

MISSISSIPPI DIVISION OF MEDICAID

Eligibility Policy and Procedures Manual

304.01 TRUSTS

Introduction

The following is a discussion of the treatment of income and resources which have been placed in, or are being distributed from, trusts, guardianships or conservatorships. The three classifications of trusts are described below. When the type of trust has been determined, refer to the applicable section in this chapter for policy pertaining to that trust classification. The trusts are discussed in the following order:

- OBRA-93 Trusts – applicable to trusts established on or after August 11, 1993, which is the date mandated by OBRA-93 federal legislation. OBRA-93 Trusts must meet certain criteria. If OBRA-93 criteria are not met, refer to the appropriate trust policy. The Deficit Reduction Act of 2005 (DRA) amended OBRA-93 trust rules and provides current operating procedures for trust issues. The specific provisions of the DRA are discussed throughout this section.
- Medicaid Qualifying Trusts - applicable to trusts established on or after March 1, 1987 through August 10, 1993 that meet MQT criteria. If MQT criteria are not met, defer to Standard Trust policy.
- Standard Trusts - applicable to 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.

Procedures for Clearing Any Type of Trusts, Guardianships, and Conservatorships

Trusts, guardianships/conservatorships are often complex documents involving state law and legal principles. They must be referred to the central office for clearance whenever a client or spouse either creates a trust or is the beneficiary of one. A copy of the trust agreement and all pertinent material must be submitted.

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304.01.01 GENERAL TRUST DEFINITIONS

The following definitions apply to any/all types of trusts. Refer to the discussion of each type of trust for definitions which are specific to that trust classification.

Trust – 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).

Grantor – 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.

Trustee – 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.

Trust Beneficiary – 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.

- **Primary Beneficiary** – the first person or class of persons to receive the benefits of a trust.
- **Secondary Beneficiaries** – the person or class of persons who will receive the benefits of the trust after the primary beneficiary has died.
- **Contingent Beneficiary** – a person or class of persons who will receive benefits only if a stated event occurs in the future.

Trust Principal (Corpus) – The trust principal 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.

Trust Earnings (Income) – 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.

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General Trust Definitions (Continued)

Totten Trust – 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.

Grantor Trust – A grantor trust is a trust in which the grantor of the trust is also the sole beneficiary of the trust.

Mandatory Trust – 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.

Discretionary Trust – 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.

Testamentary Trust – 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.

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304.02 OBRA-93 TRUST POLICY/DRA TRUST POLICY

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.

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.

This section discusses OBRA-93 trust provisions, as amended by the DRA. Trusts that do not meet the criteria for OBRA-93 trusts or trusts established prior to 08/11/93 must be reviewed under the applicable trust policy.

Definitions

Trust - For purposes of this section, 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.

Legal Instrument or Device Similar to Trust - This 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.

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OBRA-93 Trust Policy/DRA Trust Policy (Continued)

Trustee - 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.

Grantor - A grantor is any individual who creates a trust. For purposes of this section, the term "grantor" includes:

- The individual;
- The individual's spouse;
- 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
- A person, including a court or administrative body, acting at the direction or upon the request of the individual, or the individual's spouse.

Revocable Trust - A revocable trust is a trust which can under State law be revoked or amended 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. For example, a trust may require a trustee to terminate a trust and disburse the funds to the grantor if the grantor leaves a nursing facility and returns home. Such a trust is considered to be revocable.

Irrevocable Trust - An irrevocable trust is a trust which cannot, in any way, be revoked or amended by the grantor. Being irrevocable does not make the trust an unavailable asset.

Beneficiary - 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 DRA purposes, the beneficiary of a trust must be the applicant or recipient or another allowable person, as described in the trust and transfer of assets policy, and under specified conditions. A transfer of assets will result if a trust beneficiary is not an allowable person and the trust is funded with assets belonging to the applicant or recipient and/or their spouse.

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OBRA-93 Trust Policy/DRA Trust Policy (Continued)

Payment - For purposes of this section 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.

Annuity - An annuity is a right to receive fixed, periodic payments, either for life or a term of years.

For the Sole Benefit of - A trust is considered to be for the sole benefit of a spouse, blind or disabled child, or disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or any time in the future. However, the trust may provide for reasonable compensation for a trustee or trustees to manage the trust, as well as for reasonable costs associated with investing or otherwise managing the funds or property in the trust.

304.03 TRUST PROVISIONS

This section applies to any individual who establishes a trust, and who is an applicant for or recipient of Medicaid. 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.

When a trust corpus includes assets of another person or persons as well as assets of the individual, the rules in this section 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, you must prorate any amounts of income and resources, based on the proportion of the individual's assets in the trust to those of other persons. However, this general rule is subject to the policy that governs payments made by the trust to or for the benefit of the individual, i.e., these payments are income provided the payment is counted as income under SSI rules.

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Trust Provisions (Continued)

The rules set forth in this section apply to trusts without regard to:

- The purpose for which the trust is established;
- Whether the trustee(s), has or exercises any discretion under the trust;
- Any restrictions on when or whether distributions can be made from the trust; or
- Any restrictions on the use of distributions from the trust.

This means that 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.

Note: Exceptions to the count ability of trusts as a resource do exist and are outlined later in the section.

Trust assets include both resources and income the individual or individual's spouse own or would have owned but for actions taken to direct the assets elsewhere.

All assets held in a trust must be verified and the value of the assets established and documented.

304.03.01 TREATMENT OF REVOCABLE TRUSTS

In the case of a revocable trust:

- The entire corpus of the 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.
- 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.
- 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 OBRA-93 Transfer of Assets policy.

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Treatment of Revocable Trusts (Continued)

- Changes made to a revocable trust that restrict or limit its use for the individual or spouse may be a transfer of assets.

When a portion of a revocable trust is treated as a transfer of assets for less than fair market value, the look-back period in OBRA-93 transfer policy is 60 months. The 60-month look back period for assets placed in a trust is not phased in as it is for other types of transfers handled under DRA rules.

Note: Home property placed in a revocable trust loses its excluded status if the client is in an institution.

304.03.02 TREATMENT OF IRREVOCABLE TRUSTS

Payment Can Be Made Under Terms of Trust

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:

- 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;
- 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;
- 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,
- 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. The 60 month look back period for transfer of assets applies.

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Treatment Of Irrevocable Trust (Continued)

Payment Cannot Be Made Under Terms of Trust

If no payment can be made to or for the benefit of the individual from either all or a portion of the trust, treat the trust (or unavailable portion) as a transfer of assets under OBRA-93 transfer policy. In treating these portions as a transfer of assets, the date of the transfer is considered to be:

- The date the trust was established; or,
- If later, the date on which payment to the individual was foreclosed.

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. If the trustee or the grantor adds funds to that portion of the trust 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.

Thus, in treating portions of a trust which cannot be paid to an individual, the value of the transferred amount is no less than its value on the date the trust is established or payment is foreclosed. When additional funds are added to this portion of the trust, those funds are treated as a new transfer of assets for less than fair market value.

As indicated, when that portion of a trust which cannot be paid to an individual is treated as a transfer of assets for less than fair market value, **the look-back period is 60 months**. The value of the trust (or the value of the unavailable portion) is not a countable resource if it is being treated as a transfer of assets.

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304.03.03 PAYMENTS MADE FROM REVOCABLE OR IRREVOCABLE TRUSTS

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. 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.

For example, such payments could include purchase of clothing or other items, such as a radio or television, for the individual. Also, such payments could include payment for services the individual may require, or care, whether medical or personal, that the individual may need. Payments to maintain a home are also payments for the benefit of the individual.

Note: 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. For example, payments made on behalf of an individual for medical care are not counted in determining income eligibility under the SSI program. Thus, such payments are not counted as income under the trust provision.

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, take into account any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust. For 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.

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.

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304.03.04 PLACEMENT OF EXCLUDED ASSETS IN TRUST

Section 1917(e) of the Act provides that, for trust and transfer purposes, assets include both income and resources. Section 1917(e) 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). The only exception is home property of institutionalized individuals, as explained below.

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.

The only exception is the home of an institutionalized individual. Transfer of title to the home of an institutionalized individual to a revocable trust results in the home becoming a countable resource. Transfer of title to the home property of an institutionalized individual to an irrevocable trust results in 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 are treated as a countable resource to the individual. The terms of the trust must be evaluated to make this determination.

304.03.05 UNDUE HARDSHIP PROVISION

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

Undue hardship exists when:

- Application of the trust provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered.
- Application of the trust provisions would deprive the individual of food, clothing shelter, or other necessities of life causing severe deprivation.
- The applicant or spouse or representative has exhausted all legal action to have the transferred assets that caused the penalty returned.

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Undue Hardship Provision (Continued)

Undue hardship does not exist when:

- 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.
- 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.

Each case situation must be reviewed individually to determine if undue hardship exists. Generally, this provision is limited to financially and medically needy individuals with no possible means of accessing funds placed in a trust.

304.03.06 REVIEWING TRUST DOCUMENTS

In reviewing a trust, specialists must:

- Obtain copies of trust documents, including amendments and the required number of accountings;
- Make the following determinations:
 - Type of Trust, i.e., OBRA-93 Trust, Medicaid Qualifying Trust, or Standard Trust;
 - Whether the trust is revocable or irrevocable; and
 - Income released from the trust.
- Trust documents must be referred to the central office for clearance whenever an individual applicant/recipient or their spouse or someone acting in the applicant/recipient or spouse's behalf either creates a trust or is the beneficiary of a trust. A copy of the trust and all pertinent materials related to the trust must be sent in for evaluation and clearance.

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304.04 EXCEPTIONS TO TREATMENT OF TRUSTS

The rules concerning treatment of trusts do not apply to any of the following types of trusts, i.e., the trusts discussed below are treated differently in determining eligibility for Medicaid. 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.

As noted in each exception below, one common feature of all of these excepted trusts is a requirement that the trust provide that, upon the death of the individual, any funds remaining in the trust go to the Division of Medicaid, up to the amount paid in Medicaid benefits on the individual's behalf.

304.04.01 SPECIAL NEEDS TRUST (SNT)

A trust containing the assets of an individual under age 65 who is disabled (as defined by the SSI program) and which is established **for the sole benefit of** the disabled individual by a parent, grandparent, legal guardian of the individual, or a court is often referred to as a Special Needs Trust. In addition to the assets of the individual, the trust may also contain the assets of individuals other than the disabled individual.

To qualify for an exception to the rules governing trusts in this section, the Special Needs Trust 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.

When a Special Needs Trust is established for a disabled individual under age 65, the exception for the trust discussed above continues even after the individual becomes age 65. However, such a trust cannot be added to or otherwise augmented after the individual reaches age 65. Any such addition or augmentation after age 65 involves assets that were not the assets of an individual under 65 and therefore, those assets are not subject to the exemption discussed in this section.

To qualify for this exception to the rules governing trusts, the trust must be established for a disabled individual, as defined under the SSI Program. When the individual in question is receiving either Title II or SSI benefits as a disabled individual, accept the disability determination made for those programs. If the individual is not receiving those benefits, make a determination concerning the individual's disability.

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Special Needs Trust (SNT) (Continued)

Establishment of a trust 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 65. However, if the trust is not solely for the benefit of the disabled person or if the disabled person is over age 65 transfer penalties may apply.

304.04.02 POOLED TRUSTS

A pooled trust is a trust containing the assets of a disabled individual as defined by the SSI Program in Section 1614(a)(3) of the Act, that meets the following conditions:

- The trust is established and managed by a non-profit entity that has been granted that status by the Internal Revenue Service (IRS);
- 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;
- 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,
- To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the 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.

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, accept the disability determination made for those programs. If the individual is not receiving those benefits, make a determination concerning the individual's disability. If disability is not established using SSI criteria, the pooled trust exception cannot apply.

If a pooled trust does not meet the conditions specified above, a transfer of assets may apply.

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304.04.03 SPECIAL NEEDS TRUST (SNT) AND POOLED TRUSTS GUIDELINES AND RESTRICTIONS

The MS Division of Medicaid has established guidelines and restrictions regarding payments and distributions from a Special Needs Trust or Pooled Trust that must be followed in order for either type of trust to meet or continue to meet the conditions for exception. A document entitled “Special Needs Trust and Pooled Trusts Guidelines & Restrictions” is located in the Appendix. This document must be given to each applicant or recipient who qualifies for Medicaid on the basis of a SNT or Pooled Trust. The document must be signed by the trustee and a copy provided to the trustee. File the original in the case record.

304.04.04 INCOME TRUSTS

The purpose of an Income Trust is to allow an institutionalized individual with excess income who has exhausted all available resources to become eligible for Medicaid. This type of trust established for the benefit of the individual is limited to institutionalized clients, not those in a hospital setting. A recipient participating in the Home and Community Based Waiver program (HCBS) may also utilize an Income Trust for eligibility purposes. An Income Trust document is required. The Income Trust must meet the following requirements:

- The trust is composed only of the pension(s), Social Security, and other income of the individual, including accumulated interest in the trust; and,
- Upon the death of the individual, the Division of Medicaid receives all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual. To qualify for this exception, the trust must include a provision to this effect.

The Income Trust provision is designed to assist individuals who have too much income to qualify for Medicaid institutional care, but not enough income to pay private pay for the long term care needed. It is intended for individuals with excess recurring monthly income that causes ineligibility. The Income Trust is a binding document that directs how income received each month will be obligated. As a result, an Income Trust will not be allowed on a temporary or intermittent basis with the following exception: an Income Trust for monthly excess income that will be reduced at a future date will be allowed during the period of time the monthly income exceeds the Medicaid institutional limit.

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Income Trusts (Continued)

For example, a nursing home applicant with excess income that includes a VA pension will be allowed an Income Trust until such time as the VA reduces the pension payment to \$90, thereby eliminating the need for an Income Trust. Income received once or twice per year or on a quarterly basis does not qualify for the use of an Income Trust. This type of irregular and infrequent income should be converted to monthly income before allowing an Income Trust to be established.

Income Included in an Income Trust

To qualify for this exception, the Income Trust must be composed only of income to the individual, from whatever source. The trust may contain accumulated income, i.e., income that has not been paid out of the trust. However, no resources, as defined by SSI, may be used to establish or augment the trust. Inclusion of resources voids this exception.

All individuals with an income Trust who receive a 13th check from State Retirement will be required to have the 13th check averaged over the 12-month period. The representative for the recipient can have this change made by contacting the State Retirement office.

Income Not Included in an Income Trust

An individual's total income must go into the Income Trust each month. The only exception is for the types of VA payments that are not considered income, i.e., VA Reduced Pension benefits, VA Aid & Attendance payments and VA Pension payments attributed to Unreimbursed Medical Expenses.

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Income Trusts (Continued)

Funding the Income Trust Account

All of a nursing home recipient's income, less deductions authorized by Medicaid, will be paid to the nursing home. In most cases no funds will be retained in the Income Trust account.

The recipient's cost of care, referred to as Medicaid Income, will be determined by the total gross income and the daily rate that Medicaid pays the nursing facility where the recipient resides. However, if the Medicaid rate for the facility is less than the recipient's income, the recipient's excess income will fund an income trust account.

Example: The recipient's countable income is \$3,800 per month. The Medicaid daily rate for the facility where the recipient resides is \$3,500 per month. The excess income of \$300 per month must fund an Income Trust account. This example applies if income for only one month exceeds the Medicaid daily rate or if the income for all the months exceeds the Medicaid daily rate.

However, when the Medicaid rate for the facility is more than the recipient's countable income, all of the recipient's income is payable to the facility and the Income Trust account will not be funded.

Example: The recipient's countable income is \$2,500 per month. The Medicaid daily rate for the facility where the recipient resides is \$4,500 per month. The recipient will pay the facility \$2,500, and the Income Trust account will not be needed. However, a trust document is still required.

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Income Trusts (Continued)

Home and Community Based Waiver (HCBS)

For individuals in the Home and Community Based Waiver (HCBS), the difference between an individual's total income and an amount that is \$1 less than the current institutional income limit should fund the Income Trust account. Bank charges associated with maintaining trust accounts are limited to \$10 per month.

Other Income Trust Issues

- Trusts that are not properly funded into an Income Trust account do not meet the criteria for a trust exception.
- When an Income Trust is no longer needed due to the client's death, ineligibility or some other change, the Division of Medicaid receives all amounts remaining in the trust account, up to an amount equal to the total medical assistance paid on behalf of the individual. To qualify for this exception, the trust must include a provision to this effect.
- Model Income Trust agreements for both LTC and HCBS are located in the Appendix and can be copied for execution by the recipient and trustee. The only changes to this legally binding document that the 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 prior to execution.
- Income Trust cases have the same rules of timeliness as all other ABD cases. Unless establishing disability is involved, Income Trust cases are subject to the 45-day time limit. Work with someone who is making an effort to do what is required, but do not hold a case pending for them to establish the trust.
NOTE: The recipient cannot be the trustee.
- The Income Trust case cannot be approved any earlier than the effective date of the trust. If the recipient later decides that coverage in a retro period is needed, the document must be amended. If there is not an effective date, then the trust begins the month it is signed and dated.
- It is possible to have an Income Trust during a transfer period. The nursing home will be paid private pay by the client and all the income will be used to pay private pay. This allows the client to be Medicaid-eligible and the penalty period can begin.

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304.05 MEDICAID QUALIFYING TRUSTS (MQT)

The provisions in this section are applicable to any trust or similar legal device established on or after March 1, 1987, through August 10, 1993, that meet MQT criteria. If MQT criteria are not met, defer to Standard Trust policy.

A Medicaid Qualifying Trust is a trust or similar device, which:

- Is established (other than by will) with the applicant/recipient's own funds, by the applicant/recipient (or spouse),
- Names the applicant/recipient as the trust beneficiary for all or part of the payments from the trust, and
- Permits the trustee to exercise any discretion with respect to the distribution of such payments to the individual.

The MQT provision is applied without regard to whether or not:

- The MQT is revocable or irrevocable, or
- The MQT is established for purposes other than to qualify for Medicaid, or
- The discretion of the trustee is actually exercised.

NOTE: This provision also applies to SSI recipients. Refer to Special Handling of SSI cases for more discussion.

304.05.01 MQT POLICY PRINCIPLES

In determining whether an MQT exists, look for 3 main components:

1. The grantor is the Medicaid client or his representative (e.g., spouse, parent, guardian, conservator or anyone holding power of attorney for the client);
2. The trust was established with property belonging to the client; and
3. The client is at least one of the beneficiaries of the trust.

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MQT Policy Principles (Continued)

In addition, the following principles must be considered:

- The client is considered the grantor even if the trust was established pursuant to court order issued upon the petition of the client or his representative. In this situation, the court acts as the client's agent in establishing the trust.
- It is not necessary that there be a trust agreement, as defined by state law, for MQT trust policies to apply. MQT trust policies apply to **“similar legal devices”** or arrangements having all of the characteristics of an MQT, except there is no actual trust instrument. Examples are:
 - Escrow accounts;
 - Savings accounts;
 - Pension funds;
 - Annuities;
 - Investment accounts;
 - Other accounts managed by agent with fiduciary obligations, such as conservatorships or guardianships.
- The MQT provision does not apply to trust agreements established by will. These trusts are treated as standard trusts. However, if a client inherits resources and in turn establishes a trust, the MQT provision could apply.

304.05.02. RESOURCE TREATMENT OF MQT's

Each trust document must be reviewed individually to determine the resource treatment of the trust, but in general use the following criteria to determine resource treatment:

- **Revocable MQT** - The entire corpus of the trust is an available resource to the client. Resources comprising the corpus are subject to individual resource exclusions, if applicable, since the client can access these resources.

An exception is exclusion of the home for institutionalized recipients. Home property loses its excluded status when transferred into an MQT.

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Resource Treatment of MQT'S (Continued)

- **Irrevocable MQT** – The countable amount of the corpus is the maximum amount the trustee can disburse to (or for the benefit of) the client, using his full discretionary power under the terms of the trust. Resources transferred to an irrevocable MQT lose individual resource consideration. For example, home property transferred to such a trust can no longer be excluded as home property but is included in the value of the corpus.
 - If the trustee has unrestricted access to the corpus and has discretionary power to disburse the entire corpus to the client (or to use it for the client's benefit), then the entire corpus is an available resource to the client.
 - If the trust does not specify an amount for distribution from the corpus of the trust or from income produced by the corpus, but the trustee has access to and use of both corpus and income, the entire amount is an available resource to the client.
 - If the trust permits a specified amount of trust income to be distributed to the client (or to be used for his benefit), but these distributions are not made, then client's countable resources increase cumulatively by the undistributed amount.

304.05.03 **INCOME TREATMENT OF MQT's**

In general use the following criteria to determine treatment of income from an MQT:

- Amounts of trust income distributed to the client are counted as income when distributed.
- Amounts of trust income distributed to third parties for the client's benefit (including payments for medical services) are countable income when distributed.
- **Exculpatory Clauses** which limit the authority of the trustee to distribute funds from a trust if such distribution would jeopardize eligibility for government programs are ignored for MQT purposes if the language explicitly or implicitly links the trustee's discretion to Medicaid requirements.

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304.05.04 TRANSFER OF ASSETS POLICY - MQT's

If the MQT is irrevocable, a transfer of assets has occurred if the resources are no longer available to the client. Resources rendered unavailable are subject to the transfer penalty based on the value of the unavailable resources without consideration of whether the resource would have been excluded under ongoing policy.

304.05.05 UNDUE HARDSHIP - MQT's

The MQT provision may be waived if an undue hardship exists. This means Medicaid should not be denied to an individual under this provision if the individual would be forced to go without life-sustaining services because the trust funds cannot be released. This does not include situations where the trustee simply chooses not to make the trust funds available.

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304.06 STANDARD TRUSTS

Standard trust policy is applicable to trusts or conservatorships 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. In addition, testamentary trusts where the Medicaid client is the beneficiary are also standard trusts.

Whether the trust is counted as a resource depends on the client's role as beneficiary or trustee and the specific terms of the trust. In all situations listed below a copy of the trust agreement or court documents must be obtained for review:

304.06.01 MEDICAID CLIENT IS TRUSTEE

Generally, a person appointed as a trustee cannot use any of the funds in the trust for his/her own benefit. Thus, an individual can be a trustee of a valuable trust and not be able to receive money from the trust since he/she has no access to the funds for personal use. When the trustee has no access to the funds for personal use, the trust is not a resource to the client who is the trustee.

However, under certain circumstances the trust is a countable resource to the client who is the trustee. Count the trust as a resource, regardless of whose funds were originally deposited into the trust, if the client:

- Is the trustee, and
- Has the legal ability to revoke the trust and
- Use the money for his own benefit.

Also, consider the trust a resource to the client if either the client or living-with spouse (eligible or ineligible) is the person who created the trust and has the right to dissolve it and use the funds for his own benefit. Where trust principal is considered a resource to the trustee, count the total value of the trust and count any interest or distributions as a resource the month following the month of receipt. Do not count as income any withdrawals made from the trust by the trustee since the funds have already been counted as a resource.

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304.06.02 MEDICAID CLIENT IS BENEFICIARY

Restricted Access to Principal

If the client is the beneficiary of the trust and the client's access to the trust principal is restricted, meaning only the trustee or the court can invade the principal; the principal of the trust does not count as a resource to the client. Count all payments made to, or on behalf of, the client from a restricted trust as income.

Unrestricted Access to Principal

Count the trust as a resource if the client is trust beneficiary and has unrestricted access to the principal of the trust. In this situation, payments from the trust to the beneficiary are not counted as income since the funds have already been counted as a resource. The payments from the trust are conversion of a resource.

Authority for Discretion by Trustee

The authority for discretion by the trustee in the use of trust funds, including invasion of the principal for support and maintenance of the beneficiary, does not mean that the principal is available to the client and, as such, it should not be counted as a resource. Only the income or resource(s) that is available to the client via the trustee's discretion count for purposes of determining eligibility.

Trustee has Full Discretion

In cases where the trustee has "full discretion" in the use of trust funds, the trustee must specify, by way of a written and signed statement for the case record, what arrangements exist or will be made to release funds or resources for the client's use.

As outlined above, any payments made to, or on behalf of, the client are counted as income unless the trustee states the client has unrestricted access to use of the trust funds; in which case, the funds are a countable resource.

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304.07 CONSERVATORSHIPS PRIOR TO 03/01/1987

Conservators and legal guardians are court appointed and are usually court controlled. These types of legal arrangements are initiated when the competence of an individual is at issue. Technically, a legal guardian is appointed to serve over an individual and the individual's resources, whereas a conservator is appointed only to handle an individual's resources. Regardless of the legal term used, an application or active case involving a conservator or legal guardian is handled as outlined below.

- In the absence of evidence to the contrary, conserved liquid and non-liquid resources held by a guardian or conservator on behalf of a Medicaid applicant or recipient are countable resources to that client. The fact that the guardian/conservator manages and controls the funds, (e.g., makes the actual withdrawals), does not alter the attribution of the resource to the client. Since the guardian/conservator legally acts on behalf of the incompetent individual, it is the same as if the individual is controlling or managing the resource.
- “Evidence to the contrary” that may indicate a client does not have total access to conserved resources held by a guardian or conservator is a court order which specifies the disbursement of funds and/or disposal of assets. If the court order or decree specifies the amount and frequency of funds which may be disbursed or restricts the disposal of resources, the court's decision in such matters determines the client's access. However, a “silent” court order, which does not specify disposition and/or availability of conserved resources, is not considered evidence to the contrary. Therefore, conserved funds controlled by a silent court order are considered available to the client.
- The fact that a guardian/conservator must first petition the court in order to dispose of resources or disburse funds does not constitute “evidence to the contrary”. State law requires such a petition in guardian/conservator cases making petitioning a standard practice. In all cases where petitioning is required, the conserved resources are considered available to the client unless or until the court is petitioned and rules as to the availability/disposition of assets. When a signed and dated petition is presented as evidence that a court has been petitioned for disbursement of funds and/or disposal of the resources, the petition is sufficient to exclude the resources in question until the court renders a decision in the matter.

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304.07.01 ELIGIBILITY DETERMINATION INVOLVING CONSERVATORSHIPS

To determine how to handle a case involving a legal guardian or conservator, it is necessary to obtain a copy of the original decree appointing an individual as guardian or conservator. In addition, obtain copies of any legal documents which may subsequently have been issued by the court to amend or change the original decree, if any have been issued. If a guardianship or conservatorship is in the process of being established, the client's resources are considered available until court documents are presented as outlined below:

- If the court order specifies disbursement of funds, any payments made to or on behalf of the client count as unearned income to the client.
- If the court order does not specify the disbursement of any non-liquid resources conserved by the court, consider the funds as a countable resource.
- If the court order specifies that conserved non-liquid resources, such as property, may be disposed of for the benefit of the client, consider the property, etc., as a countable resource. If the court order is silent on the subject of disposal of non-liquid resources, consider the resources countable unless or until the court is petitioned for disposal.
- A court order may specify the disbursement of liquid resources and not mention disposal of any conserved non-liquid resources or vice versa. In such a case, abide by the court's decision regarding the disbursement or disposal issue specified and count as a resource the unspecified resource.

Example: A conservatorship court order specifies the release of \$100 per month from a savings account with a \$5000 balance and fails to mention the disposal of 50 acres of property owned by the client. The \$100 is counted as income while the balance of the account is excluded as a resource. The property is countable until the court is petitioned for the purpose of disposing of the property.

- Court orders that are not specific on the availability of conserved resources result in the availability of the conserved resource to the client until the month the court is petitioned for use of the conserved funds or resources. A valid petition will exclude the resource provided the petition requests the court to rule as to the disposal and/or disbursement of conserved resources. The exclusion will apply until the court rules in the matter at which time the case must be reviewed in light of the court decision.