trust are applied.

Source: Miss. Code Ann. §43-13-121.1.

History: Revised eff. 11/01/2014.

*Rule 5.13: Trust Exceptions*

- A. The following types of trusts are treated as exceptions to the trust provisions outlined above provided the trust is established according to criteria specific to the trust type. The trust exceptions are:
1. Special Needs Trust;
  2. Pooled Trust; and
  3. Income Trust.
- B. Funds entering and leaving these trusts are generally treated according to SSI rules or more liberal rules under Section 1902(r) (2) of the Act, as appropriate.
- C. As noted under the rule for each type of trust, one common feature of all of the excepted trusts is a requirement that the trust provide that, upon the death of the individual or upon termination of the trust for any other reason, any funds remaining in the trust go to the MS Division of Medicaid, up to the amount paid in Medicaid benefits on the individual's behalf.

Source: 42 CFR § 435.601(b); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 §13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.14 Special Needs Trusts (SNT)*

- A. A Special Needs Trust (SNT) contains the assets of an individual under age sixty-five (65) who is disabled and which is established for the sole benefit of the disabled individual by a parent, grandparent, legal guardian of the individual, or a court.
- B. To qualify for an exception to the rules governing trusts, the SNT must contain a provision stating that, upon the death of the individual or upon termination of the trust for any other reason, the MS Division of Medicaid receives all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual.
- C. When a SNT is established for a disabled individual under age sixty-five (65), the SNT exception for the trust continues even after the individual becomes age sixty-five (65). However, a SNT cannot be added to or otherwise augmented after the disabled individual reaches age sixty-five (65). Any such addition or augmentation after age sixty-five (65) involves assets that were not the assets of an individual under age sixty-five (65) and therefore, those assets are not subject to the SNT exception.
- D. A SNT must be established for a disabled individual, as defined under the SSI Program in section 1614(a)(3). When the individual in question is receiving either Title II or SSI benefits as a disabled individual, the disability determination made for those programs is accepted. If the individual is not receiving - SSI or title II based on disability, a determination concerning

the individual's disability must be made. If disability is not established using SSI criteria, the SNT exception cannot apply.

- E. Establishment of a SNT as described above does not constitute a transfer of assets for less than fair market value if the transfer is made into a trust established solely for the benefit of a disabled individual under age sixty-five (65). However, if the trust is not solely for the benefit of the disabled person or if the disabled person is over age sixty-five (65) at the time the SNT is established, transfer penalties may apply.

Source: 42 U.S.C. § 1396p(d)(4).

History: Revised eff. 11/01/2014.

*Rule 5.15: Pooled Trusts*

- A. A pooled trust is a trust containing the assets of a disabled individual that meets the following conditions:
  - 1. The trust is established and managed by a non-profit entity that has been granted that status by the Internal Revenue Service (IRS);
  - 2. A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds the trust pools the funds in these accounts;
  - 3. Accounts in the trust are established solely for the benefit of disabled individuals by the individual, by the parent, grandparent, legal guardian of the individual, or by a court; and
  - 4. To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary or upon the termination of the trust for any other reason are not retained by the trust, the trust pays to the MS Division of Medicaid the amount remaining in the account up to the amount equal to the total amount of medical assistance paid on behalf of the beneficiary. To meet this requirement, the trust must include a provision specifically providing for such payment.
- B. To qualify as an excepted trust, the trust account must be established for a disabled individual, as defined in Section 1614(a)(3) of the Act. When the individual in question is receiving either Title II or SSI benefits as a disabled individual, the disability determination made for those programs is accepted. If the individual is not receiving SSI or title II benefits based on disability, a determination concerning the individual's disability must be made. If disability is not established using SSI criteria, the pooled trust exception cannot apply.

Source: 42 U.S.C. §1396p(d)(4); Social Security Act §1614(a).

History: Revised eff. 11/01/2014.

*Rule 5.16: SNT and Pooled Trust Guidelines and Restrictions*

The MS Division of Medicaid has established guidelines and restrictions regarding payments and distributions from a SNT or pooled trust that must be followed in order for either type of trust to meet or continue to meet the conditions for exception. Medicaid eligibility of the disabled individual may be affected if these guidelines are not followed.

- A. Payments for medical expenses that are not paid by Medicaid are allowed to be made from the trust. One exception is the cost differential between that of a private room and a semi-private room in an institutional setting is not an allowable expense.
- B. Gifts must not be made from either type of trust,
- C. Compensation must not be paid to a family member from either type of trust for services rendered as a trustee.
- D. Compensation must not be paid to a family member from either type of trust for services rendered as a caretaker to the disabled beneficiary.
- E. The purchase of residential real property by the trust is allowable only if the residence is specially equipped to meet the needs of the disabled beneficiary and the property serves as the disabled beneficiary's place of residence. Examples of "specially equipped" are: wider doorways to accommodate wheelchairs, ramps, handrails, etc. If the disabled beneficiary does not require a home to be specially equipped, the purchase of residential real property will not be allowed as an expense from either type of trust. The trust must be the owner of any real property purchased by the trust. Additions or improvements to an existing property will be allowed only if needed to accommodate the special needs of the disabled beneficiary.
- F. The payment of ad valorem taxes and/or insurance premiums on real property will be allowed only if the property has been specially equipped to meet the needs of the disabled beneficiary. Payment of utility expenses is considered as a part of maintenance and support and is not a special need; therefore, payment of utilities by either type of trust is not allowed.
- G. The purchase of a vehicle by the trust is allowed only if it is specially equipped to allow the disabled beneficiary to operate the vehicle or to be transported in the vehicle; otherwise the purchase of a vehicle by either type of trust is not allowed. If the purchase of a non-specially equipped vehicle is considered a medical necessity, the MS Division of Medicaid will take into consideration an undue hardship request for the purchase of a vehicle prior to the purchase of such a vehicle. The payment for tags, insurance and repairs on a vehicle will be allowed only if the vehicle is specially equipped. Payments for gasoline and other operating expenses are not considered special needs but are considered as a part of basic maintenance and support. The trust must not be the owner of any vehicle that is purchased by funds from either type of trust.
- H. Payments for vacations and other non-medical trips must not exceed \$2,000 during any calendar year.

- I. Payments for recreational opportunities, family visits or visits to friends must not exceed \$2,000 during any calendar year.
- J. Payments for non-medical expenses such as radios, televisions, audio or video equipment, computer equipment or other electronic devices and/or equipment are limited to one purchase of each type every five (5) years and the total expenditures for these types of expenses must not exceed \$5,000 during any calendar year.
- K. The payment of burial expenses, the purchase of pre-need burial contracts or the payment of burial insurance premiums are not considered special needs and are not to be made from either type of trust until after the MS Division of Medicaid has been reimbursed upon the termination of the trust.
- L. Payments for food, clothing, rent, mortgage payments, furniture, appliances and household help are considered to be items of basic maintenance and support and not special needs. Such payments must not be made from either type of trust.
- M. Distributions from either type of trust directly to the disabled beneficiary or to the beneficiary's bank account will be considered income to the disabled beneficiary in the month in which the distribution is made.

Source: Miss. Code Ann. § 43-13-121.

History: Revised eff. 11/01/2014.

*Rule 5.17: Income Trusts*

- A. The purpose of an Income Trust is to allow an individual with excess income who has exhausted all available resources to become eligible for Medicaid. The trust may be used only for income belonging to the individual. No resources (assets) may be used to establish or augment the trust. Inclusion of resources voids the trust exception. It is intended to assist individuals with excess recurring monthly income who have income that exceeds the Medicaid institutional limit in effect at the time eligibility is requested but have insufficient income to pay the private cost of institutional care. Individuals with income above the private pay rate for the facility in which the individual resides will not be eligible for Medicaid under the Income Trust provision.
- B. This type of trust established for the benefit of the individual is limited to institutionalized clients, not those in an acute care (hospital) setting. A recipient participating in the Home and Community Based Waiver program (HCBS) may also utilize an Income Trust for eligibility purposes.
- C. An Income Trust must meet the following requirements:
  - 1. The trust is composed only of the pension(s), Social Security, and other income due the individual from all sources, including accumulated interest in the trust. Total income

does not include income that is not countable under Medicaid rules, such as payments from the Veterans' Administration for aid and attendance and payments for unreimbursed medical expenses; and,

2. Income Trusts, once accepted by Medicaid, cannot be modified without Medicaid's approval. An Income Trust must specify that the trust will terminate at the individual's death, when Medicaid eligibility is terminated, when the trust is no longer necessary or in the event the trust is otherwise terminated. Trusts may need to be terminated prior to an individual's death due to changes in the client's income or changes in Medicaid policy regarding how certain income must be counted or in the event the individual is discharged from the nursing facility.
3. Income Trusts for institutionalized individuals require that if the income of the Settlor is less than Settlor's cost of care at the nursing facility, all income of the Settlor, less authorized deductions, must be paid directly to the nursing facility. In that case no funds will be retained in the Trust. If the income of the Settlor exceeds the cost of care at the nursing facility, the Trust must retain the income in excess of the cost of care until such time that payment of the accumulated Income Trust funds is requested by the MS Division of Medicaid. Income trusts for Home and Community Based (HCBS) Waiver enrollees require that the Trust must distribute to the Settlor, or for his/her benefit, an amount equal to not more than \$1 less than the then current Medicaid income limit as approved by Medicaid. The trust should not specify the amount of the individual's income as this amount may change each year and the amount to be released from the trust will change to an amount equal to \$1 less than the current Medicaid income limit.
4. At the dissolution or termination of an Income Trust, the death of the Settlor, loss of the Settlor's Medicaid eligibility or in the event that the Settlor's income no longer exceeds the current Medicaid income limits, the trust agreement must provide that all amounts remaining in the trust up to an amount equal to the total medical assistance paid by Medicaid on behalf of the individual that has not previously been repaid will be paid to the MS Division of Medicaid.
5. The trust agreement must provide that at the time of each review of the Settlor's Medicaid eligibility (at least annually) while this trust is in existence, when notified by Medicaid, the Trustee must pay to the MS Division of Medicaid the amount that should be accumulated in the trust up to the amount expended by the Division of Medicaid on behalf of the Settlor that has not previously been repaid. Failure to make the requested payments may result in the loss of Medicaid eligibility for the Settlor.
6. The trust agreement must provide for an accounting to be sent to the MS Division of Medicaid when requested to show all receipts and disbursements of the trust during the prior calendar year when requested by Medicaid.
7. No fees are allowed to be paid to the Trustee for their service. In the event funds are retained in the trust, administrative fees are limited to \$10 per month and are intended to cover any bank charges required to maintain the trust account.

8. Any disbursements not approved by Medicaid or provided for by the trust agreement will result in a loss of the trust exemption.
  9. The trust instrument must specify an effective date. Unless the applicant is requesting retroactive eligibility of up to ninety (90) days (which will require that the applicant have the funds necessary to fund the trust for that period) the effective date will be the date of execution. If a retroactive date is being sought the effective date will be determined through consultation with the Medicaid Regional Office. In that case the Regional Office should be consulted to determine the effective date prior to execution of the agreement.
- D. An Income Trust will not be allowed on a temporary or intermittent basis except in instances when monthly excess income will be reduced at a future date. In such a case, an Income Trust will be allowed until such time as the excess monthly income requires an Income Trust to allow eligibility. Income received less than monthly does not qualify as recurring excess monthly income that allows the use of an Income Trust. Income received irregularly or infrequently must be converted to monthly income before evaluating the need for an Income Trust.
- E. The MS Division of Medicaid will provide model Income Trust agreements for individuals in need of an Income Trust. Model agreements are provided for individuals in institutional care and for individuals enrolled in a HCBS waiver program that need an Income Trust in order to qualify for Medicaid based on income. The only changes to these legally binding documents that the MS Division of Medicaid will accept will be to add language regarding a successor trustee or co-trustee. Changes must be approved by the Legal Bureau of the MS Division of Medicaid prior to execution of the trust. In completing the Income Trust document, the Medicaid applicant or recipient cannot be the Trustee of the Income Trust.
- F. It is possible to have an Income Trust during the time a transfer of assets penalty is in effect. Although the MS Division of Medicaid will not pay for an individual's room and board during a transfer penalty period, the Income Trust will allow an individual with excess income who otherwise requires an Income Trust in order to be eligible to qualify for all Medicaid covered services other than payment of room and board and will allow the penalty period to be implemented.

Source: 42 U.S.C. § 1396p(d)(4); Miss. Code Ann. § 43-13-121; Social Security Act § 1917(d).

History: Revised eff. 11/01/2014.



## **Title 23: Medicaid**

### **Part 103: Resources**

#### **Part 103 Chapter 5: Trust Provisions**

##### *Rule 5.1: Classification of Trusts*

The three classifications of trusts are as follows:

A. OBRA-93 Trusts:

1. Are trusts established on or after August 11, 1993, the date mandated by OBRA-93 Federal legislation.
2. Must meet certain criteria. If OBRA-93 criteria are not met, another trust policy applies.
3. Rules were amended by The Deficit Reduction Act of 2005 (DRA) which provides current operating procedures for trust issues.

B. Medicaid Qualifying Trusts (MQT) are trusts established on or after March 1, 1987, through August 10, 1993, that meet MQT criteria. If MQT criteria are not met, defer to Miss. Admin. Code Part 103, Rule 5.1.C.

C. Standard Trusts are trusts established prior to March 1, 1987, and/or trusts that do not meet the criteria of OBRA-93 or MQT trusts, regardless of the date established.

Source: 42 CFR § 435.601(b); Social Security Act § 1902 (r)(2); Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006); Consolidated Omnibus Reconciliation Act of 1985 § 9506 (Rev. 1985).

History: Revised eff. 11/01/2014.

##### *Rule 5.2: Clearing Trusts, Guardianships, and Conservatorships*

A. Trusts, guardianships/conservatorships are often complex documents involving state law and legal principles.

B. Trust documents must be referred to the state office for clearance whenever an individual or spouse either creates a trust or is the beneficiary of one.

1. Pertinent materials needed to evaluate the terms of the trust include a copy of the trust agreement and applicable material.

2. The terms of the trust will be evaluated based on the trust provisions described in this chapter. Trusts are subject to income, resource and/or transfer of assets rules, as appropriate.

Source: Miss. Code Ann. §43-13-121.1.

History: Revised eff. 11/01/2014.

### *Rule 5.3: General Trust Definitions*

#### A. Introduction.

1. The definitions in this rule apply to any/all types of trusts.
2. Each type of trust has definitions which are specific to that trust classification that are discussed under other rules.

#### B. Trust Definitions

1. A trust is a property interest whereby property is held by an individual (trustee) subject to a fiduciary duty to use the property for the benefit of another (the beneficiary).
2. A grantor (also called a settlor or trustor) is a person who creates a trust. An individual may be a grantor if an agent, or other individual legally empowered to act on his/her behalf (e.g., a legal guardian, person acting under a power of attorney or conservator), establishes the trust with funds or property that belong to the individual. The terms grantor, trustor, and settlor may be used interchangeably.
3. A trustee is a person or entity who holds legal title to property for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for his/her own benefit.
4. A trust beneficiary is a person for whose benefit a trust exists. A beneficiary does not hold legal title to trust property but does have an equitable ownership interest in it.
  - a) Primary Beneficiary is the first person or class of persons to receive the benefits of a trust.
  - b) Secondary Beneficiary is a person or class of persons who will receive the benefits of the trust after the primary beneficiary has died.
  - c) Contingent Beneficiary is a person or class of persons who will receive benefits only if a stated event occurs in the future.

5. The trust principal (corpus) is the property placed in trust by the grantor which the trustee holds, subject to the rights of the beneficiary plus any trust earnings paid into the trust and left to accumulate.
6. Trust earnings (or income) are amounts earned by trust principal. They may take such forms as interest, dividends, royalties, rents, etc. These amounts are unearned income to the person (if any) legally able to use them for personal support and maintenance.
7. A Totten trust is a tentative trust in which a grantor makes himself trustee of his own funds for the benefit of another. The trustee can revoke a Totten trust at any time. Should the trustee die without revoking the trust, ownership of the money passes to the beneficiary.
8. A grantor trust is a trust in which the grantor of the trust is also the sole beneficiary of the trust.
9. A mandatory trust is a trust which requires the trustee to pay trust earnings or principal to or for the benefit of the beneficiary at certain times. The trust may require disbursement of a specified percentage or dollar amount of the trust earnings or may obligate the trustee to spend income and principal, as necessary, to provide a specified standard of care. The trustee has no discretion as to the amount of the payment or to whom it will be distributed.
10. A discretionary trust is a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions. The trustee may pay to or for the benefit of the beneficiary, all or none of the trust as he or she considers appropriate. The beneficiary has no control over the trust.
11. A testamentary trust is a trust that is an integral part of a will and takes effect upon the death of the individual making the will.

Source: 42 CFR § 435.601(b); Social Security Act § 1902 (r)(2).

History: Revised eff. 11/01/2014.

*Rule 5.4: General Trust Definitions - OBRA-93 and DRA Trust Policy*

A. Introduction.

1. Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66) amended Section 1917(d) of the Social Security Act to revise the treatment of trusts effective with trusts established after the date of enactment of OBRA-93, which was August 11, 1993. Trusts established before this date, but added to or otherwise augmented after this date, are treated under OBRA-93 Trust rules.

2. OBRA-93 Transfer of Assets policy is used in conjunction with OBRA-93 Trust policy and provisions of the Deficit Reduction Act of 2005 (DRA), which amended rules on transfer of assets for less than fair market value by broadening the spectrum of what is considered a transfer, the length of the penalty period, the look back period for transfers, the definition of assets and how penalty periods run consecutively rather than concurrently.

B. Trust Definitions (OBRA-93 and DRA).

1. For purposes of this rule, a trust is any arrangement in which a grantor transfers property to a trustee or trustees with the intention that it be held, managed, or administered by the trustee(s) for the benefit of the grantor or certain designated individuals (beneficiaries). The trust must be valid under State law and manifested by a valid trust instrument or agreement. A trustee holds a fiduciary responsibility to hold or manage the trust's corpus and income for the benefit of the beneficiaries. The term "trust" also includes any legal instrument or device that is similar to a trust. It does not cover trusts established by will. Such trusts must be dealt with using Standard Trust policy.
2. A Legal Instrument or Device Similar to Trust is any legal instrument, device, or arrangement which may not be called a trust under State law but which is similar to a trust. That is, it involves a grantor who transfers property to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section). The grantor makes the transfer with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligations.
3. A trustee is any individual, individuals, or entity (such as an insurance company or bank) that manages a trust or similar device and has fiduciary responsibilities.
4. A grantor is any individual who creates a trust. For purposes of this rule, the term "grantor" includes:
  - a) The individual;
  - b) The individual's spouse;
  - c) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; and
  - d) A person, including a court or administrative body, acting at the direction or upon the request of the individual, or the individual's spouse.
5. A revocable trust is a trust which can under State law be revoked by the grantor. A trust which provides that the trust can only be modified or terminated by a court is considered to be a revocable trust, since the grantor (or his/her representative) can petition the court

to terminate the trust. Also, a trust which is called irrevocable but which terminates if some action is taken by the grantor is a revocable trust for purposes of this instruction.

6. An irrevocable trust is a trust which cannot, in any way, be amended or revoked by the grantor. Being irrevocable does not make the trust unavailable as a resource for Medicaid purposes.
7. A beneficiary is any individual or individuals designated in the trust instrument as benefiting in some way from the trust, excluding the trustee or any other individual whose benefit consists only of reasonable fees or payments for managing or administering the trust. The beneficiary can be the grantor himself, another individual or individuals, or a combination of any of these parties. For purposes of this rule, the beneficiary of a trust must be the applicant or Medicaid beneficiary or another allowable person, as described in the trust and transfer of assets rules, and under specified conditions. A transfer of assets will result if the trust beneficiary named is not an allowable person and the trust is funded with assets belonging to an applicant or Medicaid beneficiary and/or spouse.
8. For purposes of this rule, a payment from a trust is any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property.

Source: Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.5: Medicaid Trust Provision*

The following apply to any individual who establishes a trust, and who is an applicant for or recipient of Medicaid:

- A. An individual is considered to have established a trust if his or her assets (regardless of how little) were used to form part or all the corpus of the trust and if any of the parties described as a grantor established the trust, other than by will;
- B. When a trust corpus includes assets of another person or persons as well as assets of the individual, the rules apply only to the portion of the trust attributable to the assets of the individual. Thus, in determining countable income and resources in the trust for eligibility and post-eligibility purposes, any amounts of income and resources will be prorated, based on the proportion of the individual's assets in the trust to those of other persons. This general rule, however, is subject to the provisions of Miss. Admin. Code Part 103, Rule 5.7.A.
- C. This rule applies to trusts without regard to:

1. The purpose for which the trust is established;
  2. Whether the trustee(s), has or exercises any discretion under the trust;
  3. Any restrictions on when or whether distributions can be made from the trust; or
  4. Any restrictions on the use of distributions from the trust.
- D. Any trust which meets the basic definition of a trust can be counted in determining eligibility for Medicaid. No clause or requirement in the trust, no matter how specifically it applies to Medicaid or other Federal or State programs (i.e., an exculpatory clause), precludes a trust from being considered under these rules.
- E. Exceptions to the countability of trusts as a resource do exist and are discussed in Rule 5.13.
- F. Trust assets includes both resources and income the individual or individual's spouse own or that would have become the individual's or spouse's resources or income but for actions taken to direct the assets elsewhere.
- G. All assets held in a trust must be verified and the value of the assets established.

Source: Omnibus Reconciliation Act of 1993 (OBRA-93) § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.6: Treatment of Revocable Trusts*

- A. The entire corpus of a revocable trust is counted as an available resource to the individual. Any income earned by the trust and paid into the trust is also an available resource.
- B. Any payments from the trust made to or for the benefit of the individual are counted as income to the individual, provided the payment is counted as income under SSI cash assistance rules.
- C. Any payments from the trust which are not made to or for the benefit of the individual are considered assets disposed of for less than fair market value. [Refer to Miss. Admin. Code Part 103, Chapter 7]
- D. Home property placed in a revocable trust loses its excluded status if the client is in an institution.
- E. Changes made to a revocable trust that restrict or limit its use for the individual or spouse may be a transfer of assets. [Refer to Miss. Admin. Code Part 103, Chapter 7]

Source: 42 CFR § 435.601(b); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.7: Treatment of Irrevocable Trusts*

- A. In the case of an irrevocable trust, where there are any circumstances under which payment can be made to or for the benefit of the individual from all or a portion of the trust, the following rules apply to that portion.
1. Payments from income or from the corpus made to or for the benefit of the individual are treated as income to the individual, provided the payment is counted as income under SSI cash assistance rules.
  2. Income received by the trust which could be paid to or for the benefit of the individual is treated as a resource available to the individual.
  3. The portion of the corpus that could be paid to or for the benefit of the individual is treated as a resource available to the individual; and,
  4. Payments from income or from the corpus that are made, but not to or for the benefit of the individual, are treated as a transfer of assets for less than fair market value. [Refer to Miss. Admin. Code Part 103, Chapter 7]
- B. If no payment can be made to or for the benefit of the individual from either all of the trust or from some portion of the trust, treat the trust or the unavailable portion as a transfer of assets. The value of the trust or the value of the unavailable portion is not an available resource if it is treated as a transfer of assets. [Refer to Miss. Admin. Part 103, Chapter 7]
1. The sixty (60) month look back period for transfer of assets applies. When all or portion of the corpus or income on the corpus of a trust cannot be paid to the individual, treat all or any such portion or income as a transfer of assets under OBRA-93 transfer policy.
  2. In treating these portions as a transfer of assets, the date of the transfer is considered to be either the date the trust was established or, if later, the date on which payment to the individual was foreclosed.
  3. In determining for transfer of assets purposes the value of the portion of the trust which cannot be paid to the individual, do not subtract from the value of the trust any payments made, for whatever purposes, after the date the trust was established or, if later, the date payment to the individual was foreclosed. The value of the transferred amount is no less than its value on the date the trust is established or payment is foreclosed.
  4. If the trustee or the grantor adds funds to that portion of the trust which cannot be paid to the individual after these dates, the addition of those funds is considered to be a new

transfer of assets, effective on the date the funds are added to that portion of the trust which cannot be paid to the individual.

Source: 42 CFR § 435.601(b) (Rev 1994); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 §13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.8: Payments Made From Revocable or Irrevocable Trusts*

- A. Payments are considered to be made to the individual when any amount from the trust, including an amount from the corpus or income produced by the corpus, is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative.
- B. Payments made for the benefit of the individual are payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment.
- C. A payment to or for the benefit of the individual is counted under this provision only if such a payment is ordinarily counted as income under the SSI program.

Source: 42 CFR § 435.601(b); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.9: Circumstances Under Which Payments Can/Cannot Be Made.*

In determining whether payments can or cannot be made from a trust to or for an individual, any restrictions on payments must be taken into account, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust.

- A. Example: If an irrevocable trust provides that the trustee can disburse only \$1,000 to or for the individual out of a \$20,000 trust, only the \$1,000 is treated as a payment that could be made. The remaining \$19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual.
- B. On the other hand, if a trust contains \$50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly, if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances.

Source: Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).



History: Revised eff. 11/01/2014.

*Rule 5.10: Placement of Excluded Assets in Trust*

- A. Section 1917 of the Act provides that, for trust and transfer purposes, assets include both income and resources.
- B. Section 1917 of the Act further provides that income has the meaning given that term in Section 1612 of the Act and resources has the meaning given that term in Section 1613 of the Act (income and resources as defined in SSI policy).
- C. Transferring an excluded asset (either income or a resource, with the exception of the home of an institutionalized individual) for less than fair market value does not result in a penalty under the transfer provisions because the excluded asset is not an asset for transfer purposes. Similarly, placement of an excluded asset in a trust does not change the excluded nature of that asset; it remains excluded, except for the home property of an institutionalized individual.
- D. Transfer of title to the home of an institutionalized individual in a revocable trust results in the home becoming a countable resource. Transfer of title to the home property of an institutionalized individual in an irrevocable trust results in the home either being treated as a countable resource or shall be considered a transfer of assets. However, if there are circumstances where payment from the irrevocable trust could be made to or for the benefit of the individual, those payments shall be treated as a countable resource for the individual. The Division will look to the terms of the trust to make this determination.

Source: Social Security Act §§ 1612, 1613 and 1917; Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611(Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.11: Undue Hardship Provision*

When application of the Trust provisions would work an undue hardship, the provisions will not apply.

- A. Undue hardship exists when:
  - 1. Application of the trust provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered.
  - 2. Application of the trust provisions would deprive the individual of food, clothing shelter, or other necessities of life causing severe deprivation.

3. The applicant or spouse or representative has exhausted all legal action to have the transferred assets that caused the penalty returned.

B. Undue hardship does not exist when:

1. Application of the trust provisions merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him or her at risk of serious deprivation.
2. The resource was transferred to a person (spouse, child, or other person) who was handling the financial affairs of the client or to the spouse or children of a person handling the financial affairs of the client unless it is established that the transferred funds cannot be recovered even through exhaustive legal measures.

C. Each case situation must be reviewed individually to determine if undue hardship exists.

D. Generally, this provision is limited to financially and medically needy individuals with no possible means of accessing funds placed in a trust.

Source: Omnibus Reconciliation Act (OBRA-93) of 1993 § 13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.12: Reviewing Trust Documents*

In reviewing a trust:

- A. Trust documents, including amendments and the required number of accountings must be obtained;
- B. The type of trust, i.e., OBRA-93 Trust, Medicaid Qualifying Trust, or Standard Trust, is must be determined;
- C. The trust must be determined to be revocable or irrevocable; and
- D. Establish whether any income is released from the trust; and
- E. The applicable policy and procedural requirements for clearing the trust and the treatment of the trust are applied.

Source: Miss. Code Ann. §43-13-121.1.

History: Revised eff. 11/01/2014.

*Rule 5.13: Trust Exceptions*

- A. The following types of trusts are treated as exceptions to the trust provisions outlined above provided the trust is established according to criteria specific to the trust type. The trust exceptions are:
1. Special Needs Trust;
  2. Pooled Trust; and
  3. Income Trust.
- B. Funds entering and leaving these trusts are generally treated according to SSI rules or more liberal rules under Section 1902(r) (2) of the Act, as appropriate.
- C. As noted under the rule for each type of trust, one common feature of all of the excepted trusts is a requirement that the trust provide that, upon the death of the individual or upon termination of the trust for any other reason, any funds remaining in the trust go to the MS Division of Medicaid, up to the amount paid in Medicaid benefits on the individual's behalf.

Source: 42 CFR § 435.601(b); Social Security Act §1902 (r) (2); Omnibus Reconciliation Act (OBRA-93) of 1993 §13611 (Rev. 1993); Deficit Reduction Act of 2005 §6016 (Rev. 2006).

History: Revised eff. 11/01/2014.

*Rule 5.14 Special Needs Trusts (SNT)*

- A. A Special Needs Trust (SNT) contains the assets of an individual under age sixty-five (65) who is disabled and which is established for the sole benefit of the disabled individual by a parent, grandparent, legal guardian of the individual, or a court.
- B. To qualify for an exception to the rules governing trusts, the SNT must contain a provision stating that, upon the death of the individual or upon termination of the trust for any other reason, the MS Division of Medicaid receives all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual.
- C. When a SNT is established for a disabled individual under age sixty-five (65), the SNT exception for the trust continues even after the individual becomes age sixty-five (65). However, a SNT cannot be added to or otherwise augmented after the disabled individual reaches age sixty-five (65). Any such addition or augmentation after age sixty-five (65) involves assets that were not the assets of an individual under age sixty-five (65) and therefore, those assets are not subject to the SNT exception.
- D. A SNT must be established for a disabled individual, as defined under the SSI Program in section 1614(a)(3). When the individual in question is receiving either Title II or SSI benefits as a disabled individual, the disability determination made for those programs is accepted. If the individual is not receiving - SSI or title II based on disability, a determination concerning

the individual's disability must be made. If disability is not established using SSI criteria, the SNT exception cannot apply.

- E. Establishment of a SNT as described above does not constitute a transfer of assets for less than fair market value if the transfer is made into a trust established solely for the benefit of a disabled individual under age sixty-five (65). However, if the trust is not solely for the benefit of the disabled person or if the disabled person is over age sixty-five (65) at the time the SNT is established, transfer penalties may apply.

Source: 42 U.S.C. § 1396p(d)(4).

History: Revised eff. 11/01/2014.

*Rule 5.15: Pooled Trusts*

- A. A pooled trust is a trust containing the assets of a disabled individual that meets the following conditions:
  - 1. The trust is established and managed by a non-profit entity that has been granted that status by the Internal Revenue Service (IRS);
  - 2. A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds the trust pools the funds in these accounts;
  - 3. Accounts in the trust are established solely for the benefit of disabled individuals by the individual, by the parent, grandparent, legal guardian of the individual, or by a court; and
  - 4. To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary or upon the termination of the trust for any other reason are not retained by the trust, the trust pays to the MS Division of Medicaid the amount remaining in the account up to the amount equal to the total amount of medical assistance paid on behalf of the beneficiary. To meet this requirement, the trust must include a provision specifically providing for such payment.
- B. To qualify as an excepted trust, the trust account must be established for a disabled individual, as defined in Section 1614(a)(3) of the Act. When the individual in question is receiving either Title II or SSI benefits as a disabled individual, the disability determination made for those programs is accepted. If the individual is not receiving SSI or title II benefits based on disability, a determination concerning the individual's disability must be made. If disability is not established using SSI criteria, the pooled trust exception cannot apply.

Source: 42 U.S.C. §1396p(d)(4); Social Security Act §1614(a).

History: Revised eff. 11/01/2014.

*Rule 5.16: SNT and Pooled Trust Guidelines and Restrictions*

The MS Division of Medicaid has established guidelines and restrictions regarding payments and distributions from a SNT or pooled trust that must be followed in order for either type of trust to meet or continue to meet the conditions for exception. Medicaid eligibility of the disabled individual may be affected if these guidelines are not followed.

- A. Payments for medical expenses that are not paid by Medicaid are allowed to be made from the trust. One exception is the cost differential between that of a private room and a semi-private room in an institutional setting is not an allowable expense.
- B. Gifts must not be made from either type of trust,
- C. Compensation must not be paid to a family member from either type of trust for services rendered as a trustee.
- D. Compensation must not be paid to a family member from either type of trust for services rendered as a caretaker to the disabled beneficiary.
- E. The purchase of residential real property by the trust is allowable only if the residence is specially equipped to meet the needs of the disabled beneficiary and the property serves as the disabled beneficiary's place of residence. Examples of "specially equipped" are: wider doorways to accommodate wheelchairs, ramps, handrails, etc. If the disabled beneficiary does not require a home to be specially equipped, the purchase of residential real property will not be allowed as an expense from either type of trust. The trust must be the owner of any real property purchased by the trust. Additions or improvements to an existing property will be allowed only if needed to accommodate the special needs of the disabled beneficiary.
- F. The payment of ad valorem taxes and/or insurance premiums on real property will be allowed only if the property has been specially equipped to meet the needs of the disabled beneficiary. Payment of utility expenses is considered as a part of maintenance and support and is not a special need; therefore, payment of utilities by either type of trust is not allowed.
- G. The purchase of a vehicle by the trust is allowed only if it is specially equipped to allow the disabled beneficiary to operate the vehicle or to be transported in the vehicle; otherwise the purchase of a vehicle by either type of trust is not allowed. If the purchase of a non-specially equipped vehicle is considered a medical necessity, the MS Division of Medicaid will take into consideration an undue hardship request for the purchase of a vehicle prior to the purchase of such a vehicle. The payment for tags, insurance and repairs on a vehicle will be allowed only if the vehicle is specially equipped. Payments for gasoline and other operating expenses are not considered special needs but are considered as a part of basic maintenance and support. The trust must not be the owner of any vehicle that is purchased by funds from either type of trust.
- H. Payments for vacations and other non-medical trips must not exceed \$2,000 during any calendar year.

- I. Payments for recreational opportunities, family visits or visits to friends must not exceed \$2,000 during any calendar year.
- J. Payments for non-medical expenses such as radios, televisions, audio or video equipment, computer equipment or other electronic devices and/or equipment are limited to one purchase of each type every five (5) years and the total expenditures for these types of expenses must not exceed \$5,000 during any calendar year.
- K. The payment of burial expenses, the purchase of pre-need burial contracts or the payment of burial insurance premiums are not considered special needs and are not to be made from either type of trust until after the MS Division of Medicaid has been reimbursed upon the termination of the trust.
- L. Payments for food, clothing, rent, mortgage payments, furniture, appliances and household help are considered to be items of basic maintenance and support and not special needs. Such payments must not be made from either type of trust.
- M. Distributions from either type of trust directly to the disabled beneficiary or to the beneficiary's bank account will be considered income to the disabled beneficiary in the month in which the distribution is made.

Source: Miss. Code Ann. § 43-13-121.

History: Revised eff. 11/01/2014.

*Rule 5.17: Income Trusts*

- A. The purpose of an Income Trust is to allow an individual with excess income who has exhausted all available resources to become eligible for Medicaid. The trust may be used only for income belonging to the individual. No resources (assets) may be used to establish or augment the trust. Inclusion of resources voids the trust exception. It is intended to assist individuals with excess recurring monthly income who have income that exceeds the Medicaid institutional limit in effect at the time eligibility is requested but have insufficient income to pay the private cost of institutional care. Individuals with income above the private pay rate for the facility in which the individual resides will not be eligible for Medicaid under the Income Trust provision.
- B. This type of trust established for the benefit of the individual is limited to institutionalized clients, not those in an acute care (hospital) setting. A recipient participating in the Home and Community Based Waiver program (HCBS) may also utilize an Income Trust for eligibility purposes.
- C. An Income Trust must meet the following requirements:
  - 1. The trust is composed only of the pension(s), Social Security, and other income due the individual from all sources, including accumulated interest in the trust. Total income

does not include income that is not countable under Medicaid rules, such as payments from the Veterans' Administration for aid and attendance and payments for unreimbursed medical expenses; and,

2. Income Trusts, once accepted by Medicaid, cannot be modified without Medicaid's approval. An Income Trust must specify that the trust will terminate at the individual's death, when Medicaid eligibility is terminated, when the trust is no longer necessary or in the event the trust is otherwise terminated. Trusts may need to be terminated prior to an individual's death due to changes in the client's income or changes in Medicaid policy regarding how certain income must be counted or in the event the individual is discharged from the nursing facility.
3. Income Trusts for institutionalized individuals require that if the income of the Settlor is less than Settlor's cost of care at the nursing facility, all income of the Settlor, less authorized deductions, must be paid directly to the nursing facility. In that case no funds will be retained in the Trust. If the income of the Settlor exceeds the cost of care at the nursing facility, the Trust must retain the income in excess of the cost of care until such time that payment of the accumulated Income Trust funds is requested by the MS Division of Medicaid. Income trusts for Home and Community Based (HCBS) Waiver enrollees require that the Trust must distribute to the Settlor, or for his/her benefit, an amount equal to not more than \$1 less than the then current Medicaid income limit as approved by Medicaid. The trust should not specify the amount of the individual's income as this amount may change each year and the amount to be released from the trust will change to an amount equal to \$1 less than the current Medicaid income limit.
4. At the dissolution or termination of an Income Trust, the death of the Settlor, loss of the Settlor's Medicaid eligibility or in the event that the Settlor's income no longer exceeds the current Medicaid income limits, the trust agreement must provide that all amounts remaining in the trust up to an amount equal to the total medical assistance paid by Medicaid on behalf of the individual that has not previously been repaid will be paid to the MS Division of Medicaid.
5. The trust agreement must provide that at the time of each review of the Settlor's Medicaid eligibility (at least annually) while this trust is in existence, when notified by Medicaid, the Trustee must pay to the MS Division of Medicaid the amount that should be accumulated in the trust up to the amount expended by the Division of Medicaid on behalf of the Settlor that has not previously been repaid. Failure to make the requested payments may result in the loss of Medicaid eligibility for the Settlor.
6. The trust agreement must provide for an accounting to be sent to the MS Division of Medicaid when requested to show all receipts and disbursements of the trust during the prior calendar year when requested by Medicaid.
7. No fees are allowed to be paid to the Trustee for their service. In the event funds are retained in the trust, administrative fees are limited to \$10 per month and are intended to cover any bank charges required to maintain the trust account.

8. Any disbursements not approved by Medicaid or provided for by the trust agreement will result in a loss of the trust exemption.
  9. The trust instrument must specify an effective date. Unless the applicant is requesting retroactive eligibility of up to ninety (90) days (which will require that the applicant have the funds necessary to fund the trust for that period) the effective date will be the date of execution. If a retroactive date is being sought the effective date will be determined through consultation with the Medicaid Regional Office. In that case the Regional Office should be consulted to determine the effective date prior to execution of the agreement.
- D. An Income Trust will not be allowed on a temporary or intermittent basis except in instances when monthly excess income will be reduced at a future date. In such a case, an Income Trust will be allowed until such time as the excess monthly income requires an Income Trust to allow eligibility. Income received less than monthly does not qualify as recurring excess monthly income that allows the use of an Income Trust. Income received irregularly or infrequently must be converted to monthly income before evaluating the need for an Income Trust.
- E. The MS Division of Medicaid will provide model Income Trust agreements for individuals in need of an Income Trust. Model agreements are provided for individuals in institutional care and for individuals enrolled in a HCBS waiver program that need an Income Trust in order to qualify for Medicaid based on income. The only changes to these legally binding documents that the MS Division of Medicaid will accept will be to add language regarding a successor trustee or co-trustee. Changes must be approved by the Legal Bureau of the MS Division of Medicaid prior to execution of the trust. In completing the Income Trust document, the Medicaid applicant or recipient cannot be the Trustee of the Income Trust.
- F. It is possible to have an Income Trust during the time a transfer of assets penalty is in effect. Although the MS Division of Medicaid will not pay for an individual's room and board during a transfer penalty period, the Income Trust will allow an individual with excess income who otherwise requires an Income Trust in order to be eligible to qualify for all Medicaid covered services other than payment of room and board and will allow the penalty period to be implemented.

Source: 42 U.S.C. § 1396p(d)(4); Miss. Code Ann. § 43-13-121; Social Security Act § 1917(d).

History: Revised eff. 11/01/2014.