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No. 53782-6-II

COURT OF APPEALS, DIV. II
OF THE STATE OF WASHINGTON

In re the Trust of
Lisa Dawn Lewis, a single adult.

Lisa Dawn Lewis and Douglas A. Schafer,
Appellants,

v.

Jennifer Mick as Trustee, Carol Rainey, and Hall & West, PS,
Respondents.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants Lisa Lewis and Douglas Schafer, her attorney, here reply to the Respondents' Response and Cross-Appeal filed April 6, 2020. (Resp. Br.)

At Resp. Br. pg.5, n.1, the Respondents wrote that its citations to the Clerk's Papers (CP) were to a numbered compilation that differed from the Corrected Index filed herein on December 2, 2019. Mr. Schafer determined that the numbered compilation that Respondents used was the defective compilation prior to its correction by the superior court clerk in late November 2019. The defective compilation omitted two documents, a one-page Exhibit D at CP 133 and a 13-page revised memorandum by Mr. Hall beginning at page 164. Accordingly, to locate in the correct Clerk's Papers the citations in the Respondents' Brief, its citations to pages from 133 to 164 should be increased by one, and citations to pages from 164 to 294 should be increased by 14. The Appendix includes the email messages of late November concerning the corrections, addressed to all counsel and to this court's case manager.

Errata: In the Brief of Appellants filed January 31, 2020 (App. Br.), on page 6 at the end of the full paragraph, CP 114 should read CP 94. And on page 18, both references to July 17 should read June 17.

ARGUMENT

1. Ms. Lewis does not receive Medicaid or other essential benefits for which eligibility requires that her inheritance be held in a qualified special needs trust.

In Resp. Br. at 12, Respondents suggest that Ms. Lewis is receiving Medicaid benefits. The fact is that Ms. Lewis is *not* receiving Medicaid, a federally funded program,¹ but she receives Social Security Disability Insurance benefits (SSDI, not to be confused with SSI, a welfare program) and Medicare insurance coverage, neither of which are based upon having limited resources or income. CP 112–13. She acknowledges that a state-funded program (not Medicaid) now pays her modest Medicare premiums and copays, and she is willing to possibly lose that modest benefit if she directly receives her inheritance. WAC 182-517-0300, CP 207 n.1, App. Br. 15 n.4. She previously was unsure if that program was considered Medicaid (CP 316), but because it is entirely state-funded, is it not.

Resp. Br. 15 n.71 asserts that “Ms. Lewis receives food stamps, a resource-based government benefit.” Ms. Lewis confirms that she receives about \$16/month in food stamps, but her eligibility for that is not resource-based but is solely because her income is under twice the federal

¹ “‘Medicaid’ means the federal medical aid program under Title XIX of the Social Security Act that provides health care to eligible people.” WAC 182-500-0070. “‘Title XIX’ is the portion of the federal Social Security Act, 42 U.S.C. 1396 et seq., that authorizes funding to states for health care programs. Title XIX is also called medicaid.” WAC 182-500-0105.

poverty level. WAC 388-414-0001.

2. Trustee Mick and her counsel actively and deceptively converted Ms. Lewis' inheritance without valid judicial authority.

Resp. Br. 18–20 implies that Trustee Mick was merely a passive player who simply accepted Ms. Lewis' inheritance check tendered to her by the personal representative of the estate of Ms. Lewis' late father without having been directed to do so by court order. That is false and misleading. In fact, Trustee Mick, then represented by Ms. Rainey, surreptitiously altered the initial *unfunded* trust's document to insert the previously absent reference to it being *funded* with Ms. Lewis' inheritance from her father's estate. The Schedule A² to the original trust document was conspicuously blank, but Ms. Rainey's restatement of that instrument—allegedly to substitute Ms. Mick's name for the prior trustee—secretly substituted a new Schedule A that listed as the trust's corpus “Inheritance from Estate of Larry Dean Low, Kitsap County Cause No. 17-4-00501-0.” At the hearing on April 27, 2018 of Ms. Mick's Petition for Appointment of Successor Trustee (CP 34–5) Ms. Rainey did not inform the superior court that she had inserted a new Schedule A to her “restatement” of the trust document that she had prepared for the judge to sign. VRP1. Ms. Rainey did say to the court, “*we're just trying to make*

² It is a convention among scriveners of trust documents to identify the property funding the trust in a “Schedule A” appended to the trust document. <https://www.google.com/search?q=Trust+“schedule+A”>

the special needs trust a workable instrument.” VRP1, pg.3, ln.6. Though Ms. Mick’s petition for that hearing made no mention of an amendment or restatement of the trust document,³ Ms. Rainey’s proposed order, that the court entered, included a Finding of Fact that, “The Trust should be restated by the court this date so that the Successor Trustee has adequate and appropriate powers to execute her duties under the Trust.” CP 59. And the last sentence in Ms. Rainey’s rewritten introductory paragraph of the trust document stated, “This Restatement of the Trust was ordered by the Court to provide the necessary powers to JENIFER MICK, Trustee.” The restated trust document, however, actually made no changes from the original trust document to the trustee powers section of the document. The only substantive changes were references to Ms. Mick succeeding the prior trustee and the substitution of the new Schedule A. *Compare* CP 6–16 to CP 48–57. Superior Court Judge Olsen signed Ms. Rainey’s proposed order with a passage that “the Court shall sign this date a Restatement of the Trust provisions recognizing JENIFER MICK as the Trustee,” and the Judge signed the restated trust document. CP 57. Ms.

³ The petition falsely stated, “Factual Basis for Request. The LISA DAWN LEWIS Special Needs Trust was established by the Kitsap County Superior Court by order entered August 11, 2017. MS. LEWIS is an heir of her father’s estate being probated in In re the Estate of Larry Deane Low, Kitsap County Cause No. 17-4-00501-0. It is anticipated MS. LEWIS’ share of the estate will be approximately \$65,000. MS. LEWIS receives governmental benefits due to disability and the Special Needs Trust was established to receive her inheritance thereby preserving her eligibility for governmental benefits.”

Lewis, of course, did not.

While the superior court's April 27, 2018, approval of, and execution of, the restated trust document listing Ms. Lewis's inheritance in its Schedule A as the trust's corpus did not *expressly* order that Ms. Lewis' inheritance be distributed to the trust, it would naturally be interpreted as exactly that.⁴ And if the superior court first had obtained personal jurisdiction of Ms. Lewis, the court's order would have been valid.

Within the following month, Trustee Mick presumably reviewed the probate administration and accounting of the estate of Ms. Lewis' father. CP 100–03, 206–07, 213–15. On May 23, 2017, she signed a TEDRA Agreement (CP 126–32) consenting to the estate's accounting, proposed distributions, and closure. That agreement identified Trustee Mick as a “Beneficiary” of the estate, and she signed it as “Jenifer Mick, as Trustee of the Lisa Dawn Lewis Special Needs Trust, Beneficiary of the Estate Larry Deane Low.” Beneath her signature, Ms. Rainey,⁵ a notary, certified that Trustee Mick “on oath, stated that she was authorized to execute this instrument.” CP 132. Attorney Larry Hall, as “attorney for the estate”⁶

⁴ Mr. Schafer called to Judge Olsen's attention the surreptitious events relating to the April 27, 2018, hearing and restatement of the trust document. CP 95.

⁵ Ms. Rainey, representing Trustee Mick, billed and was paid \$616.50 by the estate administrator who treated it as an advance to Ms. Lewis. CP 102.

⁶ Paragraph 7 of the TEDRA Agreement states, “Hall & West, P.S. represents the Estate of Decedent, and does NOT represent the individual beneficiaries.” But that firm indisputably represented estate's administrator, Lana Prinz, a beneficiary. CP 113, 159. *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), held that a lawyers' client in a probate case is the personal representative, not the estate. CP 236.

wrote in his memorandum of law that “the Trust, not Lisa, was a 1/3 beneficiary of the Estate.” CP 155. But Ms. Lewis never assigned her inheritance to the trust (CP 94), and no order in either the trust proceeding or the estate proceeding expressly assigned or transferred Ms. Lewis’ inheritance to the trust. The clerk’s docket for the estate proceeding shows that the only orders entered in that case were on June 9, 2017, appointing the administrator and finding the estate to be solvent. This court may take judicial notice that docket, and a copy from the Odyssey system is in the Appendix.

Trustee Mick committed the tort of conversion by taking possession of Ms. Lewis’ inheritance without lawful authority. CP 98–9.

3. Ms. Lewis did not petition or otherwise request the superior court to establish the trust, and the trust fails, for multiple reasons, to exempt its corpus from being counted as a disqualifying resource of Ms. Lewis if she ever did apply for Medicaid benefits.

A. Washington trust law. The Resp. Br. at 20–25 argues that Ms. Lewis requested the superior court to create the trust. She did not, and nothing signed by her made any such request. The original trust document very clearly identified Ms. Lewis as the trust’s Grantor,⁷ in the cover page,

⁷ The term *grantor* in trust jargon is synonymous with *settlor* and *trustor*, meaning the party creating the trust. *Arnold v. Hall*, 72 Wash. 50, 51, 129 P. 914, (Wash. 1913); *In re Estate of Wester*, (Unpub. Wash. Ct. of App., 69845-1-I, May 5, 2014); <https://specialneedsanswers.com/whats-the-difference-between-a-settlor-and-a-grantor-15614> (visited May 4, 2020).

the body, and execution page, and identified Mr. Torell⁸ as the Trustee and prescribed his duties. They both, as competent adults, signed the document in those capacities on August 2, 2017, thereby *creating* the trust. Under RCW 11.98.011, titled “Trust Creation—Requirements,” those actions on August 2, 2017, sufficed to *create the trust*. Though the trust document did not identify any trust corpus, and was accompanied by no document assigning assets or rights to the trust, it nonetheless created and established the trust. Washington trust law recognizes that parties may *create* an unfunded trust that might be funded in the future by a later transfer of property to it. RCW 11.12.250 (unfunded trust later funded by testamentary gift), RCW 11.98.170 (unfunded trust later funded by insurance proceeds); Mark Reutlinger & William C. Oltman, Washington Law of Wills and Intestate Succession, 409 (1985) (“[The trust] need not have an existing corpus, and it may even be an unfunded life insurance with all rights of ownership in the testator. ... The trust that results following the testator’s death ... is the pre-existing inter vivos trust with the added pour-over assets.”)

So on August 2, 2017, by signing the trust document Ms. Lewis and Mr. Torell *created* the unfunded trust. Mr. Tracy’s⁹ act of signing page 8

⁸ Mr. Torell’s counsel, Mr. Tracy, mistakenly repeatedly identified him as Mr. Rorell.

⁹ Mr. Tracy, as counsel for Mr. Torell, billed and was paid \$1,406 by the estate administrator who treated it as an advance to Ms. Lewis. CP 102.

of the trust document on August 3, 2017 was of no legal significance under Washington trust law. CP 13 Similarly, neither Judge Kevin D. Hull's signature on that page 8 or his order *approving* the trust (CP 17-8), both dated August 11, 2017, were of any legal significance under Washington trust law (or under Medicaid law, discussed below).

B. The trust fails to exempt its corpus from being counted as a disqualifying resource of Ms. Lewis should she ever apply for Medicaid. Trustee Mick represented to the court that “the Special Needs Trust was established to receive her inheritance thereby preserving her eligibility for governmental benefits.” CP 34. Though Ms. Lewis does not receive Medicaid benefits, the trust's corpus would be counted as a disqualifying resource if she ever did apply for Medicaid. Medicaid law is an extraordinarily complex web of statutes, regulations, and administrative policies, as illustrated by two very significant cases: *Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015) (hereafter, *Draper*) and *Washington v. Keffeler*, 537 U.S. 371, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) (hereafter, *Keffeler*).

Section 1917(d)(4)(A) of the Social Security Act (codified at 42 U.S.C. §1396p(d)(4)(A)), in the Act's Title XIX establishing the federally-funded Medicaid program administered by the Social Security Administration (SSA), states the requirements to be met for a trust funded by a disabled beneficiary's assets to *not* be counted as resources of the

trust beneficiary for Medicaid eligibility purposes. Eligibility requires owning minimal assets—the resource test. A trust intended to qualify under that provision is commonly titled as a “special needs trust,” but affixing that title, alone, to a trust document is not legally significant.

In *Keffeler* at 380 the U.S. Supreme Court chastised the Washington state supreme court for not having given great deference to the SSA’s interpretation of the laws it was charged with administering. “The state court’s analysis not only gave no deference to the Commissioner’s regulations, but omitted any mention of the law governing rulemaking and interpretation by an administrative agency.” The *Keffeler* opinion, at 385, proceeded to give great deference to the SSA’s Program Operations Manual System (POMS), the publicly available authority used by that agency’s and state officials to apply federal Social Security and Medicaid law. The internet home page¹⁰ of POMS states:

The POMS is a primary source of information used by Social Security employees to process claims for Social Security benefits. The public version of POMS is identical to the version used by Social Security employees except that it does not include internal data entry and sensitive content instructions.

The POMS provision addressing the creation and funding of a special needs trust, POMS SI 01120.203, discussed below, is included in the Appendix.

¹⁰ <https://secure.ssa.gov/apps10/poms.nsf/Home?readform> (visited May 4, 2020).

In *Draper*, the appellate court upheld the SSA officials' determination that the trust failed the requirement that it be *established* by, among others, the beneficiary's parent or a court. Giving dispositive deference to the SSA's interpretation of §1396p(d)(4)(A) in its POMS provisions, the *Draper* court ruled that the disabled beneficiary (not her parents) impermissibly had *established* her trust because the parents did so as her agents under her power of attorney, and ruled that the state court's later order purporting to *establish* that trust was ineffective because the trust had previously been *established*. *Draper* at 562 applied the POMS provisions interpreting applicable law:

We next examine whether Draper's trust complied with the POMS provisions interpreting §1396p(d)(4)(A). POMS SI 01120.203 provides a detailed process for creating a qualifying trust under this statute: "[T]o qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the disabled individual's: parent(s); grandparent(s); legal guardian(s); or a court." POMS SI 01120.203B(1)(f). When a parent seeks to establish a trust for a legally competent adult, the POMS states that the parent "may establish a 'seed' trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust." *Id.* After a seed trust or an "empty" or "dry" trust is established, "the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust." *Id.*

The *Draper* ruling mobilized the Special Needs Alliance and other advocates to lobby, successfully, the U.S. Congress to amend §1396p(d)(4)(A) to allow a disabled beneficiary to establish a special

needs trust for himself or herself, effective December 13, 2016, without involving parents, grandparents, guardians, or any court. Public Law 114–255, §5007 titled “Fairness in Medicaid Supplemental Needs Trusts.” Accordingly, there was no competent reason for Attorney John Tracy, representing Mr. Torell, to have drafted in the trust document any reference to court approval or to petition the superior court and attend a hearing to request that the court “approve” the trust document.

The *Draper* court, at 562, quoted the following passage from POMS SI 01120.203B(1)(g):

The person establishing the trust with the assets of the individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of that individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust.

Consistent with that passage, because the Kitsap County Superior Court, on April 27, 2018, lacked personal jurisdiction over Ms. Lewis, it lacked “proper legal authority” to fund her previously established, but unfunded, trust with her vested inheritance. And neither Trustee Mick nor the administrator of the estate possessed that “proper legal authority.”

The *Draper* court dismissed a state court order purporting to *establish* the trust, writing at 564:

Finally, we agree with the SSA’s finding that the state court’s *nunc pro tunc* order did not “establish” the trust under

§1396p(d)(4)(A). [Citation omitted.] POMS SI 01120.203B(1)(f) notes that court-created trusts comply with §1396p(d)(4)(A) only if “the creation of the trust [is] required by court order.” The facts here show that the South Dakota court did not order the special-needs trust’s creation. Instead, the court merely assigned itself a retroactive role in the already-established Stephany Ann Draper Special Needs Trust. We find that this action functioned as an “approval,” an action insufficient to comply with §1396p(d)(4)(A). See POMS SI 01120.203B(1)(f) (“Approval of a trust by a court is not sufficient.”).

POMS SI 01120.203B(8) further states, “An individual may petition the court with a draft document of a trust as long as it is unsigned and not legally binding.” But in the case of Ms. Lewis’s trust, the August 11, 2017, court order merely “approved” (CP 17–18) the fully signed trust document that previously had *established* the trust under Washington law by the signatures on August 2, 2017, of its Grantor, Ms. Lewis, and its Trustee, Mr. Torell. That subsequent court order did not *establish* Ms. Lewis’ trust.

Ms. Lewis’s trust document, both the original and its restatement, provides that the trust might terminate before her death in the event of “The end of the disability.” CP 10, 52. In addition, RCW 11.96A.220 permits Ms. Lewis and Trustee Mick to settle their dispute concerning the administration of the trust by entering into a TEDRA Agreement to terminate the trust and distribute its assets to Ms. Lewis.¹¹ The Lewis

¹¹ DSHS, having merely a contingent interest in the trust for any Medical Assistance it paid for Ms. Lewis if there remain trust funds at her death, need not be a party to such a TEDRA Agreement. *In re Estate of Bernard*, 182 Wn.App. 692, 723-4, 332 P.3d 480

Trust document *does not require* that, upon an early termination, any distribution or payment be made to DSHS or other Medicaid agency.

POMS SI 01120.199, titled “Early Termination Provisions and Trusts” directs that if a special needs trust permits its early termination before the death of the beneficiary, it will not qualify under §1396p(d)(4)(A) unless the trust document provides that:

Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s).

Consistent with that policy, WAC 182-516-0100(7) in effect through substantially all of 2017 and until March 2, 2018, also conditioned the Medicaid resource exemption upon such a Medicaid-recovery-at-early-termination provision:

- (7) Trusts established on or after August 1, 2003, are not considered available resources if they contain the assets of either:**
- (a) A person sixty-four years of age or younger who is disabled as defined by SSI criteria (as described in WAC 182-512-0050 and the trust:**
 - (i) Is irrevocable;**
 - (ii) Is established for the sole benefit of this person by the person’s parent, grandparent, legal guardian, a court, or after December 13, 2016, the person; and**
 - (iii) Stipulates that the state will receive all amounts remaining in the trust upon the death of the client,**

(2014) (“[T]he Linger Beneficiaries are contingent trust beneficiaries. ... The statutory language indicates that the interest must be a present interest.”)

the end of the disability, or the termination of the trust, whichever comes first, up to the amount of medicaid spent on the client's behalf; [Emphasis added.]¹²

This 2017 rule was replaced on March 2, 2018, by WAC 182-516-0120 that at its subsection (2) continues to conditioned the Medicaid exemption for trust resources upon a special needs trust having a Medicaid-recovery-at-early-termination provision:

(2) A self-settled trust established on or after August 11, 1993, is not an available resource if:

....

(e) **The trust says that the states that have spent medicaid funds for the beneficiary will receive all amounts remaining in the trust up to the amount of medicaid funds spent for the beneficiary.**

(i) For trusts established from August 11, 1993, to July 31, 2003, the trust must pay the states when the beneficiary dies,

(ii) For trusts established on or after August 1, 2003, **the trust must pay the states when the beneficiary dies, the trust terminates, or the beneficiary's disability ends.**

As noted above, the Lewis Trust permits its early termination before Ms. Lewis' death, but it *does not* include a Medicaid-recovery-at-early-termination provision, so the trust *does not* qualify under §1396p(d)(4)(A). That is of little consequence, however, because Ms. Lewis has not received Medicaid benefits in well over a decade and has no intention of

¹² This WAC 182-516-0100 was enacted as an emergency rule published in the Washington State Register (WSR), as WSR 17-05-055 effective Feb. 10, 2017, and its effectiveness was extended by WSR 17-12-108, 17-20-104, and 18-04-041, and it was superseded by a permanent rule significantly revising WAC Ch. 182-516, published at WSR 18-04-037 effective March 2, 2018.

applying for Medicaid because she is covered by Medicare.

4. The invalidation or termination of the trust will not make its funds subject to Medicaid recovery prior to Ms. Lewis' death.

The Resp. Br. at 33 re-asserts Respondents' unsupported position that "the undoing of the trust would act to harm [Ms. Lewis] by making her funds subject to Medicaid recovery." Respondent' sole basis for that appears to be an email message from DSHS Revenue Agent Kenneth Washington, who wrote, "The current amount of the Medicaid Lien is \$41,902.50, if the trust is terminated the Medicaid Lien will have to be satisfied." CP 193. It appears that Judge Olsen was persuaded by that email message to elevate a sense of *parens patriae* as to Ms. Lewis over her fidelity to the rule of law concerning the court's lack of personal jurisdiction. Judge Olsen expressly stated her reason for denying the motion to terminate the trust due to the court's lack of personal jurisdiction over Ms. Lewis when the court funded it. The Judge stated at VRP3 pg. 32, ln. 17-25:

[T]he explicit purpose of the special needs trust is to protect people so that they can retain monies, such as their inheritance, and **not have it taken if they are otherwise subject to a Medicaid lien, and she is.** I find that to terminate the trust would be detrimental to her interests, not in her best interests. **She would lose all her money almost immediately; therefore, that's why I'm denying your motion.**

Judge Olsen declined to reconsider her rejection of the personal jurisdic-

tion issue even after Mr. Schafer filed, in response to Respondents' motion to reconsider, Revenue Agent Washington's later email to him stating that, "There is no law indicating that the client without a SNT would have to payback Medicaid if she received her inheritance however the client would be ineligible for Medicaid benefits if they were over the resource limit." CP 285. Again, *Ms. Lewis does not receive Medicaid benefits.* Revenue Agent Washington, who is not an attorney, appears to misinterpret WAC 182-516-0120 (2018) to require any trust that is titled a "special needs trust" in the event of its early termination (*i.e.*, before the beneficiary's death) to repay, to the extent of its funds, all Medicaid assistance previously provided the beneficiary. But neither that rule nor POMS SI 01120.199 compel that. Instead, both the rule and the POMS provide simply that a trust's assets *will be considered countable resources* of its beneficiary *unless* the trustee and beneficiary voluntarily stipulate or express within the trust document that in the event of the trust's early termination, the trustee will first repay any Medicaid agency that provided medical assistance to the beneficiary. That is not a "Medicaid lien" but the voluntary decision by the beneficiary and trustee to grant the Medicaid agency a contractual right or trust law right as a vested (not contingent) trust beneficiary. The Lewis Trust includes no such provision, and because Ms. Lewis is not receiving Medicaid the document likely has not even

been scrutinized by DSHS or Washington Health Care Authority officials. Revenue Agent Washington's email to Mr. Schafer explained his mistaken view, "The State of Washington is the beneficiary of the Special Needs Trust pursuant to 42 U.S.C. 1396p(d)(4)(a) and WAC 182-516-0120." CP 285. But neither of those provision makes the State or any Medicare agency a trust beneficiary—that arises *only if* the trustee and the disabled beneficiary decide to draft into the trust document the agency's desired early termination repayment provision, thereby making the Medicaid agency, arguably, a trust beneficiary.

Revenue Agent Washington is also mistaken in asserting that there presently is a *Medicaid lien* against Ms. Lewis, or against her property, or against the trust or its assets in the event of its termination. She is alive and 45 years old. CP 112. Federal law and Washington state law are clear that, with very limited exceptions (inapplicable here), a Medicaid lien may only be asserted following the death of a former recipient of Medicaid benefits. Mr. Schafer noted this briefly at CP 205–06 and argued it to the court on June 17, 2018. VRP3 31. The federal statute, 42 U.S.C. 1396p(a)(1) expressly states, "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State [Medicaid] plan, except—" then it lists exceptions for recoveries of wrongful overpayment and

recoveries from the real property of terminally institutionalized persons.

And 42 U.S.C. 1396p(b) expressly and significantly limits any recoveries of Medicaid benefits, reading in relevant part:

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section[terminally institutionalize persons, not here applicable.]

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance [not here applicable.]

(C)(i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy [not here applicable.]

Recognizing the controlling effect of 42 U.S.C. §1396p, the Washington legislature enacted RCW 41.05A.090 concerning Medicaid recovery by the state's Health Care Authority. Its subsection (1) states "The authority shall file liens, seek adjustment, or otherwise effect recovery for assistance correctly paid on behalf of an individual consistent with 42 U.S.C. Sec. 1396p." And at subsection (3), "Recovery from the individual's estate, including foreclosure of liens imposed under this section, must be undertaken as soon as practicable, consistent with 42 U.S.C. Sec. 1396p." And at subsection (8)(a), "Subject to the requirements of 42 U.S.C. Sec.

1396p(a) ... the authority is authorized to file a lien against the property of an individual prior to his or her death, and to seek adjustment and recovery from the individual's estate or sale of the property subject to the lien, if: [the individual is terminally institutionalized].”

In summary, there is no *Medicaid lien* against Ms. Lewis and a ruling that the creation of the trust was void or simply that it shall terminate will not cause its funds if distributed to Ms. Lewis to be subject to any recovery of Medicaid benefits paid on her behalf many years ago.

5. If Ms. Lewis' signing of the trust document subjected her and her property to the superior court's jurisdiction, this court should apply to her uninformed act the public policies underlying the protections given to vulnerable individuals under Washington law in similar circumstances.

At Resp. Br. pg.30, n.148, Respondents acknowledge that CR 11(a)(2) allows a party or their attorney to make good faith arguments for the extension or existing law or the establishment of new law. Ms. Lewis and Mr. Schafer did exactly that. In the Motion to Terminate Trust, they argued that the trust proceeding was sometimes being treated, and referred to by attorneys and court personnel, as a guardianship proceeding, and that it was the functional equivalent of a limited guardianship of Ms. Lewis' estate. CP 95-97. That motion asserted that even in a proceeding for a limited guardian of the estate of an alleged incapacitated person (AIP), constitutional due process requires that the AIP be personally served with

the petition and a summons. AIPs also must be served with a conspicuous statement of their rights that may be revoked in the proceeding and informed of their right to counsel to advise and represent them in the proceeding. Such proceedings are often costly, and petitioning “do-gooders” seeking to subject an AIP to the control of even a limited guardian-of-estate are not always successful in their efforts. This case suggests that they, instead, should simply intimidate or entice their AIP to sign the signature page of a legaleze document to immediately achieve their objective without the expenses and uncertainty of a limited guardianship-of-estate proceeding.

In this case, Attorneys Ferman and Hall, representing Ms. Lewis’ sister, Ms. Prinz, as administrator of their father’s estate, viewed Ms. Lewis as having “cognitive impairment,” “a mentally ill person,” and “not competent to handle her affairs.” CP 147, 160, 163, 175, App. Br. 13–14. Mr. Hall wrote. “It is the opinion of this attorney, and Lisa’s sisters, that Lisa straddles the border of competency, and would likely benefit from having a guardian appointed for her.” CP 174, App. Br. 13. Mr. Hall admits¹³ that he made the statement recited in Ms. Lewis’ Declaration—
“Mr. Hall told me that I needed to have a trust and to pick a trustee or else I would not get anything from the estate.” CP 113.

¹³ Resp. Br. pg.14, n.58. (“Mr. Hall does not dispute that he made the statement as recited in Ms. Lewis’ declaration.”)

It is certainly not an unreasonable expansion of court-made case law to argue that an AIP who is pressured to sign away her rights to receive and control her inheritance ought to be afforded the same protections—personal service of judicial process, understandable explanation of her rights, and the right to counsel—that constitutional and policy consideration would require in a proceeding for a limited guardianship of the AIP’s estate.

Another comparable circumstance in which court-made case law requires, for reasons of wise public policy, protections of a vulnerable individual is in the context of marital property agreements, as Mr. Schafer argued in the Response to Motion for Reconsideration. CP 256. He there wrote:

Property agreements between persons contemplating marriage or even after marriage that are tainted with coercion or duress are routinely ruled void. In fact, our case law generally requires each such person to be advised by their own independent counsel concerning their rights and the effect of such a property agreement. *E.g., In Re Marriage of Matson*, 107 Wn.2d 479, 730 P.2d 668 (1986). That same policy ought to apply to an heir who is coerced into signing a consent to a special needs trust receiving her own vested inheritance.

The facts of Ms. Lewis’ unfortunate acquiescence to Mr. Hall’s demand are analogous to a marital property agreement setting. Attorney Hall was representing Ms. Lewis’ sister, Ms. Prinz. In that capacity Mr. Hall threatened Ms. Lewis that she “would not get anything from the estate”

unless she agreed to a trust. Mr. Hall was advocating for Ms. Lewis to let his client, Ms. Prinz, become the trustee controlling Ms. Lewis' inheritance.¹⁴ If Ms. Lewis and a client of Mr. Hall instead had been contemplating marriage, the court-made case law would have invalidated any property-related agreement favoring dominant Mr. Hall's client unless Ms. Lewis had been represented by independent counsel to advise her so that her execution of any property-related agreement would have been made "intelligently and voluntarily." That public policy was established by our state supreme court decades ago in *In Re Marriage of Matson*, 107 Wn.2d 479, 488, 730 P.2d 668 (1986):

We still strongly urge both parties to seek advice from independent counsel before signing a premarital agreement. ... [W]e will continue to insist, however, that each party enter into a premarital agreement intelligently and voluntarily before we will bind the parties to an agreement by which one party forgoes its statutory and common law rights.

During the hearing on May 10, 2017, both Attorneys Huff and Ferman appeared to recognize that Ms. Lewis should have been advised by her own independent counsel of her rights when presented with the trust, because they both then asserted, *mistakenly* however, that she was then being represented by Mr. Tracy. VRP2 pg. 7 ln. 20, pg. 11 ln. 13.

It is certainly not an unreasonable expansion of court-made case law

¹⁴ Attorney Tracy wrote, "I was contacted by counsel for the Larry Dean Low probate estate, asking me to prepare a Special Needs Trust (SNT) for Lisa Lewis They proposed that Lana Prinz be the Trustee." CP 117.

to argue that a vulnerable woman being pressured by a dominant family member or that member's aggressive attorney to divert her vested inheritance into an irrevocable trust controlled by another, ought to be represented by competent, independent counsel to advise her about Medicaid law and state law in order that the woman may make an intelligent and voluntary decision whether acquiesce to such a waiver of her vested property rights.

The Respondents' arguments that CR 11 sanctions were warranted lacks merit.

6. Factual and legal support for Respondents' frivolous cross-appeal does not exist.

The Respondents' cross-appeal rests on absolutely false, written representations that they made. In their Motion for Reconsideration, Respondents wrote that at the hearing on June 17, 2019, after Judge Olsen denied Ms. Lewis' motion, "[T]his Court then awarded sanctions against Mr. Schafer, the attorney for the disabled Beneficiary, in the amount of the fees and costs incurred by the Trustee and the Estate." CP 246. Respondents continued their misrepresentation of events, falsely alleging that Mr. Schafer "engage[d] in a tantrum and bullying-like behavior" after which Judge Olsen "reversed the sanctions based on Mr. Schafer's tantrum, and instead cut the fees, and awarded them against the Trust." But these false

representations are belied by the hearing transcript. VRP3 33–36. In response to Attorney Huff’s inquiry if the fees for her and Attorneys Rainey, Ferman, and Tracy would be charged against Mr. Schafer or the trust, Judge Olsen replied, “Well, that’s the Court’s concern. I don’t want all of it against the trust.” Then, upon hearing opposing counsel claim orally¹⁵ that their combined fees were nearly \$10,000, Mr. Schafer commented to the court, “I volunteered for this because I thought there was a serious injustice being committed on her. If the Court is going to order me to pay significant fees, I’m going to have to appeal it.” VRP3 35.

No statute, court rule, or case law mandated that Judge Olsen award to Respondents all fees that they orally claimed to be entitled. Courts have extraordinarily broad, nearly absolute, discretion concerning awards of attorney fee, provided some law authorizes an attorney fee award. As the state supreme court held in *Humphrey Indus., Ltd. v. Clay St. Assocs.*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010):

[T]he award of attorney fees under RCW 25.15.480(2) is not mandatory. *Id.* (“The court *may* also assess the fees and expenses of counsel” (emphasis added)). Thus, even if Clay Street did fail to substantially comply with the 30 day statutory deadline, or if Humphrey did act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically entitled to an award of attorney fees. Rather, the decision to award attorney fees rests in the discretion of the trial court.

¹⁵ None of the orally claimed attorney fees were documented by any filed records.

The court did not abuse its discretion in its fee awards to Respondents.

If it is finally determined the CR 11 sanctions are warranted, Mr. Schafer (the undersigned) will pay them rather than his client's trust.

CONCLUSION

This court should rule that the funding by the superior court of Ms. Lewis' trust was void for lack of personal jurisdiction over her, or that the trust simply should be terminated as unnecessary and improperly established, that the superior court's order approving Trustee Mick's accounting should be reversed and the matter be remanded to a different judge, that the order awarding fees to the Respondent attorneys should be vacated, that the order that Ms. Lewis and her counsel violated CR 11 should be vacated, and that the Respondent's cross-appeal should be dismissed as frivolous. And if this court considers it just and equitable to award fees, pursuant to RCW 11.96A,150, to Mr. Schafer, that it do so.

Respectfully submitted this 6th day of May, 2020.

/s/ Douglas A. Schafer
Douglas A. Schafer, Attorney for Appellants
(WSBA No. 8652)

APPENDIX CONTENTS

- A-1 Email messages among counsel and court staff concerning correcting the Clerk's Papers.
- A-3 Odyssey System printout of documents filed in Kitsap County Superior Court case no. 17-4-00501-0, In re the Estate of Larry Deane Low.
- A-6 POMS SI 01120.203 Exceptions to Counting Trusts Established on or after January 1, 2000

Proof of Service

I certify that today I served a copy of this Reply Brief of Appellants on the following counsel by email, as indicated:

Jaime S. Huff
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Date: May 5, 2020

/s/ Douglas A. Schafer
Douglas A. Schafer, Attorney for Appellants
(WSBA No. 8652)

Subject:Re: Clerk's Papers of KCSD No. 17-4-00646-6/53782-6-II

Date:Wed, 20 Nov 2019 18:20:52 -0800

From:Doug Schafer <schafer@pobox.com>

To:Tricia Croston <TCroston@co.kitsap.wa.us>, schaffer49@gmail.com <schafer49@gmail.com>, jaime@rrlaw.pro <jaime@rrlaw.pro>, jpferman@handwps.com <jpferman@handwps.com>, carol@chraineylaw.com <carol@chraineylaw.com>, Marks, Debbie <Debbie.Marks@courts.wa.gov>

CC:Lindsay Jorgensen <ljorgens@co.kitsap.wa.us>

Thank you, Ms. Croston.

I appreciate you or your staff noticing that the Odyssey copy of Ms. Lewis' Declaration, filed 05/02/2019, did not include its Exhibit D. I had not yet noticed that.

I was not aware that your office uses sub-numbers, and the listing on Odyssey did not indicate sub-numbers after the first 6 documents (my docket printout is attached). I now recognizes that the bar-code stickers have what apparently is a sub-number that I previously had not noticed. And I will redact your bar-code stickers in the future in using a previously filed document as an attachment to a later one.

Thank you, again.

Doug Schafer

Subject:RE: Clerk's Papers of KCSD No. 17-4-00646-6/53782-6-II

Date:Wed, 20 Nov 2019 20:29:36 +0000

From:Tricia Croston <TCroston@co.kitsap.wa.us>

To:schafer49@gmail.com <schafer49@gmail.com>, schaffer@pobox.com <schafer@pobox.com>, jaime@rrlaw.pro <jaime@rrlaw.pro>, jpferman@handwps.com <jpferman@handwps.com>, carol@chraineylaw.com <carol@chraineylaw.com>, Marks, Debbie <Debbie.Marks@courts.wa.gov>

CC:Lindsay Jorgensen <ljorgens@co.kitsap.wa.us>

Greetings Mr. Schafer,

I am in the process of correcting the clerk's papers not only to include the 06/12/2019 Memorandum of Law, but also to include Exhibit D of the 05/02/2019 Declaration of Lisa Dawn Lewis and the original clerk's minute for the hearing held on 01/11/2019 (Your failure to cover up the barcode label on your copy of the 01/11/2019 clerk's minute resulted in our system treating it as an updated version of the clerk's minute instead of treating it as an attachment to the declaration).

For future reference, please be advised that while use of the clerk's sub number on designations is not required, it does help us prepare the clerk's papers with greater speed and accuracy. I will re-do the clerk's papers and index in their entirety once the correction in Odyssey is complete, then efile the corrected clerk's papers and distribute copies of the corrected index to all.

Sincerely,

Tricia Croston

Records Supervisor

Kitsap County Clerk's Office

A-1

614 Division Street MS-34
Port Orchard, WA 98366

From: Lindsay Jorgensen <ljorgens@co.kitsap.wa.us>
Sent: Thursday, November 14, 2019 12:17 PM
To: Tricia Croston <TCroston@co.kitsap.wa.us>
Subject: Fwd: Clerk's Papers of KCSD No. 17-4-00646-6

Tricia,
Can you please look into this and correct if needed? If you could also respond to his email as well I'd appreciate it. Thank you so much!!
Lindsay

From: Doug Schafer <schafer49@gmail.com> on behalf of Doug Schafer <schafer@pobox.com>
Sent: Wednesday, November 13, 2019 2:33:48 PM
To: Lindsay Jorgensen <ljorgens@co.kitsap.wa.us>
Cc: Huff, Jaime S. <jaime@rrlaw.pro>; Ferman, J. Paul <jpferman@handwps.com>; Rainey, Carol <carol@chraineylaw.com>
Subject: Clerk's Papers of KCSD No. 17-4-00646-6

Lindsay Jorgensen, Appeals Clerk:

I filed a Designation of Clerk's Papers on October 14, 2019, for case no. 17-4-00646-6, Special Needs Trust of Lisa Dawn Lewis. On Saturday, November 9, 2019, I received in the mail from you the Index of Clerk's Papers on Appeal.

The Index fails to include an important pleading that I designated. Your Index includes the document (signed by Mr. Hall on June 10) filed June 11, 2019, titled "Memorandum of Law in Opposition to Beneficiary Lisa Dawn Lewis's Motion to Terminate Trust and in Support of Sanctions Against Beneficiary and/or Her Counsel." But it fails to include a second pleading bearing the same title but signed by Mr. Hall and filed next day, June 12, 2019, that significantly differed from the previous day's edition.

Please cause the Index and the compilation of Clerk's Papers to also include the June 12, 2019, edition of Mr. Hall's memorandum.

Please confirm your receipt of this message. Your voice mail system's announcement stated that email was the best way to communicate with you. I am assuming that when the omitted document is included the pagination of the Clerk's Papers will change, as will the charge for them.

Thank you.

Doug Schafer, WSBA 8652

A-2

Case Information

17-4-00501-0 | IN RE THE ESTATE OF LARRY DEANE LOW

Case Number	Court	
17-4-00501-0	Kitsap	
File Date	Case Type	Case Status
06/09/2017	EST Estate	Completed/Re-Completed

Party

Petitioner
PRINZ, LANA

Deceased
LOW, LARRY DEANE

Events and Hearings

06/09/2017 Case Information Cover Sheet ▾

Comment

1: CASE INFORMATION COVER SHEET;

06/09/2017 Petition for Letters of Administration ▾

Comment

2: PETITION FOR LETTERS OF ADMINISTRATION

A-3

06/09/2017 Certified Copy of Death Certificate ▾

Comment

3: CERTIFIED COPY OF DEATH CERTIFICATE;

06/09/2017 Waiver ▾

Comment

4: WAIVER OF NOTICE - LISA DAWN LEWIS;

06/09/2017 Waiver ▾

Comment

5: WAIVER OF NOTICE-LORRAINE D BAYLESS;

06/09/2017 Order Granting Letters of Administration ▾

Comment

6: ORDER GRANTING LETTERS OF ADMINISTR;

06/09/2017 Order of Solvency ▾

Comment

ORDER OF SOLVENCY;

06/09/2017 Order Granting Motion Petition ▾

Comment

ORDER GRANTING NON-INTERVENTION; JUDGE MELISSA A
HEMSTREET, DEPT3;

06/09/2017 Ex Parte Action With Order ▾

Comment

EX-PARTE ACTION WITH ORDER;

06/09/2017 Oath ▾

Comment

OATH;

06/09/2017 Letters of Administration ▾

Comment

7: LETTERS OF ADMINISTRATION;

06/09/2017 Notice of Appointment and Pendency of Probate ▾

Comment

8: NOTICE, APPT & PENDENCY OF PROBATE;

06/09/2017 Notice to Creditors ▾

Comment

9: NOTICE TO CREDITORS;

06/09/2017 Case Resolution Personal Representative Guardian
Appointed

06/15/2017 Affidavit of Mailing ▾

Comment

10: AFFIDAVIT OF MAILING;

06/15/2017 Affidavit of Mailing ▾

Comment

11: AFFIDAVIT OF MAILING;

07/31/2017 Creditors Claim ▾

Comment

12: CREDITOR'S CLAIM/DCM SERVICES OBO; BANK OF
AMERICA;

07/31/2017 Creditors Claim ▾

Comment

13: CREDITOR'S CLAIM/DCM SERVICES OBO; BANK OF
AMERICA;

10/02/2017 Creditors Claim ▾

Comment

14: CREDITOR'S CLAIM- DISCOVER BANK;

10/03/2017 Affidavit of Mailing ▾

Comment

15: AFFIDAVIT OF MAILING;

06/07/2018 Declaration of Completion

06/07/2018 Notice of Filing Declaration of Completion

06/08/2018 Affidavit of Mailing

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TN 58 (06-19)

SI 01120.203 Exceptions to Counting Trusts Established on or after January 1, 2000

A. Introduction to Medicaid trust exceptions

We refer to the exceptions discussed in this section as Medicaid trust exceptions because section 1917(d)(4)(A) and (C) of the Social Security Act (Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) sets forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid title of the Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI program (such as undue hardship) and because the term has become a term of common usage.

The type of trust under review dictates the development and evaluation of the Medicaid trust exceptions.

There are two types of Medicaid trusts to consider:

1. Special Needs Trusts; and
2. Pooled Trusts.

CAUTION:

A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in [SI 01120.200](#) to determine if it is a countable resource. If the trust meets the definition of a resource (see [SI 01110.100B.1.](#)), it will be subject to regular resource-counting rules.

B. Policy for special needs trusts established under section 1917(d)(4)(A) of the Act before December 13, 2016

1. General rules for special needs trusts established prior to December 13, 2016

The resource counting provisions of section 1613(e) do not apply to a trust that:

- •
contains the assets of an individual who is under age 65 and is disabled;
- •
is established for the benefit of such individual through the actions of a parent, grandparent, legal guardian, or court; and
- •
provides that the State(s) will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State(s) Medicaid plan(s).

NOTE:

Although this exception is commonly referred to as the special needs trust exception, the exception applies to any trust that meets the above requirements, even if it is not titled a special needs trust.

CAUTION:

A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in [SI 01120.200](#) to determine if it is a countable resource. If the trust meets the definition of a resource (see [SI 01110.100B.1.](#)), it will be subject to regular resource-counting rules.

2. Under age 65

To qualify for the special needs trust exception, the trust must be established for the benefit of a disabled individual under age 65. For special needs trusts, an individual attains age 65 on the anniversary date of his or her birth. The special needs trust exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

3. Additions to trust after age 65

Additions to or augmentations of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust, depending on the source of the funds (see [SI 01120.201J.](#)) and may count as resources in the following months under regular SSI trust rules.

Additions or augmentations do not include interest, dividends, or other earnings of the trust or any portion of the trust meeting the special needs trust exception. If the beneficiary's right to receive payments from an annuity, support payments, or Survivor Benefit Plan (SBP) payments (see [SI 01120.201J.1.e.](#)), is irrevocably assigned to the trust, and such assignment is made when the trust beneficiary was less than 65 years of age, treat the payments paid to a special needs trust the same as payments made before the individual attained age 65. Do not disqualify the trust from the special needs trust exception.

4. Disabled

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act as of the date on which the trust's resource status could affect the individual's SSI eligibility.

In cases where you need to develop for disability, obtain a disability determination from the disability determination services (DDS) following procedure in [SI 01150.121D.2](#). Develop disability as of the date on which the trust's resource status could affect SSI eligibility.

If DDS determines that the trust beneficiary was:

- •
disabled as of the date the trust's resource status could have affected SSI eligibility, the special needs trust meets the disability requirements for exception; or
- •
not disabled as of the date the trust's resource status could have affected SSI eligibility, evaluate the trust under instructions in [SI 01120.201](#). Since the trust provisions take precedence over the transfer provisions (see [SI 01120.201D.5](#)), depending on the terms of the trust, the trust may count as a resource or the transfer penalty may apply (see [SI 01150.121](#)).

Example Scenario 1: Mark, a special needs trust beneficiary whose trust was established in 2015, applies for SSI Aged benefits in 2019. Even though disability is not a requirement for SSI Aged benefits, we must develop disability as of Mark's SSI application date in 2019 for purposes of the Medicaid trust exception.

Example Scenario 2: Sally has a special needs trust that was established in 2010 when she was 10 years old. At the time, she was not eligible for SSI Child benefits because of her deeming parents' income and resources. However, she applies for SSI Adult benefits in 2018. We must develop disability as of Sally's SSI application date in 2018. 2010 is not relevant because the trust did not present as a resource issue until the SSI application date in 2018.

5. Definition of established

Under section 1613(e) of the Act, a trust is considered to have been “established by” an individual if any of the individual's (or the individual's spouse's) assets are transferred into the trust other than by will. Alternatively, under the Medicaid trust exceptions in section 1917(d)(4)(A) and (C) of the Act, a trust can be “established by” an individual who does not provide the corpus of the trust, or transfer any of his or her assets into the trust, but who takes action to establish the trust. To avoid confusion, we use the phrase “established through the actions of” rather than “established by” when referring to the individual who physically takes action to establish a special needs or pooled trust.

6. Established for the benefit of the individual

Under the special needs trust exception, the trust must be established and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual, as described in [SI 01120.201F.2](#). Other than trust provisions for payments described in [SI 01120.201F.3](#), and [SI 01120.201F.4](#), any provisions will result in disqualification from the special needs trust exception if they:

- •
provide benefits to other individuals or entities during the disabled individual's lifetime, or
- •
allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual).

Payments to third parties for goods and services provided to the trust beneficiary are allowed under the policy described in [SI 01120.201F.3.a](#); however, such payments should be evaluated under [SI 01120.200E](#), [SI 01120.200F](#), and [SI](#)

[01120.201I](#). to determine whether the payments may be income to the individual.

NOTE:

A third party can be a family member, non-family member, or an entity. Do not differentiate between third parties; anyone other than the trust beneficiary (or spouse, guardian, or representative payee) is a third party.

7. Who established the trust

The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself. (Remember that this instruction applies specifically to special needs trusts established under section 1917(d)(4)(A) before December 13, 2016.) To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of:

- •
the disabled individual’s parent(s);
- •
the disabled individual’s grandparent(s);
- •
the disabled individual’s legal guardian(s); or
- •
a court.

In the case of a legally competent, disabled adult, a parent or grandparent may establish a “seed” trust using a nominal amount of his or her own money or, if State law allows, an empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or a second individual with legal authority (for example, a power of attorney) may transfer the disabled individual's assets into the trust. To determine if the second individual had legal authority, see [SI 01120.203B.9](#). in this section.

8. Court-established trusts

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order for the exception in section 1917(d)(4)(A) of the Act to apply. The special needs trust exception can be met when a court approves a petition and establishes a trust by court order, as long as the creation of the trust has not been completed before the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust. An individual is permitted to petition a court for the present establishment of a trust or may use an agent to do so. The court order establishes the trust, not the individual’s petition. Petitioning a court to establish a trust is not establishment by an individual.

NOTE:

An individual may petition the court with a draft document of a trust as long as it is unsigned and not legally binding.

a. Example of a court ordering the establishment of a trust

John is a legally competent adult who inherited \$250,000 in January 2015, and is an SSI recipient. His sister, Justine,

petitioned the court to create and order the funding of the John Special Needs Trust. Justine also provided the court with an unsigned draft of the trust document. A month later, the court approved the petition and issued an order requiring the creation and funding of the trust. This trust meets the requirement in [SI 01120.203B.8.](#) in this section. The fact that the trust beneficiary is a competent adult and could have established the trust himself, is not a factor in the resource determination.

b. Example of a court-established trust

Henry wins a lawsuit in the amount of \$50,000. As part of the settlement, the judge orders the creation of a trust in order for Henry to receive the \$50,000. As a direct result of this court order, a trust was created with Henry's settlement money. The trust document lists the \$50,000 as the initial principal amount in Schedule A of the trust. This trust meets the requirement for exclusion in [SI 01120.203B.8.](#) in this section.

c. Example of a court-approved trust

Jane is ineligible for SSI benefits because she has a self-established special needs trust that does not meet the requirements for exception in [SI 01120.203](#) in this section. Jane petitioned the court to establish an amended trust and to make the order retroactive, so that her original trust would become exempt from resource counting from the time of its creation. The court approved the petition and issued a nunc pro tunc order stating that the court established the trust as of the date on which Jane had previously established the trust herself. The court did not establish a new trust; it merely approved a modification of a previously existing trust. The amended trust does not meet the requirement for exclusion in [SI 01120.203B.8.](#) in this section.

d. Example of a court-approved trust

Dan is the beneficiary of a special needs trust. His sister petitioned the court to establish the Dan's Special Needs Trust and submitted to the court along with the petition Dan's special needs trust that had already been signed and funded. Although the court order states that it approves and establishes the trust, the court simply approved the existence of the already established special needs trust. This trust does not meet the requirement in [SI 01120.203B.8.](#) in this section. For an example of an unsigned and unfunded trust, see [SI 01120.201B.8.a.](#)

9. Legal authority and trusts

The person or entity establishing the trust with the assets of the legally competent disabled individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of the individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of that individual will generally result in an invalid trust under state law.

NOTE:

If you question the validity of a trust, please consult with your Regional Trust Lead (RTL) or get a Regional Chief Counsel (RCC) Opinion.

For example, John is establishing a seed trust for his adult child with his own assets, and John has legal authority over his own assets to establish the trust. John would need legal authority over his child's assets only if he actually takes action with the child's assets, for example, by transferring them into a previously established trust.

A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. However, a trust established under a POA for the trust beneficiary will result in a trust that we consider to be established through the actions of the disabled individual himself or herself because the POA merely establishes an agency relationship. A POA for the trust beneficiary may be used as the legal authority to transfer assets of the beneficiary into the trust, including, for example, a previously established seed trust.

10. State Medicaid reimbursement requirement

To qualify for the special needs trust exception, the trust must contain specific language that provides that, upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in [SI 01120.203E](#) in this section.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback also cannot be limited to any particular period of time; for example, payback cannot be limited to the period after establishment of the trust. If the trust does not have sufficient funds upon the beneficiary's death to reimburse in full each State that provided medical assistance, the trust may reimburse the States on a pro-rata or proportional basis.

NOTE:

Merely labeling the trust as a Medicaid payback trust, an OBRA 1993 payback trust, a trust established in accordance with 42 U.S.C. § 1396p, or a (MQT) is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements described above. An oral trust cannot meet this requirement.

C. Policy for special needs trusts established under section 1917(d)(4)(A) of the Act on or after December 13, 2016

1. General rules for special needs trusts established on or after December 13, 2016

On December 13, 2016, the President signed into law the 21st Century Cures Act (Public Law 114-255). Section 5007 of this Act allows individuals to establish their own special needs trusts and qualify for the exception to resource counting under Section 1917(d)(4)(A) of the Social Security Act.

The resource counting provisions of section 1613(e) do not apply to a trust that:

- •
contains the assets of an individual who is under age 65 and is disabled;
- •
is established for the benefit of such individual through the actions of the individual, a parent, a grandparent, a legal guardian, or a court; and
- •
provides that the State(s) will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan.

NOTE:

Although this exception is commonly referred to as the special needs trust exception, the exception applies to any trust meeting the above requirements, even if it is not titled as a special needs trust.

NOTE:

CAUTION:

A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of section 1613(e) must still be evaluated under the instructions in [SI 01120.200](#), to determine if it is a countable resource. If the trust meets the definition of a resource (see [SI 01110.100B.1.](#)), it will be subject to regular resource-counting rules.

2. Who established the trust

The special needs trust exception applies to a trust established through the actions of:

- •

the individual;

- •

a parent(s);

- •

a grandparent(s);

- •

a legal guardian(s); or

- •

a court.

a. Power of attorney

We consider a trust established under power of attorney (POA) for the disabled individual to be established through the actions of the disabled individual because the POA establishes an agency relationship. For additional information on a POA, see [SI 01120.203C.3](#) in this section.

b. Use of a seed trust

If the legally competent, disabled adult does not establish the trust, a parent or grandparent may establish a “seed” trust using a nominal amount of his or her own money or, if State law allows, an empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or another individual with legal authority (such as a power of attorney) may transfer the individual's assets into the trust. To determine if the individual had legal authority, see [SI 01120.203C.9.](#) in this section.

NOTE:

Under 1613(e) of the Act, a trust is considered to have been “established by” an individual if any of the individual's (or the individual's spouse's) assets are transferred into the trust other by will. Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be “established by” an individual who does not provide the corpus of the trust, or transfer any of his or her assets into the trust, but who takes action to establish the trust. To avoid confusion, we use the phrase “established through the actions of” rather than “established by” when referring to the individual who physically takes action to establish a special needs or pooled trust.

3. Legal authority and trusts

The person or entity establishing the trust with the assets of the legally competent, disabled individual or transferring the assets of the individual into the trust must have legal authority to act with respect to the assets of the individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust under state law.

NOTE:

If you question the validity of a trust, please consult with your Regional Trust Lead (RTL) or get a Regional Chief Counsel (RCC) Opinion.

For example, John, who is establishing with his own assets a seed trust for his adult child, has legal authority over his own assets to establish the trust. He needs legal authority over his child's assets only if he actually takes action with the child's assets, for instance by transferring them into a previously established trust.

A power of attorney (POA) can establish legal authority to act with respect to the assets of an individual. A trust established under a POA for the disabled individual will result in a trust that we consider to be established through the actions of the disabled individual himself or herself because the POA establishes an agency relationship. A third party can use the POA for the trust beneficiary as the legal authority to establish a trust or to transfer assets of the beneficiary into the trust, as long as the POA provides the proper authority to do so.

4. Additional requirements for a trust established on or after December 13, 2016

Except as noted in [SI 01120.203C.1.](#) through [SI 01120.203C.3.](#) in this section, the requirements for an exempt special needs trust remain the same as those for a trust established prior to December 13, 2016. For additional requirements and guidance, see [SI 01120.203B.2.](#) through [SI 01120.203B.6.](#), [SI 01120.203B.8.](#), and [SI 01120.203B.10.](#) in this section.

D. Policy for pooled trusts established under section 1917(d)(4)(C) of the Act

1. General rules for pooled trusts

A pooled trust contains the assets of many different individuals, each held in separate trust accounts and established through the actions of individuals for separate beneficiaries. By analogy, the pooled trust is like a bank that holds the assets of individual account holders. A pooled trust is established and managed by a non-profit organization. The pooled trust instruments usually consist of an overarching “master trust” and a joinder agreement that contains provisions specific to the individual beneficiary.

Whenever you are evaluating the trust, it is important to distinguish between the master trust, which is established through the actions of the nonprofit association, and the individual trust accounts within the master trust, which are established through the actions of the individual or another person or entity for the individual, through a joinder agreement.

The resource-counting provisions of section 1613(e) of the Act do not apply to a trust containing the assets of a disabled individual that meets the following conditions:

- •

The pooled trust is established and managed by a nonprofit association;

- •

Separate accounts are maintained for each beneficiary, but assets are pooled for investing and management

purposes;

- •

Accounts are established solely for the benefit of the disabled individuals;

- •

The account in the trust is established through the actions of the individual, a parent, a grandparent, a legal guardian, or a court; and

- •

The trust provides that, 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 will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).

NOTE:

There is no age restriction for this exception. However, a transfer of resources into a trust for an individual age 65 or over may result in a transfer penalty (see [SI 01150.121](#)).

NOTE:

A trust that meets the exception to counting for SSI purposes under the statutory trust provisions of 1613(e) must still be evaluated under the instructions in [SI 01120.200](#), to determine if it is a countable resource.

2. Disabled

To qualify for the pooled trust exception, the individual whose assets were used to establish the trust account must be disabled for SSI purposes under section 1614(a)(3) of the Act as of the date on which the trust account's resource status could affect the individual's SSI eligibility. This also includes individuals age 65 and older.

In cases where you need to develop for disability, obtain a disability determination from the disability determination services (DDS) following procedure in [SI 01150.121D.2](#). Develop disability as of the date on which the trust's resource status could affect SSI eligibility.

If DDS determines that the trust beneficiary was:

- •

disabled as of the date the trust's resource status could have affected SSI eligibility, the special needs trust meets the disability requirements for exception; or

- •

not disabled as of the date the trust's resource status could have affected SSI eligibility, evaluate the trust under instructions in [SI 01120.201](#). Since the trust provisions take precedence over the transfer provisions (see [SI 01120.201D.5](#)), depending on the terms of the trust, the trust may count as a resource or the transfer penalty may apply (see [SI 01150.121](#)).

For examples of how to apply this policy, see [SI 01120.203B.4](#) in this section. The scenarios apply to pooled trusts as well.

3. Nonprofit association

The pooled trust must be established and maintained by the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute. For development of nonprofit associations, see [SI 01120.203J](#), in this section. For more information on pooled trust management provisions, see [SI 01120.225](#).

4. Separate account

A separate account within the trust must be maintained for each beneficiary of the pooled trust. However, for purposes of investment and management of funds, the trust may pool the funds in the individual accounts. The trust must be able to provide an individual accounting for each individual.

5. Established for the sole benefit of the individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (For a definition of sole benefit, see [SI 01120.201F.1.](#)) Other than the payments described in [SI 01120.201F.3.](#) and [SI 01120.201F.4.](#), this exception does not apply if the trust account:

- •
provides a benefit to any other individual or entity during the disabled individual's lifetime; or
- •
allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity. For more information on early termination provisions and trusts, see [SI 01120.199](#).

NOTE:

In general, we do not limit master trusts to allow only sub-accounts that are established by parties listed in section 1917(d)(4)(C)(iii) of the Act. As pooled trusts can have SSI and non-SSI beneficiaries, we would not count a trust solely because the master trust agreement permitted a non-SSI trust to be established by someone other than those listed in section 1917(d)(4)(C)(iii).

NOTE:

6. Who established the trust account

In order to qualify for the pooled trust exception, the trust account must have been established through the actions of:

- •
the disabled individual himself or herself;
- •
the disabled individual's parent(s);
- •
the disabled individual's grandparent(s);
- •

the disabled individual's legal guardian(s); or

• •

a court.

A legally competent, disabled adult who is establishing or adding to a trust account with his or her own assets has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of a disabled individual with that individual's assets must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of a disabled individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust under state law. If there is a question regarding authority, consult your precedents or regional chief counsel.

A power of attorney (POA) is legal authority to act with respect to the assets of an individual. A pooled trust account may be established under POA given by the individual, a parent, or a grandparent.

NOTE:

A representative payee must have legal authority to establish a trust or transfer funds into a trust for the disabled individual. If a representative payee attempts to establish a trust account with the assets of a disabled individual without the legal right or authority to act with respect to the assets of that individual, this will generally result in an invalid trust under state law.

7. Court-established trusts

In the case of a trust account established through the actions of a court, the creation of the trust account must be required by a court order for the exception in section 1917(d)(4)(C) of the Act to apply. That is, the pooled trust exception can be met when courts approve petitions and establish trust accounts by court order, so long as the execution of the trust account joinder agreement and funding of the trust have not been completed before the order is issued by the court. Court approval of an already executed pooled trust account joinder agreement is not sufficient for the trust account to qualify for the exception. The court must specifically either establish the trust account or order the establishment of the trust account.

a. Example of a court ordering establishment of a trust account

John is a legally competent adult who inherited \$250,000 and is an SSI recipient. His sister, Justine, petitioned the court to create and order the funding of an account in the Chesapeake Pooled Trust. Justine also provided the court with an unsigned draft of the trust document. A month later the court approved the petition and issued an order requiring the creation and funding of the trust account. This trust account meets the requirement in [SI 01120.203D.6](#). in this section. The fact that the trust beneficiary is a competent adult and could have established the trust account himself, is not a factor in the resource determination.

b. Example of a court-established trust account

Mary, a legally incompetent SSI recipient, wins a lawsuit in the amount of \$50,000. As part of the settlement, the judge orders the creation of a pooled trust account in order for Mary to receive the \$50,000. As a direct result of this court order, a pooled trust account was created with Mary's settlement money. The pooled trust records and documentation of the initial deposit list the \$50,000 as the initial principal amount. This trust account meets the requirement in [SI 01120.203D.6](#). in this section.

c. Example of a court-approved trust account

Jane is ineligible for SSI benefits because she has a self-established pooled trust account that does not meet the

requirements for exception in [SI 01120.203D](#) stating the pooled trust has to be established and managed by a nonprofit association. A for-profit association is managing Jane's pooled trust. The pooled trust changed management to a nonprofit association to satisfy the requirement. Jane petitioned the court to establish an amended trust account joinder agreement and to make the order retroactive, so that her original trust account would become exempt from resource counting from the time of its creation. The court approved the petition and issued a nunc pro tunc order stating that the court established the trust account as of the date on which Jane had previously established the trust account herself. The amended trust account joinder agreement does not meet the requirement in [SI 01120.203D.6](#) in this section. The court did not establish a new trust account; it merely approved a modification of a previously existing trust account joinder agreement.

NOTE:

Please forward all nunc pro tunc orders to your Regional Office for additional review and final determination.

8. State Medicaid reimbursement provision

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in [SI 01120.203E](#) in this section.

The trust must provide payback to any State(s) that have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback also cannot be limited to any particular period of time; for example, payback cannot be limited to the period after establishment of the trust.

If the trust does not have sufficient funds upon the beneficiary's death to reimburse in full each State that provided medical assistance, the trust may reimburse the States on a pro-rata or proportional basis.

NOTE:

Merely labeling the trust as a Medicaid payback trust, an OBRA 1993 payback trust, a trust established in accordance with 42 U.S.C. § 1396p, or an MQT is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements described above. An oral trust cannot meet this requirement.

E. Allowable and prohibited expenses for special needs and pooled trusts established under section 1917(d)(4)(A) and (C) of the Act

The following instructions, about trust expenses and payments, apply to Medicaid special needs trusts and to Medicaid pooled trusts.

1. Allowable administrative expenses

Upon the death of the trust beneficiary, the trust may pay the following types of administrative expenses from the trust prior to reimbursement of the State(s) for medical assistance:

- •
 - Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;

• •

Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

2. Prohibited expenses and payments

Upon the death of the trust beneficiary, the following are examples of some of the types of expenses and payments not permitted prior to reimbursement of the State(s) for medical assistance:

- •
Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- •
Inheritance taxes due for residual beneficiaries;
- •
Payment of debts owed to third parties;
- •
Funeral expenses; and
- •
Payments to residual beneficiaries.

NOTE:

For the purpose of prohibiting payments prior to reimbursement of the State(s) for medical assistance, a pooled trust is not considered a residual or remainder beneficiary. Remember that a pooled trust has the right to retain funds upon the death of the beneficiary.

3. Applicability

This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement.

F. Income trusts established under section 1917(d)(4)(B) of the Act

Income trusts, sometimes called Miller trusts (named after a court case), established under section 1917(d)(4)(B) of the Act are not considered exceptions to trust rules for SSI purposes. However, some States may exclude these trusts from counting as a resource for Medicaid purposes. This type of trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust).

G. Policy for waiver for undue hardship

1. Definitions

a. Undue hardship

For purposes of the trust provisions of section 1613(e) of the Act, undue hardship exists in a month if:

- •
failure to receive SSI payments would deprive the individual of food or shelter; and
- •
the individual's available funds do not equal or exceed the Federal benefit rate (FBR) plus any federally administered State supplement.

NOTE:

Inability to obtain medical care does not constitute undue hardship for SSI purposes, although it may under a State Medicaid plan. Also, the undue hardship waiver does not apply to a trust counted as a resource under [SI 01120.200](#). It applies only to trusts counted under section 1613(e) of the Act (see [SI 01120.201](#) through [SI 01120.203](#)).

b. Loss of shelter

For purposes of undue-hardship waiver in the context of section 1613(e) of the Act, an individual would be deprived of shelter if:

- •
he or she would be subject to eviction from his or her current residence, if SSI payments were not received; and
- •
there is no other affordable housing available, or there is no other housing available with necessary modifications for the disabled individual.

2. Application of the undue hardship waiver

a. Applicability

We will consider the possibility of undue hardship under this provision only when:

- •
counting an irrevocable trust as a resource results in the individual's ineligibility for SSI due to excess resources;
- •
the individual alleges (or information in the file indicates) that not receiving SSI would deprive him or her of food or shelter; and
- •
the trust specifically prohibits disbursements, or prohibits the trustee from exercising his or her discretion to disburse funds, from the trust for the individual's support and maintenance.

NOTE:

If the trust is revocable by the individual, the requirements for undue hardship cannot be met because the individual can

access the trust funds for his or her support and maintenance.

NOTE:

b. Suspension of resource counting

An irrevocable trust is not counted as a resource in any month for which counting the trust would cause undue hardship.

c. Resource counting resumes

Resource counting of a trust resumes for any month(s) for which it would not result in undue hardship.

3. Available funds

In determining the individual's available funds, we include:

a. Income

Income includes the following:

- •

- All countable income received in the month(s) for which undue hardship is an issue;

- •

- All income excluded under the Act received in the month(s) for which undue hardship is an issue. For a list of unearned and earned income exclusions, respectively, provided under the Act, see [SI 00830.099](#). and [SI 00820.500](#).; and

- •

- The value of in-kind support and maintenance (ISM) being charged, i.e., the presumed maximum value (PMV), the value of the one-third reduction (VTR), or the actual lesser amount.

Do not include SSI payments received or items that are not income, per [SI 00815.000](#).

NOTE:

The receipt of ISM, in and of itself, does not preclude a finding of undue hardship.

b. Resources

Resources include the following:

- •

- All countable liquid resources as of the first moment of the month(s) for which undue hardship is at issue (for a definition of liquid resources, see [SI 01110.300](#).); and

- •

- All liquid resources excluded under the Act as of the first moment of the month(s) for which undue hardship is at issue (for a list of resource exclusions under the Act, see [SI 01130.050](#).).

SSI benefits retained into the month following the month of receipt are counted as a resource for purposes of determining available funds.

Do not include non-liquid resources or assets determined not to be a resource, per [SI 01120.000](#).

4. Example

Frank filed for SSI in 3/2017 as an aged individual. In 2/2017, he received an insurance settlement from an accident that was placed in an irrevocable trust. After determining that he met the other requirements for undue hardship (including a prohibition on the trustee from disbursing any funds for Franks' support and maintenance), the claims specialist (CS) determined Franks' available funds. He receives \$450 in title II benefits per month. His only liquid resource is a bank account that has \$500 in it. The total of \$950 in available funds (\$450 in title II benefits and \$500 in the bank account) means that undue hardship does not apply in 3/2017, because that amount exceeds the FBR of \$735. (His State has no federally administered State supplement.)

Frank comes back into the office in 6/2017. He presents evidence that he has spent down the \$500 in his bank account on living expenses in the past three months. As of 6/2017, he has no liquid resources, and his income total of \$450 is below the FBR. Frank meets the undue hardship test for 6/2017 (which is his E02 month). The trust does not count as his resource in that month. If his situation does not change, he qualifies for an SSI payment in 7/2017.

H. Procedure for follow-up to a finding of undue hardship

1. When to use this procedure

Use this procedure when it is necessary to determine whether an individual who established a trust continues to be eligible for SSI based on undue hardship. Since undue hardship is a month-by-month determination, recontact the individual to redevelop undue hardship periodically.

2. Recontact period

The recontact period may vary depending on the individual's situation. If the individual alleges, and information in the file indicates, that the individual's income and resources are not expected to change significantly, and the individual is continuously eligible for SSI because of undue hardship, recontact the individual no less than every six months. If the individual's income and resources are expected to fluctuate, or the file indicates a history of such fluctuation, the recontact period should be shorter, even monthly in some cases.

3. Documentation

At each recontact:

- •

Obtain on a DROC the individual's statement, either signed or recorded, that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;

- •

Determine whether total income and liquid resources exceeded the FBR plus any State supplement for each prior month;

- •

If undue hardship continued for the prior period and is expected to continue in the future period, continue payment and tickle the case for the next recontact, per [SI 01120.203H.4.](#) in this section; and

- •

If undue hardship did not continue through each month, clear the excluded amount and exclusion reason entries on the ROTH screen for each month that undue hardship did not apply. Process the excess resources overpayment for those months. If undue hardship stops due to a continuing change in the individual's situation, such as income or resources, do not tickle the file to follow up. The individual must recontact SSA and make a new allegation of undue hardship.

4. Recontact controls

For SSI Claims System cases, use the DWO1 and establish a tickle to control the case for recontact when the individual is eligible for SSI based on undue hardship. (Use the Modernized Development Worksheet (MDW) for non-SSI Claims System cases.) If MDW is applicable, set up an MDW screen using instructions in MSOM MDW 001.001 and the following MDW inputs:

- •

In the ISSUE field: input TRUST;

- •

In the CATEGORY field: input T16MISC;

- •

In the TICKLE field: input the date by which the individual should be recontacted to redevelop undue hardship; and

- •

In the MISC field: input information (up to 140 characters) about the trust undue hardship issue including issues to be aware of and anything else the CS deems appropriate. If additional space is needed, use REMARKS.

I. Procedure for developing exceptions to resource counting

1. Special needs trusts under section 1917(d)(4)(A) of the Act before December 13, 2016

The following is a summary of special needs trust development presented in step-action format. Refer to the policy cross-references for complete requirements:

STEP

ACTION

Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See [SI 01120.203B.2.](#) in this section.)

- •

1 If yes, go to Step 2.

- •

If no, go to Step 9.

Does the trust contain the assets of a disabled individual? (See [SI 01120.203B.4.](#) in this section.)

• •

2 If yes, go to Step 3.

• •

If no, go to Step 9.

Is the disabled individual the sole beneficiary of the trust? (See [SI 01120.203B.6.](#) in this section.)

• •

3 If yes, go to Step 4.

• •

If no, go to Step 9.

Did a parent, grandparent, legal guardian, or court establish the trust? (See [SI 01120.203B.7.](#) in this section.)

• •

4 If yes, go to Step 5.

• •

If no, go to Step 9.

Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in [SI 01120.203B.10.](#) in this section?

• •

5 If yes, go to Step 6.

• •

If no, go to Step 9.

Verify if the trust contains any early termination provisions as described within [SI 01120.199.](#) If the trust does not contain any early termination provisions, go to Step 7.

If the trust contains any early termination provisions, does it meet the early termination criteria in [SI 01120.199F](#) that would make early termination acceptable?

• •

6

If yes, go to Step 7.

• •

If no, go to Step 9.

The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in [SI 01120.203B.3.](#) in this section.

Go to Step 8 for treatment of assets placed in trust prior to age 65.

Go to Step 9 for treatment of assets placed in trust after attaining age 65.

Evaluate the trust under [SI 01120.200D.1.a.](#) to determine if it is a countable resource.

The trust (or portion thereof) does not meet the requirements for the special needs trust exception.

Consider if the pooled trust exception in [SI 01120.203D](#) in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under [SI 01120.203K](#) in this section.

2. Special needs trusts under Section 1917(d)(4)(A) of the Act on or after December 13, 2016

STEP

ACTION

Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See [SI 01120.203B.2.](#) in this section.)

• •

If yes, go to Step 2.

• •

If no, go to Step 9.

Does the trust contain the assets of a disabled individual? (See [SI 01120.203B.4.](#) in this section.)

• •

If yes, go to Step 3.

• •

If no, go to Step 9.

Is the disabled individual the sole beneficiary of the trust? (See [SI 01120.203B.6.](#) in this section.)

• •

If yes, go to Step 4.

• •

If no, go to Step 9.

Did the individual, a parent, a grandparent, a legal guardian, or a court establish the trust? (See [SI 01120.203BC.2.](#) in this section.)

• •

If yes, go to Step 5.

• •

If no, go to Step 9.

Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in [SI 01120.203B.10.](#) in this section?

• •

If yes, go to Step 6.

• •

If no, go to Step 9.

Verify if the trust contains any early termination provisions as described in [SI 01120.199.](#) If the trust does not contain any early termination provisions, go to Step 7.

If the trust contains any early termination provisions, does it meet the early termination criteria in [SI 01120.199F](#) that would make early termination acceptable?

• •

If yes, go to Step 7.

• •

If no, go to Step 9.

The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in [SI 01120.203B.3.](#) in this section.

Go to Step 8 for treatment of assets placed in trust prior to age 65.

Go to Step 9 for treatment of assets placed in trust after attaining age 65.

Evaluate the trust under [SI 01120.200D.1.a.](#) to determine if it is a countable resource. The trust (or portion thereof) does not meet the requirements for the special needs trust exception.

Consider if the pooled trust exception in [SI 01120.203D](#) in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under [SI 01120.203K](#) in this section.

3. Pooled trusts established under Section 1917(d)(4)(C) of the Act

The following is a summary of pooled trust development presented in step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	<p>Does the trust account contain the assets of a disabled individual? (See SI 01120.203D.2. in this section.)</p> <p>• •</p> <p>If yes, go to Step 2.</p> <p>• •</p> <p>If no, go to Step 8.</p>
2	<p>Is the pooled trust established and managed by a nonprofit association? (See SI 01120.203D.1., SI 01120.203D.3., and development instructions in SI 01120.203J in this section.)</p> <p>• •</p> <p>If yes, go to Step 3.</p> <p>• •</p> <p>If no, go to Step 8.</p>
3	<p>Does the trust pool the funds yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (See SI 01120.203D.4. in this section.)</p> <p>• •</p> <p>If yes, go to Step 4.</p> <p>• •</p> <p>If no, go to Step 8.</p>
4	<p>Is the disabled individual the sole beneficiary of the trust account? (See SI 01120.203D.5. in this section.)</p> <p>• •</p> <p>If yes, go to Step 5.</p> <p>• •</p> <p>If no, go to Step 8.</p>

Did the individual, (a) parent(s), (a) grandparent(s), (a) legal guardian(s), or a court establish the trust account? (See [SI 01120.203D.1.](#) and [SI 01120.203D.6.](#) in this section.)

• •

If yes, go to Step 6.

• •

If no, go to Step 8.

Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in [SI 01120.203D.8.](#) in this section?

• •

If yes, go to Step 7.

• •

If no, go to Step 8.

The trust meets the Medicaid pooled trust exception; however, the trust still should be evaluated under [SI 01120.200D.1.a.](#) to determine if it is a countable resource.

The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under [SI 01120.203K.](#) in this section.

J. Procedure to verify nonprofit associations when evaluating pooled trusts

When a trust is alleged to be established through the actions of a nonprofit or a tax-exempt organization, consult the pooled trust precedent in SSITMS. If none exists, follow policy and procedure for verifying the tax-exempt status of organizations found at [SI 01130.689E.](#) “Gifts to children with life-threatening conditions.”

K. Procedure for development of undue hardship waiver

The following is a summary of development instructions for undue hardship presented in step-action format. Refer to cross-references for complete instructions:

STEP

ACTION

Is the trust irrevocable?

• •

If yes, go to Step 2.

• •

If no, go to Step 8.

Would counting the trust result in excess resources?

2

- •

If yes, go to Step 3.

- •

If no, go to Step 8.

Does the individual allege, or information in the file indicate, that not receiving SSI would deprive the individual of food or shelter according to [SI 01120.203G](#) in this section?

- •

If yes, go to Step 4.

- •

If no, go to Step 8.

Obtain the individual's signed statement (on the DPST screen in the SSI Claims System or, in non-SSI Claims System cases, on a SSA-795 faxed into NDRed) as to whether:

- •

Failure to receive SSI payments would deprive the individual of food or shelter;

- •

The individual's total available funds are less than the FBR plus any federally administered State supplement;

- •

The individual agrees to report promptly any changes in income and resources; and

- •

The individual understands that he or she may be overpaid if, for any month, available funds exceed the FBR plus any State supplement or if other situations change.

- •

Go to Step 5.

Does the trust contain language that specifically prohibits the trustee from making disbursements for the individual's support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for the individual's support and maintenance?

4

5

•

If yes, go to Step 6.

• •

If no, go to Step 8.

Add up all of the individual's income, both countable and excludable (see [SI 01120.203G.3.a.](#) in this section). Do not include any SSI payments received or items that are not income, per [SI 00815.000](#). If the individual is receiving ISM, include as income the ISM being charged (the PMV, VTR, or actual amount, if less).

Add up all of the individual's liquid resources, both countable and excludable (see [SI 01120.203G.3.b.](#) in this section).

6

Does the total of the income and the liquid resources equal or exceed the FBR plus any federally administered State supplement?

• •

If yes, go to Step 8.

• •

If no, go to Step 7.

Suspend counting of the trust as a resource for any month in which all requirements above are met (see [SI 01120.203G.2.](#) in this section).

• •

In the SSI Claims System, document the findings of undue hardship and applicable months on the DROC screen.

7

• •

On paper forms, document the information in the REMARKS section. For further documentation, see [SI 01120.202D](#) and [SI 01120.202E](#); and for follow-up instructions, see [SI 01120.203H](#) in this section. STOP.

8

Undue hardship does not apply. However, in some instances where income and resources are currently too high, unless the trust is revocable, undue hardship may apply in future months.

To Link to this section - Use this URL:
<http://policy.ssa.gov/poms.nsf/lnx/0501120203>

SI 01120.203 - Exceptions to Counting Trusts Established on or after January 1, 2000 -
07/26/2018
Batch run: 06/26/2019
Rev: 07/26/2018

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