

# MISSISSIPPI DIVISION OF MEDICAID

## Eligibility Policy and Procedures Manual

### 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 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 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 may be used to establish or augment the trust. Inclusion of resources voids the trust exception.
- An Income Trust 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 for the facility in which the individual resides. 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. Refer to “Income Trusts and Private Pay Rates” later in this section.
- An Income Trust may be used for an individual receiving an institutional level of care in a nursing facility or ICF/IID. It is not available to individuals in an acute care setting, such as a hospital or PRTF.
- An individual applying for a Home & Community Based Waiver program may utilize an Income Trust in order to qualify for Medicaid; however, all income equal to and above the Medicaid institutional limit is payable to the Division of Medicaid, as discussed later in this section.
- The individual eligible for Medicaid under an Income Trust is referred to as the Settlor; the Trustee is the individual(s) or entity (such as a bank) that manages the trust and has fiduciary responsibilities. The Medicaid applicant or recipient cannot be the Trustee.

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### INCOME TRUSTS (Continued)

An Income Trust must meet all of the following requirements and conditions. Restrictions placed on Income Trusts are also described below.

#### Model Income Trust Document

The Division of Medicaid (DOM) will provide model Income Trust agreements for individuals in need of an Income Trust. Model agreements are provided for individuals in a nursing facility or ICF/IID and for individuals enrolled in a Home & Community Based Services (HCBS) waiver program that need an Income Trust in order to qualify for Medicaid based on income. The only change to these legally binding documents that DOM will accept is language to add a successor trustee or co-trustee. Changes must be approved by the Division of Medicaid prior to execution of the trust.

#### Effective Date of an Income Trust

The trust agreement must specify an effective date. The effective date will be the date the individual has been determined eligible for Medicaid on all factors of eligibility other than excess income that requires the use of an Income Trust. Retroactive Medicaid eligibility for up to 3 months prior to the month of the Medicaid application is possible if the applicant is otherwise eligible and the trust is funded for the retroactive period based on the terms of funding the Income Trust described below. Consultation with the Medicaid Regional Office is needed prior to execution of the trust to confirm the effective date applicable to the individual's Medicaid case. An Income Trust without an effective date specified will begin on the date the trust is signed and dated if the individual is otherwise eligible.

#### Restrictions on Modification

Once an Income Trust has been accepted by the Division of Medicaid (DOM), it cannot be modified without DOM's approval.

#### Income That Must Fund the Trust

The trust is composed only of the pension(s), Social Security and other income due the individual from all sources, including accumulated interest and income that have not been paid out of the trust to either the facility or to the Division of Medicaid. Income that is not countable under Medicaid rules, such as payments from the

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### INCOME TRUSTS (Continued)

Department of Veteran's Affairs (VA) for Aid & Attendance, Unreimbursed Medical Expenses and/or a Reduced Pension Payment, is not required to fund the trust.

#### Income Payable to the Division of Medicaid in the Month of Entry into a Nursing Facility

A portion of the individual's income may be protected in the month of entry into a nursing facility. When income protection is applicable, income that is \$1 less than the institutional income limit is not payable to the nursing facility. Income that is above the amount that is \$1 less than the institutional income limit is payable to the Division of Medicaid under the terms of the Income Trust. Payment is due within 30-days of the notice issued by DOM approving eligibility. The approval notice informs the Trustee of the amount payable for the month of entry.

#### Treatment of Income for All Subsequent Months Under an Income Trust (Nursing Facility)

For all subsequent months of eligibility under an Income Trust, the income that is payable to the nursing facility, referred to as Medicaid Income, and any income that funds the trust must be handled as follows:

- If income of the individual is less than the cost of care at the nursing facility in which he/she resides, all income, less authorized deductions, must be paid directly to the nursing facility as Medicaid Income. No funds are retained by the trust if all income is payable to the facility. This determination is made based on the daily Medicaid rate payable to the facility, which varies depending on the facility and the days in the month.

For example: An individual's income is \$5,000 per month in total income. The daily Medicaid rate payable to the facility is \$180 per day, or \$5,580 for a 31-day month and \$5,400 for a 30-day month. Since the individual's income is less than the Medicaid rate for any month in a calendar year, the individual's entire \$5,000 income, less any allowable deductions, is payable to the facility as Medicaid Income each month and there is no income that must fund the trust.

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### INCOME TRUSTS (Continued)

- If income of the individual exceeds the cost of care at the nursing facility in which he/she resides, the trust must retain the income in excess of the cost of care in any month the individual is eligible under an Income Trust until such time that payment of the accumulated Income Trust funds is requested by DOM.

For example: An individual's income is \$6,000 per month, which is less than the private pay rate for the facility. The daily Medicaid rate payable to the facility is \$180 per day. The amount due the facility and the amount that must fund the trust will fluctuate, depending on days in the month:

- For a 31-day month, the amount due the facility = \$5,580 less any allowable deductions; the amount that will fund the trust is \$420.
- For a 30-day month, the amount due the facility = \$5,400 less any allowable deductions; the amount that will fund the trust is \$600.
- For a 29-day February, the amount due the facility = \$5,220 less any allowable deductions; the amount that will fund the trust is \$780.
- For a 28-day February, the amount due the facility = \$5,040 less any allowable deductions; the amount that will fund the trust is \$960.

The Trustee will be notified by DOM of the amounts payable to the facility and of any amount of income that must fund the trust each month. Income Trusts that are not properly funded do not meet the criteria for a trust exception.

### Treatment of Income for Home & Community Based Waiver Enrollees Eligible Under an Income Trust

All income of the individual funds the trust but the trust must distribute to the individual, or for his/her benefit, an amount equal to not more than \$1 less than the current Medicaid institutional income limit as approved by DOM. The Income Trust will not specify the amount of the individual's income as this amount may change each year. The Medicaid institutional income limit is also subject to change each year.

For example: A individual's income is \$2,600 per month. The Medicaid institutional limit is \$2,199. The amount that is distributed to the individual is \$2,198. The amount that must fund the trust each month is \$402.

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### INCOME TRUSTS (Continued)

#### Reviews of the Individual's Medicaid Eligibility

At the time of each review of the individual's Medicaid eligibility, at least annually, while the trust is in existence, the Trustee must pay to the Division of Medicaid the amount that should be accumulated in the trust up to the amount expended by DOM on behalf of the individual that has not previously been paid. The Trustee will be notified in writing of the amount due from the trust. Failure to make the requested payments will result in the loss of Medicaid eligibility for the individual.

#### Accounting of Funds

When requested, the Trustee must provide an accounting to DOM to show all receipts and disbursements of the trust during the prior calendar year. Any disbursements not approved by DOM or provided for by the trust will result in a loss of the trust exemption.

#### Income Trust Fees

No fees are allowed to be paid to the Trustee for their service. Administrative fees are limited to \$10 per month and are intended to cover any bank charges required to maintain the trust account.

#### Income Trust Termination

An Income Trust must specify that the trust will terminate at the individual's death or when Medicaid eligibility terminates or when the trust is no longer necessary or the trust is otherwise terminated. Income Trusts may need to be terminated prior to an individual's death due to changes in the individual's income, changes in Medicaid policy regarding how certain income must be counted or in the event the individual is discharged from the nursing facility. All amounts remaining in the Income Trust will be paid to the Division of Medicaid up to an amount equal to the total medical assistance paid by Medicaid on behalf of the individual that has not previously been paid to DOM.

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### INCOME TRUSTS (Continued)

#### Restrictions on Temporary Income Trusts

An Income Trust is not allowed on a temporary or intermittent basis except in instances when monthly excess income will be reduced at a future date. In such a situation, an Income Trust will be allowed until such time as the excess income is reduced and an Income Trust is no longer needed to allow eligibility. For example, a nursing home applicant has excess income that includes a VA pension that is subject to reduction to \$90. An Income Trust would be allowed for each month that the full VA pension is payable. The Income Trust would be terminated when the \$90 pension begins if total income would be below the institutional income limit.

Income received less than monthly does not qualify as recurring excess monthly income that allows the use of an Income Trust, even on a temporary basis. Irregular or infrequent income must be converted to a monthly income before allowing an Income Trust to be established.

MS State Retirees who receive a 13<sup>th</sup> check as part of their retirement benefit are required to have the 13<sup>th</sup> check averaged over a 12 month period before allowing an Income Trust. The Public Employees Retirement System (PERS) allows the option to have the 13<sup>th</sup> check averaged and since this type of payment is considered infrequent income, averaging of the 13<sup>th</sup> check is required for Income Trust cases.

#### Income Trust During a Transfer of Assets Penalty Period

It is possible to have an Income Trust during the time a transfer of assets penalty period is in effect in order to allow the penalty period to be implemented for an individual residing in a nursing facility. DOM will not pay the room and board costs to a nursing facility during a penalty period but the individual will qualify for Medicaid to cover all other Medicaid covered services during the penalty period. The individual's income must be used to pay the private pay charges to the facility rather than fund the trust or pay Medicaid Income.

Income Trusts are not permitted for an HCBS waiver enrollee since transfer penalties result in total ineligibility for the HCBS enrollee.



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### **INCOME TRUSTS** (Continued)

#### Income Trusts and Private Pay Rates

Income Trusts are prohibited for individuals with income that is sufficient to pay the private pay rate for the facility in which the individual resides. In order to make this determination, the specialist will confirm the private pay daily rate for the facility and use a 31-day month to determine if monthly income of the individual exceeds the private pay rate. If income is at/below the 31-day private pay rate amount, an Income Trust will be allowed. The Income Trust must be funded with the overage amount that is the difference between the private pay rate and the Medicaid daily rate, as explained in the treatment of income for the month of entry and all subsequent months in a nursing facility.

For example, the private pay rate for a facility is \$6,820 for a 31-day month. If an individual residing in the facility has income that exceeds this amount, their income is too high to qualify for an Income Trust. If income is at/below \$6,820, an Income Trust is allowed. If the Medicaid daily rate is \$5820 for a 31-day month, the overage of \$1,000 must fund the Income Trust each 31-day month.

- If the individual transfers to another facility, a determination of the private pay rate for the new facility compared to the individual's income is required.
- Likewise, if income increases for an individual who is eligible under an existing Income Trust and the increase results in monthly income that exceeds the private pay rate for a 31-day month in the facility in which the individual resides, advance notice must be issued to terminate eligibility. If eligibility cannot be terminated due to advance notice requirements, but income can be counted for Medicaid Income purposes, the excess income will be payable to the Division of Medicaid upon receipt of notice from the agency.
- The private pay calculation is an eligibility decision based on total income of the individual before allowing any post-eligibility deductions for a spousal or other family member allowance or any other post-eligibility deductions.

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**INCOME TRUSTS** (Continued)

Income Trusts Involving a Conservatorship

If an applicant with a court-appointed conservator requires an Income Trust to qualify for Medicaid, the conservator must furnish a copy of the Chancery Court Order authorizing the conservator to establish the Income Trust. The court must be aware of the Income Trust requirement to pay the Division of Medicaid any accumulated trust funds up to an amount expended by the Division of Medicaid under the terms of the trust. The conservator must be notified in writing about the requirement for court authorization. The timeframe for obtaining court authorization should not take longer than the time allowed by routine requests for information provided the conservator is notified early in the application process.

If timeliness becomes a factor for an application, it is permissible to approve the application using the signed/dated Income Trust document and allow the court authorization to be provided as a post-eligibility requirement. If the conservator fails to provide the court order authorizing the Income Trust after a first/second request for information, advance notice must be issued to terminate eligibility.