SSI Regional Chief Counsel Precedents on First and Third Party SNTs, non-SNT Asset Transfers and Resource Exclusions

Published from the beginning of time
to March 3, 2014

David Lillesand, Esq.
David@LillesandLaw.com

Lillesand, Wolasky & Waks, P.L.

901 Chestnut Street, Clearwater FL 33756-5618

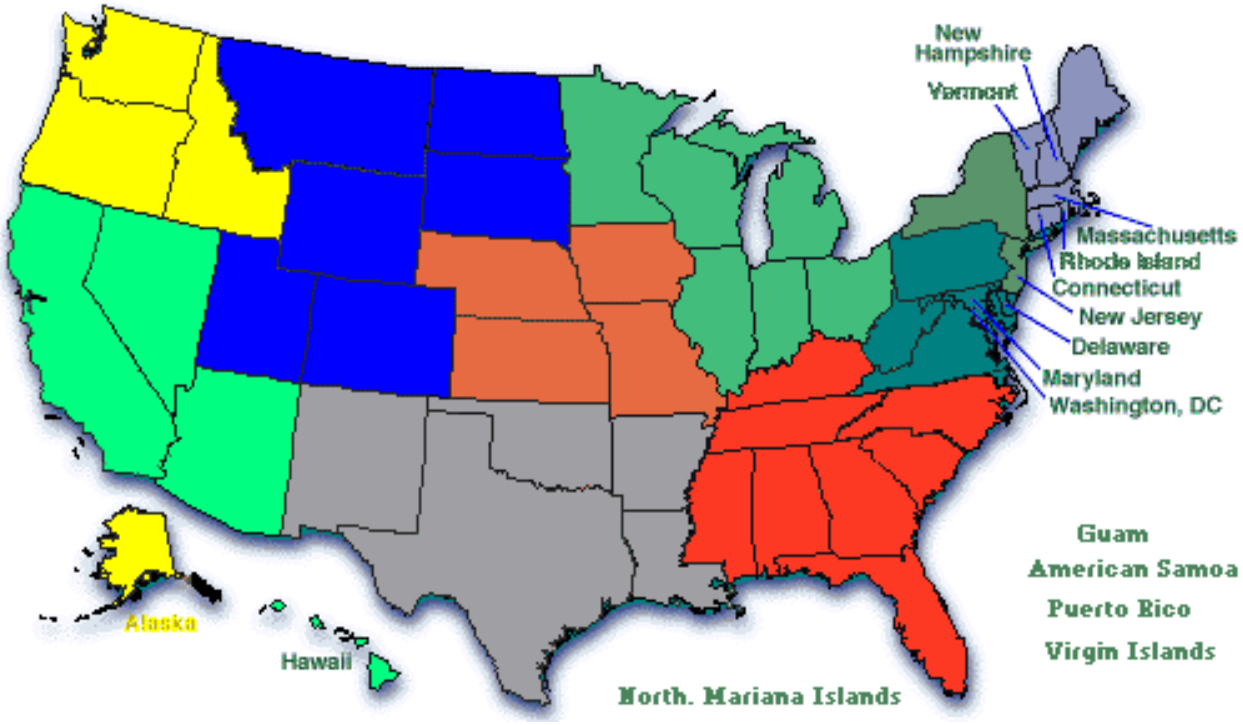
(727) 330-7895

INTRODUCTION. This guide to the Supplemental Security Income (SSI) online Regional Chief Counsel Precedents, **PS - Title XVI Regional Chief Counsel Precedents** (click preceding underlined set as a hyperlink)**,** is intended to assist special needs planners, drafters of Special Needs Trusts, and administrators of such trusts by looking at the common mistakes that crossed the desks of the SSA Regional Chief Counsel's desk. The "Regional Chief Counsel Precedents" are legal opinion letters that analyze the validity of the trust and are issued to instruct SSA staff and the public.

Although these legal opinions are very valuable resources, particularly for attorneys representing persons with disabilities who need to place funds in the safe harbor of an individual or pooled SNT, or as an alternative, employ an SSI spend-down plan, the organization of the Precedents and the lack of index makes it cumbersome to find the answers to common problems.

This document seeks to fill that gap with a re-organization of the Precedents by subject matter, a Table of Contents and an Index to the issues.

BACKGROUND. For federal administrative purposes, the government has divided the country into ten federal administrative regions. The Social Security Administration has a regional office with a regional director for administrative purposes, and a Regional Chief Counsel who provides legal support to the hundreds of staff in the SSA local offices in each of states in that region.



Regions: Atlanta, Boston, Chicago, Dallas, Denver, Kansas City, New York, Philadelphia, San Francisco, and Seattle. Each region has pages highlighting regional initiatives, local public information resources, and connections to local offices.

Although the SSI program is a federal program, state legal issues may come in to play. For example, a Special Needs Trust could be perfectly drafted, but if the state requires that the document be notarized, and it is not, the trust will fail on state law grounds. In another example, a state law judge may rule that

a defective Special Needs Trust was cured "nunc pro tunc" (literally meaning "now for then", meaning retroactively or going back to its original creation), the Social Security Administration has to determine if, under state law, a state judge has that power. In some states, a judge does not.

The Regional Chief Counsels are part of the Office of Program Law (OPL), which is responsible for providing a full range of legal services and advice (including administrative and court litigation) to the Social Security Administration related to the operation and administration of its various programs under the Social Security Act. OPL is responsible for drafting and/or reviewing SSA regulations, Federal Register materials, and legal instruments within OPL's areas of jurisdiction; proposals for legislation and specifications for such proposed legislation; reports and letters to congressional committees, the Office of Management and Budget, and others on proposed legislation and legislative matters and proposed testimony of SSA officials before Congress. OPL also coordinates program litigation strategy nationwide and is responsible for comprehensive analyses of litigation trends. OPL represents SSA, in concert with the Department of Justice, in litigation challenging its policies and procedures, the constitutionality of provisions of the Social Security Act, and benefit claim determinations.

REGIONAL CHIEF COUNSEL CONTACT INFORMATION. The names of the currently serving Regional Chief Counsel and their addresses are listed below.

Frank A. Cristaudo, Office of the Regional Chief Counsel, **Region I**, Social Security Administration, JFK Federal Building, Room 625, 15 New Sudbury Street, **Boston**, MA 02203-0002

Steven P. Conte, Office of the Regional Chief Counsel, **Region II**, Social Security Administration, 26 Federal Plaza, Room 3904, **New York**, NY 10278-0004

Nora R. Koch, Office of the Regional Chief Counsel, **Region III**, Social Security Administration, 300 Spring Garden Street, 6th Floor, **Philadelphia**, PA 19123-2932

Mary Ann Sloan, Office of the Regional Chief Counsel, **Region IV**, Social Security Administration, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Suite 20T45, **Atlanta**, GA 30303-8910

Donna L. Calvert, Office of the Regional Chief Counsel, **Region V**, Social Security Administration, 200 West Adams Street, 30th Floor, **Chicago**, IL 60606-5208Show citation box

Michael McGaughran, Office of the Regional Chief Counsel, **Region VI**, Social Security Administration, 1301 Young Street, Ste. A-702, **Dallas**, TX 75202-5433

Kristi A. Schmidt, Office of the Regional Chief Counsel, **Region VII**, Social Security Administration, Richard Bolling Federal Building, 601 E. 12th Street, Room 965, **Kansas City**, MO 64106-2898

John J. Lee, Office of the Regional Chief Counsel, **Region VIII**, Social Security Administration, 1961 Stout Street, Suite 4169, **Denver**, CO 80294-4003

Donna L. Calvert, Office of the Regional Chief Counsel, **Region IX**, Social Security Administration, 160 Spear Street, Suite 800, **San Francisco**, CA 94105-1545

David F. Morado, Office of the Regional Chief Counsel, **Region X**, Social Security Administration, 701 Fifth Avenue, Suite 2900 M/S 221A, **Seattle**, WA 98104-7075

***IMPORTANT NOTE*:** Client applications for benefits, requests for reconsideration, hearings, and Appeals Council reviews should be requested through the network of local Social Security field offices. To obtain information concerning the client's local field office, use the Social Security Office Locator.

RCCs NOT INVOLVED IN INDIVIDUAL SSI CLAIMS AT THE ADMINISTRATIVE APPEALS LEVEL. Although the Regional Chief Counsels represent the agency in federal litigation, testify before Congress, work on proposed legislation, and other duties listed above, they are NOT involved in individual client appeals of denials of eligibility at the local SSA office level, nor at the Administrative Law Judge hearing nor the Appeals Council in Falls Church, Virginia (Washington, D.C.), the last administrative level of appeal before the case goes to federal court. When requested by SSA local office staff, however, they will provide individual guidance on claims pending at the local office level. Thus, the numerous RCC Precedents on trusts and other resource issues.

THE OFFICE OF DISABILITY ADJUDICATION AND REVIEW (ODAR). Administrative appeals at the ALJ and Appeals Council level are handled by the Office of Disability Adjudication and Review (ODAR) which also has 10 regional offices, 169 hearing offices in the fifty states of the United States (including 7 satellite offices), 5 national hearing centers, and 1 national case assistance center. There are approximately 1,500 administrative law judges and 7,000 support staff in the field organization. Additionally, administrative law judges may travel to other sites such as local Social Security offices to conduct hearings if needed. The federal ALJs are supervised by a Regional Chief Administrative Law Judge, and by a national Chief Administrative Law Judge.

The Office of Disability Adjudication and Review (ODAR) is responsible for holding hearings and issuing decisions as part of the Social Security Administration's process for determining whether or not a person may receive benefits. Headquartered in Falls Church, Virginia, ODAR is one of the largest administrative adjudication systems in the world. ODAR conducts, on average, about 700,000 hearings per year.

ODAR directs a nationwide field organization of administrative law judges (ALJ) who conduct impartial "de novo" hearings and make decisions on appealed determinations involving retirement, survivors, disability, and supplemental security income benefits. Through the Appeals Council, ODAR also reviews ALJ decisions on appeal by claimants, or on its own motion, and issues the final agency decision on such cases.

Information about each of the ODAR offices, and even the individual ALJs, including their denial/approval statistics, updated monthly, can be found at www.DisabilityJudges.com.

Information about the SSA appeals process in general can be found here http://www.ssa.gov/pubs/EN-05-10041.pdf . The latter is particularly useful to help clients understand the appeals process.

Table of Contents

INTRODUCTION. There are two ways to commit error with regard to Special Needs Trusts (SNTs): draft the trust incorrectly so that it does not meet the resource (asset) rules, or even if drafted and executed correctly, administer the trust in a way that violates the distribution rules. There are other options to preserve benefits other than trusts. The following reviews the RCC Precedents that have been issued regarding some of the alternatives, and revealing some of the mistakes that have occurred in creating or managing trusts. Be aware that there are other alternatives in the POMS, such as prepayment of food and shelter, that are not a subject of an RCC Precedent as of this date.

1 Transfer of Resources Alternatives to SNTs

1.1 Personal Service Contracts

SUMMARY - FL. The office of Regional Chief Counsel (RCC) determined that this case represented a transfer of resources without due compensation. The person receiving the resources is the niece of the SSI applicant. This niece, a resident of New Jersey, failed to sign the agreement of transfer and therefore no legally binding agreement exists. The transferred funds count as a resource. In addition, the niece failed to convince the RCC that undefined services she would be prepared to perform from a location over a thousand miles away justified the transfer of $37,000 to her. The 72 year old applicant's basic needs are presently being met as a resident of a nursing home in Florida. **A. PS 13-065 Supplemental Security Income Resource Determination—Validity of Personal Services Contract**

1.2 Transfers to Minors Act (UTMA)

SUMMARY – OH. This opinion concerns a Medicaid payback trust established in 2003 by a parent for his son using UGMA/UTMA funds. In this case, the UGMA/UTMA funds were determined to be the assets of the son, so the trust is a grantor trust. The trust was determined to be irrevocable because the language of the trust states that it is irrevocable, it meets the Medicaid payback requirements, and SSA considers the State of Ohio to be a residual beneficiary in this type of situation. (*See also* Chicago Region's POMS issuance SI CHI 01120.200.) **P. PS 04-221 SSI-Ohio-Review of the Scott E. K~ Special Needs Trust, ~ Your Reference: SI-2-1-3 OH (K~) Our Reference: 04P045**

SUMMARY – MN. This opinion involves a transfer by a beneficiary's parents of Uniform Transfer to Minors Act (UTMA) funds to newly established trusts for the beneficiary prior to his attainment of the age of majority. Two issues arose. First, does State law permit the transfer of UTMA funds into a trust and, second, are the trusts resources for SSI purposes? Regional counsel determined that Minnesota law did permit the parents to transfer the UTMA funds and that such action was not a breach of their fiduciary responsibilities. However, because each trust contained a discretionary termination clause in the event of the beneficiary's noneligibility for public assistance (e.g., SSI), the trusts created a contingent interest in third parties. Because neither trusts would be for the sole benefit of the beneficiary during his lifetime, the statutory trust exceptions discussed at POMS SI 00120.203B.1.d. would not apply and the trusts would be resources for SSI purposes (*also see* SI 01120.201F.2. for a discussion of sole lifetime beneficiary). **G. PS 06-091 Opinion Request Transfer; Treatment of Trust for SSI Resource Purposes (Ryan A. S~)-Reply Your Reference: S2D8B51:RLM Our Reference: 06-0012**

SUMMARY – MN. This opinion evaluates whether a father's use of a minor's UTMA account to establish a trust satisfies the requirements to meet the Medicaid Trust Exception found in Section 1917(d)(4)(A) of the Act. The trust states that the minor beneficiary established the trust with his own funds. However, since the funds originated from an UTMA account to which the minor had ownership, but not legal access, his father is determined to have established the trust for the beneficiary's benefit in his capacity as UTMA custodian. Since an UTMA custodian is analogous to a guardian acting in a financial capacity, there is no requirement to establish a "seed" trust when the beneficiary of the UTMA has no legal right to access the funds. Moreover, the trust meets all other requirements for exclusion under the Medicaid trust exception. As such, the trust is an excluded resource for SSI purposes. **D. PS 07-125 SSI-Minnesota-Review of 3 versions of the David L. H~ Special Needs Trust SSN: ~ -REPLY Your Reference: S2D5G6, SI-2-1-3 MN (H~) Our Reference: 07-0117-NC**

SUMMARY - CA. The issue is whether a retroactive transfer of real property to two minor children to one custodian is a valid transfer of real property and sufficient to create custodial property pursuant to the Uniform Transfers to Minors Act (UTMA) under any state law. The transfer in this case is not a valid UTMA transfer of real property because it did not comply with the legal requirements to establish a custodianship of the property. A valid custodianship must invoke the law of a particular state. The transfer documents did not invoke any particular state laws. Real property can only be transferred to one child under UTMA. The transfer of real property in this case was to two children which violated the UTMA. An additional document deficiency was the attempt to show the transfer occurred retroactively using the term "nunc pro tunc" which has no legal effect under California state law absent an order by a court of competent jurisdiction. No such court order was presented to SSA. The transfer of property demonstrated by this case is invalid because it did not follow the requirements of the UTMA and applicable California state laws. **A. PS 04-321 Attempt to Transfer Property Pursuant to the Uniform Transfers to Minors Act ("UTMA") for Violeta and Salvador M~, Respectively ~/~**

1.3 Transfer of Non-Home Real Property

SUMMARY - IN. In this case, an SSI recipient had ownership interest in two homes for the period January 2002 through June 2002. Home A was excluded from resources as her principal place of residence, but when she obtained ownership interest in Home B in January 2002, it was countable as a resource which made her ineligible for SSI. In June 2003, she quitclaimed Home A to her mother for $1 and moved to Home B in July 2002. It was determined that quitclaiming Home A was a transfer of a resource for less than fair market value, and that she is subject to the 36-month period of ineligibility for SSI because the transfer did not meet any of the exceptions to the transfer penalty provided in the law. **A. PS 03-170 SSI-Indiana Review of Transfer of Resources by Sharon K~ Refer to: S2D5G6; Our Reference: 03PO59**

SUMMARY - IN. Does a valid deed exist even though it has not been recorded? In general, deeds must be recorded in order to provide notice to the public and to potential purchasers of the ownership of land. However, when a deed is executed and delivered, but not recorded, it may still be effective as against the grantor. Indiana law provides that an unrecorded deed is effectual against the grantor and persons having notice of the transfer. Therefore, in this case, the transfer of the property from the SSI recipient to his grandchildren was a valid transfer even though the deed was never recorded. **B. PS 00-498 Non-Home Real Property Transfer for David M~**

SUMMARY – MI. This opinion analyzes a probate court order that provided non-home real property to an SSI beneficiary, and the beneficiary's subsequent transfer of the property. In June, 2000 a probate court order was executed resulting in an SSI beneficiary receiving sole ownership of one piece of non-home real property (Property A) and a one-third interest in another (Property B). The beneficiary entered into a land contract agreement with a third party for property A in October, 2001 and property B was sold on the open market in July, 2004. In January, 2004 the beneficiary established a living trust with the intention of placing property A in the trust for the benefit of two of the beneficiary's relatives. Property A is determined to be the beneficiary's resource until the land contract was issued. At that time, the land contract becomes a resource to the beneficiary in the amount of the balance due. The beneficiary's one-third interest in property B is also determined to be a resource. The transfer of property A into the trust is determined to be a transfer for less than fair market value since no compensation was received. Additionally, the beneficiary did not receive one-third of the proceeds from the sale of property B, resulting in another transfer for less than fair market value. **A. PS 06-122 SSI-Michigan-Review of Property of John E~, ~ REPLY Your Reference: S2D5G6, SI 2-1-6 MI (E~) Our Reference: 05-0134**

SUMMARY – PR. This opinion examines whether real property that no longer serves as the recipient's principal place of residence can be excluded from countable resources. The recipient owns a house in Puerto Rico that she no longer uses as her principal place of residence, and she alleges her daughter has an equitable ownership interest in the real property. The recipient's real property could be excluded from countable resources if the obtained case evidence proves the following: (1) the real property is the recipient's home (regardless of what is the intent to return); (2) the daughter is a co-owner of the house; and (3) the sale of the house would cause undue hardship, due to loss of housing, for the daughter. **PS 12-078 Aracelis' Eligibility for SSI Benefits**

1.4 Support Trusts

SUMMARY – MI. This 1999 opinion concerns a Michigan trust and concludes that the trust is a countable resource for SSI purposes because it is a support trust. In general, a support trust imposes on the trustee the obligation to provide funds for the support of the beneficiary. In this case, the trust imposes such an obligation which gives the beneficiary a judicially enforceable right to receive support. **J. PS 04-172 SSI-Michigan-Review of a Trust for Michael Z~, ~-ACTION**

1.5 Burial and Funeral Trusts

SUMMARY – WI. In this opinion, the individual entered into an irrevocable contract for $5,116.18 for funeral and burial services which was subsequently placed in an irrevocable trust by the funeral director. This trust is considered to be established with the assets of the funeral director. Under Wisconsin law burial agreement funds must be held in trust but the trust can be made irrevocable only up to $2,500. Therefore, SI 01130.420C.5.b. was followed to determine that, after applying all appropriate exclusions, the resource value of this burial arrangement is $1,000. **T. PS 03-081 SSI - Wisconsin - Review of Burial Trust for Mary M. G~, ~ Your Reference No.: SI-2-1-3 Our Reference No.: 03P006**

SUMMARY – WI. This opinion concerns 2 grantor trusts established in Wisconsin and funded by life insurance policies. Both were established prior to 1/1/2000. The trusts are not countable as resources for SSI purposes because the beneficiary does not have the legal authority to revoke the trusts or

direct the use of the trusts' assets for her own support. Because of a change in the Social Security Act, this precedent is only applicable to a trust established before 1/1/2000. **AA. PS 02-067 Jean M. B~ Trust, Wisconsin SSN ~**

SUMMARY – WI. This opinion concerns an assignment form submitted by the Pekin Life Insurance Company applicable to life insurance funded burial contracts in Wisconsin. The company asked SSA to evaluate whether a transaction using this form would be countable as a resource for SSI purposes. Under this assignment form, the policyholder irrevocably assigns the policy to the funeral director who then must re-assign the policy to a trust. In this case the life insurance funded funeral arrangement would be a resource for SSI purposes for the first thirty days. This is because under Wisconsin law, the policy holder has the right to return a policy used to fund a funeral arrangement within thirty days of receiving it. After thirty days, the policy would no longer be a resource for SSI purposes because it is then irrevocable. **BB. PS 01-190 SSI - Wisconsin - Review of Pekin Life Insurance Assignment To Funeral Home, Prepared by Pekin Life Insurance Co.**

SUMMARY – WI. In this opinion an insurance funded burial contract is excluded from counting as a resource for SSI purposes. The individual irrevocably assigned ownership and proceeds of a life insurance policy to her sister on the condition that the policy's proceeds may only be used to pay for funeral expenses. The sister signed an agreement with a funeral home for a funeral but did not assign the ownership of the insurance to the funeral home. However the sister, acting with power of attorney, signed a "public assistance" caveat that the individual was irrevocably renouncing the power to control the policy and irrevocably waived all rights to surrender the policy for cash, and irrevocably assigned the policy for payment of funeral expenses. Based on these facts the individual does not appear to have the right to surrender her policy for its cash value. In addition, the individual's assignment of the proceeds to her sister is akin to a trust agreement since she assigned her legal ownership to the sister and retained a beneficial right which can only be used for funeral expenses. This assignment agreement was established prior to 1/1/2000 and meets the pre-1/1/2000 requirements for a trust to be excluded from resource counting. **U. PS 03-072 SSI - Wisconsin - Review of the Wisconsin Life Insurance Funded Burial Contract for Kathleen F. S~, ~ Your Reference No.: S2DG6, SI-2-1-8 Our Reference No.: 02 P098**

SUMMARY – WI. In this Wisconsin opinion, ownership of a life insurance policy was irrevocably assigned to a life insurance trust whose proceeds are to be used for the funeral expenses of insured individual. This trust is a resource for SSI purposes because it was created on or after January 1, 2000 with the individual's own assets and there are circumstances under which payment from the trust could be made for the benefit of the individual, i.e., it will pay the individual's funeral expenses. This trust also would be a resource because it is revocable under Wisconsin law. It is revocable because the SSI applicant is both the grantor and the sole beneficiary of the trust. **V. PS 03-061 SSI - Wisconsin - Review of the Life Insurance Funded Burial Trust for Jennifer P~ - REPLY Your Ref: S2D5G6, SI 2-1-3 WI Our Ref: 03P002**

SUMMARY – WI. This opinion clarifies State law regarding prepaid burial agreements in Wisconsin. The beneficiary possesses a burial trust, a casket trust and a life insurance policy. The burial trust is not a resource to the beneficiary because it is irrevocable. The initial deposit to fund the trust was $1,500 when the trust was established in 1986. At that time, State law permitted the irrevocable treatment of the first $1,500 of a burial agreement funded by a trust. NOTE**:** The current amount allowed per Wisconsin law is $2,500; effective 07/01/03, the allowable amount will increase to $3,000. *See* Wis. Stat. Ann. §445.125(a)(2)-(3). The beneficiary's assignment of her life insurance policy to a funeral home also met the statutory requirements for burial agreements funded by life insurance

policies and could be excluded. Finally, however, the casket trust could not be excluded because it was deemed revocable. Although the trust was termed "irrevocable," the statutory limit for irrevocable burial agreements in effect when the casket trust was established would have been exceeded since we already recognized, as irrevocable, the $1,500 burial trust. OGC opined that it was doubtful a State court would recognize a second irrevocable trust under the statute. **Y. PS 03-023 SSI-Wisconsin--Review of the Life Insurance Policy and Funeral Trusts of Marion P~, ~**

SUMMARY – WI. In this case, the ownership of a Forethought Life Insurance policy was irrevocably assigned to a funeral director. The funeral director subsequently assigned the ownership of the policy to a Forethought Trust which will pay for the funeral services. This opinion finds that the irrevocable assignment of the life insurance policy to the funeral director substantially complies with the Wisconsin law that governs prepaid burial contracts and this individual can be considered to have an irrevocable prepaid burial contract under Wisconsin law. Therefore, this burial contract/trust arrangement meets the POMS requirements in SI 01120.210H.1. i.e., this transaction constitutes a purchase of goods and services by the individual and trust is considered purchased with the funeral director's funds, not the individual's. Therefore, the life insurance policy and the trust are not resources for SSI purposes. **X. PS 03-057 SSI - Wisconsin - Review of Life Insurance Funded Burial Trust of Bernice M. E~, ~ Our Reference No.: 02PO57**

SUMMARY – WI. This opinion concerns a life insurance-funded burial contract in Wisconsin. In this case the life insurance policy has been assigned to the funeral home. However, a life insurance-funded burial contract must be assigned to a person or entity other than the funeral home to be considered valid under Wisconsin law. Therefore this policy is not valid and the ownership has not been irrevocably assigned. Therefore, the purchaser is still considered the owner of the policy for SSI purposes. **FF. PS 00-318 Forethought Life Insurance Funded Burial Contract in Wisconsin Viola L. K~, ~ (Your November 18, 1994 Request) (Your ref: S2D5B51, SI 2-1-8)**

SUMMARY – WI. In this Wisconsin opinion, ownership of a life insurance policy was irrevocably assigned to a life insurance trust which is to be used for the funeral expenses of the insured person. This trust is a resource because it was created on or after January 1, 2000 with the individual's own assets and there are circumstances under which payment from the trust could be made for the benefit of the individual, i.e., it will pay the individual's funeral expenses. This trust also would be a resource because it is revocable under Wisconsin law because the SSI applicant is both the grantor and the sole beneficiary of the trust. The trust document has a space for naming a residual beneficiary but none was named. **W. PS 03-058 SSI - Wisconsin - Review of the Life Insurance Funded Burial Trust for Tab H~, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 WI Our Ref: 03P003**

SUMMARY – WI. In this opinion, OGC found that an insurance policy assigned to a trust was a resource for SSI purposes because the owner retained the power to revoke the agreement and could convert the policy to cash which she could use for her support and maintenance. While the trust established by the funeral provider was irrevocable, the assignment of the insurance proceeds to fund the trust was revocable. Therefore, OGC concluded that the beneficiary rather than the funeral provider established the trust. Finally, OGC opined that the undue hardship provision explained at SI 01120.203E. should be considered in this case because the trust would be viewed by a Georgia court as irrevocable. This is an interesting case because it serves as a reminder to field offices that State law from more than one jurisdiction may have to be considered when rendering a determination. In the instant case, Wisconsin law applies to the transactions at hand, but Georgia law determines whether the trust is irrevocable for purposes of applying the undue hardship provision for trusts. **S. PS 03-102 SSI - Wisconsin - Review of Life Insurance Funded Burial Trust for Barbara K~, ~**

SUMMARY – WI. This 1997 opinion concludes that a life insurance-funded burial trust arrangement is not a countable resource for SSI purposes. Under this pre 1/1/2000 arrangement, the eligible individual irrevocably transferred ownership of a life insurance policy to the Forethought Trust. By doing this, she gave all rights to this policy and it is not a resource. The opinion further concludes that the Forethought Trust meets the requirements to be considered valid under Wisconsin State law which requires that ownership of the policy must be assigned to a person or entity other than a funeral home. **P. PS 04-140 Wisconsin Forethought Life Insurance Funded Burial Trust for Marcella L. P~ SSN ~**

SUMMARY – WI. This opinion examines whether or not a life insurance funded burial trust is a resource for SSI purposes. A burial trust is not considered to be a countable resource if an individual irrevocably contracts with a provider of funeral services, funds the contract by prepaying for the goods and services, and the funeral provider places the funds in trust. The claimant in this case purchased a life insurance policy which she irrevocably assigned to a trust presumably as part of a pre-planned funeral agreement. However, the claimant never executed a pre-planned funeral agreement with the funeral home and thus does not have a valid life insurance funded burial contract under Wisconsin law. Because the claimant did not enter into a valid burial agreement, the life insurance policy is a resource for SSI purposes. **M. PS 05-172 SSI - Wisconsin- Review of the Life Insurance Funded Burial Trust of Barbara Y~, REPLY; SSN: ~-Action; Your Reference: SI 2-1-4 WI (Y~); Our Ref.: 05-003**

SUMMARY – WI. This opinion concerns a funeral trust in the State of Wisconsin. The individual deposited a total of $4,800 into the trust. Consistent with Wisconsin State law, $2,000 is designated by the trust as irrevocable. Under the trust, the individual retains the authority to revoke or liquidate the remaining $2,800. Therefore, $2,000 in the trust is not countable as a resource. But, $2,800 is countable as a resource for SSI purposes. CAUTION**:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **II. PS 00-270 State of Wisconsin - Irrevocable Funeral Trust Agreement for Walter E. J~**

SUMMARY – WI. In Wisconsin, irrevocable assignment of a life insurance policy funding a funeral contract to the Forethought Trust is valid under State law. The policy is not a resource to the individual. Because of a change in the Social Security Act, this opinion may only be valid to trusts established by an individual prior to 01/01/00. **JJ. PS 00-265 Wisconsin Forethought Life Insurance Funded Burial Contract for Phillip H~, SSN ~**

SUMMARY – WI. This opinion is in reference to an irrevocable prepaid burial agreement that is supported by a life insurance policy and held in a trust by the Great Western Trust Insurance Company and whether or not the trust is a resource to the beneficiary. Great Western Trust Insurance Company is based in Utah. Utah law states that if the grantor and the sole beneficiary are the same individual, the trust is revocable. However, if the trust has more than one beneficiary, the trust is not revocable. In this case, there are two beneficiaries (SSI beneficiary and the funeral home) to the trust. An irrevocable prepaid burial agreement that is supported by life insurance policy and is held in a trust by the Great Western Trust Insurance Company is not a resource after the mandatory 30 day right of return period if the beneficiary has (A) irrevocably contracted with a provider of funeral services and (B) pre-paid and (C) established an irrevocable trust naming the funeral home as a beneficiary. **N. PS 05-029 SSI-Wisconsin- Review of Life Insurance Funded Burial Trust for Linda M. E~ Your Ref: SI-2-1-4 WI (E~) Our ref: 04 P 022 REPLY**

SUMMARY – MN. Under Minnesota law, an individual can assign a life insurance policy to fund a prearrangement funeral trust, which may also be called a prearranged funeral or burial contract. Such a trust can be made irrevocable up to an amount equivalent to the current allowable SSI resource limit used for determining SSI eligibility (currently $2,000 for an individual and $3,000 for a couple) plus interest. These amounts are excluded from resources for SSI purposes. The assignment of any trust assets above this amount would be revocable and, therefore, a countable resource (unless otherwise excludable). **S. PS 00-278 Midland Life Insurance Funded Burial Contract (LIFBC); Your Reference No. SI-2-1-4**

SUMMARY – MN. In this Minnesota opinion, ownership of a life insurance policy was irrevocably assigned to a funeral home. The life insurance policy was not a resource to the individual because ownership of the policy, including the right to obtain the cash surrender value, was irrevocably assigned to a person or entity other than a trust or trustee. In Minnesota, an irrevocably assigned life insurance policy is not a resource for SSI purposes if: (1) the individual did not previously name an irrevocable beneficiary of the policy; (2) the individual did not previously irrevocably assign the policy; (3) the policy permits the assignment; and (4) the individual names a particular funeral home or funeral provider in the assignment, even though he or she retains the right to change the funeral home or funeral provider. NOTE**:** Minnesota law addresses revocability and sets monetary limits relative to trust-funded preneed arrangements. However, the statute [Minn. Stat. § 149A.97] did not apply in this case because the preneed arrangement was funded by a life insurance policy. **L. PS 03-056 SSI - Minnesota - Review of the Life Insurance Funded Burial Contract for Marville E. P~, ~**

SUMMARY – MN. On March 27, 2004 an annuity policy was purchased by an SSI beneficiary from the Funeral Directors Life Insurance Company. The annuity was purchased with a single premium of $7000, and provided that the proceeds of the policy could be assigned. An irrevocable assignment of ownership was made to N~-D~ funeral home effective March 27, 2004 (the "Assignment"). The Assignment was made as consideration for performing the terms of the Funeral Pre-Arrangement Agreement (the "Agreement"), but could be cancelled without penalty within three days of that date. The Agreement authorized N~-D~ to transfer ownership of the Annuity to a trustee and to apply the proceeds in accordance with the Pre-Arrangement Agreement. The assignment of the annuity and the terms of the Agreement established an annuity funded burial trust. Standard post-January 1, 2000 trust rules do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral goods/services; the individual pre-pays for the goods and services; and the funeral provider places the funds in a trust. When these conditions are met it is determined that that funeral home has "established" the trust. Since the Assignment and Agreement establish that the conditions are met, the annuity funded burial trust is determined to be an excludable resource after the initial 3 day cancellation period. Additionally, the SSI beneficiary's equitable interest in the resulting trust is determined to have no discernable market value. **H. PS 05-121 SSI-Minnesota-Review of the Annuity Funded Burial Trust of Dorothy S~, REPLY Your Ref: S2D5G6, SI 2-1-4 MN (S~)Our Ref: 04P103**

SUMMARY – MI. In this opinion, OGC found that an insurance policy assigned to a trust was a resource for SSI purposes because the owner retained the power to revoke the agreement and could convert the policy to cash which she could use for her support and maintenance. While the trust established by the funeral provider was irrevocable, the assignment of the insurance proceeds was revocable. Once the 10-day cancellation period under the policy lapsed, the cash surrender value of the insurance policy, i.e., the value of the trust, became a countable resource to the owner. Further, OGC concluded that the undue hardship provision explained at SI 01120.203E. need not be

considered in this case because the trust was revocable. **K. PS 03-103 SSI-Michigan-Review of the Transfer of Life Insurance Proceeds to the Pre-Thana Trust for Previsteria S. G~**

SUMMARY – MI. The opinion in this case addresses two issues: 1) Is the SSI recipient's life insurance funded burial trust agreement valid under Michigan law? 2) Is the cash surrender value of the life insurance policy a countable resource? Under Michigan law, a person entering into an irrevocable prearranged funeral contract reserves the right to change funeral providers, although not the right to terminate the underlying services to be rendered. In this case, the trust agreement makes clear that the trust is irrevocable and that the SSI recipient retains the right to change funeral providers but cannot surrender the policy for cash or obtain a loan against it. Consequently, under Michigan law, the life insurance funded burial trust is valid. With regard to whether or not the cash surrender value of the life insurance policy is a countable resource, the SSI recipient no longer owns the policy or has the ability to use it for support and maintenance thus it is not a countable resource for SSI purposes. **I. PS 04-186 Michigan Life Insurance Funded Burial Trust for Patricia J. W~, ~; your Ref. No. S2D5B51, SI-2-1-4**

SUMMARY – MI. This opinion evaluates whether a life insurance funded burial trust is a countable resource to an SSI beneficiary. In January, 2005 the beneficiary purchased a single premium life insurance policy that was subsequently assigned to a funeral home and transferred to a burial trust by the funeral home. A burial trust is not considered to be a countable resource if an individual irrevocably contracts with a provider of funeral services, funds the contract by prepaying for the goods and services, and the funeral provider places the funds in trust. The transaction ultimately resulting in formation of the trust is deemed to be a purchase of goods and services in those instances. In the case evaluated in this opinion the contract between the beneficiary and the funeral home fails to satisfy three of the Michigan state statutory requirements. As such, a Michigan court would likely find the assignment of proceeds is void. In the absence of a valid contract between the beneficiary and the funeral home, none of the burial trust exceptions can apply and the trust is determined to be a countable resource. **G. PS 06-142 SSI - Michigan - Review of the Life Insurance Funded Burial Trust for Barbara V~ D~ - REPLY Our Ref: 05-0199 Your Ref: S2D5G6, SI 2-1-4 MI (V~ D~)**

SUMMARY – IN. The issue in this case concerns whether or not an Irrevocable Funeral Trust Agreement (IFT Agreement) is valid under Indiana law and constitutes a countable resource for SSI purposes. This IFT Agreement provided that it is irrevocable after the first 30 days, that the deposit to the trust of the life insurance policy is irrevocable, and that the assignment of the policy proceeds to the funeral home and of ownership to the Trustee is irrevocable. While the IFT Agreement meets the requirements to be valid under Indiana law, the cash surrender value is considered a resource for SSI purposes during the first 30 days because it could be revoked by the recipient. After 30 days, the policy would not be a countable resource because the policy was irrevocably assigned to the trust. **I. PS 02-039 Indiana Irrevocable Funeral Trust Agreement for Franklin T. T~, ~; Your Reference: S2D5G3**

SUMMARY – IL. In this case the assignment of a life insurance policy as collateral to a funeral home does not meet the requirement to be non-countable because there is no written contract. A written contract is a required element of a pre-need funeral arrangement under the Illinois Funeral or Burial Funds Act. In fact, the absence of a written contract in this situation is unlawful under Illinois law. Being unlawful at the outset the owner of the policy has a right to request that the funeral home surrender the life insurance policy to her and therefore, the policy is considered a countable resource.

E. PS 08-017 SSI- Illinois-Review of the Life Insurance Funded Burial Contract of Connie T~, ~- REPLY Your Ref: S2D5G6, SI 2-1-4 IL Our Ref: 07-0329-NC

SUMMARY – IL. This opinion evaluates a life insurance funded burial contract to determine if it is a countable resource for SSI purposes. The contract was signed in January, 2008 and the SSI beneficiary attempted to irrevocably assign the life insurance policy to fund the contract. Irrevocable assignment of a life insurance policy to fund a burial contract is permissible under Illinois state law, however, certain conditions must be met. One such condition is that the burial contract must specify whether the price of merchandise and services is guaranteed. In this case, the contract itself fails to meet that criteria and several others dictated by Illinois law. Failure to meet the required criteria means that the burial contract in this case may be void and unenforceable and, in any case, the life insurance policy has not been irrevocably assigned. Since the beneficiary can revoke the assignment and access the cash surrender value of the life insurance policy it is considered a resource for SSI purposes. **B. PS 08-080 SSI - Illinois: Review of the Life Insurance-Funded Burial Contract of Marilyn M~, ~ - Reply Your Reference: S2D5G6 (M~, Marilyn) Our Reference: 08-082-NC**

SUMMARY – IL. Funding a pre-paid funeral contract by irrevocably transferring ownership of a life insurance policy to an irrevocable trust that is not the funeral provider or the seller is valid under Illinois law. **B. PS 00-327 Illinois—Forethought Prepaid Burial Agreement for Edward M~, ~; Your Ref. S2D5G3**

SUMMARY – MI. This opinion addresses whether or not a life insurance funded burial contract is a resource for SSI purposes. As SI 01130.420(B) explains, a burial contract is not a resource if it cannot be revoked or sold without significant hardship. In this situation, the SSI claimant purchased a prepaid funeral agreement by irrevocably assigning ownership of her life insurance policies. This agreement was approved by the State of Michigan and is irrevocable. Because the funeral agreement is irrevocable and cannot be sold without significant hardship, it is not a resource for SSI purposes. **A. PS 06-093 SSI-Michigan-Review of the Life Insurance Funded Burial Trust for Mildred N~ - REPLY Our Ref: 06-0007 Your Ref: S2D5G6, SI 2-1-4 MI (N~)**

SUMMARY – MI. The opinion below makes a recommendation that CHI TN 333 and 345 be revised to reflect current law in the state of Michigan regarding the irrevocability of life insurance funded burial contracts. You informed us that you received a fax of an internal Family Independence Agency (FIA) memo dated July 2, 2002, which indicated that the monetary limitation on irrevocable burial contracts had been changed under Michigan law. You also indicated that information in the memo was contrary to the amounts in TN 333. You further noted that some of the information discussed in the FIA memorandum seemed inconsistent with TN 345. You expressed concern about these discrepancies and your ability to properly assess future life insurance funded burial contract issues arising out of Michigan. **. PS 04-019 SSI-Michigan-Review of Michigan Life Insurance Funded Burial Contracts, OGC control number 03P054**

SUMMARY – MI. Life insurance funded burial contracts are valid in Michigan. The only dollar limits placed on assignment of ownership of life insurance funded burial contracts occur when dealing with minors, legally incapacitated persons or recipients of public aid. There is no prohibition on placing revocably assigned life insurance policies to fund burial contracts irrevocably in trust. **F. PS 00-304 SSI Regional Transmittal Concerning Michigan Life Insurance Funded Burial Contracts**

SUMMARY – MI. This opinion examines regional transmittal SI R01130.420 (MI), which addresses prepaid burial contracts in the state of Michigan. The opinion states that all of the information

contained in the regional transmittal regarding Michigan State law is accurate. However, a recommendation is made to amend paragraph A to reflect the fact that the Department of Mental Health also approves prepaid burial agreements if the agreement is made when the individual is a patient in a mental health facility. **D. PS 02-121 SSI Regional Supplement on Prepaid Burial Contracts Under Michigan Law Your Reference: S2D5G6**

SUMMARY – MN. The owner of the life insurance policy is a parent deemor who permanently and irrevocably assigned the ownership of the policy to a funeral home which subsequently transferred the policy to the Forethought Trust. Per POMS SI 01120.201(H)(1), the trust is not subject to the statutory trust provisions. Under regular resources rules, neither the claimant nor the deemor has the legal authority to revoke the trust and use the funds for claimant's support and maintenance since the funeral provider is also a beneficiary of the trust. Since the sole purpose of the trust is to fund beneficiary's funeral, and the deemor has no beneficial interest in the trust, the trust has no discernable market value. Hence, if a life insurance funded burial arrangement is considered to be an irrevocable trust with no discernable market value, then the trust is not considered as a resource to the deemor and is not a resource to the claimant. **PS 03-173 SSI-Minnesota-Review of the Life Insurance Funded Burial Trust for Kevin J~**

SUMMARY – WI. The opinion in this case concerns whether or not a burial contract or the life insurance policy used to fund the burial contract are considered resources for purposes of SSI eligibility. For SSI purposes, assets are considered a resource if an individual owns them and can convert them to cash to be used his/her support and maintenance. In this case, the life insurance policy is not a resource because the beneficiary never owned the policy nor did he have the power to surrender the policy for cash. This opinion also addresses the issue of whether or not the burial trust that was funded with the life insurance policy is considered a resource. The trust is not considered a resource because the beneficiary could not revoke the trust and use the funds for his support and maintenance. **PS 03-039 SSI-Wisconsin-Review of the Life Insurance Funded Burial Contract of William E~, ~--REPLY Your Reference: S2D5G6 Our Reference: 02P069**

SUMMARY – WI. The issue discussed here is whether or not a life insurance policy that is assigned to fund a burial agreement is considered a resource for SSI purposes. A life insurance policy can be considered a resource if an individual can surrender it for cash or recover the premiums paid. Under Wisconsin law, a life insurance policy issued for a burial agreement is revocable for the first 30 days after issuance. Recognizing this, for SSI purposes the policy would considered a resource for the first 30 days, but not thereafter. **PS 02-062 Pre-review of Irrevocable Assignment of Death Benefit Proceeds and Transfer of Ownership Document for Advance Planning, Inc. a Private Wisconsin Corporation**

SUMMARY – WI. This opinion provides criteria for evaluating life insurance funded burial arrangements in the State of Wisconsin. It supersedes prior opinions. **PS 00-319 Wisconsin Life-Insurance-Funded Burial Agreements: Betty U~, ~ - Wisconsin Funeral Assurance Plan (Your July 17, 1991 Request) (Your ref: S2D5B2, SI 2-1-4); Rose A. S~, ~ - Gold Key Life Insurance (Your August 28, 1991 Request) (Your ref: S2D5B2, SI 2-1-4); Lorena M~, ~ - Gold Key Life Insurance (Your October 30, 1991 Request) (Your ref: S2D5B2, SI 2-1-4); National Security Memorial Plan - Monumental Life Insurance**

SUMMARY – WI. This opinion concerns whether some or all of the funds in an irrevocable funeral trust agreement are excludable or countable resources. The grantor deposited $4,245 in a funeral trust agreement for future payment of the cost of her own funeral services. The agreement designates

as irrevocable the first $2,000 of the trust principle and provides that the nature and type of funeral services shall be agreed upon and the cost of services and merchandise determined at the date of her death. The agreement does not provide for, or otherwise represent, the purchase of a particular burial space, container, or casket. The trust at issue is partially revocable and partially irrevocable. Consistent with Wisconsin law, the agreement designated the first $2,000 of trust funds as irrevocable. Thus, it is unavailable for the individual's support and maintenance and is not a countable resource for SSI purposes. However, the rest of the trust is revocable and the individual has the legal authority to liquidate it. Thus, the remaining $2,245, together with interest or dividends, constitutes a resource for SSI purposes. In addition, the $2,000 in irrevocable trust funds uses up the burial fund exclusion and does not allow any of the remaining funds to be excluded under that exception. Since the funeral trust agreement is neither a contract for a specific burial space, nor does it represent the individual's ownership or possession of a burial space, the funds do not qualify for the burial space exclusion under regulations section 416.1231(a). Thus, the first $2,000 in trust funds is excluded from resources and the remaining $2,245 in funds is a resource for SSI purposes. **PS 00-206 SSI - Wisconsin - Review of Irrevocable Funeral Trust Agreement for Elizabeth D~**

SUMMARY – MI. This 1992 opinion explains why the cash surrender value of the Forethought life insurance-funded burial agreement was not a resource at that time. **AA. PS 00-233 Michigan Forethought Life Insurance-Funded Burial Agreements: Ora N~, ~ (Your December 4, 1991 Request), and Minnie M~, ~ (Your December 10, 1991 Request), (Your ref: S2D5B51, SI 2-1-4)**

1.6 Tuition Contracts or Trusts

SUMMARY – OH. A contract made with the Ohio Tuition Trust Authority (OTTA) to purchase tuition credits creates a tuition trust. Ohio law provides that tuition credits already purchased with OTTA can be refunded and the contract terminated in limited circumstances. For example, if the OTTA determines the beneficiary of a trust becomes disabled and incapable of participating in higher education, the contract may be terminated and the credits refunded. A physician's statement that the beneficiary of the trust is disabled is generally sufficient to establish the disability. Also, Ohio law imposes no restrictions on the use of the money once it's refunded. Therefore, in those limited circumstances where a contract can be terminated, the trust can be considered revocable. However, if the OTTA does not permit termination of the contract, the trust would be considered irrevocable. **II. PS 00-195 Ohio Tuition Trust for Robert D. D~**

1.7 Resource Needed for Claimant's Personal Condition

SUMMARY – MN, OH AND OTHERS IN CHICAGO REGION. [DJL Note: This case was decided before the new national POMS on personal property that removed the $2,000 cap on personal property as long as it is for personal use]. This opinion addresses whether a personal effect (in this case, a piano) owned by an SSI recipient, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required by her physical condition under the household goods and personal effects exclusion. This is essentially an evidentiary issue; i.e., the key is whether the fact finder in the FO has sufficient evidence to determine that the piano is required by the individual's physical condition. Under 20 CFR 416.1216(c), certain household goods and personal effects are excluded from SSI resource counting if they are "required because of a person's physical condition. "As long as there is sufficient evidence for the fact finder to determine that the piano (or similar item) is required as treatment or therapy for the individual's physical condition, then the item

could be excluded as a resource. If the fact finder cannot determine that the piano (or similar item) is required, then the current market value of the piano (or similar item) is subject to the $2,000 maximum exclusion for household goods and personal effects [20 CFR 416.1216(a)-(b)]. It should be noted that the exclusions discussed above do not appear in the Social Security Act. **B. PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~; OHIO PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~**

1.8 Life Estate Interests

SUMMARY – KY. This opinion clarifies that under Kentucky law a will established a life estate interest in a piece of property but restricted its sale during the life time of the heirs. Only on the death of the last original heir can the property be sold. The Regional Chief Counsel finds that this property is not countable as a resource for SSI because of these restrictions. You asked whether a life estate interest, which the SSI recipient's mother devised to him and his three siblings through her last will and testament, would constitute a countable resource for SSI purposes. We believe the SSI recipient's life estate interest should not be considered a countable resource for SSI purposes because the will lawfully prohibited the SSI recipient from selling his life estate interest while he and his siblings are alive. **A. PS 10-57 Life Estate Interest Granted Under a Will as a Countable Resource for Supplemental Security Income (SSI) Eligibility Purposes – Kentucky SSI Recipient – Michael E. ~**

SUMMARY – MO. This opinion answers the question whether an individual can legally quit claim a life estate interest in a tract of land. The opinion states that Missouri law permits an individual to lease, mortgage, or sell his or her life estate interest to a third party. The opinion further states that, under Missouri law, a quit claim deed is an appropriate vehicle for transferring a life estate. Thus, if the individual quit claims a life estate to a third party, it would not be a resource for SSI purposes. **PS 00-461 Eula K~ Warranty Deed; Quitclaim of a Life Estate in Missouri**

SUMMARY – MO. This opinion discusses whether conveyance of a tract of land in Missouri created a life estate interest or a remainder interest for the individual who conveyed the land and whether his interest is a resource for SSI purposes. The individual conveyed land to 3 persons as joint tenants in fee simple, and retained a life estate interest for himself. The individual who conveyed the land is not a joint tenant with the other persons. He has a life estate interest only, and does not have a remainder interest. He has a right to use the property and convey his life estate interest to a third party, but he does not have the right to dispose of the property itself. If he uses this property as his home, his life estate interest would not be counted as a resource because the individual's home is excludable. If he does not use this property as his home, the life estate can be considered a resource. **PS 00-460 J.P. J~ Warranty Deed; Missouri Life Estate as a Resource for SSI Purposes**

SUMMARY – NC. This opinion examines whether a life estate interest constitutes an "ownership interest" for determining whether the property meets our definition of a "home." The opinion states that the recipient and her husband's life estate interest in the property appears legally sufficient under North Carolina law and therefore qualifies as an "ownership interest." Since the property in question meets our definition of a home, we may apply one of the intent to return exceptions in SI 01130.1005.B, and continue to exclude the property while the recipient lives in an institution, and her husband lives on the property. **PS 13-035 Whether a Life Estate Constitutes an Ownership Interest – North Carolina**

1.9 Home Ownership

SUMMARY – IN. The issue is whether a parent's inheritance in an estate should be treated as a resource or income for the purpose of determining a child's SSI eligibility in the state of Indiana. All states in Region V consider an inheritance as income as of the date of death and a resource in subsequent months. The mother of an SSI child was one of the heirs to the Decedent's estate, and had an inheritance interest in the property (condo) of the estate and title in Decedent's property. The mother's share of the interest in the condo is income up to the presumed maximum value in the month of Decedent's death, and an excludable resource in the following months, since it served as the principal residence for herself and SSI child prior to the decedent's death. **A. PS 07-119 SSI - Indiana - Review of the Inheritance of Gail J~, Parent Deemor for Jacque J~, ~ Your Reference: S2D5G6 SI-2-1-IN (J~)**

SUMMARY – OH. This opinion addresses whether a quit claim deed must be signed for ownership interest to end on real property when a divorce decree has already ordered said property ownership be terminated. In this case, the claimant married in 1995 and co-owned a house with her spouse. The claimant separated from her spouse and applied for SSI in November 2007. In May 2008, a divorce decree was issued stating that her spouse owned the house free and clear of any claim from the claimant and stipulated that she must sign a quit claim deed to the real property. Although the claimant did not sign a quit claim deed, the opinion finds that the real property is not a resource to the claimant because the divorce decree served to terminate her ownership interest. **PS 10-122 SSI-Ohio- Review of Ownership Interest of Traci S~ in a Home in Ohio- REPLY Your Reference: S2D5G6, SI 2-1-5 OH Our Reference: 10-0101**

SUMMARY – WI. Despite quitclaiming his interest in home property to his spouse, under certain circumstances, an individual retains property rights under the Wisconsin homestead statute. The property may not be sold without his consent. **PS 00-330 Wisconsin Real Property Bettie J. M~ (A/N ~)**

SUMMARY – MN. This opinion concerns a trust and the SSI home exclusion. The SSI applicant inherited a one-fourth interest in a farm house with contiguous farmland. The applicant is also a beneficiary of a trust that has farm land as its only asset. The farmland held by the trust is contiguous to the inherited farm house and farmland. This was once all one farm owned by the applicant's parents. The regional attorney determined that the SSI applicant has ownership interest in the inherited farm house and farmland, and that this is not counted as a resource because it is considered an excluded home. The regional attorney also determined that the farmland held in the trust is not a countable resource. This is because the SSI applicant has ownership interest in this land because she is a beneficiary of the trust. And, the farmland held by the trust is covered by the home exclusion because this exclusion includes land that is contiguous to the home in which the recipient lives. **R. PS 00-305 SSI-Minnesota-Review of a Trust for Dana J. K~, SSN: ~**

1.10 Non-Residential Real Property

SUMMARY – OH. This opinion concerns whether or not a non-principal residence is considered an excludable resource for SSI purposes. Generally, property that is not the principal place of residence is not considered an excludable resource. However, if the sale of the property would cause undue hardship due to the loss of housing to a co-owner of the property, an exception would be made and the property would remain an excluded resource. Thus, the residential property is not considered a

resource for SSI purposes. **PS 00-160 Revised Opinion - Non-Home Real Property for Mary A. B~**

SUMMARY – PR. This opinion examines whether real property that no longer serves as the recipient's principal place of residence can be excluded from countable resources. The recipient owns a house in Puerto Rico that she no longer uses as her principal place of residence, and she alleges her daughter has an equitable ownership interest in the real property. The recipient's real property could be excluded from countable resources if the obtained case evidence proves the following: (1) the real property is the recipient's home (regardless of what is the intent to return); (2) the daughter is a co-owner of the house; and (3) the sale of the house would cause undue hardship, due to loss of housing, for the daughter. **PS 12-078 Aracelis' Eligibility for SSI Benefits**

SUMMARY – WI. Despite quitclaiming his interest in home property to his spouse, under certain circumstances, an individual retains property rights under the Wisconsin homestead statute. The property may not be sold without his consent. **PS 00-330 Wisconsin Real Property Bettie J. M~ (A/N ~)**

1.11 Life Insurance Policy

SUMMARY – WI. This decision highlights the fact that a life insurance policy purchased under the auspices of a revocable trust can also be revoked and, therefore is countable. Unlike many life insurance policies which are the basis of burial contract funding, this revocable policy has no connection to any funeral home. **E. PS 08-133 SSI- Wisconsin-Review of the Irrevocable Life Insurance Trust Agreement for Nancy S~, ~ Our Reference: 08-108-NC**

1.12 Annuities – Private

SUMMARY – FL. The beneficiary gave 50,000.00 to a relative. In exchange for the 50,000.00, a private annuity was created between the beneficiary and the relative. The annuity stated that the beneficiary would receive a specified amount of money over a specified period of time. This agreement was irrevocable and the beneficiary did not have the right to sell her interest in the private annuity. Florida law stated that the private annuity established between the beneficiary and her relative was valid under state law. The resource transfer was developed Per SI 01150.003 and SI 01150.005. It was found that the beneficiary did receive the fair market value for the resource transfer. Therefore, a period of ineligibility did not apply and the annuity was a not a countable resource. **. PS 05-078 Request for Legal Opinion Number Holder - Eleanor G~, SSN ~**

1.13 Conservatorship/Guardianship Accounts

SUMMARY – MI. The issue concerns whether funds held by a conservator as fiduciary for a minor SSI beneficiary are countable resources for SSI purposes. Generally, under Michigan law, such funds are presumed to be available for support and maintenance. However, if a court restricts use of the funds to certain medical expenses and precludes use of the funds for everyday support of the child, the funds are not resources of the beneficiary for SSI purposes. **Z. PS 00-239 Conservatorship/Blocked Account for Melanie G~; your reference S2D5B51**

SUMMARY – AZ. This decision clarifies the issue that blocked accounts in Arizona are non-countable for SSI purposes when established by a court. Under Arizona law, funds in a conservatorship account are generally available for the support and maintenance of the protected individual. However, funds in Julia's blocked account are not a countable resource because of the court-ordered restrictions placed on the account. **PS 12-016 Julia Conservatorship Account.**

SUMMARY – IL. This opinion concerns whether funds held in a blocked account for a minor SSI recipient are countable resources. An account is considered "blocked" where a State permits a guardian or payee to access funds held on behalf of another only with the permission of the court. Such funds are generally presumed to be available under Illinois law unless there is a legal restriction on the use of the funds that nullifies the presumption of availability. Not every court order denying a request for expenditures constitutes a legal restriction that nullifies the presumption that the funds are available for the beneficiary's support and maintenance. Under Illinois law, a guardian of a minor's estate is required to expend the minor's funds for his/her support and maintenance. Thus, as long as the funds are available for the minor's support and maintenance, they are considered a resource. **YY. PS 00-180 Blocked Account in Illinois as SSI Resource: Duane P. C~, Jr., ~ (Your Ref: S2D5B2, SI-2-1)**

1.14 Unprobated Estate

SUMMARY – CA. This decision shows that residency in an unprobated house that a recipient is the sole heir to is sufficient to establish the exclusion for home property. The decision also clarifies that the obligation to make mortgage payments is sufficient to prevent in kind support and maintenance (ISM) being charged. You asked whether a house, belonging to the unprobated estate of Tony's sister, and occupied by Tony as his primary residence, is countable to him as a resource for purposes of determining his eligibility for Supplemental Security Income (SSI). You also asked whether Tony received unearned income through in-kind support and maintenance (ISM) because he lives in the house without paying mortgage or rent. The house is not a countable resource to Tony, and his failure to make mortgage payments does not constitute ISM. **PS 12-031 Unprobated California Estate: Tony**

SUMMARY – MO. Inherited property left in trust for an SSI claimant/recipient is not a resource if the claimant/recipient cannot revoke the trust or direct the use of trust assets, even during the period that the decedent's estate has not been closed. **A. PS 00-475 Determination of Ownership of Inherited Real Property When Such Property is Part of an Estate and is to be Held in Trust and the Heir/Beneficiary Seeks SSI Entitlement**

2 Drafting and Execution of Special Needs Trust

2.1 Who is and can be Grantor – Lillesand Introduction

For an individual Special Needs Trust pursuant to 42 U.S. C. 1396p(d)(4)(A) the grantor must be a parent, grandparent, legal guardian or a court. For a pooled trust under (d)(4)(C), in addition to the four, the individual may be the grantor. For a Third Party Trust, anyone can be a grantor.

2.1.1 Failure to Use Parent, Grandparent, Legal Guardian or Court as Grantor

SUMMARY – IN. A discretionary special needs trust was created for a competent, adult SSI beneficiary on July 6, 2002. Although the trust names a third party as the grantor and trustee, it was entirely funded with the SSI beneficiary's own insurance settlement proceeds. The trust is determined irrevocable because it contains a spendthrift clause and establishes residual beneficiaries in the event the SSI beneficiary dies. While Medicaid reimbursement language is included, it is determined that the trust does not meet any of the Medicaid trust exceptions presented in section 1917(d)(4)(A) of the SSACT. The requirement that the trust be established by a parent, grandparent, legal guardian or court is not satisfied in this case since the corpus was comprised entirely of the beneficiary's own funds. The CD renewed on April 4, 2004 is determined to represent the remaining proceeds of the trust and an asset of the trust. Since no exceptions are met, the trust is determined to be a countable resource to the SSI beneficiary since its inception in 2002. **E. PS 05- 091 SSI-Indiana - Trust for Sole Benefit of Nicole C. R~~ Your Reference: SI-2-1-3 IN (R~) Our Reference: 04P064**

2.1.2 Parent

SUMMARY – SD. This decision exemplifies an often overlooked element in establishing a special needs trust. This decision shows that a trust must be established by the actions of a parent, grandparent, legal guardian, or a court. The Regional Chief Counsel (RCC)'s office determined that the parents used a power of attorney to establish this trust. Using a power of attorney meant the parents established the trust as the beneficiary's representative, and evidence showed they used only the beneficiary's funds to establish this trust. Therefore, the RCC determined the beneficiary was the creator of the trust. The RCC pointed out that the State court approved the trust but did not establish it. We include this decision because it is a straight forward example of the requirements, whether met or not met, for excepting a special needs trust from resource counting. **A. PS 12-045 Treatment of Trust for SSI Purposes (Stephany) – REPLY**

SUMMARY – MN. The opinion in this case examines whether or not the special needs trust in question is a countable resource for SSI purposes. There is an exception to counting a special needs trust as a resource if certain criteria are met. One of the criteria is that the trust be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court. This trust does not satisfy this criterion because the adult claimant's funds were used to establish the trust (established by parents but didn't contain "seed trust funds" and the trust contains an early termination provision that could allow a third party to benefit from the trust during the claimant's lifetime. In addition, the trust does not comply with the Medicaid payback requirement as it allows for the payment of prohibited expenses and limits the amount and state jurisdictions that can be reimbursed. For the reasons outlined above, the trust is a countable resource for SSI purposes. **C. PS 09-021 SSI-Review of the Request for Reconsideration on the Judith C~ Trust, ~ ACTION Your Reference: SI 2-1-4 MN (C~) Our Reference: 08-128**

SUMMARY – IL. This opinion examines whether or not the trust in question is a resource for SSI purposes. As outlined in the POMS at SI 01120.201, the principal of an irrevocable trust established with the benefits of individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse, unless one of the exceptions in SI 01120.203 (Medicaid trust exceptions) applies. As outlined in SI 01120.203B.1., a special needs trust established under Section 1917(d)(4)(A) of the Act is not a countable resource assuming it meets the criteria established in that section. In this case, the trust is a countable resource because it fails to satisfy the requirement that the trust be established for the benefit of the individual

by a parent, grandparent, legal guardian, or a court. [The parent acted as agent of disabled person, not as parent]. **N. PS 05-149 SSI-Illinois-Review of the Jonathon L. D~ Special Needs Irrevocable Pay Back Trust, ~ Your Reference: S2D5G6, SI-2-1-3 IL (D~) Our Reference: 05-0087**

SUMMARY – MN. This opinion concerns a supplemental needs trust in Minnesota. The trust is not a resource for SSI purposes because the grantor (the SSI recipient) does not have the legal authority to revoke the trust or direct the use of its assets for her own support and maintenance. A trust may be revoked if the grantor of the trust is the sole beneficiary. However, under the terms of this trust, the grantor is not the sole beneficiary. The trust provides for residual beneficiaries in the event of the grantor's death. Therefore, the grantor cannot revoke the trust. The trust also provides the trustee with sole discretion over payments made from the trust. Therefore, the grantor does not have the ability to direct the use of the trust assets. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. On October 29, 1997, David W. N~ and Amy S. N~ executed a trust agreement entitled "Riley L. M~ Supplemental Needs Trust." Art. 6 1. *See* 42 U.S.C. 1396p(4)(B). The trust agreement names David and Amy N~ as both "Settlors" and "Trustees." Art. 1 1. Riley L. M~ (Ms. M~) is described as the beneficiary of the trust. Art. 2 1. The corpus of the trust consists of $37,871.25. The trust is funded by the proceeds of Ms. M~'s settlement of what appears to be a personal injury action. Art. 2 1. Mr. G~, Ms. M~'s attorney, indicated that the trust was established with Ms. M~'s assets. **P. PS 00-332 Riley L. M~ Supplemental Needs Trust, SSN ~, Your File No.: S2D5G3**

SUMMARY – OH. This opinion modifies a previous opinion which concluded that the trust in question is a countable resource for SSI purposes. The original opinion concluded that the trust did not satisfy the rules in SI 01120.203 (Medicaid trust exceptions) because the trust was not established by a parent, grandparent, legal guardian, or court. However, upon further review, it was determined that the trust was established by the claimant's mother and thus is an excludable resource for SSI purposes. This opinion also revises a previous opinion by concluding that the state of Ohio would recognize the existence of a "dry" or "empty" trust for purposes of applying the Medicaid trust exceptions (see SI 01120.203). **O. PS 05-155 SSI - Review of the Request for Reconsideration of the Review of the Charles C. G~ Trust, SSN: ~ - Reply; Your Reference: S2D5G6, SI 2-1-3 OH (G~); Our Reference: 05-0081**

2.1.3 Grandparent

SUMMARY – WI. This opinion concerns a trust established by a grandmother with her own funds for her mentally disabled granddaughter. This trust, established with the assets of a third party, is not a resource for SSI purposes because the granddaughter cannot direct the use of the assets, cannot terminate or revoke the trust and use the assets for her support and maintenance, and cannot sell her beneficial interest in the trust. **Z. PS 03-006 SSI - Wisconsin - Supplemental Trust for Elizabeth M. H~, SSN ~, Your Reference: S2D5G6**

2.1.4 Legal Guardian

SUMMARY – AZ. This opinion address two primary issues: 1) Whether or not the trust in question satisfies the establishment requirement found in 1917(d)(4)(A) of the Act, and 2) whether the abolishment of the doctrine of worthier title in the State of Arizona makes the trust irrevocable. To qualify as a special needs trust under 1917(d)(4)(A) of the Act, the trust must be established by a parent, grandparent, legal guardian, or a court. In this case, a special conservator, appointed by the court, established the trust. Under Arizona law, a conservator is not considered the legal equivalent

of a legal guardian. Moreover, the trust cannot be considered established by the court as the court merely approved the trust. Regarding the second issue, the trust would not be considered irrevocable under the doctrine of worthier title because the state of Arizona does not recognize this doctrine. **B. PS 08-172 The Marvin A. V~ Special Needs Trust**

SUMMARY – WI. At issue in this opinion is if a trust established by a legally incompetent grantor who is also the sole beneficiary of the trust can be revoked by the grantor/sole beneficiary. Wisconsin law recognizes that when the grantor of a trust is the sole beneficiary of the trust, the grantor/sole beneficiary can revoke the trust even if the trust states that it is irrevocable. An incompetent in Wisconsin could revoke the trust for which he/she is the grantor/sole beneficiary as the court and guardian ad item would be under an obligation to act in the grantor/sole beneficiary's best interest. **MM. PS 00-200 Whether Trust Established By A Legally Incompetent Grantor That Solely Benefits Grantor And Those Whom the Grantor Might Appoint in Her Will Is A Revocable Trust Under Wisconsin Law And Hence A Countable SSI Resource; Theresa L. D. G~, SSN ~**

2.1.5 Court

SUMMARY – AZ. This opinion address two primary issues: 1) Whether or not the trust in question satisfies the establishment requirement found in 1917(d)(4)(A) of the Act, and 2) whether the abolishment of the doctrine of worthier title in the State of Arizona makes the trust irrevocable. To qualify as a special needs trust under 1917(d)(4)(A) of the Act, the trust must be established by a parent, grandparent, legal guardian, or a court. In this case, a special conservator, appointed by the court, established the trust. Under Arizona law, a conservator is not considered the legal equivalent of a legal guardian. Moreover, the trust cannot be considered established by the court as the court merely approved the trust. Regarding the second issue, the trust would not be considered irrevocable under the doctrine of worthier title because the state of Arizona does not recognize this doctrine. Grantor Trust Rule – Doctrine of Worthier Title. **B. PS 08-172 The Marvin A. V~ Special Needs Trust**

SUMMARY – MI. The issue concerns whether or not the funds held in the irrevocable trust are countable resources for SSI purposes. Under Michigan Law, the recipient is not considered the sole beneficiary of the trust, and cannot unilaterally revoke the trust. Moreover, the recipient cannot direct use of the assets for maintenance and support under the terms of the trust or sell the interest in the trust and use the proceeds for support and maintenance. Recognizing these facts, the trust assets are not considered resources for SSI purposes. However, although the trust principal is not a countable resource, disbursements from the trust, under certain circumstances, would be countable income for determining SSI eligibility and level of benefits. On September 3, 1998, the St. Clair Circuit Court entered an order establishing the "Ashlee M. N~ Irrevocable Trust." The trust agreement provides that the trust is established for the benefit of Ashlee N~, who has multiple physical and developmental disabilities arising from birth trauma. The trust is funded from proceeds resulting from the settlement of litigation associated with the birth trauma. The trust agreement names Michelle B~ (Ashlee's mother) and Comerica Bank as the trustees. The trust states that it is established pursuant to 42 U.S.C. § 1396p(d)(4)(A). **M. PS 01-227 SSI-Michigan-Review of the Ashlee N~ Trust SSN: ~**

SUMMARY – MI. This trust is not a resource for SSI because the beneficiary cannot revoke the trust, direct the use of the funds for his support and maintenance or sell his beneficial interest. However, disbursements from the trust may be income to the beneficiary. On May 4, 1994, the Oakland County Probate Court of the State of Michigan entered an Order Appointing Trustee and Establishing Trust Agreement. That Order states that "all payments from the 1982 settlement" shall be received into the Trust. A report of contact verified that the money in the trust came from the settlement of a

malpractice suit brought on Anthony's behalf as an infant. The Order appoints Richard and Mary C~ as trustees. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00. **N. PS 01-183 SSI-Michigan—Review of a Trust for Anthony C~**

SUMMARY – MI. This trust, which was created in July 2000, satisfies the requirements of the Medicaid Trust exception (SI 01120.203). Therefore, the trust principal is not a countable resource. However, even though the principal is not a resource, any income distributions from the trust could be income and should be developed under the SSI income rules. For example, any cash disbursements made to the SSI beneficiary would be considered unearned income. Following settlement of a medical malpractice claim initiated on behalf of Vanessa N. B~, the settlement funds were transferred into a trust for the benefit of Ms. B~. The trust was created in July 2000, by the Wayne County Probate Court, naming Ms. B~, a minor, the sole beneficiary of the trust. **Q. PS 01-092 SSI-Michigan-Review of a Trust for Vanessa B~, ~; Your ref: S2D5G3**

2.2 Dry or Empty Trusts and Seed Trusts

SUMMARY – WI. In August, 2005 an SSI beneficiary's parents created a sub-account in the WisPACT II Trust for the benefit of the SSI eligible individual. The sub-account was created with an unspecified transfer of cash to the WisPACT II pooled trust. The WisPACT II Master Trust has been previously evaluated and it has been determined that sub-accounts created after May 17, 2004 can be excluded as a resource if either Medicaid trust exception is met. This opinion discusses that the sub-account in question does not meet the criteria to be excluded under 42 USC 1396p(d)(4)(A) because the parents established the sub-account with the beneficiary's own funds. They failed to establish a "seed trust" and the state of Wisconsin does not recognize "dry" or "empty" trusts. However, the sub-account does meet the criteria to be excluded under the pooled trust exception described at SI 01120.203(B)(2). Additionally, the sub-account is irrevocable since the SSI beneficiary is not the sole beneficiary of the sub-account. Since the trust meets the criteria of the pooled trust exception and is irrevocable it is not a resource for SSI purposes. **I. PS 06-104 SSI-Wisconsin-Review of the Request for Reconsideration on the Sub-Account of Robert G~, ~ , in the WisPACT Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3-WI (G~) Our Ref: 06-0003**

SUMMARY – OH. This opinion modifies a previous opinion which concluded that the trust in question is a countable resource for SSI purposes. The original opinion concluded that the trust did not satisfy the rules in SI 01120.203 (Medicaid trust exceptions) because the trust was not established by a parent, grandparent, legal guardian, or court. However, upon further review, it was determined that the trust was established by the claimant's mother and thus is an excludable resource for SSI purposes. This opinion also revises a previous opinion by concluding that the state of Ohio would recognize the existence of a "dry" or "empty" trust for purposes of applying the Medicaid trust exceptions (see SI 01120.203). **O. PS 05-155 SSI - Review of the Request for Reconsideration of the Review of the Charles C. G~ Trust, SSN: ~ - Reply; Your Reference: S2D5G6, SI 2-1-3 OH (G~); Our Reference: 05-0081**

SUMMARY – MP. This guide from Chief Counsel's office in the San Francisco Region tells us that the establishment of empty or dry trusts are not valid in the Northern Marianas Islands with regard to SSI excluded trusts. You asked whether an unfunded, or "empty," Northern Marianas Islands trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we

conclude that an empty trust is not a valid trust under Northern Marianas Islands law. **A. PS 10-009 Northern Marianas Islands Law on Empty Trusts**

SUMMARY – NV. This guide from the San Francisco Regional Chief Counsel's office informs us that the establishment of "empty" or "dry" trusts are not valid in the state of Nevada with regard to SSI excluded trusts. You asked whether an unfunded, or "empty," Nevada trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under Nevada law. **A. PS 10-008 Nevada State Law on Empty Trusts**

SUMMARY – MN. The opinion in this case examines whether or not the special needs trust in question is a countable resource for SSI purposes. There is an exception to counting a special needs trust as a resource if certain criteria are met. One of the criteria is that the trust be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court. This trust does not satisfy this criterion because the adult claimant's funds were used to establish the trust (established by parents but didn't contain "seed trust funds" and the trust contains an early termination provision that could allow a third party to benefit from the trust during the claimant's lifetime. In addition, the trust does not comply with the Medicaid payback requirement as it allows for the payment of prohibited expenses and limits the amount and state jurisdictions that can be reimbursed. For the reasons outlined above, the trust is a countable resource for SSI purposes. **C. PS 09-021 SSI-Review of the Request for Reconsideration on the Judith C~ Trust, ~ ACTION Your Reference: SI 2-1-4 MN (C~) Our Reference: 08-128**

SUMMARY – AZ. This guide from the San Francisco Regional Chief Counsel informs us that the establishment of an "empty" or "dry" trust is not valid in Arizona where SSI excluded trusts are concerned. You asked whether an unfunded, or "empty," Arizona trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under Arizona law. **A. PS 10-005 Arizona State Law on Empty Trusts**

SUMMARY – CA. This guide from the San Francisco Regional Chief Counsel's office informs us that the establishment of "empty" or "dry" trusts are not valid in the state of California with regard to SSI excluded trusts. **E. PS 10-006 California State Law on Empty Trusts**

SUMMARY – ALL REGION III STATES – VA. DE, D.C., MD, PA, WV. SEE THE FOLLOWING OPINION THAT DISCUSSES THE LAW IN EACH STATE. Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. **PS 01825.009 Delaware - A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~**

SUMMARY – HI. You asked whether an unfunded, or "empty," Hawaii trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under Hawaii law. **A. PS 10-007 Hawaii State Law on Empty Trusts**

2.3 ANNUITIES – STRUCTURED SETTLEMENT ANNUITIES IN SNT

SUMMARY – IL. You asked us whether payments from an annuity issued by the Metropolitan Insurance & Annuity Company (hereinafter "Annuity") to the Virginia L~ Irrevocable Special Needs Trust (hereinafter "Trust") constitute income to Hector L~, a disabled adult. For the reasons discussed below, we conclude that the annuity payments are income. The periodic payments from the settlement are income because the payments to Hector are either non-assignable to the trust, or are assignable, but not irrevocably so. Pursuant to POMS SI 01120.200(G)(1)(c), certain payments are non-assignable by law and may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. *See also Reames v. Oklahoma ex rel. OK Health Care Authority*, 411 F.3d 1164, 1171 (10th Cir. 2005) (holding that Social Security disability income could not be assigned into a special needs trust). Pursuant to POMS SI 01120.200(G)(1)(d), a legally assignable payment that is assigned to a trust is income for SSI purposes unless the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual. **A. PS 07-034 SSI-IL.-Review of Annuity Payments to the Virginia L~ Irrevocable Special Needs Trust, ~ ACTION/Your Ref: S2D5G6 SI 2-1-3 IL Our Ref: 06-0090**

SUMMARY – WI. Under Wisconsin law, an individual can assign his/her income from an annuity to the State for his/her care at a group home. Thus, the money from the annuity is not considered income for SSI purposes. This is with reference to your June 5, 1992 inquiry concerning whether Bethany L~ could under Wisconsin law irrevocably assign her income from an annuity to the Winnebago County Department of Community Programs so that the funds would not be considered income to her and she would be eligible for SSI and Medicaid. We conclude that the assignment appears valid under Wisconsin law, but that the validity of the assignment may be controlled by the law of another state. We note that there is a possibility that another state's law would govern the assignability of Bethany's interest. It is likely that another state also would uphold the assignment in this case. See Restatement (Second) of Contracts §§ 317(2), 321 comment a; 4 Am. Jur. 2d Annuities § 21; 6 Am. Jur. 2d Assignments §§ 16, 90; but see Allstate Ins. Co., 882 F.2d at 859-60 (annuitant could not assign payments because he was not owner of annuity policy issued as part of structured settlement of personal injury claim and because it would not be a valid legal assignment of existing right). **A. PS 00-313 Assignment of Income for Bethany L~, ~; Your reference S2D5B51**

SUMMARY – OH. This opinion evaluates a trust established for a disabled child in 1993. The trust was established by the Probate Court of Crawford County, Ohio, and funded with the proceeds from a personal injury settlement. The terms of the settlement included lump sum deposits to the trust and periodic annuity payments that are irrevocably assigned to the trust. Because the trust was established prior to January 1, 2000, it is evaluated only under regular SSI resource rules. That is, the trust principal is a countable resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. In this case, the trust is irrevocable as stated. Moreover, the individual cannot direct usage of the trust assets because a trustee-appointed Trust Advisory Committee has absolute discretion to make distributions. The periodic annuity payments are not considered countable income because the annuity payments are determined to have been irrevocably assigned under Ohio state law. **CAUTION:** Due to a change in Social Security law this precedent may only be applicable for trusts established prior to January 1, 2000. **C. PS 08-159 SSI-Review of the Trust and Annuity for Dustin J. E~, ~ - REPLY; Your Ref: S2D5G6, SI 2-1-3 OH (E~); Our Ref: 08-0142-NC**

SUMMARY – OH. This opinion examines whether or not a trust established on June 14, 2005, with the assets of an individual is a resource for Supplemental Security Income (SSI) purposes. This opinion also examines whether or not an annuity is irrevocably assigned to the trust. The trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act. Generally under these provisions, trusts established with the assets of the individual or the individual's spouse are considered resources for SSI purposes, unless an exception applies. The trust does not qualify for the special needs trust exception because it allows for the payment of prohibited expenses. Therefore, the trust is a countable resource. With respect to the annuity, the annuity payments are irrevocably assigned to the trust. The payments to the trust are income because the trust is a countable resource. On January 1, 2007, the trustee amended the trust so that it meets all of the criteria required to be excluded under the special needs trust exception. The trustee, however, did not provide any evidence showing a court approved the amendment as is mandated by the trust. Therefore, the initial decision to count the trust as a resource remains until such evidence is provided. **B. PS 09-071 SSI - Ohio - Review of Special Needs Trust and Annuity for Joseph A. N~ Your Ref: S2D5G6 SI-1-3- OH Our Ref: 08-0117**

SUMMARY – MN. This opinion provides an analysis of the subject trust under section 1613(e) of the Social Security Act (statutory trust provisions effective 1/1/00). The opinion also provides an analysis of an assignment of an annuity to the trust by the trust beneficiary. Note, however, that the opinion fails to address the potential transfer of resources issue and its implications. Assuming Kevin had sufficient mental capacity on the date that he signed the January 25, 2000, letter, the letter would serve to irrevocably assign his annuity payments to the Kevin G. S~ Supplemental Needs Trust. In addition, the trust assets are an excludable resource. As such, the annuity payments would not be considered income for SSI purposes under POMS SI 01120.200(G)(1)(d). **N. PS 00-500 SSI-Minnesota-Review of the Kevin G. S~ Supplemental Needs Trust; SSN:~**

SUMMARY – MI. A trust was established on 2/16/05 as a result of a personal injury settlement received by an SSI beneficiary. The settlement resulted in an annuity being purchased from an insurance company and the subsequent annuity payments being irrevocably assigned to the court-ordered trust. The trust language provides that the SSI beneficiary has no access to the trust and cannot direct use of the funds found therein. Language found in the trust dictates that, upon the beneficiary's death, any funds remaining in the trust will be distributed to applicable State Medicaid agencies for reimbursement prior to any payments to the SSI beneficiary's "heirs at law". A change in Michigan state law effective 4/1/00 establishes that "heirs at law" or similar language constitutes creation of a beneficial, or remainder, interest. Thus, the trust is irrevocable and meets the Medicaid Trust Exception. As such, the trust itself is excluded from countable resources, and the annuity payments irrevocably assigned to the trust are excluded from countable income. **H. PS 06-060 SSI-Michigan-Review of Irrevocable Trust Agreement and Assignment of Annuity for Julia Z~ - REPLY Our Ref: 05-0194 Your Ref: S2D5G6, SI 2-1-3 MI (Z~)**

SUMMARY – MI. This opinion examines whether or not a trust established with the assets of an individual is a resource for Supplemental Security Income (SSI) purposes. This opinion also examines whether or not the annuity payments assigned to the trust are income for SSI purposes. The trust in this case satisfies all of the criteria needed to be excluded under the special needs trust exception, however, the trust must still be evaluated under the regular resource rules. The trust is not a resource under regular resource rules because it is irrevocable under State law and the claimant is unable to direct the use of the trust assets for her support and maintenance. With respect to the annuity payments, the payments were irrevocably assigned to the trust by the court and thus are not income to the claimant. Finally, certain distributions from the trust may be income if they result in the claimant

receiving food or shelter. **B. PS 09-062 SSI-Review of the Annuity and Special Needs Trust for Jeri L. K~, ~ REPLY Your Ref: S2D5G6, SI-2-1-3 OH (K~)Our Ref: 08-103-NC**

SUMMARY – IL. This opinion addresses whether or not the periodic payments made to the special needs trust in question are income for SSI purposes. A legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. If the assignment is revocable, then the payments are income to the individual legally entitled to receive them. In this case, while the SSI recipient is a minor, the payments were effectively irrevocably assigned to the trust, and thus they are not income for SSI purposes. However, once the recipient reached the age of majority in Illinois (18 years old), the recipient was entitled to directly receive the periodic payments. The entitlement to direct payments means the assignment is revocable and thus the payments are considered income to the recipient upon reaching the age of majority. **C. PS 08-061 SSI-Illinois-Review of Annuity Payments for Krysten M~, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 IL (M~) Our Ref: 07-0337-nc**

SUMMARY – IN. This opinion examines whether or not the trust and annuity in question are a resource for SSI purposes. In this case, the trust meets all of the criteria required to meet the special needs trust exception. Likewise, the annuity is not currently a resource because the claimant does not have the ability to sell her right to receive future payments. The claimant is eligible to receive payments from the annuity beginning in August 2022. The annuity payments may be income to the claimant beginning in 2022 and should be evaluated at that time. Also relevant is the annuity, under which payments do not begin until 2022. The Settlement Agreement and the Annuity Certificate specify that the annuity cannot be assigned. Therefore, the annuity is not currently a resource because Savanna cannot sell her right to receive the future payments. The question, then, is whether the annuity payments will be income to Savanna beginning in 2022, or whether the future payments have been irrevocably assigned to the Trust. See POMS SI 01120.200(G)(1)(d). While the court order of June 2007 requires that Mollie W~ "pay and distribute the remaining balance of the settlement that would otherwise be payable to Savanna to the Trustee of the Trust for the Sole Benefit of Savanna R. W~," and the Trust Agreement also explicitly references "a periodic annuity payment . . . to be made to the Trust for a term certain," it is not clear that the annuity has been assigned irrevocably to the Trust, particularly since the Settlement Agreement and the Annuity both state that the payments cannot be assigned. When the payments begin in 2022: (a) Savanna may be emancipated, and she may be able to receive the annuity payments directly; or (b) Savanna's guardians could petition the court to use the payments for Savanna's support instead of placing the payments in the Trust. Thus, the payments may be income when they begin in 2022, and this issue should be reevaluated at that time. **A. PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~ Your Ref: S2D5G6 SI 2-1-3 IN**

2.4 Right of Withdrawal

SUMMARY – MI. The trust addressed in this opinion is generally a standard irrevocable trust established by a third party. The opinion provides an analysis of a provision whereby the trust beneficiary has a limited right to withdraw certain additions to the trust for 30 days after the addition is deposited. NOTE: This limited right of withdrawal confers certain gift tax rights on the donor. For the foregoing reasons, we believe that the trust assets should not be considered a countable resource to Scott ~. The trust appears to be a discretionary trust, and Mr. ~ does not have a judicially enforceable right to command the trustee to make disbursements from the trust. Furthermore, he cannot unilaterally revoke the trust, or transfer his interest in the trust, and thereby gain access to

trust assets. However, Scott does have limited withdrawal rights in contributions made to the trust, and those contributions may be considered income when received and a resource for a brief period thereafter, as discussed above. **Y. PS 00-294 Review of the Scott ~ Trust**

2.5 Grantor Trusts – Doctrine of Worthier Title

SUMMARY – WI. At issue in this opinion is if a trust established by a legally incompetent grantor who is also the sole beneficiary of the trust can be revoked by the grantor/sole beneficiary. Wisconsin law recognizes that when the grantor of a trust is the sole beneficiary of the trust, the grantor/sole beneficiary can revoke the trust even if the trust states that it is irrevocable. An incompetent in Wisconsin could revoke the trust for which he/she is the grantor/sole beneficiary as the court and guardian ad item would be under an obligation to act in the grantor/sole beneficiary's best interest. **MM. PS 00-200 Whether Trust Established By A Legally Incompetent Grantor That Solely Benefits Grantor And Those Whom the Grantor Might Appoint in Her Will Is A Revocable Trust Under Wisconsin Law And Hence A Countable SSI Resource; Theresa L. D. G~, SSN ~**

SUMMARY – TX. A special needs trust was established for the benefit of an SSI eligible child on January 11, 2005. The trust was executed and approved by a court and the corpus was formed with a lump sum malpractice award. Trust language restricted the use of the funds by the third party trustee and contained a spendthrift provision preventing anticipation or transfer of the beneficiary's interest in the trust. Terms of the trust stated that termination of the trust would provide that any remaining assets be used for reimbursement of Medicaid expenses incurred after the establishment of the trust. Since the trust was established in Texas, state law dictates that Medicaid agencies are considered residual beneficiaries, resulting in an irrevocable trust. The trust meets the special needs trust requirements of age, disability, and being court-established. However, the third requirement is not met. The trust only provides that Medicaid expenses incurred after the trust was established will be reimbursed. Regulations require that the trust language provide for repayment of all incurred medical expenses, regardless of occurrence before or after trust establishment. Since the special needs trust exemption requirements are not met, the trust is determined to be a countable resource. An additional question regarding child support deposited into the trust is not evaluated due to a lack of sufficient information. **B. PS 05-166 SSI-Review of the D~ R~ Trust, ~-REPLY Your Ref.: S2D5G6, SI 2-1-3 (R~) Our Ref.: 05-0097**

SUMMARY – PA. At issue in this opinion is whether or not the trust is considered a countable resource for Supplementary Security Income (SSI) purposes. Under Pennsylvania law, if one is both the settlor and sole beneficiary of a trust, he/she has the authority to revoke the trust and use the assets for support and maintenance. Thus, the trust is a countable resource for SSI purposes. **B. PS 00-224 Pennsylvania Trust for Alexander J. E~**

SUMMARY – OR. This opinion concerns an Oregon trust established in 1994. The opinion states that this trust is irrevocable. The trust was established with the individual's funds from a damage settlement. Therefore, the individual is the grantor of the trust. The trust also states that, upon the individual's death, the trust will repay the State medical assistance agency for the care provided to the individual. The trust further states that, upon the individual's death, remaining funds in the trust are to be distributed to Wildwood Personal Initiatives which is a nonprofit corporation. The opinion states that, under Oregon law, an entity such as a nonprofit corporation can be a beneficiary of a trust. Therefore, because the trust has a valid remainder beneficiary, the trust is irrevocable. NOTE:

Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **. PS 00-340 Trust Document re: Jasen R~**

SUMMARY – OH. The issue is whether a special needs trust is a resource for SSI purposes when the grantor of the trust is also the sole beneficiary. In Ohio, a grantor may terminate an otherwise irrevocable trust if he/she is the sole beneficiary. If the grantor is also the sole beneficiary, he/she can revoke the trust and use it for his/her support and maintenance. Thus, the funds in the trust are a resource for SSI purposes. **HH. PS 00-198 Ohio Special Needs Trust for Leona D~ SSN: ~**

SUMMARY – OH. Although a trust is generally irrevocable unless the settlor reserves the right to revoke it, in Ohio it is revocable where the grantor is the sole beneficiary. In this case, the trust was established by the beneficiary's mother as her agent. The trust has no remainder interests. Therefore it is a grantor trust and revocable under Ohio law. **CC. PS 00-281 SSI-Ohio-Review of a Trust for Christi S. M~, SSN: ~**

SUMMARY – OH. This opinion concerns a trust established in 1995 in Ohio on behalf of a minor with funds from a personal injury award. Although the trust was established by a court, the minor is considered the grantor because the trust was funded with the minor's own assets. The trust is revocable because the minor is the grantor and the sole beneficiary of the trust. Therefore, the trust is countable as a resource for purposes of determining eligibility for SSI. In this case, even if the trust was irrevocable, it would be considered a resource for SSI purposes because the funds in the trust are available for the beneficiary's support and maintenance. **T. PS 02-134 SSI-Ohio-Review of the Dustin A. M~ Trust, ~**

SUMMARY – OH. Under Ohio law, a trust, which purports to be irrevocable, may nevertheless be terminated if the grantor is the sole beneficiary, even if the purposes of the trust have not been accomplished. However, if the trust specifies that any trust assets remaining at the time of the beneficiary's death are to be distributed to certain other individuals, then the need to obtain consent from those residual beneficiaries would render the trust irrevocable. **U. PS 01-109 Ohio Guardianship/Blocked Account/Grantor Trust for Ruth A. H~, SSN~; Your Reference No.: S2D5G3**

SUMMARY – OH. This opinion concerns a special needs trust established in Ohio in November 1996. The trust is a resource for SSI purposes as the SSI recipient is both the grantor and the sole beneficiary of the trust and can revoke the trust and use the assets for his support and maintenance. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00. **Y. PS 00-373 Ohio Special Needs Trust for Nathan S. R~, SSN: ~**

SUMMARY – OH. Note: This trust was evaluated under the rules in place prior to 1/1/00 and thus this precedent may not apply to trusts established after that time. For SSI purposes, a trust may be considered a resource if the beneficiary can direct use of the trust principal to pay for his/her support and maintenance, or if the beneficiary can revoke the trust and use the funds to pay for his/her food, clothing, and shelter needs. In this situation the SSI applicant is both the grantor and the sole beneficiary of the trust, thus creating a grantor trust (see SI 01120.200(B)8). This trust is a countable resource for SSI purposes because the SSI applicant has the ability to revoke the trust and use the assets for his support and maintenance. **W. PS 00-387 SSI-Ohio-Review of a Medicaid Trust for Silas K~ SSN: ~**

SUMMARY – OH. This opinion concerns a special needs trust established in 1997 in Ohio with funds from a personal injury lawsuit. The trust is countable as a resource for SSI purposes because the trust is revocable under Ohio law. The trust is revocable because the grantor is also the sole beneficiary of the trust. **FF. PS 00-261 Ohio Special Needs Trust for Faith D. H~, SSN: ~**

SUMMARY – OH. In this opinion, a trust funded with the beneficiary's personal injury settlement contains Medicaid reimbursement language and states that it is irrevocable. However, it names only the beneficiary's estate as the residual beneficiary which is not sufficient to create a residual beneficiary in Ohio. Furthermore, the State of Ohio is considered a creditor with respect to the reimbursement of Medicaid funds, not a beneficiary. Under Ohio law, a trust can be revoked if the grantor and sole beneficiary are the same person. Therefore, this trust is considered a resource for SSI purposes. The beneficiary also asserted that this trust should not be counted as a resource because the county Probate Court will not permit him to change the residual beneficiary and asserted that such a change is permitted in other Ohio jurisdictions. This opinion concludes that SSA does not need to decide if the county Probate Court made the correct decision and that the beneficiary's remedy is to appeal the Probate Court's decision in a higher court. **S. PS 03-024 SSI-Ohio-Review of Reconsideration Request on the Daniel J. R~ Special Needs Trust; SSN: ~**

SUMMARY – ND. Given the current absence of a Regional POMS Supplement to SI 01120.200, this information should prove valuable to field offices who seek guidance on the treatment of trusts established in the State of North Dakota. In its opinion, the Denver OGC assumed the trusts met an exception outlined in SI 01120.203B.1. and SI 01120.203B.2. and then considered whether the trusts would count under the regular resource rules. OGC recognized that most States would determine that a grantor trust is revocable if the grantor is the sole beneficiary of the trust. OGC next considered whether either trust contained sufficient language necessary to establish a residual beneficiary; most States recognize the irrevocability of a grantor trust if there is a named residual beneficiary. While North Dakota law had been silent on the issue of whether the State could be considered a residual beneficiary, OGC opined that the courts would likely consider the State to be a creditor rather than a residual beneficiary. If a beneficiary is "the person for whose benefit property is held in a trust," then OGC concluded that reimbursement to the State would constitute payment of a debt; therefore, none of the property held in either trust could be considered "held for the benefit" of the State. Having concluded that the State could not be considered a residual beneficiary, OGC examined the remaining trust language to determine whether either trust could be deemed irrevocable. In both instances, the grantor called for any remaining funds following Medicaid reimbursement to go to the "estate of the beneficiary." OGC concluded that such language is not sufficient to name a residual beneficiary. Thus, each trust was found revocable and a resource for SSI purposes. **A. PS 03-060 Revocability of Draft Self-Settled Special Needs Trust and Pooled Trust - North Dakota**

SUMMARY – NJ. This opinion provides a summary of New Jersey law, when an irrevocable trust is considered revocable, whether the use of the terms "heirs," "heirs at law," or "next of kin" create a residual beneficiary of the trust and whether the State of New Jersey can be a beneficiary of a trust. **B. PS 01-013 New Jersey Law of Trusts**

SUMMARY – NJ. The trust in this opinion is not a countable resource for SSI purposes as the SSI beneficiary does not have the authority to revoke the Trust or direct the use of its principal for his support and maintenance without the consent of other individuals named in the court order as "remaindermen". NOTE: Because of a change in the Social Security Act, this opinion may only be valid to trusts established by an individual prior to 01/01/00. **C. PS 01-009 SSI Resource Issue - Trust for Albert ; SSN: ~**

SUMMARY – NJ. In the State of New Jersey, an otherwise irrevocable trust is revocable if the grantor of the trust is the sole beneficiary. In this case, the trust does not name a residual beneficiary. However, the court order establishing the trust provides that upon the death of the grantor/beneficiary, the individual's parents would receive the remainder. The trust also provides that in the event of a conflict between the trust and the court order, the court order should be followed. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual prior to 1/1/00. **D. PS 01-002 SI Resource Issue - Trust for Albert ; SSN: ~**

SUMMARY – NE. This Nebraska trust was established after 1/1/01 and is subject to the statutory provisions of section 1613(e) of the SSACT. The trust is a revocable grantor trust despite the statements that it is irrevocable because it does not name a residual beneficiary. The balance of the trust will be paid to the beneficiary's heirs. The trust also does not meet the requirements of a supplemental needs or Medicaid pay back trust (1917(d)(4)(A)) because it provides for the payment of funeral expenses before reimbursing the State for Medicaid expenditures. Finally, the judge's attempted restriction removing the grantor's common law and statutory right to revoke the trust and precluding the Agency from finding the trust revocable is not valid. **A. PS 01-170 Your Request for Determination of the Revocability of a Nebraska Trust: Logan S~ Trust**

SUMMARY – MT. This decision describes a trust that meets all of the requirements for a Special Needs Trust except for the fact that it is not irrevocable because the claimant is the sole beneficiary of this self-settled trust. Notwithstanding the language of the Trust that proclaims that it is irrevocable, under Montana law this beneficiary has the power to dissolve the trust at will. **A. PS 08-073 Revocability of M.C. Supplemental Trust**

SUMMARY – MN. This opinion concerns whether or not a "supplemental needs trust" is considered a countable resource for SSI purposes. A general rule of trust law asserts that if an individual is both the grantor and sole beneficiary of a trust it is considered a resource. Thus, the trust is a countable resource in determining eligibility for SSI. **T. PS 00-169 SSI-Minnesota Sara R. C~ Supplemental Needs Trust ~ (Your File No. S2D5G3)**

SUMMARY – MN. This opinion involves a trust created for the SSI recipient with funds he received from the settlement of a lawsuit. Prior to the SSI recipient's 18th birthday, the trust funds were not a resource as under Minnesota law, court approval was required to release the funds and a Minnesota court would not have released the funds for his support and maintenance. However, the funds became a resource as of the SSI recipient's 18th birthday since he is both the grantor and the sole beneficiary of the trust. CAUTION: Because of a change in the Social Security act, this precedent may only be applicable to trusts established before 1/1/00. **Q. PS 00-312 Trust Accessibility Minnesota Nathan L~ Trust, SSN ~; Your File No. S2D8NG**

SUMMARY – MN. This opinion provides detailed analysis of a special needs trust established for an SSI beneficiary with the proceeds of a court-approved personal injury settlement. While the trust purports itself to be irrevocable, the SSI beneficiary is both the settler (grantor) and sole beneficiary of the trust. Since the settler of the trust is also the sole beneficiary, the trust is revocable and, thus, a countable resource for SSI purposes. This remains true despite that fact that the trust otherwise meets the requirements to be excluded under the special needs trust provisions. Naming a residual beneficiary would likely have the effect of making the trust irrevocable, but the deemed death provision would then allow for the residual beneficiary to potentially benefit from the trust during the lifetime of the beneficiary. In that instance, the trust no longer meets the special needs trust requirement dictating that the trust must be for the sole benefit of the beneficiary during their

lifetime. **F. PS 07-045 SSI-Minnesota-Review of the Jennifer T~ Special Needs Trust, ~, - REPLY Your Ref: SI 2-1-3 MN Our Ref: 06-0056**

SUMMARY – MI. The source of the funds in a trust is important in determining if the trust is revocable. An otherwise irrevocable trust is considered to be revocable if the grantor is also the sole beneficiary. **W. PS 00-367 Supplemental Security Income - Michigan Trust - Brian P~, SSN ~; Your Reference: S2D5G3**

SUMMARY – MI. This opinion concerns a discretionary trust in Michigan. The trust is countable as a resource for SSI purposes because the individual can revoke the trust and use the assets for his own support and maintenance. The trust was established with the individual's own funds which makes him the grantor under Michigan law. And the individual is the sole beneficiary of the trust because the trust does not establish a residual beneficiary. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **X. PS 00-310 Supplemental Security Income - Michigan Trust - Carl R. L~, SSN ~, Your Reference: S2D5G3**

SUMMARY – MI. A trust was established for an SSI beneficiary in 1996 based on a personal injury settlement. The corpus of the trust was funded with the distribution from the settlement. Trust language indicated that upon the SSI beneficiary's death, remaining funds would be distributed to pay expenses and then to persons determined to be the beneficiary's "heirs at law." However, trust language indicating a remainder interest for unspecified persons determined to be "heirs at law" does not create additional beneficiaries. The trust agreement also names the SSI beneficiary's guardian as the grantor, however, trusts funded with personal injury awards are generally regarded as established by the recipient of the award. Even though the trust is described as irrevocable, when a grantor of a trust is also the sole beneficiary the trust is deemed revocable despite language to the contrary. Since the SSI beneficiary is the grantor and also the sole beneficiary, the trust is determined revocable and, thus, a countable resource for SSI purposes. **U. PS 00-433 (Michigan) Michigan Trust for Karmone W~ SSN: ~ File Code: SI-2-1-3-MI**

SUMMARY – MI. This precedent is included because of the changes made in Michigan law in 1998 and effective in 04/2000. The change in Michigan's law retroactively opens the door for creating a contingent remainder in an individual's estate and, therefore, the individual is no longer the sole beneficiary of the trust. This specific Trust was created in 1993 with only references to distributions upon death to "those persons entitled to a share in her estate" the new Michigan law "expressly abolished the doctrine of worthier title, both as a rule of law and as a rule of construction." Hence, this Trust is considered irrevocable and meeting all other criteria it is not a countable resource. **F. PS 07-135 SSI-Michigan-Review of the Trust Agreement for the Benefit of Elaine M~, ~ REPLY Your Reference: S2D5G6, SI 2-1-3 MI (M~) Our Reference: 07-0191/561673**

SUMMARY – KY. This opinion evaluates a trust created for an SSI beneficiary in the state of Kentucky. Whether the subject trust is ultimately determined to be a countable resource for SSI purposes will depend largely on whether the trust was funded with the beneficiary's assets or those of a third party. The opinion does not speak directly to the funding of the trust. The trust was created on January 17, 2002 by the beneficiary's mother and legal guardian. Terms of the trust provide for reimbursement to Medicaid upon the beneficiary's death and leave all distribution discretion to the Trustee. At issue is whether the trust language establishing a remainder interest to the beneficiary's heirs at law establishes an irrevocable trust. Many states have adopted the general rule put forth in the Restatement (Third) of Trusts that creates an renders a trust irrevocable by creation of a remainder interest to indefinite parties such as "heirs at law". The opinion goes on to say that Kentucky has not

adopted the position put forth in the Restatement (Third) of Trusts and, as such, would not recognize a trust as irrevocable solely on the basis of a remainder interest to "heirs at law". **A. PS 08-108 In Re: Nathan W. R~, SSN: ~ -- Supplemental Security Income (SSI) Trust Policy on Residual Beneficiaries in Kentucky**

SUMMARY – REGION VII OPINION ON LAW OF IA, NE, MO, KS. The issue concerns what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska. Although the laws of Nebraska have not specifically addressed it, it appears that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable. There does not appear to be any Kansas statute or case applying the grantor trust rule in Kansas. Generally, a trust is revocable when the grantor is the sole beneficiary. Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary. There does not appear to be any Iowa statute or case applying the grantor trust rule in Iowa. It appears Iowa would follow general trust law regarding revocability of a trust when the grantor is the trust's sole beneficiary. Thus, in all Region VII States, the words "child," "children," "issue," "descedents," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next of kin," or "by intestate succession," in most cases it would justify a finding that a residual beneficiary was not created and a grantor trust is revocable. **A. PS 00-468 Determination of Irrevocability of a Nebraska Trust Kyle D. S~, SSN: ~**

SUMMARY – REGION VII OPINION ON LAW OF IA, NE, MO AND KS. The regional attorney was asked if a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the States of Missouri, Kansas, Iowa and Nebraska. All four states are considered creditors and not beneficiaries. Even if a trust contains a State reimbursement provision, it would be revocable if the SSI recipient was the grantor and the sole beneficiary since the state is a creditor and not a beneficiary. CAUTION: Because of a change in the Social Security Act, this opinion may only be applicable to trusts established before 1/1/00. **B. PS 00-466 Request for Iowa, Kansas, Missouri, and Nebraska State Law on Grantor Trusts; SSI Resource Issue**

SUMMARY – KS. This opinion discusses whether a grantor trust is irrevocable under Kansas law. The trust was determined to be irrevocable because Kansas law holds that the primary consideration in the construction of trusts is the intention of the grantor based on an examination of the entire trust document. In this case, the Trust Agreement Introduction indicates that it was created for the benefit of the beneficiary and the beneficiary's descendants. Therefore, it's assumed that a Kansas court would conclude that in this case the use of the word "descendants" was sufficient to demonstrate the grantor's intent to create a residual beneficiary. **B. PS 04-169 (Kansas) Determination of Irrevocability of a Kansas Trust Elizabeth G~ Trust, SSN: ~**

SUMMARY – IL. As a general rule, funds in a trust that is irrevocable by its terms and under State law are not countable resources. However, when the grantor of the trust is also the sole beneficiary of the trust arrangement, the trust is revocable regardless of language in the trust document to the contrary. Since the individual is the sole beneficiary of the trust, he/she can revoke the trust at any time and use the assets for his/her support and maintenance, even though his/her guardian may have to obtain court approval to revoke the trust on his/her behalf. Thus, the trust is a countable resource for SSI purposes. **WW. PS 00-235 Illinois Trust for Theodore F~ SSN: ~**

SUMMARY – IL. The trust in this case is a countable resource as the SSI recipient is the grantor and the sole beneficiary of the trust and can revoke the trust and use the principal for her own support and maintenance. **XX. PS 00-227 Illinois Trust for Rita M. F~, SSN: ~**

SUMMARY – IL. An otherwise irrevocable trust may be revocable if the actual grantor is also the sole beneficiary. However, naming a residual beneficiary to the trust will result in the trust being considered irrevocable. Providing for reimbursement to the State for payment of medical expenses does not create a residual beneficiary. **II. PS 00-379 SSI-Illinois-Review of the Caitlin N. S~ Supplemental Care Trust, SSN ~; (your reference number S2D5G3)**

SUMMARY – AK. The grantor trust rule provides that a trust is revocable if the grantor of the trust is the sole beneficiary. In this case, the SSI recipient is both the grantor and the beneficiary. Therefore, the trust is revocable. However, since the trust consists of dividends from stock in a Native Corporation, the Alaska Native Settlement Claims Act (ANSCA) applies and up to $2,000 per year from the Native Corporation is excluded from resources. (See POMS instructions at SI 00830.830 and Seattle regional instructions at SI SEA00830.830 regarding ANCSA.) **A. PS 00-341 Trust Document re: Tim L~**

SUMMARY – CA. This opinion clearly establishes California as a state where residual beneficiaries of trusts need not be specifically named. It suffices to use terms "heirs" and "heirs at law" to maintain the irrevocability of a grantor trust. **D. PS 12-122 California Trust Law: "Heirs" or "Heirs at Law" as Residual Beneficiary**

SUMMARY – GA. This opinion examines whether or not the trust in question (established in 1996) is considered irrevocable under Georgia law. A trust is a countable resource for SSI purposes if an individual has legal authority to revoke the trust and then use the funds to meet his/her food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance. The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or State law. In this case, the trust identifies the claimant's "heirs" as the residual beneficiary. Under Georgia law, a trust must specify a particular person or entity as the residual beneficiary. The reference to "heirs" in this trust is too indefinite to create a residual interest under Georgia law thus making the trust revocable and a countable resource for SSI purposes. **A. PS 08-109 Requirements for an irrevocable Special Needs Trust according to Georgia Law**

SUMMARY –IL. This opinion addresses whether or not the trust in question is a resource for SSI purposes. As outlined in the POMS at SI 01120.201(D)(1)(a), a trust established by an individual after January 1, 2000 is a countable resource if the trust is revocable. In this case, the trust claims to be irrevocable and identifies a as the grantor. However, the actual trust language indicates that the SSI claimant is the true grantor of the trust and the trust can be revoked by the claimant who is the sole beneficiary. Because the trust can be revoked by the claimant, it is a countable resources for SSI purposes. **H. PS 06-165 SSI-IL-Review of the Declaration of Trust for Monica D. L~--REPLY Our Ref: 06-0031 Your Ref: S2D5G6, SI 2-1-3 IL (L~)**

SUMMARY – IL. A trust is revocable if the grantor is also the sole beneficiary, even if the trust purports to be irrevocable. A trust that provides for payment of the beneficiary's funeral expenses prior to reimbursement of Medicaid expenditures to the State does not qualify for the Medicaid payback trust exception to counting as a resource under section 1613(e) of the SSAct. Payments to the trust from the Illinois Fireman's Pension are income to the individual entitled to the payment (the beneficiary) because those payments cannot be irrevocably assigned to the trust under Illinois State

law. **AA. PS 01-189 SSI-Illinois-Review of Proposed Irrevocable Special Needs Trust for Joyce H~; SSN: ~; Your Reference: S2D5G3**

2.6 Non-assignable Assets Fund the Trust (e.g., ERISA Pensions, Civil Service)

SUMMARY – MI. Federal law prohibits the assignment of a Civil Service Pension annuity to a trust. Therefore, for the purposes of SSI eligibility, the Civil Service Pension Trust assets are a countable resource and the annuity payments are unearned income when received. **L. PS 01-232 SSI-Michigan-Reconsideration of the Sylvia A. C~ Civil Service Pension Trust, SSN ~**

SUMMARY – MI. Federal law prohibits the assignment of a Civil Service Pension annuity to a trust and, therefore, the "trust" assets should be considered a resource and any annuity payments should be considered unearned income for purposes of SSI eligibility. You asked whether a Civil Service Pension Trust established for Sylvia C~, the developmentally disabled daughter of a retired civil servant, constitutes a countable resource for purposes of determining her SSI eligibility. We conclude that federal law prohibits the assignment of the Civil Service Pension annuity to a trust and, therefore, the "trust" assets should be considered a resource and the annuity payments should be considered unearned income for purposes of SSI eligibility. You also asked us when Ms. C~ could be charged with the income and resource, should we determine that the assignment to the trust was invalid. We conclude that the Agency can reopen the case (based on good cause) and suspend her benefits (if appropriate) effective up to two years ago. **P. PS 01-098 SSI-Michigan-Review of the Sylvia A. C~ Civil Service Pension Trust, SSN~**

SUMMARY – MI. This precedent involves a non-countable trust funded by countable income. The trust meets all the requirements for exception as a Special Needs Trust. However, the funds that are received by the claimant are considered income because the benefits are non-assignable. The Employee Retirement Income Security Act (ERISA) makes clear that certain types of income are not assignable. The attorney for our claimant used two arguments to assert that the income should not be countable. First, he indicated his claimant was not the individual who earned the pension and second, that it was a state court that awarded her the benefits from her spouse's retirement funds. The Regional Counsel determined that ERISA states that an individual named as alternate payee, as our claimant was, has a right under Federal law to receive payments and these payments cannot be assigned. This Federal act preempts state law. The Trust is not countable but the income is countable. **D. PS 07- 179 SSI-Michigan - Review of Peggy J. V~ Special Needs Trust and Pension Benefits ~ -REPLY Your Reference: S2D5G6, SI 2-1-3 MI (V~) Our Reference: 07-0231**

SUMMARY – IL. A trust is revocable if the grantor is also the sole beneficiary, even if the trust purports to be irrevocable. A trust that provides for payment of the beneficiary's funeral expenses prior to reimbursement of Medicaid expenditures to the State does not qualify for the Medicaid payback trust exception to counting as a resource under section 1613(e) of the SSAct. Payments to the trust from the Illinois Fireman's Pension are income to the individual entitled to the payment (the beneficiary) because those payments cannot be irrevocably assigned to the trust under Illinois State law. **AA. PS 01-189 SSI-Illinois-Review of Proposed Irrevocable Special Needs Trust for Joyce H~; SSN: ~; Your Reference: S2D5G3**

2.7 CHILD SUPPORT TRUSTS

SUMMARY – MO. Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support without judicial modification of the support decree. Therefore, payments made by one parent to a trust in lieu of court ordered support payments are considered the child's income, available for the child's support and maintenance. Caution: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **D. PS 00-383 Illinois Trust for Lorraine S~**

SUMMARY – IL. Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support without judicial modification of the support decree. Therefore, payments made by one parent to a trust in lieu of court ordered support payments are considered the child's income, available for the child's support and maintenance. CAUTION**:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **HH. PS 00-383 Illinois Trust for Lorraine S~**

SUMMARY – IL. This opinion addresses whether or not the assignment of child support payments into a supplemental needs trust is irrevocable and whether the payments should be considered countable income for SSI purposes. According to the POMS at SI 01120.200(G)(1)(d), a legally assignable payment that is assigned to a trust is income for SSI purposes unless the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual legally entitled to receive it. Under Illinois law, a trust is allowed to receive child support payments. In this case, it has been determined that the child support payments have been irrevocably assigned to a trust that is not a countable resource, thus the child support payments are not countable income for SSI purposes. **I. PS 06-152 SSI-Illinois-Review of Assignment to a Trust of Child Support Payments for Michael L~, ~ -REPLY Our Ref: 06-0040 Your Ref: S2D5G6, SI 2-1-3 IL (L~)**

SUMMARY – IL. The issue is whether child support payments deposited in a trust are a countable resource for SSI purposes. Also, whether the assets of a sub-trust intended to hold property previously owned by the SSI recipient or within her control, should be considered a resource. Child support payments made by the father of the SSI recipient into the trust or sub-trust are illegal under Illinois law because the Declaration prohibits the use of property in either trust for the recipient's support. The Illinois court ordered the child support for "the support of" an adult disabled child. Since the trust declaration specifically states the trust monies cannot be used for the recipient's support, the payment of support into either trust is improper under Illinois State law. Therefore, the support payments continue to be countable income for SSI purposes and any portion of such support payments improperly deposited into and retained in the trust are a resource for SSI purposes. Assets in a sub-trust intended to hold property previously owned by the SSI recipient or within her control are not the SSI recipient's resources because she cannot revoke the sub-trust. Trust assets properly not within the sub-trust (i.e., assets not derived from the SSI recipient's property and not under her control), are not a resource since she has no power to revoke and she does not have grantor/sole beneficiary status. Any trust assets which are derived from the SSI recipient's property, or property under her control, but not placed in the sub-trust are her resources for SSI purposes only if her mother is also her legal guardian, because her mother can revoke the trust as to those particular assets and use the assets to pay for the SSI recipient's support and maintenance. **T. PS 04-243 Illinois Trust for Krystal L. S~ ~**

SUMMARY – IN. The issue is whether a subaccount established for an individual in the Association for Retarded Citizens of Indiana Master Trust is a resource. Also, would court-ordered support payments into the Trust be considered income to the individual for SSI purposes. The purpose of the Trust is to provide the comfort and happiness of disabled beneficiaries and provide for their supplemental needs, over and above their basic maintenance, support, medical, dental and therapeutic care. Within the Trust, individual Trust accounts (subaccounts) are created and maintained for each beneficiary, but pooled for investment and management of the funds. The trustee has full power, authority, and absolute discretion to perform all acts necessary to accomplish the purpose of the Trust. The Trust was established in 1989 by joinder agreement. However, the parents did not deposit any funds into the subaccount at that time,. Instead, they noted their intention to fund the account upon the death of the last surviving parent. The parents are complying with a December 17, 2004 court order to deposit support funds into this account monthly. Thus, the account is currently funded with support money from the father beginning 2004. The Trust is a third party Trust established after January 1, 2000. The individual has no authority over the Trust account and cannot direct its use or sell his interest in the Trust. Therefore, the subaccount would not constitute a resource and the support payments to the Trust would not be considered income for SSI purposes. However, any cash disbursements made directly to the individual would be income, and any disbursements to third parties that result in the individual's receipt of food, clothing, or shelter would be considered income in the form of in-kind support and maintenance. **D. PS 05-125 SSI-Indiana-Review of the Sub-Account of Michael D~ in the Association of Retarded Citizens Pooled Trust, ~ Your Ref: S2D5G6 SI 2-1-3 IN (D~)Our Ref: 05-0075**

SUMMARY – IL. Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support without judicial modification of the support decree. Therefore, payments made by one parent to a trust in lieu of court ordered support payments are considered the child's income, available for the child's support and maintenance. Caution: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **B. PS 00-383 Illinois Trust for Lorraine S~**

2.8 ALIMONY TRUSTS

SUMMARY – WI. The SSI beneficiary was divorced from her spouse and was awarded a marital settlement that was ordered to be paid into a Special Needs Trust created for her benefit. Wisconsin law permits an individual to make spousal payments into a trust and Wisconsin law also permits an individual to irrevocably assign spousal support payments to a trust. If the trust is not a resource for SSI purposes, then the payments are not considered income. However, if the trust is a countable resource for SSI purposes, then the payments are income regardless of assignment. **Q. PS 04-073 SSI-Wisconsin-Review of the Marital Settlement Agreement for Donald R~ and Sylvia R~ and the Sylvia A. R~ Special Needs Trust, ~ Your Ref: S2D5G6, SI 2-1-3 WI Our Ref: 03P086 Social Security No. ~,**

SUMMARY – IL. This Illinois opinion concerns a Medicaid payback trust that is funded with maintenance (alimony) payments, has a termination clause, and is established by a court order. The opinion states that Illinois would allow a court to create a trust to receive maintenance payments and that the payments are not income to the beneficiary because the court ordered that the payments must go directly to the trust. The opinion states that the termination clause does not prevent the trust from meeting the requirements for an exception under section 1917(d)(4)(A) because exercise of the termination clause would not benefit anyone other than the beneficiary during the

beneficiary's lifetime. The opinion also states that the court ordered the creation of this trust consistent with the requirement for an exception under section 1917(d)(4)(A). **Q. PS 05-002 SSI-Illinois-Review of Joyce H~ Special Needs Trust ~ Your Reference: SI-2-1-3 IL (H~) Our Reference: 04P004**

SUMMARY – MI. This case concerns whether or not a "Special Needs" Trust is considered a countable resource and whether alimony payments placed in the trust from the beneficiary's former spouse are countable as income for SSI eligibility. A general rule of trust law asserts that even if a trust purports to be irrevocable, it nevertheless may be revoked if the individual is both the settler and the sole beneficiary of the trust. The addition of residual beneficiaries makes the trust irrevocable because these beneficiaries' consent would be required to revoke the trust. Consequently the trust property is not a resource for SSI purposes. The corpus of the trust is the alimony that the court ordered to be paid to the beneficiary. The alimony payments are first received by the beneficiary's trustee on her behalf, rather than paid directly into the trust, thus the alimony constitutes income when received. Moreover, the inclusion of the alimony payments in a trust which expressly precludes using the trust assets for the beneficiary's support is improper under Michigan law. **BB. PS 00-154 Review of a Trust for Cynthia J. B~. NOTE – 1999 trust.**

2.9 Trusts Created Prior to 1/1/00

SUMMARY – WI. The trust in the opinion is not a countable resource for the following reasons: 1) The SSI recipient named in the trust does not have the authority to direct payments from the principal of the trust for her support and maintenance. 2) The trust cannot be revoked by the SSI recipient and the principal used for her support and maintenance. and 3) The SSI recipient is not the sole beneficiary of the trust and cannot revoke the trust without consent of additional parties. **KK. PS 00-257 Supplemental Security Income - Wisconsin Trust - Sarah K. H~, SSN ~, Your Reference: S2D5G3**

SUMMARY – WI. This opinion states that if a trust is excluded from resources for Medicaid eligibility purposes, it may still be a resource for SSI purposes. Additionally, providing for reimbursement to the State for Medicaid expenditures on behalf of the beneficiary does not make the State a residual beneficiary of the trust. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 01/01/00. You asked for state-by-state evaluation of how trusts created under the Omnibus Reconciliation Act (OBRA) of 1993, P.L. 103-66, 13611(b) (codified at 42 U.S.C. 1396p(d)(4)), to shelter money for Medicaid purposes should be treated when determining whether the trust assets are a resource for SSI purposes. We conclude that, for any state, the mere fact that a trust may comply with the OBRA 1993 provisions is irrelevant to determining whether the trust assets are a resource for SSI purposes. **HH. PS 00-287 States Named as Beneficiary to a Trust; Your Reference No. SI-2-1-3**

SUMMARY – OH. This opinion concerns a special needs trust in Ohio. The trust is not a resource for SSI purposes because the SSI recipient (the grantor) does not have the legal authority to revoke the trust or direct the use of its assets for his own support and maintenance. Under Ohio law, a trust may be revoked if the grantor of the trust is the sole beneficiary. However, under the terms of this trust, the grantor is not the sole beneficiary. The trust provides that the grantor's parents are the beneficiaries in the event of the grantor's death. The trust also provides that the Trustee has sole discretion over payments made from the trust. Therefore, the SSI recipient does not have the ability to direct the use of the trust assets. CAUTION: Because of a change in the Social Security Act, this

precedent may only be applicable to trusts established before 1/1/00. **Z. PS 00-325 SSI - Ohio - Review of Special Needs Trust for Kevin E. L~, SSN: ~**

SUMMARY – OH. Under Ohio law, an Ohio Community Pooled Trust/Gift Annuity is not a resource since the beneficiary cannot direct the trustee to make payments on his behalf for his support and maintenance, sell or otherwise transfer his interest in the trust, or revoke or terminate the trust to obtain the assets. Also, if disbursements are made pursuant to the trust agreement, those disbursements are not income to the SSI recipient. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **BB. PS 00-306 SSI-Ohio-Review of a Trust/Gift Annuity Agreement for Kenneth K~**

SUMMARY – OH. The trust in this case is not a countable resource for SSI purposes. The SSI recipient does not have the authority to direct payment from the principal of the trust for her support and maintenance. She also cannot revoke or terminate the trust to obtain the funds in the trust because there are contingent beneficiaries. Betsy J. G~ (Mrs. G~), Katelynn's parent and Court appointed guardian for her estate, sought leave from the Champaign County Ohio Probate Court to establish a trust for Katelynn. The trust names Mrs. G~ as the grantor and as the trustee of trust assets. Katelynn is named as the beneficiary of the trust (Article 1, Section 1). Katelynn is a minor and, according to the cover letter enclosed with the copy of the trust, is receiving SSI from the Social Security Administration. The trust was to be initially funded with $90,000, which are assets from a personal injury settlement. **GG. PS 00-237 Request to Review Ohio Trust or Special Needs Trust for Katelynn G~**

SUMMARY – OH. Under Ohio law, if an individual does not have the right to revoke a trust and gain unrestricted access to the trust assets, cannot direct the use of the trust assets to meet his/her needs for food, clothing, and shelter, or cannot sell his/her beneficial interest in the trust, it is not a resource for SSI purposes. However, disbursements from the trust (such as cash paid directly to the individual or payments to a third party for any food, clothing, or shelter received by the individual) are income for SSI purposes. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **AA. PS 00-322 Review of an Ohio Children's Luxury Trust for Douglas A. M~, SSN: ~; Your Ref. No. S2D5G3**

SUMMARY – NY. In New York State, a trust is irrevocable and not a resource if the SSI claimant/beneficiary cannot revoke the trust or direct the use of the trust assets for his/her support and maintenance. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00. The Trust was established on December 4, 1997, by the Supreme Court, County of Erie, State of New York, as Grantor (the "Grantor") and Marine Midland Bank, as Trustee (the "Trustee"), for the benefit of Gloria (the "Beneficiary). The Trust was to be funded with the proceeds of the settlement of a lawsuit. The Grantor intended to create a supplemental needs trust which conforms to the provisions of New York Estates, Powers, and Trusts Law ("EPTL") Section 7-1.12. **B. PS 01-111 SSI Resource Issue - Trust for Gloria; SSN: ~**

SUMMARY – MN. The opinion concerns a Supplemental Needs Trust established in January 1994. The opinion explains that the trust is not a countable resource because the SSI beneficiary does not have the right to revoke the trust, direct the use of the trust assets or sell his interest in the trust. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **M. PS 01-095 Review of a Supplemental Needs Trust for Xang V~; SSN ~; Your Ref. No. S2D5G3**

SUMMARY – MN. The trust assets in "The New Hope Trust" and "The W~ Family Supplemental Needs Trust" were funded with a Disability Insurance Benefits back payment received by the claimant who is also the beneficiary of the trust during her lifetime. However, the trust agreement states that any residual trust assets left after the claimant's death are to be held in a charitable trust for "persons with disabilities in Cass County." Since the claimant is not the sole, identifiable beneficiary of the trust agreements, the trust is irrevocable and should not be considered a resource to the claimant. **K. PS 04-158 Minnesota Trust for Sandra W~; SSN: ~ Your Reference No.: S2D5G3**

SUMMARY – MN. Note: This trust was established in 1992 and thus will be evaluated under the trust rules in place prior to 1/1/00. This precedent may not apply to trusts established after 1/1/00. This case examines whether or not the special needs trust in question is a resource for SSI purposes. For SSI purposes, trust assets are a resource if 1) the individual can revoke the trust and use the assets to meet their food, clothing or shelter needs; 2) the individual can direct use of the trust principal for their support and maintenance under the terms of the trust; or 3) if beneficial interest in the trust can be sold. In this case the individual does not have the ability to do any of the three actions listed above thus the trust is not a countable resource for SSI purposes. **I. PS 04-296 (Minnesota) SSI--Review of the Scott E. N~ Irrevocable Special Needs Trust, SSN: ~ --ACTION**

SUMMARY – MN. Note: This trust was established in 1998 and thus was evaluated under the trust rules in place prior to 1/1/00. This precedent may not apply to trusts established after 1/1/00. This opinion provides an analysis of a special needs trust established for an SSI beneficiary with the proceeds of a court-approved personal injury settlement. Because the trust was established prior to January 1, 2000, the regular trust resource rules found at POMS SI 01120.200 govern the determination of whether the trust is a resource to the SSI beneficiary. The trust principal would be a countable resource if the SSI beneficiary: (1) has legal authority to revoke or terminate the trust and use the funds to meet food or shelter needs; (2) can direct use of the trust principal for support and maintenance; or (3) can sell beneficial interest in the trust, and the trust provides for mandatory disbursements. Under the provisions of the trust, the SSI beneficiary does not have the authority to effectuate any of the disqualifying provisions listed above and thus the trust is not a countable resource for SSI purposes. **E. PS 07-102 Opinion Request Transfer; Treatment of Trust for SSI Resource Purposes (James S~) - REPLY Our Ref: 07-0169**

SUMMARY – MI. If an SSI recipient is a beneficiary of a trust but his/her access to the trust is restricted, the trust funds are not a resource to the recipient. If the SSI recipient is the trustee and has the right to revoke the trust, the trust funds are a resource to that individual. The primary issue to be resolved here is whether either Nathan or Karen, both SSI recipients, has any access to the trust funds. If either has access, then the trust is considered as a countable resource to that individual. It is clear from the terms of the trust agreement that Nathan has no right to access the trust funds until he reaches 21. As a result, the trust is not a countable resource to him. It is equally clear, however, that Karen, as grantor and trustee of the trust, has unfettered access to the trust funds. The trust grants her the right to manage, hold, and invest the trust funds. Moreover, she has the right to revoke the trust at any time. Accordingly, the trust funds are a countable resource to Karen. Caution: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **V. PS 00-378 Michigan Trust - Countable Resource - Nathan D. S~**

SUMMARY – MI. A trust was established for an SSI beneficiary in 1996 based on a personal injury settlement. The corpus of the trust was funded with the distribution from the settlement. Trust language indicated that upon the SSI beneficiary's death, remaining funds would be distributed to pay expenses and then to persons determined to be the beneficiary's "heirs at law." However, trust

language indicating a remainder interest for unspecified persons determined to be "heirs at law" does not create additional beneficiaries. The trust agreement also names the SSI beneficiary's guardian as the grantor, however, trusts funded with personal injury awards are generally regarded as established by the recipient of the award. Even though the trust is described as irrevocable, when a grantor of a trust is also the sole beneficiary the trust is deemed revocable despite language to the contrary. Since the SSI beneficiary is the grantor and also the sole beneficiary, the trust is determined revocable and, thus, a countable resource for SSI purposes. **U. PS 00-433 (Michigan) Michigan Trust for Karmone W~ SSN: ~ File Code: SI-2-1-3-MI**

SUMMARY – MI. The trust was established in the State of Michigan. It is not a countable resource for the following reasons: The SSI applicant is not the settlor or the sole beneficiary. He does not have direct use of the assets for his support and maintenance, and, He cannot sell his interest in the trust. NOTE: Because of a change in the Social Security Act, this precedent may only apply to trusts established before 1/1/00. **S. PS 00-601 State Law on A Trust Agreement for Brian ~**

SUMMARY – MI. A supplemental needs trust is not a resource when the grantor (the SSI recipient) cannot direct the assets for his/her food, clothing, or shelter needs, cannot terminate or revoke the trust and gain access to the trust property, and cannot sell his/her beneficial interest in the trust. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **T. PS 00-497 SSI-Review of the Joshua C. Y~ Irrevocable Special Needs Trust, SSN: ~**

SUMMARY – MI. The issue concerns a discretionary trust where the individual does not have a judicially enforceable right to command the trustee to make disbursements from the trust. Furthermore, he cannot unilaterally revoke the trust or transfer his interest in the trust, and thereby gain access to trust assets. Thus, the trust assets are not a countable resource for SSI purposes. However, since the individual does have limited withdrawal rights in contributions made to the trust, those contributions may be considered income when received and a resource for a brief period thereafter. **CAUTION:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **R. PS 01-001 Review of the Scott ~ Trust, SSN ~**

SUMMARY – MI. This trust is not a resource for SSI because the beneficiary cannot revoke the trust, direct the use of the funds for his support and maintenance or sell his beneficial interest. However, disbursements from the trust may be income to the beneficiary. On May 4, 1994, the Oakland County Probate Court of the State of Michigan entered an Order Appointing Trustee and Establishing Trust Agreement. That Order states that "all payments from the 1982 settlement" shall be received into the Trust. A report of contact verified that the money in the trust came from the settlement of a malpractice suit brought on Anthony's behalf as an infant. The Order appoints Richard and Mary C~ as trustees. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00. **N. PS 01-183 SSI-Michigan—Review of a Trust for Anthony C~**

SUMMARY – MI. This 1999 opinion concerns a Michigan trust and concludes that the trust is a countable resource for SSI purposes because it is a support trust. In general, a support trust imposes on the trustee the obligation to provide funds for the support of the beneficiary. In this case, the trust imposes such an obligation which gives the beneficiary a judicially enforceable right to receive support. **J. PS 04-172 SSI-Michigan-Review of a Trust for Michael Z~, ~-ACTION**

SUMMARY – MI. Because the SSI claimant is both the grantor of the trust and the sole beneficiary, under Michigan law the trust is revocable and, therefore, a countable resource. NOTE: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **E. PS 00-343 Review of Michigan Trust for Neal P~**

SUMMARY – MA. This opinion examines whether or not a trust established prior to January 1, 2000, with the assets of a third party is a resource for Supplemental Security Income (SSI) purposes. The trust is not subject to the statutory trust provisions in Section 1613(e) of the Social Security Act. If an individual has the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal is a resource for SSI purposes. In this case, the claimant, who is the beneficiary and one of three trustees, cannot unilaterally act to revoke or terminate the trust or to direct the use of the trust assets. Therefore, the trust is irrevocable and not a resource for SSI purposes. **A. PS 10-058 Trust Resource Opinion – Dorothy R~ Trust**

SUMMARY – IL. A general rule of trust law asserts that a trust is not a countable resource for SSI purposes if the recipient cannot revoke or direct use of the trust for his/her support and maintenance. The Trust principal therefore is not a countable resource. However, although the Trust principal is not a countable resource, disbursements from the Trust under certain circumstances would be countable income for determining SSI eligibility. **VV. PS 00-236 SSI Illinois Review of Trust for William N. G~**

SUMMARY – IL. The funds in the trust are a countable resource as the SSI recipient is the grantor and sole beneficiary of the trust and can revoke the trust and use the funds for his support and maintenance. **UU. PS 00-241 Illinois OBRA 93 Trust for Dominick J. G~, SSN: ~ Your Reference: SI-2-1-3**

SUMMARY – IL. The opinion involves a grantor trust which names contingent identifiable beneficiaries. The presence of these beneficiaries shows that the grantor is not the sole beneficiary of the trust. Thus, the trust is not a resource. **TT. PS 00-250 SSI-Illinois-Petition to Amend Trust for Joyce G~, SSN: ~**

SUMMARY – IL. At issue is whether or not the trust is a resource for SSI purposes. The beneficiary does not have the authority to direct the payment of the trust principal for his/her support and maintenance or revoke the trust and use the trust principal for his/her support and maintenance. The trust also provides for contingent beneficiaries. Therefore, the trust is not a resource for SSI purposes. **SS. PS 00-259 Supplemental Security Income - Illinois Trust - Anna M~ H~ a/k/a Alice C~, SSN ~, Your Reference: S2D5G3**

SUMMARY – IL. This trust, created in 1995, is not a countable resource as the SSI recipient cannot direct payment of the trust principal for his support and maintenance or revoke or terminate the trust to obtain the assets. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/01/00. **RR. PS 00-262 SSI-Illinois - Review of the John E. H~ OBRA '93 Trust, SSN:**

SUMMARY – IL. The opinion concerns a trust created for the benefit of the SSI recipient with funds awarded the SSI recipient as a result of a settlement in a malpractice action. The trust is not a resource for SSI purposes because the grantor (the SSI recipient) does not have the legal authority to revoke the trust or direct the use of its assets for her own support and maintenance. A trust can be revoked if the grantor of the trust is the sole beneficiary. However, under the terms of this trust the grantor

cannot revoke the trust as she is not the sole beneficiary since the trust provides for residual beneficiaries in the event of her death. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **QQ. PS 00-268 Illinois OBRA '93 Trust for J~, SSN: ~, Your Reference: S2D5G3**

SUMMARY – IL. At issue is whether the beneficiary has unrestricted access to the trust principal and can therefore use it for his support and maintenance. Even though there is general language in this trust and others similarly set up by the grantor that allows the beneficiary access to the trust principal, this trust contains specific language that it be a discretionary trust for a disabled beneficiary with the trustee having sole and absolute discretion as to the control of the assets in the trust. Therefore, the trust is not a resource for SSI purposes. **PP. PS 00-269 Illinois Trust For Joseph A. A~, SSN: ~**

SUMMARY – IL. Under Illinois law, because the purpose of the trust is for the individual's support, the discretionary authority given to the trustee on how to apply the trust funds does not permit him/her to avoid contributing to the individual's support and maintenance. Thus, the individual can direct the use of the funds for his/her support and maintenance. Therefore, the funds in the trust are a resource to the individual. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **OO. PS 00-272 Supplemental Security Income - Wisconsin Trust - Lauren M. J~, SSN ~; Your Reference: S2D5G3**

SUMMARY – IL. A account trust is a valid trust in Illinois. If the beneficiary cannot revoke the trust or has no access to it or cannot direct the use of trust funds, it is not a resource. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00. **NN. PS 00-273 Illinois Trust - Countable Resource - Christine K~, ~**

SUMMARY – IL. When the trustee has total discretion as to if and when any distributions from the trust corpus or income will be made, and the sole discretion to withhold any distributions, the beneficiary has no access to the trust. The trust is not a resource and earnings are not income. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 01/01/00. **MM. PS 00-275 Trust Document - Terry K~**

SUMMARY – IL. Under Illinois law, if an individual has no authority to revoke a trust and cannot direct the use of the trust principal for his/her support and maintenance, the trust assets are not a resource for SSI purposes. CAUTION**:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **LL. PS 00-328 Illinois Trust for Madhu S. M~**

SUMMARY – IL. If an individual can sell his/her interest in a land trust, it is a countable resource for SSI purposes. CAUTION**:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **GG. PS 00-479 SSI-Illinois-Review of a Land Trust for Rita P~ (parent-deemor of Carly P~), ~ (your reference number S2D5G3)**

SUMMARY – IL. The trust in this opinion is titled a "revocable living trust" as the settlor intended for the trust to be revocable. All of the funds are available to the SSI recipient for her support and maintenance. Therefore, the trust is a countable resource. CAUTION**:** Because of a change in the Social Security Act, this opinion may only apply to trusts established before 1/1/00. **FF. PS 00-491 SSI-Illinois-Review of a Trust for Jo L. A~**

SUMMARY – FL. Note: This opinion is only valid for trusts created prior to 1/1/00. This opinion discusses a trust agreement executed in 1966, and an Amendment executed in 1974, that established a trust for an individual SSI beneficiary. The Amendment directed the trustees (the beneficiary's parents) to purchase a $100,000 annuity contract to provide monthly payments during the beneficiary's life. While a declaration of trust annuity was executed in 1981, an annuity has not been purchased as directed in the trust. The trust provides that the trustees retain sole judgment over disbursements and names contingent beneficiaries. Under Florida law, the beneficiary does not have the legal authority to revoke the trust or direct the trustees to use the principal for her support. Since the trust is irrevocable and the beneficiary cannot direct the use of its contents, the trust is not a resource. Moreover, since the trustees never carried out the provision of the trust to establish an annuity, the beneficiary cannot anticipate, assign, or sell the right to future payments. Until some action is taken to provide for regular, anticipated payments, the prospective future payments are not a resource to the beneficiary. **B. PS 07-087 Effect of Trust as Resource for SSI Eligibility Purposes - Florida Number Holder - Mary , SSN ~**

SUMMARY – GA. This opinion examines whether or not the trust in question (established in 1996) is considered irrevocable under Georgia law. A trust is a countable resource for SSI purposes if an individual has legal authority to revoke the trust and then use the funds to meet his/her food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance. The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or State law. In this case, the trust identifies the claimant's "heirs" as the residual beneficiary. Under Georgia law, a trust must specify a particular person or entity as the residual beneficiary. The reference to "heirs" in this trust is too indefinite to create a residual interest under Georgia law thus making the trust revocable and a countable resource for SSI purposes. **A. PS 08-109 Requirements for an irrevocable Special Needs Trust according to Georgia Law**

SUMMARY – IL. This 1992 opinion concludes that an oral trust agreement alleged by an SSI recipient did not meet the requirements to be a valid trust under Illinois law. In 1981, the recipient entered into an oral agreement that had some aspects of a trust, but all the legal requirements for a trust were not present. Therefore, the assets in the alleged trust were counted as resources for SSI purposes. It is important to note that this trust was evaluated under SSI rules applicable before the 1999 legislation which changed how trusts are counted in the SSI program. The analysis done on this trust would not be sufficient for a trust established on or after 1/1/2000 that purports to meet the requirements for a Medicaid payback exception. **S. PS 04-256 Illinois Oral Trust - Eloise H~, ~**

SUMMARY – IL. **NOTE:** This trust was established before 1/1/00. The issue in this case is whether or not the SSI recipient has access to the trust funds. If an individual has legal authority to revoke the trust and then use the funds to meet his/her food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes. In this situation, the SSI recipient has no access to the trust funds, thus it is not a countable resource for SSI purposes. **U. PS 04-134 Illinois Trust - Countable Resource - Joseph W~, ~**

2.10 Trust not a Trust

SUMMARY – IL. This 1992 opinion concludes that an oral trust agreement alleged by an SSI recipient did not meet the requirements to be a valid trust under Illinois law. In 1981, the recipient entered into an oral agreement that had some aspects of a trust, but all the legal requirements for a trust

were not present. Therefore, the assets in the alleged trust were counted as resources for SSI purposes. It is important to note that this trust was evaluated under SSI rules applicable before the 1999 legislation which changed how trusts are counted in the SSI program. The analysis done on this trust would not be sufficient for a trust established on or after 1/1/2000 that purports to meet the requirements for a Medicaid payback exception. **S. PS 04-256 Illinois Oral Trust - Eloise H~, ~**

SUMMARY – OH. This opinion concerns an allegation by an SSI recipient in Ohio that funds were being held in an oral trust for another person. It was determined that the alleged oral trust was not valid because the recipient did not provide clear and convincing evidence of its validity as required under Ohio law. Therefore, the funds were counted as a resource for determining SSI eligibility. **DD. PS 00-266 Validity of an Alleged Oral Trust in Ohio SSI Resources (Sally H~, SSN # ~)**

2.11 Spendthrift Clauses

SUMMARY – WI. This opinion examines whether or not a claimant's interest in a testamentary trust (i.e. a trust established by a will and effective at the time of the testator's death) is a resource for Supplemental Security Income (SSI) purposes. The opinion also examines whether or not the spendthrift clause is valid. If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal is not the individual's resource for SSI purposes. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance (e.g. it contains a valid spendthrift clause), it is not a resource. In this case, the claimant's interest in the trust is not a resource because the trust is irrevocable and cannot be used by the claimant for support and maintenance due to a valid spendthrift clause that complies with Wisconsin law. However, certain distributions from the trust may be income to the claimant. **C. PS 09-088 SSI-Review of the Testamentary Trust for the Benefit of Cassie A~, Ineligible Spouse of Erik A~, 391-90-7317-REPLY Your Ref: S2D5G6, SI-2-1-3 WI (A~) Our Ref: 09-0042-NC**

SUMMARY – OH. At issue is whether the trust is a resource of the beneficiary for SSI purposes. If the beneficiary has the legal authority to convert his interest in the trust into cash and then use the funds for his/her support and maintenance, the trust if a resource. This trust does not restrict the beneficiary's right to sell his/her interest in the trust. Therefore, his/her share of the trust is a resource for SSI purposes. **EE. PS 00-263 Ohio Trust for Anthony L. H~, SSN: ~, Your Reference: S2D5G3**

SUMMARY – NJ AND NY. This opinion addresses whether spendthrift clauses are recognized in New York and New Jersey and whether these states presume the existence of a spendthrift clause if a trust is silent as to whether it is a spendthrift trust. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. New York and New Jersey both enforce spendthrift clauses in trusts, except when the beneficiary of the trust is also the trust's grantor. In New York, a trust is presumed to be a spendthrift trust with respect to an income interest in the trust but not for other interests. In New Jersey, a trust can be presumed to be a spendthrift trust based on evidence about the intent of the grantor. **A. PS 14-042 Spendthrift Trusts – New York and New Jersey**

SUMMARY – IL. A third party established an irrevocable trust for the benefit of the SSI recipient in 1973. The trust is not a resource. Although the trust provides that the trustee is required to distribute the income of the trust to the beneficiary "at convenient intervals," a spendthrift clause in the trust prevents the beneficiary from selling or anticipating these distributions. Therefore, any distributions

from the trust are subject to regular income counting rules. **CC. PS 01-105 SSI-Illinois-Review of Stacy A. A~ 1973 Trust, Mother of Alicia A~, SSN: ~**

SUMMARY – IL. THIS IS A REVIEW OF ALL SIX STATES IN THE CHICAGO REGION – IL, IN, MI, MN, OH AND WI. This opinion addresses whether spendthrift clauses are recognized in the six states that compose the Chicago region and whether these states allow for a settler to establish a spendthrift trust for his or her own benefit. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. All states in the Chicago region recognize a spendthrift provision in a third-party trust. Likewise, all states in the Chicago region recognize that a beneficial interest in a self-settled discretionary trust would typically not be a countable resource as it would have little, if any, market value. In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursements, regardless of whether the trust has a spendthrift provision. Due to a lack of precedent, self-settled trusts with a spendthrift provision in Indiana or Ohio should be submitted to the Regional Chief Counsel's office for evaluation. **A. PS 09-104 SSI - Request for Six State Legal Opinion on Spendthrift Clauses - REPL Your Reference: S2D5G6, SI 2-1-3 (Spendthrift) Our Reference: 08-0141**

SUMMARY – IL. This opinion concerns an Ohio trust that was established by a third party for the benefit of an individual who has now applied for SSI payments. Although the beneficiary is neither the grantor nor the sole beneficiary of the trust, and although the beneficiary does not retain the power to revoke or terminate the trust, he does have the power to convert his interest into cash and then use those funds to meet his needs for food, clothing or shelter. This is because the trust does not contain a spendthrift provision, which is intended to protect the beneficiary from spending his money in improvident ways. Because OGC concluded that the beneficiary could sell the right to his future income stream, the value of that interest is a resource for SSI purposes. OGC concluded by saying that, while the value of the beneficiary's interest in the trust is difficult to measure given the complexity of buying someone's interest in a trust that would terminate with his death, the value is at least $2,000. NOTE: Although this involves an Ohio trust, OGC did not rely on specific State law. The principles discussed in this opinion apply Regionwide. **V. PS 04-017 SSI - Illinois - Review of Irrevocable Special Needs Pay Back Trusts Devon B~, SSN: ~ - Action Your Reference: S2D5G6 SI 2-1-3 IL (B~) Our Reference: 04P**

2.12 Third Party Special Needs Trusts

SUMMARY – WI. This opinion concerns a testamentary trust established for an SSI recipient by his aunt in her will. The opinion explains that the testamentary trust is not countable as a resource because the recipient has no authority to revoke the trust, sell his interest in the trust, or direct the use of the trust assets. **LL. PS 00-247 SSI-Wisconsin-Review of a Trust for Michael G~**

SUMMARY – WI. This opinion examines a third-party trust and whether or not it is a countable resource for SSI purposes. The trust in this case is not a resource because the claimant cannot revoke the trust and obtain the assets, nor does he have the authority to direct use of the trust principal for his support and maintenance. Moreover, under the terms of the trust, the claimant cannot assign or sell his right to future payments. It should be noted that the trust may be terminated when the claimant reaches age 60 and thus the trust should be re-evaluated at that time to determine whether it should be counted as income or a resource. **D. PS 08-156 SSI- Wisconsin-Review of the Trust for Brian G~, ~ Our Reference: 08-0168-NC**

SUMMARY – WI. This opinion concerns an Irrevocable Family Trust established in December 1992. For reasons explained below, the trust is not countable as a resource. In Wisconsin, a trust can only be revoked with the consent of the grantor and all beneficiaries. The grantor of the trust is the SSI recipient's mother. In addition to the SSI recipient, there are other beneficiaries named. Therefore, since the SSI recipient is not the grantor or sole beneficiary of the trust it is not a countable resource to him. However, any payments from the trust fund should be considered in assessing the SSI recipient's eligibility for SSI benefits. CAUTION**:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **GG. PS 00-307 Supplemental Security Income - Wisconsin Trust - Matthew T. K~, SSN ~, Your Reference: S2D5G3**

SUMMARY – WI. This opinion involves an Irrevocable Supplemental Trust established on February 19, 1999. The trust assets are not considered a countable resource for SSI purposes since the settlor (the SSI recipient) is not the sole beneficiary of the trust and he cannot direct use of the trust assets for his support and maintenance. CAUTION**:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **EE. PS 00-337 Supplemental Security Income - Wisconsin Trust - Christopher J. M~, Jr., SSN ~; Your Reference: S2D5G3**

SUMMARY – WI. A Revocable Supplemental Trust was established in 1997 that named an SSI beneficiary as a "contingent beneficiary" of the trust. His mother established the trust to receive assets either from her estate or from deposits she might make during her lifetime. Wisconsin state law permits establishment of a trust without initial principal if the trust will obtain property through a will, however, the trust is not created until the property is acquired and the intention is confirmed. Since the grantor (the SSI beneficiary's mother) is not identified as a beneficiary under a will, there is some question as to the validity of the trust naming the SSI recipient as a "contingent beneficiary". Regardless, the SSI beneficiary is precluded by trust terms from revoking the trust or obtaining a vested interest in trust income or principal. Any funds that were transferred into the trust in the future are not to be used for the SSI beneficiary's basic needs such as food, clothing, and shelter. Therefore, the trust should not be considered a resource for SSI purposes. **DD. PS 00-436 Wisconsin Trust for Travis J. W~; SSN: ~ Your Reference No.: S2D5G3**

SUMMARY – WI. The issue involves whether funds held in a trust are a resource when there are contingent beneficiaries and under the terms of the trust, any revocation results in the immediate payment of the trust assets to the contingent beneficiaries. Under Wisconsin law, all trusts may be terminated or modified only with written consent of the Settlor and all beneficiaries, if any, to the trust. The trust principal would not be counted as a resource because the individual lacks the unilateral right, power, or authority to liquidate the trust. In addition, any revocation would result in payment of the trust assets to the contingent beneficiaries. Since revocation would not allow the individual to convert the trust assets for use toward his/her support and maintenance, the funds in the trust are not a resource for SSI purposes. **NN. PS 00-152 Supplemental Security Income-Wisconsin Trust, Sarah L. B~, SSN ~**

SUMMARY – OH. This opinion addresses whether or not the trust in question is considered a resource for SSI purposes. Trust assets established with funds of a third party are a resource if the individual: (1) can terminate the trust and obtain unrestricted access to the trust assets; (2) has access to the trust assets and can direct the use of the trust assets to meet his/her need for food or shelter; or (3) can sell his/her beneficial interest in the trust. In this case, the SSI claimant does not have the authority to terminate the trust. In addition, the claimant cannot assign interest in the trust or direct use of the trust assets. For these reasons, the trust is not a resource for SSI purposes. **H. PS 07-091**

SSI-Ohio-Review of the Anthony P. C~, Sr. Special Needs Trust for Anthony P. C~ Jr., ~ Your Reference: S2D5G6, SI-2-1-3 OH (C~) Our Reference: 06-00143

SUMMARY – NY. Claimant's mother created a testamentary trust for the benefit of her son. The trust provides that the trustee shall apply the monthly net income derived from the trust for the benefit of the beneficiary. The trustee has absolute discretion as to whether any distributions should be made and had chosen not to make any distributions. The trust is not a resource and monthly net income is not subject to income counting rules unless actually paid to or for the benefit of the beneficiary. **C. PS 01-016 Payment of Trust Income as SSI Resource**

SUMMARY – NY. The Trust discussed in this opinion was created and funded from the assets of two families to purchase a house and lease it to a non-profit agency. The Trust beneficiaries will be the initial occupants of this facility. Under the terms of the Trust and New York law, the Trust is not a countable resource as the beneficiaries of the Trust hold no power to revoke or to direct the use of the principal of the Trust. In addition, the Trust beneficiaries will use their monthly SSI benefits to pay the full value of their care at the rate established by the placing agency. Therefore, they are not receiving in-kind support and maintenance from the Trust and the presumed maximum value does not apply. NOTE: Because of a change in the Social Security Act, this precedent may only be applicable to trust established before 1/1/00. **D. PS 01-012 SSI Resource Issue - Trust Question from the Office of Mental Retardation and Developmental Disabilities**

SUMMARY – NE. This irrevocable trust was established on March 24, 1994 as a discretionary trust. The trustee has complete discretion as to the control of the assets in the trust and in the distribution of the principal to the benefit of the beneficiary. As the beneficiary of the trust, the SSI recipient does not have the power to revoke the trust or to use the trust principal for her support and maintenance. Therefore, the trust is not a resource for SSI purposes. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **D. PS 00-280 SSI-Nebraska-Review of a Trust for J.S. M~**

SUMMARY – MN. This trust is not a resource for SSI purposes because the grantor (the SSI recipient) is not the sole beneficiary and, therefore, does not have the legal authority to revoke the trust or direct the use of its assets for her own support and maintenance. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. Revocability of a trust depends on the terms of the trust agreement and State law. This Trust purports to track Minnesota statute 501B.89: "Trust Provisions linked to public assistance eligibility; supplemental needs trusts"; and subdivision 2 of that statute, which is entitled "Supplemental trusts for persons with disabilities." The statute in question, provides that for purposes of subdivision 2, a supplemental needs trust must be funded by someone other than the trust beneficiary, the beneficiary's spouse, or anyone obligated to pay any sum for damages or any other purpose to or for the trust beneficiary under the terms of a settlement agreement or judgment. **O. PS 00-362 Request to Review Minnesota Trust for Elizabeth P~**

SUMMARY – MN. SI 01120.200 states that a trust is a resource if the beneficiary has the right to revoke the trust and use it to meet food, shelter, or clothing needs or can direct the use of the trust principal to meet these needs. The trust, in this case, is revocable, but is not revocable and available for the beneficiary to meet food, shelter, and clothing needs until he is 18 years of age or until further order of the court. Minnesota courts have established that a minor's proceeds from a settlement may not be used to meet support and maintenance needs for the minor child. Based on the Minnesota

laws outlined in the opinion, the trust is not a resource to the beneficiary until he reaches age 18. **J. PS 04-205 Minnesota Trust for Bradley T~ SSN ~ Your File No. S2D5B51**

SUMMARY – IO. This opinion provides that under Iowa law, a trust is irrevocable unless the power of revocation is specifically reserved. **C. PS 00-464 Emil E. L~ Revocable Trust; Whether Iowa Revocable Trust is a Resource to Glenn L~**

SUMMARY – IN. This irrevocable trust is not a resource for SSI because the beneficiary cannot revoke the trust, direct the use of the funds for her support and maintenance or sell her beneficial interest. However, disbursements from the trust may be income to the beneficiary. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00. **J. PS 00-339 Indiana Trust for Angela R. M~, SSN: ~; Your Reference: S2D5G3**

SUMMARY – IN. This case involves a testamentary trust that was established by the individual's grandmother. The trust was to distribute any remaining trust principal to the individual upon attainment of age 30. Prior to his attainment of age 30, the individual's parents petitioned the Court to modify the distribution clause of the trust to "make the trust a special needs trust." Indiana law allows judicial modification of a trust when the modification would be necessary to prevent the failure of the purposes of the original trust. In this case, the grandmother had created the original trust to provide for her grandson's needs because he had a "learning disability." However, the grandson was more severely disabled due to autism and mental retardation. For this reason, OGC concluded that the judicial modification of the trust was allowed under Indiana law. The pre-01/01/00 rules for trusts still apply because the trust remains a third party trust. Since the individual cannot terminate the trust, direct distributions from the trust for his support and maintenance, or sell his beneficial interest in the trust, the trust is not a resource for SSI purposes. However, disbursements from the trust may be income. **H. PS 04-084 SSI-Indiana-Review of the Trust for the Benefit of Zachary S~, ~-ACTION Your Ref: S2D5G6, SI 2-1-3 IN (S~) Our Ref: 04P021**

SUMMARY – MI. This opinion concerns a "Giftrust" in the State of Michigan. The trust was established by a father (the grantor) for his son (the beneficiary) and will mature in February 2021. The beneficiary cannot revoke the trust, cannot direct the use of the trust assets, and cannot sell his beneficial interest due to a spendthrift clause. Therefore, the trust is not a resource for SSI purposes. In 2021, the funds will be released to the beneficiary and will be considered income. **O. PS 01-112 SSI-Michigan-Review of Richard O~ American Century Giftrust, SSN: ~**

SUMMARY – IN. On 11/30/93, an irrevocable trust was created for an SSI recipient. The trust has a spendthrift provision and names her mother as the settler (grantor) of the trust; however, it is unclear whose money was used to fund the trust. Per the terms of the trust, the trustee "may" use the income or principal of the trust for the recipient's health, education and support. The trust is not determined to be a countable resource for the following three reasons: 1) The NH is not the sole beneficiary of the trust and, therefore, cannot revoke or terminate the trust and obtain the assets contained therein. 2) The trustee retains the power to determine when, and if, to make any payments from the trust (i.e. the beneficiary cannot direct use of the trust to meet her basic needs). 3) According to the terms of the trust, the recipient cannot sell or transfer her beneficial interest in the trust. While it is noted that the trust contains language allowing amendments to the trust, it is determined that since the trustee has discretion to deny consent, the trust remains a non-countable resource. Any disbursements from the trust, whether cash or in-kind, may constitute income for SSI purposes and, therefore, must be reported when received. **F. PS 04-312 Indiana Trust for Angela R. M~ SSN: ~ --ACTION Your Reference: S2D5G3**

SUMMARY – IL. The original trust established on September 11, 1996 was revocable and a countable resource since the SSI recipient was both the grantor and the sole beneficiary of the trust. However, the trust was amended to provide for contingent residual beneficiaries in the event of the SSI recipient's death, and on November 24, 1997 the court entered an order allowing the trust to be amended. Therefore, as of 12/1/97, the trust is irrevocable and not a countable resource since the SSI recipient is no longer the sole beneficiary of the trust. CAUTION**:** Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00. **KK. PS 00-363 SSI-Illinois-Review of Trust for Phillip P~, SSN: ~; Your Ref. S2D5G3**

SUMMARY – IL. This opinion involves a discretionary trust established in Illinois. The trust is not a resource for SSI purposes as the SSI recipient is not the grantor or the sole beneficiary. In addition, the terms of the trust indicate that the funds are not available for her support and maintenance. **CAUTION:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00. **JJ. PS 00-364 SSI-Illinois-Review of The Laura P~ Trust**

SUMMARY – IL. A third party established an irrevocable trust for the benefit of the SSI recipient in 1973. The trust is not a resource. Although the trust provides that the trustee is required to distribute the income of the trust to the beneficiary "at convenient intervals," a spendthrift clause in the trust prevents the beneficiary from selling or anticipating these distributions. Therefore, any distributions from the trust are subject to regular income counting rules. **CC. PS 01-105 SSI-Illinois-Review of Stacy A. A~ 1973 Trust, Mother of Alicia A~, SSN: ~**

SUMMARY – CA. This opinion examines whether the assets and income of a living trust should be counted when determining the eligibility of an SSI beneficiary. The living trust was established in 2002 by the beneficiary's mother using only the mother's assets. Upon the death of the mother the trust became irrevocable and her sons succeeded her as co-trustees. The assets remaining in the trust post-mortem were to be used for the benefit of the SSI beneficiary at the sole discretion of the trustees. Since the trust is irrevocable and the SSI beneficiary cannot revoke the trust or direct the use of assets the trust principal is excluded from resource counting. Furthermore, income derived from the real property contained in the trust is deposited directly in the trust and is not directly accessible to the SSI beneficiary at any time. Thus, the rental income is not countable for purposes of determining SSI eligibility and payment amount. **F. PS 06-130 Carlotta Living Trust SSI beneficiary: Loretta, DOB 1/19/48**

SUMMARY – CA. The issue in this case concerns whether the modification of the claimant's trust makes the trust a resource for the purposes of SSI eligibility. The special needs trust in this matter allows the trustee to provide for the claimant's special needs, such as health, safety and welfare when such requisites are not being provided by public benefits. However, the claimant cannot direct use of the trust assets for his own support and maintenance. Because the claimant does not have the legal authority to revoke the trust or direct use of the trust assets for his own support and maintenance, the trust is not considered a resource for SSI purposes. **G. PS 01-203 Mark Testamentary Trusts, SSN:~**

SUMMARY – FL. Note: This opinion is only valid for trusts created prior to 1/1/00. This opinion discusses a trust agreement executed in 1966, and an Amendment executed in 1974, that established a trust for an individual SSI beneficiary. The Amendment directed the trustees (the beneficiary's parents) to purchase a $100,000 annuity contract to provide monthly payments during the beneficiary's life. While a declaration of trust annuity was executed in 1981, an annuity has not been purchased as directed in the trust. The trust provides that the trustees retain sole judgment over

disbursements and names contingent beneficiaries. Under Florida law, the beneficiary does not have the legal authority to revoke the trust or direct the trustees to use the principal for her support. Since the trust is irrevocable and the beneficiary cannot direct the use of its contents, the trust is not a resource. Moreover, since the trustees never carried out the provision of the trust to establish an annuity, the beneficiary cannot anticipate, assign, or sell the right to future payments. Until some action is taken to provide for regular, anticipated payments, the prospective future payments are not a resource to the beneficiary. **B. PS 07-087 Effect of Trust as Resource for SSI Eligibility Purposes - Florida Number Holder - Mary , SSN ~**

SUMMARY – IL. An SSI beneficiary's mother established an irrevocable trust funded by a previously countable Coverdell Educational Savings Account. The intent of the trust was to qualify as a Medicaid pay-back trust. The trust allows for allocation of assets within the trust between two sub-trusts: one for the SSI beneficiary's benefit during her lifetime, and the other to be funded only after she attains age 65 and exclusively for post-mortem use by her descendants. The trust language establishes contingent beneficiaries and directs that the SSI beneficiary's mother, as trustee, holds absolute authority to direct use of trust assets. As such, the beneficiary's interest in the trust is a countable resource with zero value. The descendant's share sub-trust does not impact the beneficiary's eligibility at this time since nothing can be transferred until she attains age 65. Since the trust meets the Medicaid pay-back exception, it is not a countable resource, however, any distributions from the trust may be countable income. **L. PS 05-215 SSI-Illinois-Review of the Katelyn J. H~ 2005 Trust, SSN ~ -Reply Your Reference: S2D5G6, SI 2-1-3 IL (H~)Our Reference: 05-139**

SUMMARY – IL. This opinion concerns an Ohio trust that was established by a third party for the benefit of an individual who has now applied for SSI payments. Although the beneficiary is neither the grantor nor the sole beneficiary of the trust, and although the beneficiary does not retain the power to revoke or terminate the trust, he does have the power to convert his interest into cash and then use those funds to meet his needs for food, clothing or shelter. This is because the trust does not contain a spendthrift provision, which is intended to protect the beneficiary from spending his money in improvident ways. Because OGC concluded that the beneficiary could sell the right to his future income stream, the value of that interest is a resource for SSI purposes. OGC concluded by saying that, while the value of the beneficiary's interest in the trust is difficult to measure given the complexity of buying someone's interest in a trust that would terminate with his death, the value is at least $2,000. NOTE: Although this involves an Ohio trust, OGC did not rely on specific State law. The principles discussed in this opinion apply Regionwide. **V. PS 04-017 SSI - Illinois - Review of Irrevocable Special Needs Pay Back Trusts Devon B~, SSN: ~ - Action Your Reference: S2D5G6 SI 2-1-3 IL (B~) Our Reference: 04P**

2.13 Null and Void Clauses

SUMMARY – SD. This opinion evaluates whether a Master Trust Agreement (MTA) and an Amended Joinder Agreement (AJA) meet the statutory requirements to be excluded under section 1917(d)(4)(C) of the Social Security Act. Secondly, it establishes that SSA is not bound by an Administrative Law Judge's "*nunc pro tunc*" (now for then) opinion to permit the claimant to amend the original Joinder Agreement to include Medicaid payback language. While the trust documents meet the first two requirements under the pooled trust exception, they do not meet the following requirements: Medicaid reimbursement language; established for the sole benefit and for the benefit of a disabled individual; and, established by the individual, a parent, grandparent, a legal guardian, or a court. Amendments to the MTA and AJA to satisfy the pooled trust exclusion requirements, will apply

prospectively, at which time the trust needs to be evaluated under appropriate resource rules. **B. PS 12-026 Treatment of Trust for SSI Resources Purposes (Isaac)**

SUMMARY – OH. Trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary is considered a resource to the extent that the trust is revocable or the extent any payments can be made from the trust for the benefit of the individual. However, certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under § 1917(d)(4)(C) of the Act. In order to qualify for the Medicaid pooled trust exception, the trust must contain the assets of a disabled individual and satisfy the following conditions: 1) It must trust be established and maintained by a nonprofit association; 2) Separate accounts be maintained for each beneficiary, but assets are pooled for investing and management purposes; 3) Accounts are established solely for the benefit of the disabled individual; 4) Accounts in the trust must be established by the individual, a parent, grandparent, legal guardian, or a court; and 5) The trust must provide that to the extent 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 the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan. In this case, the trust contains a provision that might allow other individuals to benefit from the trust during the beneficiary's lifetime which is contrary to requirement three listed above. However, the trust contains a void clause which nullifies the offending provision which permits the trust to meet the Medicaid pooled trust exception and thus be excluded from resources for SSI purposes. **. PS 06-356 SSI-Ohio-Review of the Sub-Account of Jackie R~, ~ in the Ohio Pooled Trust-REPLY Your Reference: S2D5G6, SI 2-1-3 OH (R~) Our Reference: 06-0014**

SUMMARY – OH. This opinion addresses whether or not the special needs trust in question is a resource for SSI purposes. The special needs trust satisfies all of the criteria found in SI 001120.203B. in order to be excluded from resource counting, however, the trust does provide for payment of taxes that would fall outside the scope of allowable expenses as outlined in SI 01120.203B.3. The trust does contain a limiting clause stating, "to the extent permitted by applicable Medicaid or SSI, regulation or policy at the time of death." The limiting clause as written is acceptable, provided that the field office properly documents the fact that the non-permissible taxes cannot be paid before the State Medicaid Agency is reimbursed. For these reasons, the trust is not a countable resource for SSI purposes. **G. PS 07-120 SSI- Ohio Review of the Jennifer C. S~ Special Needs Trust, ~ - REPLY Your Ref: S2D5G6 SI 02-1-3 OH (S~) Our Ref: 07-0008**

SUMMARY – MI. This opinion addresses whether or not the Synod Pooled Disability trust is a resource for SSI purposes. In order to meet the special needs pooled trust exception, a trust must satisfy several criteria. One of those criteria is that the individual trust account be established for the sole benefit of the disabled individual. In this case, there are circumstances where the trustee, during the disabled individual's lifetime, may terminate the trust account and distribute the assets as if the disabled individual had died. This early termination provision violates the requirement that the trust account be established for the sole benefit of the disabled individual. However, the trust contains a savings clause that renders the early termination provision ineffective. For this reason, the trust satisfies all of the special needs exception criteria and is not a countable resource for SSI purposes. **E. PS 07-166 SSI-Review of the Sub-Account of Ricky H~, in the Synod Pooled Disability Trust - REPLY Your Ref: S2D5G6 (H~) Our Ref: 07-0141-NC**

SUMMARY – FL. This opinion addresses whether or not the Special Needs Trust (SNT) in question is a countable resource for SSI purposes. To be excluded from resource counting, a SNT must:1) contain the assets of a disabled individual under age 65, 2) be established for the benefit of the individual by

a parent, grandparent, legal guardian or a court, and 3) provide that the State 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. In this case, the SNT appears to satisfy the criteria to meet the SNT exception, except that the trust could be terminated and the assets distributed to the remainder beneficiaries during the claimant's lifetime. This would prevent the trust from being an excludable resource; however, the trust also stipulates that any provision of the trust that prevents compliance with the SNT exception is null and void. Florida law allows the null and void clause to override the provisions that might allow disbursements to remainder beneficiaries during the claimants lifetime, thus the SNT is not a countable resource. **C. PS 06-043 Effect of Null and Void Clause in Special Needs Trust, Florida Beneficiary – Austin**

SUMMARY – IL. This opinion addresses whether or not a sub-account in the Illinois Disability Pooled Trust can be excluded from resources for SSI purposes. To be excluded from resources under the Medicaid trust exception a pooled trust must satisfy several criteria. Two of the criteria are that the trust must be established for the sole benefit of the beneficiary and that to the extent that the trust does not retain funds remaining in the sub-account, the State Medicaid Agency must be listed as first payee. The amended trust below contains several provisions that could allow for third-parties to benefit from the trust during the beneficiary's lifetime. In addition, the trust also contains provisions that frustrate the Medicaid payback requirement. While these provisions would preclude the trust from being excluded from resources for SSI purposes, the trust contains a null and void clause. This clause renders the offending provisions as void and thus the trust can be excluded under the Medicaid pooled trust exception. **G. PS 07-069 SSI-Illinois Review of the Second Amendment to the Illinois Disability Pooled Trust - ACTION, Your Ref: SI 2-1-3 IL, Our Ref: 06-0064**

2.14 Amending Trusts – Nunc Pro Tunc

SUMMARY – TN. In this case the trustees did not disclose the fact that they had established a trust in 2004 for a disabled SSI recipient. Recently, the local field office discovered it and determined it was countable because this special needs trust allowed funeral expenses to be paid prior to any Medicaid reimbursement. The trustees petitioned the state court in January 2010 to change the language to conform to the law and backdate the changes to 2004 through a *nunc pro tunc* order. The Regional Chief Counsel's opinion clearly states that under Tennessee law this type of retro change can only happen as the result of an error on the part of the court, such as a typographical error. It cannot overcome the language submitted by the trustees' legal advisors in 2004. The opinion establishes that the trust can only be excludable for SSI from the date in 2010 that the court amended it making it non-countable. **A. PS 10-114 Effect of a Tennessee State Court Order Entered *Nunc Pro Tunc* Deleting Language in Trust Created for a Supplemental Security Income Recipient**

SUMMARY – SD. This opinion evaluates whether a Master Trust Agreement (MTA) and an Amended Joinder Agreement (AJA) meet the statutory requirements to be excluded under section 1917(d)(4)(C) of the Social Security Act. Secondly, it establishes that SSA is not bound by an Administrative Law Judge's "*nunc pro tunc*" (now for then) opinion to permit the claimant to amend the original Joinder Agreement to include Medicaid payback language. While the trust documents meet the first two requirements under the pooled trust exception, they do not meet the following requirements: Medicaid reimbursement language; established for the sole benefit and for the benefit of a disabled individual; and, established by the individual, a parent, grandparent, a legal guardian, or a court. Amendments to the MTA and AJA to satisfy the pooled trust exclusion requirements, will apply

prospectively, at which time the trust needs to be evaluated under appropriate resource rules. **B. PS 12-026 Treatment of Trust for SSI Resources Purposes (Isaac)**

SUMMARY – MN. This opinion evaluates whether an "Amendment and Complete Restatement" of a trust formed in 1991 is permissible under Minnesota law, and whether the resultant trust is a countable resource for SSI purposes. The opinion concludes that Minnesota law concerning trust amendments is intended to give courts the authority to make substantive alterations in the terms of a trust, in addition to authorizing interpretation and construction of a trust. In pertinent case, the court, in 2008, made certain changes in the distributive provisions of the trust. Because the amendments were valid under Minnesota law, the revised trust was then evaluated under the applicable SSI resource provisions in place for trusts formed prior to 1/1/00. The opinion considers those resource policies and concludes that the amended trust is not a resource for SSI purposes. **A. PS 09-107 SSI - Minnesota: Review of the Nathan A~ Special Needs Trust, ~ Reply Your Reference: S2D5G6 SI 2-1-3 MN (A~)Our Reference: 08-0224-NC**

SUMMARY – IL. This opinion concerns a trust that was amended by an Illinois court under a nunc pro tunc order. The opinion explains that a nunc pro tunc order may be used to make clerical changes to an existing legal document, but not substantive changes. These changes are retroactive to the date of the original document. Prior to the order, this trust was considered a resource for SSI purposes because it was a grantor trust without a named residual beneficiary. However, the Illinois court determined that the original trust sufficiently indicated its intent concerning residual beneficiaries, in this case "heirs at law." The court allowed the trust to be amended by a nunc pro tunc order which added the names of the heirs at law to the trust. The regional counsel determined that this change in the trust was not substantive, so it was appropriate for the court to use a nunc pro tunc order to change the trust. Since the amended trust now identifies residual beneficiaries, it is not a resource for SSI purposes. **DD. PS 00-495 Michael R~ Trust, SSN: ~ - Effect of Nunc Pro Tunc Order, Your Reference: S2D5G3**

SUMMARY – CA. This Regional Chief Counsel (RCC) opinion examines whether a court order amending the terms of special needs trust, brought the trust into compliance with section 1917(d)(4)(A) of the Act and whether such amendment applies retroactively. The original trust did not meet the requirements for the special needs trust exception because it was established through the beneficiary's own actions, as opposed to the actions of his parents, grandparents, legal guardian, or the court. The beneficiary sought to remedy this deficiency by requesting the State court to establish an amended trust and make it retroactive, so that the original trust would become exempt from resource counting from the time of its creation. However, the court order amending the trust did not bring the trust into compliance with section 1917(d)(4)(A) of the Act because the court order merely served to modify the original trust, rather than "create" a new trust. Furthermore, the California court did not have authority to order retroactive application of the amended terms. **A. PS 13-109 Robert Special Needs Trust**

SUMMARY – FL. This decision centers on the issue of the State approving modifications to an otherwise SSI countable trust that allowed the trust to meet the Federal SSI exceptions for trusts. The Regional Chief Counsel determined that the State court correctly modified the trust allowing it to meet Federal trust exceptions, but the State court had no authority under State law to issue a *nunc pro tunc* order. The trust only qualifies for exception retroactively from the date the court amended the trust language. **A. PS 12-011 Interest Held in a Florida Trust by a Supplemental Security Income Applicant and Effect of a Florida State Court Order Entered *Nunc Pro Tunc* and Purporting to Modify the Trust**

2.15 Amendment or Modification of Trusts

SUMMARY – WI. This decision illustrates that a pre-01/01/00 countable Trust can be reformed under its own terms and Wisconsin law to be made non-countable. The court in Wisconsin restated and replaced the older trust framework within the body of a new trust that retained enough of the original to allow it to remain under our pre-01/01/00 rules. This restated Special Needs Trust now contains all the elements to be a non-countable trust. **F. PS 08-081 SSI-Review of the William S~ Irrevocable Trust, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 WI (S~) Our Ref: 08-059-NC**

SUMMARY – WI. This opinion evaluates whether the amended third party testamentary trust in question is a countable resource for SSI purposes. The original trust was created and funded solely with third party funds upon the grantor's death in 2006. The original terms mandated regular distributions of trust interest and principal to the SSI beneficiary. The trust was subsequently amended such that the trustee was prohibited from making distributions that would make the beneficiary ineligible for SSI and/or Medicaid benefits. The trust cannot be terminated by the beneficiary due to the presence of a residual beneficiary. Additionally, the SSI beneficiary cannot direct the trustee to make distributions, and a spendthrift provision prevents the beneficiary from anticipating or otherwise encumbering the future distributions. For these reasons, the amended trust is not a countable resource for SSI purposes. **G. PS 08-060 SSI-Wisconsin-Review of the Amended Testamentary Trust for the Benefit of Sharon C~, ~ - Reply Your Reference: S2D5G6, SI 2-1-3 WI (C~) Our Reference: 08-053-nc**

SUMMARY – OH. The Ohio Community Pooled Trust was amended on September 16, 2005 to incorporate changes to the Master Trust that would permit all sub-accounts to be excluded from countable resources for SSI purposes. The amendments to the Master Trust Agreement bring the Trust into compliance with the Medicaid payback provisions such that the subaccounts are now excluded under provisions found at 42 U.S.C.1396p(d)(4)(c). Amendments incorporated September 16,2005 modified the original Trust. This means that the changes to the Master Trust, and the subaccounts found therein, are effective September 16,2005 and not for any time prior to execution of the amendments. **M. PS 06-053 SSI-Ohio-Review of the Gift Annuity Account for Janalyn M. H~ in the Ohio Community Pooled Trust, ~ - REPLY Your Ref: S2D5G6 SI 2-1-3 OH (H~) Our Ref: 05-0174**

SUMMARY – OH. This opinion examines whether or not a trust established on June 14, 2005, with the assets of an individual is a resource for Supplemental Security Income (SSI) purposes. This opinion also examines whether or not an annuity is irrevocably assigned to the trust. The trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act. Generally under these provisions, trusts established with the assets of the individual or the individual's spouse are considered resources for SSI purposes, unless an exception applies. The trust does not qualify for the special needs trust exception because it allows for the payment of prohibited expenses. Therefore, the trust is a countable resource. With respect to the annuity, the annuity payments are irrevocably assigned to the trust. The payments to the trust are income because the trust is a countable resource. On January 1, 2007, the trustee amended the trust so that it meets all of the criteria required to be excluded under the special needs trust exception. The trustee, however, did not provide any evidence showing a court approved the amendment as is mandated by the trust. Therefore, the initial decision to count the trust as a resource remains until such evidence is provided. **B. PS 09-071 SSI - Ohio - Review of Special Needs Trust and Annuity for Joseph A. N~ Your Ref: S2D5G6 SI-1-3- OH Our Ref: 08-0117**

SUMMARY – IN. This case involves a testamentary trust that was established by the individual's grandmother. The trust was to distribute any remaining trust principal to the individual upon attainment of age 30. Prior to his attainment of age 30, the individual's parents petitioned the Court to modify the distribution clause of the trust to "make the trust a special needs trust." Indiana law allows judicial modification of a trust when the modification would be necessary to prevent the failure of the purposes of the original trust. In this case, the grandmother had created the original trust to provide for her grandson's needs because he had a "learning disability." However, the grandson was more severely disabled due to autism and mental retardation. For this reason, OGC concluded that the judicial modification of the trust was allowed under Indiana law. The pre-01/01/00 rules for trusts still apply because the trust remains a third party trust. Since the individual cannot terminate the trust, direct distributions from the trust for his support and maintenance, or sell his beneficial interest in the trust, the trust is not a resource for SSI purposes. However, disbursements from the trust may be income. **H. PS 04-084 SSI-Indiana-Review of the Trust for the Benefit of Zachary S~, ~-ACTION Your Ref: S2D5G6, SI 2-1-3 IN (S~) Our Ref: 04P021**

SUMMARY – IN. An irrevocable trust was established by an SSI beneficiary's grandparents in 1993. The trust contained a spendthrift provision and the grandparents served as trustees and had absolute authority over distributions. In 2002, the Superior Court ordered that the trust be reformed and the assets were subsequently placed in a sub account of the Association for Retarded Citizens (ARC) of Indiana Master Trust I. Barring an explicit statement to the contrary, reformation of a trust relates back and serves to alter the text of the trust as of the original date of execution. Additionally, a trustee to trustee transfer does not constitute the establishment of a new trust for SSI purposes unless there is an indication that the beneficiary is using the transfer as an estate planning tool. Thus, the beneficiary's sub account in the ARC Trust is considered a continuation of the original Trust. Since the original trust was not a resource for SSI purposes, the second trust created by the reformation is also not a resource for SSI purposes. Due to a change in the Social Security Act, this precedent may only be applicable to a trust established before 1/1/00. **C. PS 05-224 SSI-Indiana-Review of the Brooke G~ Irrevocable Trust Number One and the Sub-Account of Brooke G~, ~, in the ARC of Indiana Master Trust I-REPLY Our Ref: 05-140 Your Ref: S2D5G6, SI 2-1-3 IN (G~)**

SUMMARY – IN. The Chicago Regional Counsel previously determined that a sub-account created under the ARC of Indiana Master Trust (Trust II) and Joinder Agreement was a resource for SSI purposes. This opinion addresses proposed amendments to the trust which are intended to make it a non-countable resource for SSI purposes. Upon review, the proposed changes would be considered modifications, not revisions, and would only be effective on the date they were executed. Even with the modifications, the trust amendments still are not sufficient to change the previous determination. Two areas remain which make this trust a countable resource. One is that no provision is made for a change of residence so that more than one state would be eligible for the Medicaid assistance payback on the death of the claimant. Another is that the potential exists for distribution to others on the "deemed death" of the claimant. Therefore, the distribution resulting from this early termination would not be for the sole use of the claimant. The precedent here is that revisions or modifications to trusts that do not address and solve the central issues for exclusion remain a countable resource for SSI purposes. **B. PS 07-170 SSI-Indiana-Review of Proposed Restatement of the ARC of Indiana Master Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3 IN (ARC) Our Ref: 07-0277**

SUMMARY – CA. The issue in this case concerns whether the modification of the claimant's trust makes the trust a resource for the purposes of SSI eligibility. The special needs trust in this matter allows the trustee to provide for the claimant's special needs, such as health, safety and welfare when

such requisites are not being provided by public benefits. However, the claimant cannot direct use of the trust assets for his own support and maintenance. Because the claimant does not have the legal authority to revoke the trust or direct use of the trust assets for his own support and maintenance, the trust is not considered a resource for SSI purposes. **G. PS 01-203 Mark Testamentary Trusts, SSN:~**

SUMMARY – CO. This decision clarifies that all the essentials of meeting the Special Needs Trust criteria in Section 1917(d)(4)(A) have to be met. This case centers on the revision of a trust previously reviewed and found to be a countable resource by the Regional Chief Counsel (RCC). The present finding of the RCC when they examined this same trust again was that the revision failed to follow the procedures contained in the body of the trust allowing for revisions. Although the revision did correct one provision by allowing any state to seek reimbursement for medical treatment provided by Medicaid, it still failed to meet the sole benefit criteria by allowing others to benefit from an early termination, that is, a termination occurring during the lifetime of the trust beneficiary. **A. PS 11-143 Treatment of Amendments to Trust for SSI Purposes (Ronald S~)—REPLY**

SUMMARY – FL. This decision centers on the issue of the State approving modifications to an otherwise SSI countable trust that allowed the trust to meet the Federal SSI exceptions for trusts. The Regional Chief Counsel determined that the State court correctly modified the trust allowing it to meet Federal trust exceptions, but the State court had no authority under State law to issue a *nunc pro tunc* order. The trust only qualifies for exception retroactively from the date the court amended the trust language. **A. PS 12-011 Interest Held in a Florida Trust by a Supplemental Security Income Applicant and Effect of a Florida State Court Order Entered *Nunc Pro Tunc* and Purporting to Modify the Trust**

2.16 Medicaid Payback

SUMMARY – WY. This opinion contains a very concise description of the requirements of a Special Needs Trust whereby it was determined that this particular trust did not meet all of the criteria. Specifically, this trust does not provide a provision for Medicaid reimbursement to any state other than Wyoming making it a countable resource. The opinion also offers a suggestion for revising the language of the trust so that it would meet the criteria and could, therefore, be a non-countable resource. **A. PS 08-012 Treatment of Trust for SSI Purposes - Michael N. G~**

SUMMARY – TX. A special needs trust was established for the benefit of an SSI eligible child on January 11, 2005. The trust was executed and approved by a court and the corpus was formed with a lump sum malpractice award. Trust language restricted the use of the funds by the third party trustee and contained a spendthrift provision preventing anticipation or transfer of the beneficiary's interest in the trust. Terms of the trust stated that termination of the trust would provide that any remaining assets be used for reimbursement of Medicaid expenses incurred after the establishment of the trust. Since the trust was established in Texas, state law dictates that Medicaid agencies are considered residual beneficiaries, resulting in an irrevocable trust. The trust meets the special needs trust requirements of age, disability, and being court-established. However, the third requirement is not met. The trust only provides that Medicaid expenses incurred after the trust was established will be reimbursed. Regulations require that the trust language provide for repayment of all incurred medical expenses, regardless of occurrence before or after trust establishment. Since the special needs trust exemption requirements are not met, the trust is determined to be a countable resource. An additional question regarding child support deposited into the trust is not evaluated due to a lack

of sufficient information. **B. PS 05-166 SSI-Review of the D~ R~ Trust, ~-REPLY Your Ref.: S2D5G6, SI 2-1-3 (R~) Our Ref.: 05-0097**

SUMMARY – SD. This opinion evaluates whether a Master Trust Agreement (MTA) and an Amended Joinder Agreement (AJA) meet the statutory requirements to be excluded under section 1917(d)(4)(C) of the Social Security Act. Secondly, it establishes that SSA is not bound by an Administrative Law Judge's "*nunc pro tunc*" (now for then) opinion to permit the claimant to amend the original Joinder Agreement to include Medicaid payback language. While the trust documents meet the first two requirements under the pooled trust exception, they do not meet the following requirements: Medicaid reimbursement language; established for the sole benefit and for the benefit of a disabled individual; and, established by the individual, a parent, grandparent, a legal guardian, or a court. Amendments to the MTA and AJA to satisfy the pooled trust exclusion requirements, will apply prospectively, at which time the trust needs to be evaluated under appropriate resource rules. **B. PS 12-026 Treatment of Trust for SSI Resources Purposes (Isaac)**

SUMMARY – OH. In this case, a pooled trust is determined to be a resource because it does not meet one of the requirements for the exception in Section 1917(d)(4)(C) of the Social Security Act, i.e., that the trust must be established solely for the benefit of the disabled individual. This trust provides that, if it becomes impossible or impracticable to carry out the trust purposes with respect to all beneficiaries, the trustee may terminate the trust and distribute property as if the beneficiary had died. These terms create a contingency under which someone other than the beneficiary could benefit from the trust during the beneficiary's lifetime. Therefore it is not considered to be for the beneficiary's sole benefit, so it does not meet all the requirements for the Section 1917(d)(4)(C) exception. **R. PS 04-003 SSI-Ohio-Review of the Subaccount of Mary T~, ~, in the Community Fund Management Foundation Pooled Medicaid Payback Trust Your Reference: S2D5G6 OH**

SUMMARY – OH. The Ohio Community Pooled Trust was amended on September 16, 2005 to incorporate changes to the Master Trust that would permit all sub-accounts to be excluded from countable resources for SSI purposes. The amendments to the Master Trust Agreement bring the Trust into compliance with the Medicaid payback provisions such that the subaccounts are now excluded under provisions found at 42 U.S.C.1396p(d)(4)(c). Amendments incorporated September 16,2005 modified the original Trust. This means that the changes to the Master Trust, and the subaccounts found therein, are effective September 16,2005 and not for any time prior to execution of the amendments. **M. PS 06-053 SSI-Ohio-Review of the Gift Annuity Account for Janalyn M. H~ in the Ohio Community Pooled Trust, ~ - REPLY Your Ref: S2D5G6 SI 2-1-3 OH (H~) Our Ref: 05-0174**

SUMMARY – OH. Trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary is considered a resource to the extent that the trust is revocable or the extent any payments can be made from the trust for the benefit of the individual. However, certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under § 1917(d)(4)(C) of the Act. In order to qualify for the Medicaid pooled trust exception, the trust must contain the assets of a disabled individual and satisfy the following conditions: 1) It must trust be established and maintained by a nonprofit association; 2) Separate accounts be maintained for each beneficiary, but assets are pooled for investing and management purposes; 3) Accounts are established solely for the benefit of the disabled individual; 4) Accounts in the trust must be established by the individual, a parent, grandparent, legal guardian, or a court; and 5) The trust must provide that to the extent 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 the amount remaining up to an amount equal to the total

amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan. In this case, the trust contains a provision that might allow other individuals to benefit from the trust during the beneficiary's lifetime which is contrary to requirement three listed above. However, the trust contains a void clause which nullifies the offending provision which permits the trust to meet the Medicaid pooled trust exception and thus be excluded from resources for SSI purposes. **. PS 06-356 SSI-Ohio-Review of the Sub-Account of Jackie R~, ~ in the Ohio Pooled Trust-REPLY Your Reference: S2D5G6, SI 2-1-3 OH (R~) Our Reference: 06-0014**

SUMMARY – OH. This opinion concludes that a trust established with the proceeds of an inheritance is a countable resource to the SSI beneficiary because it cannot be excluded under the Medicaid payback trust exception. The trust in question meets the first requirement of a Medicaid payback trust because it was established by a court with the assets of a disabled individual under the age of 65. However, the trust fails to meet the second statutory requirement because it creates contingent interests that could benefit third parties during the lifetime of the SSI beneficiary. The trust also does not meet the third requirement to qualify under the Medicaid trust exception due to language permitting prohibited payments to be made prior to Medicaid reimbursement. **J. PS 07-024 SSI-Ohio-Review of Request for Reconsideration on the James J. S~ Trust Agreement, ~-Action Your Reference: S2D5G6, SI 2-1-3 OH (S~) Our Reference: 06-0054**

SUMMARY – OH. This decision clarifies the issue of the extent of the Medicaid reimbursement. This Trust fails to meet the criteria of a Special Needs Trust because it would limit the amount to be reimbursed to Medicaid at the death of the beneficiary to only the Medicaid paid from the establishment of the Trust. The law requires reimbursement of all the Medicaid funds without regard to any limits on time**. D. PS 08-150 SSI - Ohio -- Review of Ashley E. D~ Irrevocable Special Needs Trust, ~ - REPLY; Your Reference: SI-2-1-3-OH (D~); Our Reference: 08-0138**

SUMMARY – OH. This case represents a distinction between trust funds originating from different sources. The funds coming from a 3rd party are not countable, but the funds originating from the grantor are countable. The grantor funds did not follow the strict guidelines for the order of payment for the Medicaid reimbursement making it countable**. I. PS 07-086 SSI - Ohio - Review of the Gwen M. F~ Special Needs Trust, ~- REPLY OGC Ref: 070177 Your Ref: SI 2-1-3 OH (F~)**

SUMMARY – OH. The opinion in this case examines whether or not the pooled trust account in question is a countable resource for SSI purposes. There is an exception to counting a pooled trust as a resource if certain criteria are met. One of the requirements is that to the extent any amounts remaining in the beneficiary's account upon the death are not retained by the trust, the trust will pay to the State the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan. The pooled trust in this case frustrates the Medicaid payback requirement in two respects. First, the trust allows for payment of unallowable taxes, fees, and expenses before Medicaid reimbursement. Second, the trust limits Medicaid reimbursement to the time period after the establishment of the individual's trust account. For these reasons the trust does qualify for the pooled trust exception and is a countable resource for SSI purposes. **E. PS 08-075 SSI-Ohio: Review of Sub-Account of Nathan H~, ~, in the Ohio Community Pooled Flexible Spending Trust -- Reply Our Reference: 08-060 Your Reference: SI 2-1-3 OH (Ohio Community)**

SUMMARY – OH. This case involved a special needs trust established by court order. It involves the purchase of an annuity to fund the Trust. In order to meet the requirements of the special needs trust language was included that assures the state will be reimbursed for the medical assistance given the

claimant during the time he was eligible for Supplemental Security Income. The term "minimum" was added when applied to the medical assistance reimbursement but this has no effect on the amount that Medicaid may demand. The precedent that is established is that the term "minimum" has no effect on what the state determines it is owed or will accept. There is no range of acceptable payments only what the state demands. **F. PS 07-161 SSI-Ohio-Review of the Rodney S. H~ Irrevocable Special Needs Trust,~ - ACTION Your Reference: S2D5G6, SI 2-1-3 OH (H~) Our Reference: 07-0268**

SUMMARY – MN. The opinion in this case examines whether or not the special needs trust in question is a countable resource for SSI purposes. There is an exception to counting a special needs trust as a resource if certain criteria are met. One of the criteria is that the trust be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court. This trust does not satisfy this criterion because the adult claimant's funds were used to establish the trust (established by parents but didn't contain "seed trust funds" and the trust contains an early termination provision that could allow a third party to benefit from the trust during the claimant's lifetime. In addition, the trust does not comply with the Medicaid payback requirement as it allows for the payment of prohibited expenses and limits the amount and state jurisdictions that can be reimbursed. For the reasons outlined above, the trust is a countable resource for SSI purposes. **C. PS 09-021 SSI-Review of the Request for Reconsideration on the Judith C~ Trust, ~ ACTION Your Reference: SI 2-1-4 MN (C~) Our Reference: 08-128**

SUMMARY – MI. This decision emphasizes a more direct approach in defining the requirements of a Special Needs Trust. Although several provisions of the Trust appear ambiguous specific language, taken almost directly from the POMS, leaves no doubt that Medicaid reimbursement is the first priority. The possibility that another party could profit from the Trust during the recipient's lifetime through a partial termination of stock was also addressed and the Regional Counsel makes clear that any distribution could only be made to the recipient. If a distribution was made it would be counted as income. **C. PS 07-190 SSI-Michigan-Review of the Cheryl I. S~ Irrevocable Special Needs Trust, ~ - REPLY Your Reference: S2D5G6, SI 2-1-3 MI (S~)Our Reference: 07-0302**

SUMMARY – IN. The Chicago Regional Counsel previously determined that a sub-account created under the ARC of Indiana Master Trust (Trust II) and Joinder Agreement was a resource for SSI purposes. This opinion addresses proposed amendments to the trust which are intended to make it a non-countable resource for SSI purposes. Upon review, the proposed changes would be considered modifications, not revisions, and would only be effective on the date they were executed. Even with the modifications, the trust amendments still are not sufficient to change the previous determination. Two areas remain which make this trust a countable resource. One is that no provision is made for a change of residence so that more than one state would be eligible for the Medicaid assistance payback on the death of the claimant. Another is that the potential exists for distribution to others on the "deemed death" of the claimant. Therefore, the distribution resulting from this early termination would not be for the sole use of the claimant. The precedent here is that revisions or modifications to trusts that do not address and solve the central issues for exclusion remain a countable resource for SSI purposes. **B. PS 07-170 SSI-Indiana-Review of Proposed Restatement of the ARC of Indiana Master Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3 IN (ARC) Our Ref: 07-0277**

SUMMARY – IL. This opinion clarifies that the Illinois disability association's pooled trust was amended effective April 30, 2002 to reimburse the state for Medicaid payments prior to the payment of any funeral expenses. As a result of this amendment, for those who joined the trust before January

1, 2000, the trust sub-account would not be a resource. For those who joined the trust on or after January 1, 2000 but before April 30, 2002, the trust would be a resource until April 30, 2002, but not thereafter. And, for those who joined the trust on or after April 30, 2002, the sub account would not be a resource at any time. **X. PS 03-141 SSI-Illinois-Review of the Illinois Disability Pooled Trust and Amendment Action**

SUMMARY – CA. This opinion reveals the inadequacy of the provisions of a Special Needs Trust to meet the requirements for exception from SSI resource counting. The Regional Chief Counsel's office reveals that this Trust does not satisfy the State Medicaid reimbursement requirement for several reasons. The Trust does not list the State(s) as the primary creditor and it allows other debts to take precedence over the State. The Trust fails again by not adhering to the "sole benefit" provisions when it allows termination prior to death and distribution to the beneficiary's mother or other heirs. **B. PS 13-058 Special Needs Trust for Keith**

SUMMARY – IL. This opinion evaluates a trust established for a disabled SSI beneficiary. The trust is intended to meet the requirements for the Medicaid trust exception. It was established for the benefit of the SSI beneficiary with the assets of the beneficiary's parents and subsequently funded with the beneficiary's assets. While the trust meets the first two requirements under the Medicaid trust exception, it does not meet the third requirement pertaining to Medicaid reimbursement upon death. The terms of the trust state that the beneficiary's home state of Illinois must be reimbursed for Medicaid expenditures, but do not require reimbursement to other states. Instead, the terms establish a complicated process of reimbursement for other states that may not ultimately result in repayment to those states. Specifically, the two sections of the trust require other states to respond to one of the first two requests within a specified timeframe or the remainder of the trust will be distributed to the beneficiary or their heirs-at-law. Since the trust does not comport to the requirements of the Medicaid trust exception, it is determined to be a countable resource. **D. PS 08-054 SSI-Illinois-Review of the Ani M. H~ OBRA Pay Back Trust, SSN ~ - REPLY Your Reference: S2D5G6, SI 2-1-3 IL (H~) Our Reference: 08-028**

SUMMARY – IL. This opinion evaluates whether a self-funded trust meets the statutory requirements to be excluded under section 1917(d)(4)(A) of the Social Security Act. The trust in question was funded by a settlement awarded to an SSI eligible minor child and established by the child's guardian. The trust recognizes that the child may, at some point, move to another state, but fails to provide for potential payback for Medicaid services provided in any state other than Illinois. This type of provision does not satisfy the statutory requirements because it would frustrate any other state's ability to receive reimbursement. Further, even if that language was amended, the trust is countable resource due to the ability of the child's guardian to revoke the trust in her capacity as the child's agent. **F. PS 07-153 SSI- Illinois - review of the David C~ f/k/a K~ Supplemental Care and Needs Trust, ~ - REPLY Our Ref: 07-0266 Your Ref: S2D5G6; SI 2-1-3 IL (C~)**

SUMMARY – IL. This opinion addresses whether or not a sub-account in the Illinois Disability Pooled Trust can be excluded from resources for SSI purposes. To be excluded from resources under the Medicaid trust exception a pooled trust must satisfy several criteria. Two of the criteria are that the trust must be established for the sole benefit of the beneficiary and that to the extent that the trust does not retain funds remaining in the sub-account, the State Medicaid Agency must be listed as first payee. The amended trust below contains several provisions that could allow for third-parties to benefit from the trust during the beneficiary's lifetime. In addition, the trust also contains provisions that frustrate the Medicaid payback requirement. While these provisions would preclude the trust from being excluded from resources for SSI purposes, the trust contains a null and void clause. This

clause renders the offending provisions as void and thus the trust can be excluded under the Medicaid pooled trust exception. **G. PS 07-069 SSI-Illinois Review of the Second Amendment to the Illinois Disability Pooled Trust - ACTION, Your Ref: SI 2-1-3 IL, Our Ref: 06-0064**

SUMMARY – IL. This opinion concerns a pooled trust in Illinois. This pooled trust has been determined to be countable as a resource for SSI purposes because it does not meet the requirements for an exception as a Medicaid payback trust. This trust inappropriately provides for payment of the trust beneficiary's funeral expenses before the State is reimbursed for Medicaid benefits. **R. PS 04-308 Illinois Disability Pooled Trust for Jerry L. R~, ~; Your Reference: S2D5G6**

SUMMARY – IL. This legal opinion serves as an excellent reminder that a pooled trust must meet four basic requirements in order to be excluded as a resource. They are as follows: the trust must be established and maintained by a non-profit organization; a separate account must be maintained for each trust beneficiary; accounts must be established solely for the benefit of the disabled individual by the individual, parent, grandparent, legal guardian or court; and the trust must provide that to the extent that funds that remain in the sub-account upon the death of the beneficiary are not retained by the trust, the trust will pay to the State an amount equal to the total of medical assistance paid on behalf of the beneficiary. In this case, regional counsel determined that the sub-account would be a countable resource because of specific language contained in the trust document. The trust provided, for example, that the trustee in his or her sole discretion could terminate the sub-account. OGC opined that this violated the third requirement that the trust be established solely for the benefit of the individual since this provision might create the possibility that other individuals could benefit from the trust during the primary beneficiary's lifetime. Further, regional counsel opined that the fourth and final requirement may also not be met because the trust language suggests funeral or other prohibited expenses may be paid prior to State reimbursement. **W. PS 03-174 SSI - Illinois - Review of the proposed Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust Your Reference: S2D5G6; SI 2-1-3 ILOur Ref: 02-P-066**

2.17 Sole Benefit Rule

SUMMARY – WI. This opinion analyzes a special needs trust to determine whether the criteria are met to be exempted from SSI resource counting. The subject trust was established in 2004 with the assets of a disabled individual under age 65. The trust fails to meet the sole benefit criteria to be exempted from SSI resource counting due to an early termination provision that would distribute trust assets as though the beneficiary had died. The provision thus allows that, subsequent to Medicaid reimbursement, the beneficiary's heirs could receive benefit from the trust while he is still alive. The trust also contains a potentially problematic provision stating that members of the beneficiary's family may benefit from distributions of the trust if the trustee determines that such distributions promote the purpose of the trust. The language in that provision is imprecise and does not specify that such benefits to family members are strictly collateral and subordinate to trust distributions made on behalf of the beneficiary. **A. PS 09-123 Wisconsin - SSI Review of Special Needs Trust for Paul J. V~ Your Ref: S2D5G6 SI-2-1-3 WI Our Ref: 08-0184**

SUMMARY – WI. A trust was established in July, 2003 for a legally incompetent, eligible individual. The trust was established with his funds (grantor trust) by his legal guardians and qualifies as a Medicaid trust. Remainder interests were granted to the eligible individual's two brothers, thus, creating an irrevocable trust. The trustees were assigned absolute discretion over distributions on behalf of the beneficiary and the trust does not contain any provisions allowing the beneficiary to

direct use of the trust assets. In addition, the trust contains a "spendthrift" provision precluding the eligible individual from assigning his interest in the trust. Wisconsin state law, however, allows the grantor of a trust who is also the beneficiary to sell his interest in the trust regardless of the "spendthrift" provision. It is concluded that the beneficiary could sell his interest in the trust, but disbursements are completely within the trustee's discretion. Therefore, the trust has no significant market value and is considered to be a countable resource with zero value. **O. PS 04-326 SSI-Wisconsin-Review of Erik M~ Trust, SSN: ~ -ACTION Your Reference: S2D5G6, SI 2-1-3 WI (M~) Our Reference: 04S042**

SUMMARY – SD. This opinion evaluates whether a Master Trust Agreement (MTA) and an Amended Joinder Agreement (AJA) meet the statutory requirements to be excluded under section 1917(d)(4)(C) of the Social Security Act. Secondly, it establishes that SSA is not bound by an Administrative Law Judge's "*nunc pro tunc*" (now for then) opinion to permit the claimant to amend the original Joinder Agreement to include Medicaid payback language. While the trust documents meet the first two requirements under the pooled trust exception, they do not meet the following requirements: Medicaid reimbursement language; established for the sole benefit and for the benefit of a disabled individual; and, established by the individual, a parent, grandparent, a legal guardian, or a court. Amendments to the MTA and AJA to satisfy the pooled trust exclusion requirements, will apply prospectively, at which time the trust needs to be evaluated under appropriate resource rules. **B. PS 12-026 Treatment of Trust for SSI Resources Purposes (Isaac)**

SUMMARY – OH. This case involves a sub-account (Charitable Gift Annuity) created in the Ohio Community Pooled Trust in 2004 for an SSI individual. Generally, such an account would constitute a resource for SSI purposes if it is created on or after January 1, 2000 and the Master Trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary. However, Section 1917(d)(4)(C) of the Social Security Act permits an exception to pooled trusts if the following conditions are met: (1) the trust must be established and managed by a non-profit corporation; (2) a separate account must be maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts; (3) accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or the disabled individual's parent, grandparent, or legal guardian, or a court; and (4) the trust must provide that to the extent that 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 from such remaining amounts an amount equal to the total amount of medical assistance paid on behalf of the beneficiary. In the immediate case, the RCC determined that the third requirement for the exception was not met; i.e., the sub-account was not established for the sole benefit of the disabled individual. The Master Trust contains a provision that allows the beneficiary to disclaim her interest in the sub-account, at which point she would be "deemed dead." The trustee would then distribute any annuity amount and any remaining accumulated annuity amount to the State for reimbursement . Any remaining property in the sub-account would then be allocated to a separate fund of the Master Trust to be used for disability programs and services the trustee deemed advisable. The RCC opined that, given the possibility that a third party (the separate fund of the trust) could benefit from the assets in the beneficiary's sub-account during the beneficiary's lifetime, that the trust exception did not apply. Thus, the sub-account was found to be a resource for SSI purposes. **N. PS 05-160 SSI-Ohio-Review of the Gift Annuity Account for J~ M. H~ in the Ohio Community Pooled Trust, ~ Your Ref: S2D5G6 SI 2-1-3 OH (H~) Our Ref: 05-0095**

SUMMARY – OH. A trust agreement executed on September 28,2004 created two special needs trusts for the benefit of an SSI beneficiary. The first trust (the Zoom Trust) was funded solely with the

beneficiary's assets and named the parents as grantors. The second trust (the N.R.R Trust) was funded solely with the assets of a third party and also names the parents as grantors. The Zoom Trust contains a provision stating that the Trust can be terminated if it interferes with Medicaid eligibility and, at that time, the Trust assets shift to the second Trust (the N.R.R Trust). Due to language contained in the second Trust, the assets of the Zoom Trust could potentially be used for the benefit of contingent beneficiaries during the SSI beneficiary's lifetime. Therefore, the Zoom Trust is not for the sole benefit of the beneficiary and does not qualify for the Medicaid trust exception. The second Trust, funded solely with the assets of a third party, is not subject to examination under the Medicaid trust exception policy. As such, it is excluded from resource counting since the Trust is irrevocable, contains a spendthrift clause, and the beneficiary cannot direct use of the funds to meet basic needs. **L. PS 06-113 SSI-Ohio-Review of the Agreement of Trust for Nicole R. R~, ~ -REPLY Your Reference: S2D5G6, SI-2-1-3 OH (R~)**

SUMMARY – CA. This opinion reveals the inadequacy of the provisions of a Special Needs Trust to meet the requirements for exception from SSI resource counting. The Regional Chief Counsel's office reveals that this Trust does not satisfy the State Medicaid reimbursement requirement for several reasons. The Trust does not list the State(s) as the primary creditor and it allows other debts to take precedence over the State. The Trust fails again by not adhering to the "sole benefit" provisions when it allows termination prior to death and distribution to the beneficiary's mother or other heirs. **B. PS 13-058 Special Needs Trust for Keith**

SUMMARY – CO. This decision clarifies that all the essentials of meeting the Special Needs Trust criteria in Section 1917(d)(4)(A) have to be met. This case centers on the revision of a trust previously reviewed and found to be a countable resource by the Regional Chief Counsel (RCC). The present finding of the RCC when they examined this same trust again was that the revision failed to follow the procedures contained in the body of the trust allowing for revisions. Although the revision did correct one provision by allowing any state to seek reimbursement for medical treatment provided by Medicaid, it still failed to meet the sole benefit criteria by allowing others to benefit from an early termination, that is, a termination occurring during the lifetime of the trust beneficiary. **A. PS 11-143 Treatment of Amendments to Trust for SSI Purposes (Ronald S~)—REPLY**

SUMMARY – CO. This decision clarifies several aspects of trust law including early terminations and sole benefit provisions. It illustrates this by indicating how and why this trust fails to meet those criteria for exception. It also indicates that Colorado law does not allow "empty " or "dry" trusts. **B. PS 11-034 Treatment of Trust for SSI Purposes (Ronald S~)**

2.18 Pooled Special Needs Trusts

SUMMARY – WI. This opinion addresses whether or not the trust in question meets the criteria to qualify for the Medicaid pooled trust exception. As outlined in SI 01120.203, to qualify for this exception, the trust must contain the assets of a disabled individual and satisfy the following conditions: 1) Be established and maintained by a nonprofit association; 2) A separate account be maintained for each beneficiary; 3) The account be established for the sole benefit of the disabled individual by the individual, or parent, legal guardian, or a court; and 4) The trust must provide that to the extent that amounts remaining in the beneficiary's account upon death of the beneficiary are not retained by the trust, the trust will pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary. In this case, the trust satisfies the conditions as outlined above and thus is excluded from resources for SSI

purposes. **L. PS 05-219 SSI-Wisconsin-Review of Special Needs Trust for Kenneth J. W~, ~, Established with the ARC Milwaukee and U.S. Bank (N.A.) Community Trust for Persons with Developmental Disabilities - REPLY Your Ref: S2D5G6 SI 2-1-3 WI (W~) Our Ref: 05-0129**

SUMMARY – WI. In August, 2005 an SSI beneficiary's parents created a sub-account in the WisPACT II Trust for the benefit of the SSI eligible individual. The sub-account was created with an unspecified transfer of cash to the WisPACT II pooled trust. The WisPACT II Master Trust has been previously evaluated and it has been determined that sub-accounts created after May 17, 2004 can be excluded as a resource if either Medicaid trust exception is met. This opinion discusses that the sub-account in question does not meet the criteria to be excluded under 42 USC 1396p(d)(4)(A) because the parents established the sub-account with the beneficiary's own funds. They failed to establish a "seed trust" and the state of Wisconsin does not recognize "dry" or "empty" trusts. However, the sub-account does meet the criteria to be excluded under the pooled trust exception described at SI 01120.203(B)(2). Additionally, the sub-account is irrevocable since the SSI beneficiary is not the sole beneficiary of the sub-account. Since the trust meets the criteria of the pooled trust exception and is irrevocable it is not a resource for SSI purposes. **I. PS 06-104 SSI-Wisconsin-Review of the Request for Reconsideration on the Sub-Account of Robert G~, ~ , in the WisPACT Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3-WI (G~) Our Ref: 06-0003**

SUMMARY – WI. This opinion discusses changes to the Wisconsin Initiatives in Sustainable Housing ("WISH") Pooled Trust and the Asset Contribution Agreements ("ACA") pertinent thereto. SSA previously advised that self-settled sub-accounts in the WISH trust were countable resources due to failure to meet the Medicaid payback requirements of Section 1917(d)(4)(C) of the Act. WISH, Inc. has now modified the ACA for a self-settled account and provides that after termination of the trust and payment of allowable death expenses, amounts not retained by the trust will be used to reimburse Medicaid. This modified language resolves the prior defect and sub-accounts with the new language meet the requirements for the pooled trust exception. The opinion further concludes that home property transferred to a sub-account establishes an equitable ownership interest for the beneficiary. As a result, distributions from the sub-account to pay the mortgage or other household bills would constitute ISM in the form of shelter, though limited by the presumed maximum value (PMV). **H. PS 07-118 SSI-WISH-Review of Treatment of Rental Arrangements in the Wisconsin Initiatives in Sustainable Housing Trust - REPLY Your Ref: SI 2-1-3 WI (WISH)Our Ref: 06-0087**

SUMMARY – WI. The Wisconsin Initiatives in Sustainable Housing Trust (WISH) and the subaccounts contained therein are discussed in this opinion. The WISH Trust is a pooled trust established and managed by a nonprofit organization. The Trust is designed to hold assets for the purpose of meeting the housing and other supplemental needs of subaccount beneficiaries. The Trustee has sole discretion regarding disbursements from the Trust, but is required to make a home available for subaccount beneficiaries as a primary residence. The subaccounts are irrevocable, contain a spendthrift clause, and cannot be amended or revoked by the subaccount beneficiary. The current language contained in the Trust permits that initial post-mortem disbursements from the Trust may be made to creditors other than the State Medicaid agency. As such, self-settled subaccounts contained in the WISH Trust do not meet the pooled trust exception. Subaccounts established solely with the assets of third parties are determined to be excluded from resource counting. Still, disbursements made from the Trust may be countable income in the form of cash unearned income or ISM depending on the circumstances surrounding the disbursement. Whether the subaccount beneficiary has an equitable ownership interest in the home being held by the Trust is also a controlling factor in determining whether ISM in the form of shelter may be received by the

beneficiary. **J. PS 06-081 SSI-Wisconsin-Review of the Declaration of the Wisconsin Initiatives in Sustainable Housing Trust - REPLY Your Ref: SI 2-1-3 WI (WISH) Our Ref: 06-0004**

SUMMARY – SD. This opinion evaluates whether a Master Trust Agreement (MTA) and an Amended Joinder Agreement (AJA) meet the statutory requirements to be excluded under section 1917(d)(4)(C) of the Social Security Act. Secondly, it establishes that SSA is not bound by an Administrative Law Judge's "*nunc pro tunc*" (now for then) opinion to permit the claimant to amend the original Joinder Agreement to include Medicaid payback language. While the trust documents meet the first two requirements under the pooled trust exception, they do not meet the following requirements: Medicaid reimbursement language; established for the sole benefit and for the benefit of a disabled individual; and, established by the individual, a parent, grandparent, a legal guardian, or a court. Amendments to the MTA and AJA to satisfy the pooled trust exclusion requirements, will apply prospectively, at which time the trust needs to be evaluated under appropriate resource rules. **B. PS 12-026 Treatment of Trust for SSI Resources Purposes (Isaac)**

SUMMARY – OH. In this case, a pooled trust is determined to be a resource because it does not meet one of the requirements for the exception in Section 1917(d)(4)(C) of the Social Security Act, i.e., that the trust must be established solely for the benefit of the disabled individual. This trust provides that, if it becomes impossible or impracticable to carry out the trust purposes with respect to all beneficiaries, the trustee may terminate the trust and distribute property as if the beneficiary had died. These terms create a contingency under which someone other than the beneficiary could benefit from the trust during the beneficiary's lifetime. Therefore it is not considered to be for the beneficiary's sole benefit, so it does not meet all the requirements for the Section 1917(d)(4)(C) exception. **R. PS 04-003 SSI-Ohio-Review of the Subaccount of Mary T~, ~, in the Community Fund Management Foundation Pooled Medicaid Payback Trust Your Reference: S2D5G6 OH**

SUMMARY – OH. The Ohio Community Pooled Trust was amended on September 16, 2005 to incorporate changes to the Master Trust that would permit all sub-accounts to be excluded from countable resources for SSI purposes. The amendments to the Master Trust Agreement bring the Trust into compliance with the Medicaid payback provisions such that the subaccounts are now excluded under provisions found at 42 U.S.C.1396p(d)(4)(c). Amendments incorporated September 16,2005 modified the original Trust. This means that the changes to the Master Trust, and the subaccounts found therein, are effective September 16,2005 and not for any time prior to execution of the amendments. **M. PS 06-053 SSI-Ohio-Review of the Gift Annuity Account for Janalyn M. H~ in the Ohio Community Pooled Trust, ~ - REPLY Your Ref: S2D5G6 SI 2-1-3 OH (H~) Our Ref: 05-0174**

SUMMARY – OH. Trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary is considered a resource to the extent that the trust is revocable or the extent any payments can be made from the trust for the benefit of the individual. However, certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under § 1917(d)(4)(C) of the Act. In order to qualify for the Medicaid pooled trust exception, the trust must contain the assets of a disabled individual and satisfy the following conditions: 1) It must trust be established and maintained by a nonprofit association; 2) Separate accounts be maintained for each beneficiary, but assets are pooled for investing and management purposes; 3) Accounts are established solely for the benefit of the disabled individual; 4) Accounts in the trust must be established by the individual, a parent, grandparent, legal guardian, or a court; and 5) The trust must provide that to the extent 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 the amount remaining up to an amount equal to the total

amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan. In this case, the trust contains a provision that might allow other individuals to benefit from the trust during the beneficiary's lifetime which is contrary to requirement three listed above. However, the trust contains a void clause which nullifies the offending provision which permits the trust to meet the Medicaid pooled trust exception and thus be excluded from resources for SSI purposes. **. PS 06-356 SSI-Ohio-Review of the Sub-Account of Jackie R~, ~ in the Ohio Pooled Trust-REPLY Your Reference: S2D5G6, SI 2-1-3 OH (R~) Our Reference: 06-0014**

SUMMARY – MI. This opinion addresses whether or not the Synod Pooled Disability trust is a resource for SSI purposes. In order to meet the special needs pooled trust exception, a trust must satisfy several criteria. One of those criteria is that the individual trust account be established for the sole benefit of the disabled individual. In this case, there are circumstances where the trustee, during the disabled individual's lifetime, may terminate the trust account and distribute the assets as if the disabled individual had died. This early termination provision violates the requirement that the trust account be established for the sole benefit of the disabled individual. However, the trust contains a savings clause that renders the early termination provision ineffective. For this reason, the trust satisfies all of the special needs exception criteria and is not a countable resource for SSI purposes. **E. PS 07-166 SSI-Review of the Sub-Account of Ricky H~, in the Synod Pooled Disability Trust - REPLY Your Ref: S2D5G6 (H~) Our Ref: 07-0141-NC**

SUMMARY – KS. This case concerns whether or not the ARCare Trust II is an excluded resource for SSI purposes. According to the Social Security Act, assets held in trust for individuals generally are countable resources, even if state property law might otherwise exclude them, if any portion of the trust property could be used for the benefit of an eligible individual or their spouse. However, there is an exception to this general rule which is commonly referred to as the "pooled trust exception." This exception states that a trust containing the assets of a disabled individual is not a countable resource when certain requirements are met. One of those requirements is that upon death, the trust must use any remaining funds in the account to reimburse the State for any medical assistance provided on behalf of the beneficiary. Before July 29, 2003, the ARCare Trust II was not compliant with this provision. However, the ARCare Trust II was subsequently amended to include all criteria necessary to qualify for the pooled trust exception, and is thus excluded from resources for SSI purposes. It is our opinion that a trust with a provision permitting payment of funeral expenses and other expenses prior to reimbursing the State and limiting the State's reimbursement for medical assistance by the date of the establishment of the trust is outside the scope of the exception at 42 U.S.C. §§ 1396p(d)(4)(C). However, the July 29, 2003 amendment to the Agreement appears to cure the defective provisions. Therefore, as of July 29, 2003, the ARCare Trust II qualifies as an exception to the general rule that assets held in trust must be counted as a resource. **A. PS 03-193 ARCare Trust Medicaid Reimbursement Provision and the Supplemental Security Income Resource Pooled Trust Exception Insured: Tammy C~**

SUMMARY – IN. The individual has a trust sub-account in the ARC of Indiana Master Trust, funded by the individual's insurance settlement. The trust monies provide for the comfort and happiness of disabled beneficiaries by using the trust property to serve their interests over and above their basic maintenance, support, medical, dental, and therapeutic care or any other appropriate care or service which may be paid for or provided by other sources. The trustee has discretion to make disbursements. The trustee, however, cannot make any disbursements which would jeopardize a disabled beneficiary's eligibility for Government assistance. The trustee is also prohibited from using trust property to reimburse any local, State, or Federal Government agency for such assistance. The individual does not have the power to direct use of the trust property to meet his needs for food,

clothing, or shelter. Nor can the individual sell his beneficial interest in the trust, or revoke the trust and obtain the trust assets. Since the individual is the trust settler, but is not the sole beneficiary of the trust (after his death, the money goes to his heirs and the ARC), the individual cannot revoke the trust without consent of the other beneficiaries. Since the trust is irrevocable, and the individual cannot direct any disbursements from the account or convert trust property to cash to be used for his support, the property in the sub-account is not a resource for SSI purposes. **G. PS 04-198 Indiana Trust for David S~, ~**

SUMMARY – IN. The issue is whether a subaccount established for an individual in the Association for Retarded Citizens of Indiana Master Trust is a resource. Also, would court-ordered support payments into the Trust be considered income to the individual for SSI purposes. The purpose of the Trust is to provide the comfort and happiness of disabled beneficiaries and provide for their supplemental needs, over and above their basic maintenance, support, medical, dental and therapeutic care. Within the Trust, individual Trust accounts (subaccounts) are created and maintained for each beneficiary, but pooled for investment and management of the funds. The trustee has full power, authority, and absolute discretion to perform all acts necessary to accomplish the purpose of the Trust. The Trust was established in 1989 by joinder agreement. However, the parents did not deposit any funds into the subaccount at that time,. Instead, they noted their intention to fund the account upon the death of the last surviving parent. The parents are complying with a December 17, 2004 court order to deposit support funds into this account monthly. Thus, the account is currently funded with support money from the father beginning 2004. The Trust is a third party Trust established after January 1, 2000. The individual has no authority over the Trust account and cannot direct its use or sell his interest in the Trust. Therefore, the subaccount would not constitute a resource and the support payments to the Trust would not be considered income for SSI purposes. However, any cash disbursements made directly to the individual would be income, and any disbursements to third parties that result in the individual's receipt of food, clothing, or shelter would be considered income in the form of in-kind support and maintenance. **D. PS 05-125 SSI-Indiana-Review of the Sub-Account of Michael D~ in the Association of Retarded Citizens Pooled Trust, ~ Your Ref: S2D5G6 SI 2-1-3 IN (D~)Our Ref: 05-0075**

SUMMARY – IN. The Chicago Regional Counsel previously determined that a sub-account created under the ARC of Indiana Master Trust (Trust II) and Joinder Agreement was a resource for SSI purposes. This opinion addresses proposed amendments to the trust which are intended to make it a non-countable resource for SSI purposes. Upon review, the proposed changes would be considered modifications, not revisions, and would only be effective on the date they were executed. Even with the modifications, the trust amendments still are not sufficient to change the previous determination. Two areas remain which make this trust a countable resource. One is that no provision is made for a change of residence so that more than one state would be eligible for the Medicaid assistance payback on the death of the claimant. Another is that the potential exists for distribution to others on the "deemed death" of the claimant. Therefore, the distribution resulting from this early termination would not be for the sole use of the claimant. The precedent here is that revisions or modifications to trusts that do not address and solve the central issues for exclusion remain a countable resource for SSI purposes. **B. PS 07-170 SSI-Indiana-Review of Proposed Restatement of the ARC of Indiana Master Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3 IN (ARC) Our Ref: 07-0277**

SUMMARY – IL. The Lambs Farm, a not-for-profit corporation, proposes to form The Lambs Care Trust, Inc. This is a pooled trust wherein individual trust accounts will be maintained for each disabled beneficiary who chooses to adopt the trust, but the funds from each trust account will be pooled for

investment and management. Funds in the Lambs Care Trust will not count as a resource under the new rules in effect for trusts created after 1/1/00. **EE. PS 00-493 SSI-Illinois-Review of The Lambs Care Trust, Inc., OBRA '93 Pooled Trust**

SUMMARY – IL. The regional attorney was asked to review the Options for Living Pooled OBRA Pay Back Trust under the newly enacted trust provisions effective January 2000. It is the opinion of the regional attorney that the trust qualifies for the Medicaid trust exception (SI 01120.203) and would not be considered a resource to an SSI beneficiary. **BB. PS 01-107 SSI-Illinois-Review of Options for Living Pooled OBRA Pay Back Trust**

SUMMARY – IL. Depending on the date of execution of the Joinder Agreement, the Illinois Disability Pooled Trust discussed below may or may not be considered a resource for SSI purposes. Assets generally are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his or her support or maintenance. In this case, for those individuals who signed the Joinder Agreement between January 1, 2000 and April, 29, 2002, the trust assets would be considered a resource until April 30, 2002, because the Trustee had the discretion to expend the trust assets for the benefit of the beneficiary. **Z. PS 02-133 SSI-Illinois-Review of the Illinois Disability Pooled Trust and Amendment Action, Your Ref: S2D5G6; SI 2-1-3 IL**

SUMMARY – CA. The Planned Lifetime Assistance Network of California Master Pooled Trust examined by the San Francisco Regional Chief Counsel (RCC) counts as a resource because its provisions treat early termination the same as termination by death. The RCC clearly identified the significant fact that this would violate the sole benefit provisions by allowing remainder beneficiaries a way to obtain these trust funds as if the sole beneficiary were dead. **C. PS 12-130 Legal Opinion on Planned Lifetime Assistance Network of California (PLAN) Master Pooled Trust for SSI Recipient Stephen**

SUMMARY – IL. This opinion addresses whether or not a sub-account in the Illinois Disability Pooled Trust can be excluded from resources for SSI purposes. To be excluded from resources under the Medicaid trust exception a pooled trust must satisfy several criteria. Two of the criteria are that the trust must be established for the sole benefit of the beneficiary and that to the extent that the trust does not retain funds remaining in the sub-account, the State Medicaid Agency must be listed as first payee. The amended trust below contains several provisions that could allow for third-parties to benefit from the trust during the beneficiary's lifetime. In addition, the trust also contains provisions that frustrate the Medicaid payback requirement. While these provisions would preclude the trust from being excluded from resources for SSI purposes, the trust contains a null and void clause. This clause renders the offending provisions as void and thus the trust can be excluded under the Medicaid pooled trust exception. **G. PS 07-069 SSI-Illinois Review of the Second Amendment to the Illinois Disability Pooled Trust - ACTION, Your Ref: SI 2-1-3 IL, Our Ref: 06-0064**

SUMMARY – IL. This opinion reviews a sub-account in the Illinois Disability Pooled Trust. The corpus of the sub-account was formed in August, 2005 from funds held in a guardianship account for the SSI beneficiary. The execution of the Joinder Agreement by the Public Guardian created the sub-account with the SSI beneficiary as the sole beneficiary of the Trust and her estate as the Final Remainder Beneficiary. The Agreement states that the State will receive reimbursement for services provided (e.g. Medicaid) upon the death of the beneficiary. Based on the terms of the Master Trust and the sub-account, the Trust qualifies as a Medicaid payback Trust meeting the pooled trust exception and is excluded from resource counting under those provisions. Further, since the beneficiary cannot direct use of the funds and the anti-lapse Trust language creates an irrevocable

residual beneficiary, the Trust is not countable under normal resource counting policy. **J. PS 06-078 SSI - Illinois - Review of the Sub-Account of Teresa R~ in the Illinois Disability Pooled Trust Joinder Agreement - REPLY Your Reference: S2 D 5G6 SI 2-1-3 IL (R~) Our Ref: 05-0185**

SUMMARY – IL. A pooled trust was created by the Illinois Disability Association on July,17 1998. The Illinois Disability Pooled Trust and the subaccounts contained therein are irrevocable and the terms of the Trust contain a spendthrift provision preventing transfer or assignment of a beneficiary's interest in the Trust. The trustee has sole discretion regarding all distributions. At the time the Trust was created, the Trust and the subaccounts were determined to be countable resources for SSI purposes because the terms did not meet the requirements for the Medicaid payback trust exception. On April 30, 2002 the Trust was amended and the language that allowed payment of funeral expenses before payment to Medicaid was deleted. For the beneficiary cited in this opinion, an irrevocable subaccount was created in May, 2002 that named the Illinois Disability Association as the residual beneficiary. The Trust and the subaccount should not be considered resources for SSI purposes since they are now excluded under the Medicaid payback trust exception. Due to the revisions that occurred on April 30, 2002, this opinion should only be used for the Illinois Disability Pooled Trust after that date. For Trusts or subaccounts established before April 30, 2002 refer to PS 01825.016(E). **K. PS 05-225 SSI- Review of the Sub-Account of Jesus C~ (~) in the Illinois Disability Pooled Trust - REPLY SSN: ~ Number Holder: Jesus C~ Your Ref: S2D5G6, SI 2-1-3 IL (C~)**

SUMMARY – IL. An SSI beneficiary established a sub-account in a pooled Trust held by a not-for-profit corporation. She funded the irrevocable account with her own money in the form of a check post-1/1/00. The Trust grants the trustee sole discretion regarding distributions and contains a spendthrift provision precluding transfer or anticipation of the funds. Although the Trust contains Medicaid payback provisions, it is determined to be a countable resource as a result of the "deemed death" early termination clause. Language in the Trust provides that the trustee can terminate the Trust at their discretion as if the SSI beneficiary had died. The money in the Trust would then be distributed to: an expense account, the State of Illinois, a Charitable Fund, and the beneficiary's children. The possibility that others could benefit from the Trust while the SSI beneficiary is still alive means that the Trust does not meet the sole benefit requirement to be excluded under the pooled trust exception. **M. PS 05-188 S2D5G6 SSI-Illinois Review of Life's Plan Self-Funded Payback Trust - Reply Your Ref: SI-2-1-3 IL (H~)Our ref: 05 0113**

SUMMARY – IL. The opinion in this case addresses whether or not the sub-accounts within the master pooled trust are a resource for SSI purposes. The POMS at SI 01120.203B.2. outline the criteria that must be met in order for a pooled trust to qualify for the special needs trust exception. One of the criteria is that the sub-accounts in the trust must be established solely for the benefit of the disabled individual. One the provisions in the trust in question creates a possibility that upon termination of the trust, other individuals could benefit from the trust during the primary beneficiary's lifetime. Because of this provision, a sub-account in the pooled trust is considered a resource for SSI purposes. **O. PS 05-036 SSI - Illinois - Review of the Proposed Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust Your Reference: S2D5G6; SI 2-1-3 IL (Jewish Federation) Our Ref: 04-P-093**

SUMMARY – IL. This opinion concerns a pooled trust in Illinois. This pooled trust has been determined to be countable as a resource for SSI purposes because it does not meet the requirements for an exception as a Medicaid payback trust. This trust inappropriately provides for payment of the trust beneficiary's funeral expenses before the State is reimbursed for Medicaid benefits. **R. PS 04-308 Illinois Disability Pooled Trust for Jerry L. R~, ~; Your Reference: S2D5G6**

SUMMARY – IL. This legal opinion serves as an excellent reminder that a pooled trust must meet four basic requirements in order to be excluded as a resource. They are as follows: the trust must be established and maintained by a non-profit organization; a separate account must be maintained for each trust beneficiary; accounts must be established solely for the benefit of the disabled individual by the individual, parent, grandparent, legal guardian or court; and the trust must provide that to the extent that funds that remain in the sub-account upon the death of the beneficiary are not retained by the trust, the trust will pay to the State an amount equal to the total of medical assistance paid on behalf of the beneficiary. In this case, regional counsel determined that the sub-account would be a countable resource because of specific language contained in the trust document. The trust provided, for example, that the trustee in his or her sole discretion could terminate the sub-account. OGC opined that this violated the third requirement that the trust be established solely for the benefit of the individual since this provision might create the possibility that other individuals could benefit from the trust during the primary beneficiary's lifetime. Further, regional counsel opined that the fourth and final requirement may also not be met because the trust language suggests funeral or other prohibited expenses may be paid prior to State reimbursement. **W. PS 03-174 SSI - Illinois - Review of the proposed Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust Your Reference: S2D5G6; SI 2-1-3 IL Our Ref: 02-P-066**

SUMMARY – IL. This opinion clarifies that the Illinois disability association's pooled trust was amended effective April 30, 2002 to reimburse the state for Medicaid payments prior to the payment of any funeral expenses. As a result of this amendment, for those who joined the trust before January 1, 2000, the trust sub-account would not be a resource. For those who joined the trust on or after January 1, 2000 but before April 30, 2002, the trust would be a resource until April 30, 2002, but not thereafter. And, for those who joined the trust on or after April 30, 2002, the sub account would not be a resource at any time. **X. PS 03-141 SSI-Illinois-Review of the Illinois Disability Pooled Trust and Amendment Action**

SUMMARY – IL. This opinion concerns the Illinois Disability Pooled Trust which was established by the Illinois Disability Association on July 17, 1998. For a beneficiary who joined the trust before January 1, 2000, a trust sub-account would not be a resource for SSI purposes. For those beneficiaries who joined the trust between January 1, 2000 and April 30, 2002, the trust sub-account would be a resource until April 30, 2002 but not thereafter. For those who joined the trust on or after April 30, 2002, the trust sub-account would not be a resource at any time. **Y. PS 03-011 SSI-Illinois-Review of the Illinois Disability Pooled Trust and Amendment Action Your Ref: S2D5G6; SI 2-1-3 IL**

2.19 Early Termination including "Deemed Death"

SUMMARY – WI. This opinion analyzes a special needs trust to determine whether the criteria are met to be exempted from SSI resource counting. The subject trust was established in 2004 with the assets of a disabled individual under age 65. The trust fails to meet the sole benefit criteria to be exempted from SSI resource counting due to an early termination provision that would distribute trust assets as though the beneficiary had died. The provision thus allows that, subsequent to Medicaid reimbursement, the beneficiary's heirs could receive benefit from the trust while he is still alive. The trust also contains a potentially problematic provision stating that members of the beneficiary's family may benefit from distributions of the trust if the trustee determines that such distributions promote the purpose of the trust. The language in that provision is imprecise and does not specify that such benefits to family members are strictly collateral and subordinate to trust

distributions made on behalf of the beneficiary. **A. PS 09-123 Wisconsin - SSI Review of Special Needs Trust for Paul J. V~ Your Ref: S2D5G6 SI-2-1-3 WI Our Ref: 08-0184**

SUMMARY – TX. This opinion examines whether or not a trust established after January 1, 2000 with the assets of an individual is a resource for Supplemental Security Income (SSI) purposes. The trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act. Generally under these provisions, trusts established with the assets of an individual or the individual's spouse are considered resources for SSI purposes, unless an exception applies. The trust in this case is excluded from resources under Section 1917(d)(4)(A) as a special needs trust, even though the trust allows for termination prior to the individual's death. The individual, however, lacks the authority to terminate the trust. Additionally, upon termination preceding death, the trust provides for reimbursement first to any State that has provided medical assistance. If any assets remain, the trust provides that the remainder shall be distributed to the beneficiary. Therefore, no other entity benefits from the trust during the beneficiary's lifetime. In this case, the trust is excluded from resources. **A. PS 10-065 Irrevocable Trust Agreement and Early Termination Provision in the Aiden H~ Special Needs Trust, SSN ~ – REPLY**

SUMMARY – SD. This opinion evaluates whether a Master Trust Agreement (MTA) and an Amended Joinder Agreement (AJA) meet the statutory requirements to be excluded under section 1917(d)(4)(C) of the Social Security Act. Secondly, it establishes that SSA is not bound by an Administrative Law Judge's "*nunc pro tunc*" (now for then) opinion to permit the claimant to amend the original Joinder Agreement to include Medicaid payback language. While the trust documents meet the first two requirements under the pooled trust exception, they do not meet the following requirements: Medicaid reimbursement language; established for the sole benefit and for the benefit of a disabled individual; and, established by the individual, a parent, grandparent, a legal guardian, or a court. Amendments to the MTA and AJA to satisfy the pooled trust exclusion requirements, will apply prospectively, at which time the trust needs to be evaluated under appropriate resource rules. **B. PS 12-026 Treatment of Trust for SSI Resources Purposes (Isaac)**

SUMMARY – MN. This opinion involves a transfer by a beneficiary's parents of Uniform Transfer to Minors Act (UTMA) funds to newly established trusts for the beneficiary prior to his attainment of the age of majority. Two issues arose. First, does State law permit the transfer of UTMA funds into a trust and, second, are the trusts resources for SSI purposes? Regional counsel determined that Minnesota law did permit the parents to transfer the UTMA funds and that such action was not a breach of their fiduciary responsibilities. However, because each trust contained a discretionary termination clause in the event of the beneficiary's noneligibility for public assistance (e.g., SSI), the trusts created a contingent interest in third parties. Because neither trusts would be for the sole benefit of the beneficiary during his lifetime, the statutory trust exceptions discussed at POMS SI 00120.203B.1.d. would not apply and the trusts would be resources for SSI purposes (*also see* SI 01120.201F.2. for a discussion of sole lifetime beneficiary). **G. PS 06-091 Opinion Request Transfer; Treatment of Trust for SSI Resource Purposes (Ryan A. S~)-Reply Your Reference: S2D8B51:RLM Our Reference: 06-0012**

SUMMARY – MN. This opinion provides detailed analysis of a special needs trust established for an SSI beneficiary with the proceeds of a court-approved personal injury settlement. While the trust purports itself to be irrevocable, the SSI beneficiary is both the settler (grantor) and sole beneficiary of the trust. Since the settler of the trust is also the sole beneficiary, the trust is revocable and, thus, a countable resource for SSI purposes. This remains true despite that fact that the trust otherwise meets the requirements to be excluded under the special needs trust provisions. Naming a residual

beneficiary would likely have the effect of making the trust irrevocable, but the deemed death provision would then allow for the residual beneficiary to potentially benefit from the trust during the lifetime of the beneficiary. In that instance, the trust no longer meets the special needs trust requirement dictating that the trust must be for the sole benefit of the beneficiary during their lifetime. **F. PS 07-045 SSI-Minnesota-Review of the Jennifer T~ Special Needs Trust, ~, - REPLY Your Ref: SI 2-1-3 MN Our Ref: 06-0056**

SUMMARY – MN. The opinion in this case examines whether or not the special needs trust in question is a countable resource for SSI purposes. There is an exception to counting a special needs trust as a resource if certain criteria are met. One of the criteria is that the trust be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court. This trust does not satisfy this criterion because the adult claimant's funds were used to establish the trust (established by parents but didn't contain "seed trust funds" and the trust contains an early termination provision that could allow a third party to benefit from the trust during the claimant's lifetime. In addition, the trust does not comply with the Medicaid payback requirement as it allows for the payment of prohibited expenses and limits the amount and state jurisdictions that can be reimbursed. For the reasons outlined above, the trust is a countable resource for SSI purposes. **C. PS 09-021 SSI-Review of the Request for Reconsideration on the Judith C~ Trust, ~ ACTION Your Reference: SI 2-1-4 MN (C~) Our Reference: 08-128**

SUMMARY – MI. This opinion addresses whether or not the Synod Pooled Disability trust is a resource for SSI purposes. In order to meet the special needs pooled trust exception, a trust must satisfy several criteria. One of those criteria is that the individual trust account be established for the sole benefit of the disabled individual. In this case, there are circumstances where the trustee, during the disabled individual's lifetime, may terminate the trust account and distribute the assets as if the disabled individual had died. This early termination provision violates the requirement that the trust account be established for the sole benefit of the disabled individual. However, the trust contains a savings clause that renders the early termination provision ineffective. For this reason, the trust satisfies all of the special needs exception criteria and is not a countable resource for SSI purposes. **E. PS 07-166 SSI-Review of the Sub-Account of Ricky H~, in the Synod Pooled Disability Trust - REPLY Your Ref: S2D5G6 (H~) Our Ref: 07-0141-NC**

SUMMARY – IN. The Chicago Regional Counsel previously determined that a sub-account created under the ARC of Indiana Master Trust (Trust II) and Joinder Agreement was a resource for SSI purposes. This opinion addresses proposed amendments to the trust which are intended to make it a non-countable resource for SSI purposes. Upon review, the proposed changes would be considered modifications, not revisions, and would only be effective on the date they were executed. Even with the modifications, the trust amendments still are not sufficient to change the previous determination. Two areas remain which make this trust a countable resource. One is that no provision is made for a change of residence so that more than one state would be eligible for the Medicaid assistance payback on the death of the claimant. Another is that the potential exists for distribution to others on the "deemed death" of the claimant. Therefore, the distribution resulting from this early termination would not be for the sole use of the claimant. The precedent here is that revisions or modifications to trusts that do not address and solve the central issues for exclusion remain a countable resource for SSI purposes. **B. PS 07-170 SSI-Indiana-Review of Proposed Restatement of the ARC of Indiana Master Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3 IN (ARC) Our Ref: 07-0277**

SUMMARY – CA. The Planned Lifetime Assistance Network of California Master Pooled Trust examined by the San Francisco Regional Chief Counsel (RCC) counts as a resource because its provisions treat early termination the same as termination by death. The RCC clearly identified the significant fact that this would violate the sole benefit provisions by allowing remainder beneficiaries a way to obtain these trust funds as if the sole beneficiary were dead. **C. PS 12-130 Legal Opinion on Planned Lifetime Assistance Network of California (PLAN) Master Pooled Trust for SSI Recipient Stephen**

SUMMARY – CO. This decision clarifies several aspects of trust law including early terminations and sole benefit provisions. It illustrates this by indicating how and why this trust fails to meet those criteria for exception. It also indicates that Colorado law does not allow "empty " or "dry" trusts. **B. PS 11-034 Treatment of Trust for SSI Purposes (Ronald S~)**

SUMMARY – IL. An SSI beneficiary established a sub-account in a pooled Trust held by a not-for-profit corporation. She funded the irrevocable account with her own money in the form of a check post-1/1/00. The Trust grants the trustee sole discretion regarding distributions and contains a spendthrift provision precluding transfer or anticipation of the funds. Although the Trust contains Medicaid payback provisions, it is determined to be a countable resource as a result of the "deemed death" early termination clause. Language in the Trust provides that the trustee can terminate the Trust at their discretion as if the SSI beneficiary had died. The money in the Trust would then be distributed to: an expense account, the State of Illinois, a Charitable Fund, and the beneficiary's children. The possibility that others could benefit from the Trust while the SSI beneficiary is still alive means that the Trust does not meet the sole benefit requirement to be excluded under the pooled trust exception. **M. PS 05-188 S2D5G6 SSI-Illinois Review of Life's Plan Self-Funded Payback Trust - Reply Your Ref: SI-2-1-3 IL (H~)Our ref: 05 0113**

SUMMARY – IL. This opinion determined that an Illinois special needs trust does not meet the requirements for an exception under section 1917(d)(4)(A) of the Social Security Act. This trust contains a Disclaimer provision coupled with a Distribution-Upon-Termination-of-the-Trust provision. The combination of these 2 provisions creates contingent interests which could benefit third parties during the lifetime of the beneficiary. Accordingly, the trust does not meet the requirement in section 1917(d)(4)(A) that the trust must be established for the benefit of the beneficiary. Thus, it should be counted as a resource for SSI purposes. **P. PS 05-033 SSI - Illinois. - Review of the Brian V~ Irrevocable OBRA Pay Back Trust Our Reference: 04S044 Your Reference: S2D5G6, S1 2-1-3 IL (V~)**

SUMMARY – IL. This Illinois opinion concerns a Medicaid payback trust that is funded with maintenance (alimony) payments, has a termination clause, and is established by a court order. The opinion states that Illinois would allow a court to create a trust to receive maintenance payments and that the payments are not income to the beneficiary because the court ordered that the payments must go directly to the trust. The opinion states that the termination clause does not prevent the trust from meeting the requirements for an exception under section 1917(d)(4)(A) because exercise of the termination clause would not benefit anyone other than the beneficiary during the beneficiary's lifetime. The opinion also states that the court ordered the creation of this trust consistent with the requirement for an exception under section 1917(d)(4)(A). **Q. PS 05-002 SSI-Illinois-Review of Joyce H~ Special Needs Trust ~ Your Reference: SI-2-1-3 IL (H~) Our Reference: 04P004**

SUMMARY – OH. This opinion discusses a trust case in Ohio The trust is excludable from SSI resource counting until 7/10/04. This is because, under the trust's terms, the beneficiary cannot revoke the trust, cannot direct the trustee to use the benefits for his support and maintenance, and cannot get any value for his interest in the trust. However, the trust will be countable as a resource starting on 7/10/04 because the trust gives the beneficiary the authority to revoke the trust and use the money on that date. Note: Because of a change in the Social Security Act, this precedent may only be applicable to a trust established prior to 1/1/00. **V. PS 01-104 SSI-Ohio-Review of Chad W. J~ Trust, SSN: ~; Your Ref.: S2D5G3**

3 Administration of Special Needs Trusts

3.1 Transfer of Trust to New Trustee

SUMMARY – IN. An irrevocable trust was established by an SSI beneficiary's grandparents in 1993. The trust contained a spendthrift provision and the grandparents served as trustees and had absolute authority over distributions. In 2002, the Superior Court ordered that the trust be reformed and the assets were subsequently placed in a sub account of the Association for Retarded Citizens (ARC) of Indiana Master Trust I. Barring an explicit statement to the contrary, reformation of a trust relates back and serves to alter the text of the trust as of the original date of execution. Additionally, a trustee to trustee transfer does not constitute the establishment of a new trust for SSI purposes unless there is an indication that the beneficiary is using the transfer as an estate planning tool. Thus, the beneficiary's sub account in the ARC Trust is considered a continuation of the original Trust. Since the original trust was not a resource for SSI purposes, the second trust created by the reformation is also not a resource for SSI purposes. Due to a change in the Social Security Act, this precedent may only be applicable to a trust established before 1/1/00. **C. PS 05-224 SSI-Indiana-Review of the Brooke G~ Irrevocable Trust Number One and the Sub-Account of Brooke G~, ~, in the ARC of Indiana Master Trust I-REPLY Our Ref: 05-140 Your Ref: S2D5G6, SI 2-1-3 IN (G~)**

SUMMARY – WI. An irrevocable grantor trust was created in 1994 for an SSI beneficiary. The corpus was held in a subaccount of the Wisconsin Family Community Trust and terms provided that the trustee had exclusive discretion regarding disbursements. The subaccounts of the Trust were determined to be excluded from resource counting as long as they named a residual beneficiary. This subaccount named Wisconsin Medicaid as the residual beneficiary and was, thus, excluded from SSI countable resources. In July 2003, the Trust Advisory Committee terminated the Community Trust and transferred all assets to the WisPACT II trust. A trustee-to-trustee transfer does not constitute establishment of a new trust as long as there is no indication that the beneficiary is using the transfer as an estate planning tool. Since there is no indication that the beneficiary is using the transfer to circumvent SSI resource counting policy, the subaccount in WisPACT II should not be considered a resource. **K. PS 05-228 SSI - Wisconsin - Review of the Account of Luann A~, ~, in the Wisconsin Family Community Trust for the Disabled and the WisPACT Trust II - REPLY Our Ref: 05-0136 Your Ref: S2D5G6, SI 2-1-3 WI (A~)**

3.2 Mandatory Distributions

SUMMARY – OH. A living trust established by her mother in October, 2002 named an SSI recipient as a beneficiary upon the death of the grantor. The SSI recipient's brother became the trustee over

her funds when her mother passed away. He was responsible for distributing monthly payments composed of net earnings and principal to the SSI recipient for a period of five years following the mother's death. The trust contained a spendthrift provision preventing sale of the recipient's beneficial interest in the trust, but allowed her to direct the trustee to retain required payments for future use. Any retained payments could thereafter be requested by the recipient at any time to provide for food, clothing, or shelter. Based on SSI trust policy, it was determined that the trust was not a countable resource since the recipient could not revoke the trust, direct the trustee to make additional payments for basic needs, or sell her beneficial interest in the trust. However, because the trustee is required to make mandatory distributions from the trust, those distributions are countable unearned income even if the recipient directs the distribution to be retained. Furthermore, any distributions retained in trust would be countable resources if held in the following month since the recipient could, in that instance, direct the retained distributions to be used for food, clothing, or shelter. **Q. PS 04-345 SSI-Ohio-Review of the Inter Vivos Trust Agreement of Anne L. M~ for the Benefit of Catherine M~, ~Your Reference: SI-2-1-3 OH (M~)Our Reference: 04P082**

3.3 Income Distributions

SUMMARY – WI. This opinion concerns a grantor trust in Wisconsin. In this case the grantor is not the sole beneficiary because the trust created 2 beneficiaries. Because there is an additional beneficiary, the grantor cannot revoke the trust. And because the trustee has full discretion to distribute the assets, the grantor cannot direct the use of the assets. Therefore, the trust is not a resource of the grantor for SSI purposes. However, each month the trust disburses a cash payment to the grantor's guardian for the grantor. Although the guardian does not use the disbursements for the grantor's food and shelter, the disbursement is considered cash income to the grantor for SSI purposes. NOTE**:** Because of a change in the Social Security Act, this precedent may be applicable only to trusts established before 1/1/00. **CC. PS 01-100 SSI-Wisconsin-Review of a Trust for Jesse S. B~, ~; Your ref: S2D5G3**

SUMMARY – WI. This opinion concerns a living trust in the State of Wisconsin. The trust agreement created 3 separate trusts. The SSI beneficiary is the grantor and beneficiary of one of the 3 trusts. The trust was established in 1983, so it was evaluated under the SSI trust rules in effect prior to the 1/1/2000 change in the law. The SSI beneficiary's trust is not revocable and the beneficiary cannot direct the use of the trust, so that trust not a resource for SSI purposes. However, the beneficiary does have access to the trust income which is kept in a separate account. Therefore, the income generated by the trust is unearned income for SSI purposes and, if retained, is a countable resource. **R. PR 04-051 SSI-Minnesota-Review of the Interest of David H~ in the H~ Revocable Living Trust, ~-ACTION Your Ref: S2D5G6, SI 2-1-3 MN Our Ref: 3P091**

3.4 In-kind Support and Maintenance

SUMMARY – WI. This opinion discusses changes to the Wisconsin Initiatives in Sustainable Housing ("WISH") Pooled Trust and the Asset Contribution Agreements ("ACA") pertinent thereto. SSA previously advised that self-settled sub-accounts in the WISH trust were countable resources due to failure to meet the Medicaid payback requirements of Section 1917(d)(4)(C) of the Act. WISH, Inc. has now modified the ACA for a self-settled account and provides that after termination of the trust and payment of allowable death expenses, amounts not retained by the trust will be used to reimburse Medicaid. This modified language resolves the prior defect and sub-accounts with the new language

meet the requirements for the pooled trust exception. The opinion further concludes that home property transferred to a sub-account establishes an equitable ownership interest for the beneficiary. As a result, distributions from the sub-account to pay the mortgage or other household bills would constitute ISM in the form of shelter, though limited by the presumed maximum value (PMV). **H. PS 07-118 SSI-WISH-Review of Treatment of Rental Arrangements in the Wisconsin Initiatives in Sustainable Housing Trust - REPLY Your Ref: SI 2-1-3 WI (WISH)Our Ref: 06-0087**

SUMMARY – NY. This opinion discusses whether payments made from a trust for the trust beneficiary's food and shelter are countable as income by the SSI program. Under SSI regulations, food and shelter provided to an SSI recipient is considered as income to the recipient if paid for by another person. This income is called in-kind support and maintenance. Since the trustee holds legal title to the trust property, the trust property is not owned by the trust beneficiary. Thus, payments made from the trust on behalf of the trust beneficiary are considered payments made by another person. Consequently, payments by the trust for food and shelter are counted as income to the trust beneficiary. **E. PS 01-004 Trust Disbursements As In-kind Support and Maintenance**

4 TEXT OF THE REGIONAL CHIEF COUNSEL PRECEDENTS – BY STATE

4.1 ALASKA

A. PS 00-341 Trust Document re: Tim L~

DATE: September 27, 2000

1. SYLLABUS

The grantor trust rule provides that a trust is revocable if the grantor of the trust is the sole beneficiary. In this case, the SSI recipient is both the grantor and the beneficiary. Therefore, the trust is revocable.

However, since the trust consists of dividends from stock in a Native Corporation, the Alaska Native Settlement Claims Act (ANSCA) applies and up to $2,000 per year from the Native Corporation is excluded from resources. (See POMS instructions at SI 00830.830 and Seattle regional instructions at SI SEA00830.830 regarding ANCSA.)

2. OPINION

You have requested a legal opinion regarding the "Tim L~ Irrevocable Trust" (hereafter "Trust") to determine whether this trust document is revocable. You have specifically asked whether the beneficiary of the trust would be considered the grantor.

FACTUAL BACKGROUND

The Trust names Goldbelt, Inc., a Native Village Corporation established pursuant to the Alaska Native Claims Settlement Act (ANCSA), Pub. L. 92-203, codified at 43 U.S.C. § 1601 et seq., as the settlor of the Trust. Goldbelt, Inc. established the Trust on July 19, 1994 with dividends otherwise payable to the beneficiary of the Trust, Tim L~. Article II of the Trust names the State of Alaska's Office of Public Advocacy, Tim L~'s court-appointed full guardian, as the trustee. Trust, at p.1.

Article III of the Trust provides that "[t]he corpus of this Irrevocable Trust consists of monies which would otherwise be paid by Goldbelt, Inc. as dividends to Tim L~ by virtue of his ownership, pursuant to federal and state law, of 100 shares of stock in Goldbelt, Inc." Trust, at pp. 1-2. Section 4.01(a) of Article IV of the Trust provides that the trustee may not make any payments for L~'s ongoing support and maintenance and that L~ may not specify, control or direct any payments. Trust, at p. 2. Section 4.02(b) of Article IV of the Trust provides that "[n]o part of the Trust corpus created herein shall be used to supplant or replace public assistance benefits, if any, in the form of cash, services, or otherwise, available from any state, federal, or other governmental agency." Trust, at p. 4.

Section 4.03(a) of Article IV of the Trust provides that the Trust will terminate upon the earliest of the following events: distribution of all of the corpus, L~'s death, or entry of a judgment terminating the Trust after petition of the trustee because the Trust has rendered L~ ineligible for a public benefit. Trust, at p. 6. Section 4.03(d) governs termination of the trust due to L~'s death. In that situation, the trustee is directed to pay expenses for the efficient administration and termination of the Trust and then to pay Alaska's Division of Medical Assistance to reimburse it for Medicaid benefits paid on L~'s behalf during the Trust's existence. The Trust then directs that if there is any balance remaining in the Trust, the trustee is to pay it in accordance with L~'s last will and testament or in accordance with the laws of intestate succession if they apply. Trust, at pp. 6-7.

ISSUE PRESENTED

Your question is whether the beneficiary of the Trust, Tim L~, is also the grantor, thereby making the Trust revocable.

DISCUSSION

The Social Security Administration considers property an available resource if an individual has the right, authority or power to liquidate it. 20 C.F.R. §416.1201(a)(1) (1997). See also POMS SI 01120.200(D)(1).

The general rule is that a trust is established by the person who provides the consideration for the trust for which he is beneficiary even though in form, the trust is created by someone else. Restatement (Second) of Trusts, § 156, comment f (1959). Alaska follows the Restatement (Second) of Trusts. See e.g., Aiello v. Clark, 680 P.2d 1162 (Alaska 1984). Because the trust has been established by money which represents dividends on shares of stock owned by Mr. L~, it can be said that L~ provided the consideration for the trust.

The grantor trust rule provides that a grantor may revoke a trust if he is the sole beneficiary even if the trust is labeled "irrevocable." Am.Jur.2d Trusts, § 96. See Hal v. Malstrom, 29 Wn.2d 746, 189 P.2d 471 (1948). If the trust remainder vests immediately in a specifically named person, the trust is not revocable. See Lucas v. Velikanje, 2 Wash.App. 888, 471 P.2d 103 (1970). See also Restatement (Second) of Trusts, § 112 (1959). While we could not find any Alaska cases directly on point, an Alaska court would most likely follow the above rules as they are longstanding principles of trust law.

Under the grantor trust rule, the Trust would be revocable. However, because the trust corpus consists of dividends from stock in a Native Corporation, the Alaska Native Settlement Claims Act (ANSCA), 43 U.S.C. § 1601 et seq. applies.

ANSCA was enacted to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims..." 43 U.S.C. § 1601(a). It provides for the formation of Native Corporations which issue 100 shares of stock to each Native living in a Corporation's region. 43 U.S.C. § 1606(g).

43 U.S.C. § 1626(c) specifically addresses the interplay of ANCSA and the Social Security Act. The statute states in pertinent part:

In determining the eligibility of ...an individual Native ... to—-

...(2) receive aid, assistance, or benefits, based on need, under the Social Security Act [42 U.S.C. § 301 et seq.], ...

none of the following received from a Native Corporation, shall be considered or taken into account as an asset or resource:

(A) cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum;

Given the direct applicability of the above federal statute, the first issue to analyze would be whether the Trust receives over $2,000 per year in dividend monies from the Native Corporation. Under the above statute, up to $2,000 per year cannot be counted as a resource. Under the grantor trust rules, any dividends received by the Trust above $2,000 per year could be counted. The Trust does not specifically name a remainder beneficiary. Regarding the issue of a specifically named remainder beneficiary, see also our previous opinion regarding the Jeannette B~ Living Trust, the Surrana G~ Trust, and the H~ Family Trust, dated October 21, 1996.

CONCLUSION

Under 43 U.S.C. § 1626(c), up to $2,000 per year of dividends on stock in a Native Corporation may not be counted as a resource for SSI eligibility purposes. L~ is the grantor of the trust because he has provided the consideration for the Trust. He

owns stock in a Native Corporation by virtue of ANCSA. His shares of stock and the dividends received therefrom are analogous to settlement proceeds. He received the stock by virtue of his loss of claim to aboriginal lands. Because the Trust does not specifically name a remainder beneficiary, the grantor trust rule would apply to any annual dividends over $2,000.

4.2 ARIZONA

A. PS 10-005 Arizona State Law on Empty Trusts

DATE: August 5, 2009

1. SYLLABUS

This guide from the San Francisco Regional Chief Counsel informs us that the establishment of an "empty" or "dry" trust is not valid in Arizona where SSI excluded trusts are concerned.

2. OPINION

OVERVIEW

You asked whether an unfunded, or "empty," Arizona trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under Arizona law.

BACKGROUND

In general, when determining an individual's eligibility for SSI, all assets in a revocable trust established by the individual, as well as those assets in an irrevocable trust which could be paid to the individual, will be considered a resource. *See* Act § 1613, 42 U.S.C. § 1382b(e)(3); POMS SI 01120.201(D). Assets in a trust may be excluded as a resource, however, if a statutory exception applies.

Section 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A), provides for one such exception, commonly known as the Medicaid payback trust or "special needs trust." To qualify for the exception, a trust must:

1. be established with the property of an individual under age 65 who is disabled;

2. be established for the benefit of such individual by a parent, grandparent, legal guardian, or court; and

3. provide that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

Act § 1917(d)(4)(A); POMS SI 01120.203(B)(1).

Where a parent or grandparent creates such a trust, the parent or grandparent must either (1) create a "seed" trust, i.e., establish a trust using a nominal amount of his or her own funds, after which the disabled individual may transfer his or her own funds to the trust, or (2) create an empty or dry trust, if state law permits, into which the competent disabled adult's funds can be placed. POMS SI 01120.203(B)(1)(f).

Thus, if Arizona law recognizes the validity of an empty trust, trusts created in this manner may be eligible for the Medicaid payback trust exception. Conversely, if Arizona law does not recognize the validity of an empty trust, such trusts will not qualify for the exception.

DISCUSSION

Arizona has not directly addressed whether it would recognize an empty Section 1917(d)(4)(A) trust. Arizona law embraces special needs trusts and Section 1917(d)(4)(A) trusts, but does not specify whether such trusts may be unfunded. *See, e.g., Ariz.Rev.Stat*. §§ 14-10103(16) (defining "special needs trust"), 36-2934.01 (setting forth rules governing "trusts that are created pursuant to section 1917(d)(4)(A)" of the Act); *Romo v. Kirschner,* 889 P.2d 32, 34 n.2 (Ariz. Ct. App. 1995) (acknowledging creation of exemption under 42 U.S.C. § 1396p(d)(4)(A)).

As a general rule, however, Arizona does not recognize empty trusts as valid. Arizona common law uniformly requires trust property for the creation of a trust. *See Lane Title and Trust Co. v. Brannan,* 440 P.2d 105, 109-110 (Ariz. 1968) (listing "ascertainable trust res" as an essential element of a trust); *accord Haines v. Goldfield Property Owners Ass'n,* 121 P.3d 1276, 1279 (Ariz. Ct. App. 2005); In *re Estate of Moore*, 97 P.3d 103, 108 (Ariz. Ct. App. 2004); *Golleher v. Horton,* 715 P.2d 1225, 1231 (Ariz. Ct. App. 1985); *Jabczenski v. Southern Pac. Memorial Hosp. Inc.,* 579 P.2d 53, 57 (Ariz. Ct. App.1978); *see also Restatement (Second) of Trusts* § 74 (requiring tangible trust property for creation of trust).

Consistent with this general principle, Arizona case law has rejected empty trusts as invalid. *See, e.g., Matter of Strobel,* 717 P.2d 913, 914 (Ariz. Ct. App. 1985 (observing that testamentary trust that was never funded never came into existence), vacated on another issue by *Matter of Strobel,* 717 P.2d 892 (Ariz. 1986); *see also In re Estate of Friedman,* 2008 WL 2916812, at *8 (Ariz. Ct. App. Jul. 24, 2008) (finding trust did not exist where trust was unfunded, among other deficiencies).

CONCLUSION

Arizona law does not recognize empty trusts as valid. Consequently, such trusts would not qualify for the exception to counting set forth in Section 1917(d)(4)(A).

B. PS 08-172 The Marvin A. V~ Special Needs Trust

DATE: August 15, 2008

1. SYLLABUS

This opinion address two primary issues: 1) Whether or not the trust in question satisfies the establishment requirement found in 1917(d)(4)(A) of the Act, and 2) whether the abolishment of the doctrine of worthier title in the State of Arizona makes the trust irrevocable. To qualify as a special needs trust under 1917(d)(4)(A) of the Act, the trust must be established by a parent, grandparent, legal guardian, or a court. In this case, a special conservator, appointed by the court, established the trust. Under Arizona law, a conservator is not considered the legal equivalent of a legal guardian. Moreover, the trust cannot be considered established by the court as the court merely approved the trust. Regarding the second issue, the trust would not be considered irrevocable under the doctrine of worthier title because the state of Arizona does not recognize this doctrine.

2. OPINION

You asked about the construction of the Marvin A. V~ Special Needs Trust (Special Needs Trust) with respect to the Trust's beneficiary, Marvin A. V~. Specifically, you asked whether (1) the Special Needs Trust is a valid trust document if the Superior Court of Arizona appointed a special conservator for the sole purpose of establishing a trust for Marvin V~'s benefit; and (2) whether the abolishment of the doctrine of worthier title in the State of Arizona makes the Special Needs Trust irrevocable.

FACTUAL BACKGROUND

Marvin A. V~ has been receiving Supplemental Security Income (SSI) payments since 1989. His parents, Adolph and Amanda V~, established the "Adolph and Amanda G. V~ Family Trust" (Family Trust) on August 28, 2000. Adolph V~ died on May 14, 2003, and Amanda V~ died on June 26, 2006. Marvin V~ was a named beneficiary of the Family Trust. However, the Family Trust did not direct the establishment of a trust for Marvin V~.

On Marvin V~'s behalf, the Law Office of Bridget O'B~ S~, P.L.L.C. (Law Office), petitioned the Superior Court of the State of Arizona, County of Maricopa, to appoint a special conservator and to authorize the establishment of a special needs trust. On October 24, 2006, the Superior Court issued an Order appointing Southwest Fiduciary, Inc. (Southwest Fiduciary) as the Special Conservator "for the sole purpose of establishing a special needs trust for the benefit of the protected person." Southwest Fiduciary also serves as Marvin V~'s representative payee for his SSI payments. Marvin V~ does not have a legal guardian.

The Law Office prepared the Marvin A. V~ Special Needs Trust. Southwest Fiduciary is named the special conservator and the trustee. The trust was funded with a one-third share of monthly annuity payment in the amount of $1,364.24, payable on the 31st day of each month; a one-third share of monthly annuity payment in the amount of $1,195.79, payable on the 1st day of each month; a one-third share of monthly annuity payment in the amount of $505.95, payable on the 26th day of each month; and one-third beneficiary interest in the Family Trust in the estimated amount of $70,000.

DISCUSSION

Federal Law

To qualify as a special needs trust established under the statutory exception in section 1917(d)(4)(A) of the Social Security Act, the trust must be established for the benefit of the disabled individual by a parent, grandparent, legal guardian of the individual, or a court. 42 U.S.C. § 1396p(d)(4)(A); Program Operations Manual System (POMS) SI 01120.203(B)(1)(a).

We examined whether, under Arizona law, a conservator might be considered the legal equivalent of a legal guardian for the purposes of section 1917(d)(4)(A) of the Act. This does not appear to be the case for two main reasons: 1) an Arizona guardian is authorized to establish a trust, *see* Ariz. Rev. Stat. Ann. § 14-5312 (i.e., it is not necessary for a conservator to do so); and 2) the requirements for appointment of a guardian are more burdensome than those for appointment of a conservator. For example, the procedure for legal guardian appointment involves a hearing on the issue of incapacity; appointment of an investigator to interview the alleged incapacitated individual, as well as the prospective guardian; visits to the homes of both parties; and an examination of the alleged incompetent person by physician, psychologist or registered nurse appointed by the court. *See Ariz. Rev. Stat. Ann.* § 14-5303. The procedure for appointment of a conservator requires much less. *Ariz. Rev. Stat. Ann.* § 14-5401. For those reasons, we do not view the two as being equivalent for the purposes of section 1917(d)(4)(A) of the Act.

We also note that the trust was not established by the court. First, the Superior Court's order states that "a special conservator [was] appointed for the sole purpose of establishing a special needs trust for the benefit of the protected person." *See* Order Appointing Special Conservator and Authorizing Establishment of Special Needs Trust at page 1, paragraph 4. In addition, in the accompanying Letters and Acceptance of Special Conservatorship, the Superior Court states that "the Special Conservator's authority is limited to executing and establishing The Marvin A. V~ Special Needs Trust." *See* Letters and Acceptance of Special Conservatorship at page 1, lines 16 and 17. Thus, it appears that the conservator is actually establishing the trust and the Superior Court is approving that establishment, as evidenced further by a statement in the order, which reads: "it is further ordered approving the Marvin A. V~ Special Needs Trust . . . ." *See* Order Appointing Special Conservator and Authorizing Establishment of Special Needs Trust at page 2, paragraph 2. The trust must actually be established by the court, not merely approved by the court. *See, e.g.*, Memorandum from Regional Chief Counsel, San Francisco, to Center for Programs Support, San Francisco, Request for Opinion - [ ] *Chasey Trust Document* (June 4, 2008) (the court merely approved a trust that was established by the disabled individual's sister via a power of attorney).

Finally, you also asked whether Arizona's abolishment of the doctrine of worthier title makes the Marvin A. V~ Special Needs Trust irrevocable. If a special needs trust were established under the statutory exception in section 1917(d)(4)(A) of the Act, the abolishment of the doctrine of worthier title would make such a trust irrevocable. The doctrine of worthier title is a legal doctrine that essentially gives preference of title through intestate succession over title by an instrument and therefore, a reversionary interest to the grantor. *See Black's Law Dictionary,* 1440 (5th ed. 1979). Since Arizona does not recognize this doctrine, there would be no reversionary interest to the grantor. *Ariz. Rev. Stat. Ann.* § 14-2710.

A. PS 12-016 Julia Conservatorship Account

DATE: November 9, 2011

1. SYLLABUS

This decision clarifies the issue that blocked accounts in Arizona are non-countable for SSI purposes when established by a court.

2. OPINION

QUESTIONS

You asked: (1) how Arizona law views the availability of funds in a “conservatorship account;” and (2) whether funds placed in a “blocked account” in Arizona are a countable resource for purposes of determining Julia’s eligibility for Supplemental Security Income (SSI) payments.[1]

SHORT ANSWER

Under Arizona law, funds in a conservatorship account are generally available for the support and maintenance of the protected individual. However, funds in Julia's blocked account are not a countable resource because of the court-ordered restrictions placed on the account.

BACKGROUND

Julia is a minor and an SSI recipient residing in Arizona. In 2007, when Julia was 8 years old, she received settlement proceeds of approximately $39,500. In approving the settlement terms, the state court ordered that the funds belonging to Julia be placed in a restricted bank account labeled "The *Estate of Julia M*. ." *See* Order Appointing Conservator for a Minor and Approving Settlement of Claim, ¶ 5. The court appointed Julia's mother, Yvonne, as the conservator. Id. ¶ 1. The court also ordered that funds in the bank account may not be withdrawn until after Julia turns 18 years old and that any withdrawals from the account must have prior court approval. *Id.* ¶¶ 1, 6. In a subsequent order, the court reaffirmed these restrictions. *See* Order Affirming Conservatorship Authority and Bank Account Restrictions Until the Age of Majority.

ANALYSIS

In general, the assets of an individual are counted as a resource to that individual for purposes of SSI eligibility. *See generally* Social Security Act § 1611(a), 42 U.S.C. § 1382(a); Program Operations Manual System (POMS) SI 01110.001. Thus, as a starting point, the funds in the account belong to Julia and would be counted as a resource to her unless an exception applies.

The bank account at issue qualifies as a "conservatorship account." A conservatorship account is "a financial account in which a person or institution has been appointed by a court to manage and preserve the assets of an individual which are held in the account." POMS SI 01140.215(A)(1). The court ordered the settlement proceeds to be deposited in a bank account and appointed Julia's mother the conservator. Accordingly, this account is a "conservatorship account." See POMS SI 01140.215(A)(1).

To determine whether the funds in a conservatorship account are a resource, the agency first considers state law. If state law requires funds in a conservatorship account to be available for an individual's care and maintenance, the agency presumes that funds in the account are a resource. The agency then considers any factual evidence to the contrary. ***See*** POMS SI 01140.215(B)(1) ("If State law requires that funds in a conservatorship account be made available for the care and maintenance of an individual, we assume, absent evidence to the contrary, that funds in such an account are available for the individual's support and maintenance and are, therefore, that individual's resource.").

With respect to the first factor, Arizona state law provides that funds in a conservatorship account are to be used for "the support, education, care or benefit" of the protected individual. *See* Ariz. Rev. Stat. § 14-5425(A)(2) (providing that a conservator "shall expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person and the person's dependents"). Thus, unless there is "evidence to the contrary," the funds in Julia's account would be counted as a resource. *See* POMS SI 01140.215(B)(2).

Regarding the second factor, "evidence to the contrary" includes the following types of evidence:

• restrictive language in the court order establishing the account or a subsequent order;

• state or local procedural rules for withdrawing funds from the account; and

• local court practices regarding withdrawal of funds.

POMS SI 01140.215(B)(2).

Here, restrictive language in multiple court orders is strong "evidence to the contrary," showing that funds in the blocked account are not available for Julia's support and maintenance. First, the court order establishing the account precludes the withdrawal of funds until Julia reaches age 18. *See* Order Appointing Conservator for a Minor and Approving Settlement of Claim ¶ 1. Second, the order contains the additional restriction that a withdrawal may occur only by obtaining a court order authorizing the withdrawal. *See id.* ¶ 5. Third, a subsequent court order reaffirms these restrictions and explicitly states that access to the account is "prohibited" and that funds in the account are not to be used for Julia's care and maintenance. *See* Order Affirming Conservatorship Authority and Bank Account Restrictions Until the Age of Majority. [2]

Accordingly, the court's language rebuts the presumption that funds in the account are available for care and maintenance. The restrictions in these court orders constitute clear "evidence to the contrary," *see* POMS SI 01140.215(B)(2), showing that funds in the blocked account are not available for Julia's support and maintenance and should not be counted as a resource.

CONCLUSION AND RECOMMENDATIONS

Although Arizona law provides that funds in a conservatorship account are generally available for the support and maintenance of the protected individual, the court has severely restricted access to funds in Julia's blocked account. Consequently, funds in the account are not a countable resource to Julia pursuant to Social Security Act § 1611(a), 42 U.S.C. § 1382(a).

Footnotes:

[1] For purposes of a resource determination, the terms "conservatorship account" and "blocked account" are synonymous. *See* Program Operations Manual System SI 01140.215(A)(3).

[2] The subsequent court order states as follows: [T]he Conservatorship authority is Restricted and no withdrawals shall be made from the restricted bank account until the Minor turns 18, the age of majority, and said restricted funds may not be released without approval of the Court. Access to the Minor's restricted account is affirmed as prohibited and not intended for the care and maintenance of the Minor. Order Affirming Conservatorship Authority and Bank Account Restrictions Until the Age of Majority.

4.3 CALIFORNIA

A. PS 13-109 Robert Special Needs Trust

DATE: August 8, 2013

1. SYLLABUS

This Regional Chief Counsel (RCC) opinion examines whether a court order amending the terms of special needs trust, brought the trust into compliance with section 1917(d)(4)(A) of the Act and whether such amendment applies retroactively. The original trust did not meet the requirements for the special needs trust exception because it was established through the beneficiary's own actions, as opposed to the actions of his parents, grandparents, legal guardian, or the court. The beneficiary sought to remedy this deficiency by requesting the State court to establish an amended trust and make it retroactive, so that the original trust would become exempt from resource counting from the time of its creation. However, the court order amending the trust did not bring the trust into compliance with section 1917(d)(4)(A) of the Act because the court order merely served to modify the original trust, rather than "create" a new trust. Furthermore, the California court did not have authority to order retroactive application of the amended terms.

2. OPINION

Question

You asked whether the California court's January 3, 2013 order, amending the terms of the Irrevocable Special Needs Trust for Robert (Original Trust), brought the trust into compliance with Social Security Act (Act) § 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A), and whether the amendment applies retroactively such that the Original Trust became exempt from resource counting from the time of its creation.

Short Answer

The California court's January 3, 2013 order amending the terms of the trust did not bring the trust into compliance with section 1917(d)(4)(A) of the Act. The Original Trust was created through Robert's actions, and the Court's order merely served to modify the Original Trust, rather than "create" a new trust. Furthermore, the California court did not have authority to order retroactive application of the amended terms.

BACKGROUND

Robert was born on May and resides in San Jose, California. He receives Supplemental Security Income (SSI) due to disability.

On May 20, 2001, Robert established the Original Trust, funding the trust with approximately $12,500 of inheritance money he received from his mother, Sonia. Robert declared that he suffered from a disability that substantially impaired his ability to care for himself and he established the fund to supplement his basic living needs, which public benefits might not cover. He gave the trustee sole discretion to pay trust principal or income to the extent necessary to satisfy Robert's special needs. The declaration of trust defined "special needs" as "dental care, special equipment, programs of training, education and habilitation, travel needs, and recreation." Additionally, the declaration of trust expressed Robert's intent that the trustee be cognizant of applicable resource and income limitations for public assistance programs when making trust distributions to him. The stated purpose of the trust was to supplement, and not supplant, public assistance benefits available from state, federal or local government agencies.

The declaration of trust stated that, upon Robert's death, the trust would terminate, and the trustee would notify the State of California for possible reimbursement of funds spent for Robert's benefit. The trustee would then deliver all remaining principal and income, after the State's reimbursement, to William and George .

On November 13, 2012, Sharon , acting under a Power of Attorney for Robert, petitioned the Superior Court of California, County of Santa Clara, to amend the Original Trust and retroactively "establish" the Robert Special Needs Trust (Amended Trust). The petition sought to have the amended terms deemed "established" as of the date of the Original Trust, May 20, 2001, and also fund the Amended Trust with assets of the Original Trust.

On January 3, 2013, the State court granted Robert's petition, [1] and approved the trust amendment. The State court's order directed that the Amended Trust was "deemed to have been established as of 5/20/2001." The court directed the petitioner, Sharon, "to execute the trust as settlor." The court order repeatedly referred to the Amended Trust as the "ROBERT SPECIAL NEEDS TRUST dated 5/20/2001 (Amended)."

The Amended Trust provided that its purpose was to supplement, and not supplant, public benefits available to Robert. The trustee was directed to administer the trust so as to encourage support and maintenance from public resources, including SSI and Medi-Cal (California's term for Medicaid). The trustee had sole and absolute discretion in determining how to distribute trust principal and income, taking into consideration applicable resource and income limitations of the public benefits programs for which Robert was eligible.

In addition, the declaration of the Amended Trust stated that Robert was a disabled individual under 65, and the court purportedly "established" the trust using his assets. The declaration also stated that Robert was the sole beneficiary of the trust, and upon Robert's death, the trust would reimburse all states for medical assistance paid to Robert during his lifetime.

ANALYSIS

Generally, a trust established after January 1, 2000, with the assets of an SSI beneficiary will be a resource attributable to that beneficiary for purposes of determining SSI eligibility. ***See*** Social Security Act § 1613(e), 42 U.S.C. § 1382b(e); Program Operations Manual System (POMS) SI 01120.201(A).

Here, the Original trust was created after January 1, 2000, with Robert's assets. Robert funded the Original Trust with inheritance money he received from his mother. Accordingly, the Original Trust would normally be considered a countable resource.

However, pursuant to the Special Needs Trust exception, a trust will not count as a resource if it: (1) contains the assets of a disabled individual under the age 65; (2) is established by the actions of the individual's parent, grandparent, legal guardian, or court; and (3) contains a provision for the states to receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid to the individual. ***See*** Social Security Act § 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A); [2] POMS SI 01120.203(B)(1).

As initially drafted, the Original Trust did not meet the requirements for the Special Needs Trust exception. Although the Original Trust was established as an irrevocable trust to provide for the special needs of Robert, a disabled individual under 65 years old, the trust was created by Robert's own action, as opposed to the actions of his parents, grandparents, legal guardian, or the court. [3]

Robert sought to remedy this deficiency when he petitioned the State court in November 2012, requesting that it establish the Amended Trust and make it retroactive to May 20, 2001. The provisions of the Amended Trust appear specifically tailored for the purpose of meeting the requirements of a Special Needs Trust, pursuant to section 1917(d)(4)(A) of the Act. The declaration of trust stated that Robert was a disabled individual under 65, the trust was "established" with his assets, he was the sole beneficiary of the trust, the trust was purportedly "established" by the actions of the court, and upon Robert's death, the trust would reimburse all states for medical assistance paid to Robert during his lifetime. In theory, the Amended Trust would replace the previously existing Original Trust, and, because it was created by court order, would satisfy the Special Needs Trust requirements of section 1917(d)(4)(A) of the Act. This theory fails, however, because the State court did not have power to establish a new trust and have its terms apply retroactively.

In 1986, the California legislature revised the California Probate Code and codified the common law power of the court to modify the terms of a trust instrument where such modification was necessary to serve the original intentions of the settlors, often due to a mistake or ambiguity in the original document. *See Ike v. Doolittle*, 61 Cal. App. 4th 51, 82-85 (Cal. App. 1998); Cal. Prob. Code §§ 15400-15414, 17200(b)(13). Probate Code § 15409 provides that the court has power to modify the provisions of the trust if, based on circumstances not known to or anticipated by the settlor, the terms of the trust defeat or substantially impair the accomplishment of the purpose of the trust. Cal. Prob. Code § 15409. In addition, if all of the beneficiaries to an irrevocable trust consent, they may compel modification of the trust upon petition to the probate court. Cal. Prob. Code § 15403(a). A court may also equitably reform a trust based on mistake, but may not "create a new trust agreement under the theory of reformation." *See I~*, 61 Cal. App. at 84-85 (discussing Cal. Civ. Code § 3399); *see also Giammarrusco v. Simon*, 171 Cal. App. 4th 1586 (Cal. App. 2009) (discussing and approving the analysis and rationale of *I~*).

Robert was the sole beneficiary of the Original Trust, and therefore, modification of the trust based on his petition under section 15403 was appropriate. Furthermore, as the Original Trust was intended to supplement, rather than supplant, public benefits available to Robert, the court appropriately modified the trust terms under section 15409 to carry out that purpose.

However, while state law gave the court power to modify the Original Trust and replace its terms with those of the Amended Trust, the modifications had prospective (future) impact only. We found no legal authority suggesting that California permits substantive modifications to have retroactive effect. Moreover, the modification was not merely to correct a drafting error or clarify an ambiguity, as in *I~*, but instead its purpose was to substantially revise the trust's terms and provisions.

California courts have inherent power to issue orders *nunc pro tunc* to correct clerical errors, by placing on the record what the court actually decided, but incorrectly recorded. *Carpenter v. Pacific Mut. Life. Ins. Co.*, 14 Cal. 2d 704, 707-708 (Cal. 1939); *Hamilton v. Laine*, 47 Cal. App. 4th 885, 890 (Cal. App. 1997). "The function of the *nunc pro tunc* order is merely to correct the record of the judgment and not to alter the judgment actually rendered." *Id.* (citing *Estate of E~*, 54 Cal. 2d 540, 544 (Cal. 1960)). A court may only issue an order *nunc pro tunc* to correct clerical error or to finalize completed litigation. Cal. Code Civ. Pro. § 473(d) (the court may correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may set aside any void judgment or order); Social Security Ruling (SSR) 77-11 ("unless the particular judgment *nunc pro tunc* was entered either to correct a judicial error or to finalize completed litigation, it would be invalid under California law.").

The California Appellate Court has held that issuance of an order *nunc pro tunc* to retroactively modify a special needs trust exceeded the limited permissible purpose of the court's inherent power to rectify clerical errors. *H~*, 57 Cal. App. 4th at 887, 892; *accord* In re *Conservatorship of Estate of K~*, 137 Cal. App. 4th 400, 408 n.4 (Cal. App. 2006) (noting that trial courts should avoid using the *nunc pro tunc* procedure in connection with special needs trusts). In *H~*, the trial court established a trust fund for a minor in 1985, which resulted in the minor losing his eligibility for Medi-Cal. *Id.* at 887-88. The Department of Developmental Services (DDS) requested reimbursement from the trust for medical benefits paid on the minor's behalf, and in 1995, the minor's guardian ad litem petitioned the court to restructure the minor's trust to establish a special needs trust. *See id.* In 1996, the court granted the petition, establishing a special needs trust which related back *nunc pro tunc* to 1985. *See id.* at 889. The California Appellate Court found that the *nunc pro tunc* order was not made to cure a clerical error or omission; rather, it "materially altered the relative rights of the parties…in a manner not contemplated." *Id.* at 892 ("It is apparent that the effect of the nunc pro tunc order was to ensure the special needs trust would predate the monetary disbursements made by DDS in the minor's behalf, thereby rendering DDS without legal redress for its outstanding lien."). Therefore, the 1996 order to restructure the trust retroactively exceeded the court's power and authority.

Here, although the State court did not explicitly state that it was issuing its order *nunc pro tunc*, an exhaustive review of California statutory and case law revealed no other legal authority that would permit a trial court to issue an order modifying

the rights of parties retroactively in the absence of a drafting error in the original document. [4] As in *H~*, the trial court's attempt to establish a new trust or modify a previously existing trust did not fall under the *nunc pro tunc* powers of the court. Indeed, *nunc pro tunc* is only applicable when there is some prior court action that is not properly reflected in the record. *See* POMS PS 01825.047. The court was not involved with the creation of the Original Trust in May 2001; therefore, there was no prior court action to rectify. An order *nunc pro tunc* cannot be issued to rectify an attorney's failure to draft a trust with provisions in compliance with section 1917(d)(4)(A) of the Act. *See id.*

In addition to the absence of specific state authority permitting the court's action here, other authority cautions against permitting these types of retroactive modifications that could negatively impact third parties, including government parties. The Uniform Trust Code provides that a court has power to reform the terms of a trust to conform to the settlor's intent. *See* Unif. Trust Code § 415. This provision of the Uniform Trust Code was based on the *Restatement (Third) of Property: Donative Transfers*, section 12.1. Comment f of this section provides that "unless otherwise stated, a judicial order of reformation relates back and operates to alter the text as of the date of execution rather than the date of the order." *Restatement (Third) of Property: Donative Transfers* § 12.1, comment f; *see also* Unif. Trust Code § 416 (to achieve the settlor's tax objectives, the court may modify the terms of a trust and the modification will have retroactive effect). However, the Court of Appeals for the Seventh Circuit has held that, even when reformation of a trust relates back to the date of the original trust, it does not affect the rights acquired by non-parties, including the federal government. *Van Den Wymelenberg v. U.S.*, 397 F.2d 443, 445 (7th Cir. 1968) ("Were the law otherwise there would exist considerable opportunity for 'collusive' state court actions having the sole purpose of reducing federal tax liabilities.").

California has not adopted the Uniform Trust Code and thus its provisions regarding reformation of trusts cannot provide a basis for the court's action here. [5] Moreover, the Seventh Circuit's holding in *Van W~* suggests that the rights of the federal government would not be affected by any retroactive amendment. *See id.* Here, SSA has an interest in recovering an overpayment based on counting the Original Trust as a resource, and the State court's action could be viewed as collusively attempting to reduce a federal liability. *See id.* Similarly, to the extent California Civil Code § 3399 might apply to permit revision of a contract based on mistake, it may only be revised "so far as it can be done without prejudice to rights acquired by third persons[.]" The *H~* court's rationale in considering the impact on the state's lien in rejecting the attempt to make a special needs trust is in line with this policy. *H~*, 57 Cal. App. 4th at 892.

Finally, even supposing that the State court's order made the terms of the Amended Trust effective as of May 20, 2001, the trust would nevertheless fail to meet the requirements of a Special Needs Trust under 1917(d)(4)(A) of the Act. Specifically, the Amended Trust was not established by the actions of the Robert's parent, grandparent, legal guardian, or a court. [6] While it is apparent that Robert intended the State court's January 3, 2013 order to constitute a court action "establishing" the Amended Trust, in fact, by its own terms and language the court merely approved an amendment of the already existing Original Trust. *See* POMS PS 01825.046 (opining that a court's mere approval of an amendment to an already existing trust is not "establishing" the trust for purposes of section 1917(d)(4)(A) of the Act; rather, "the creation of the trust must be required by court order") (citing POMS SI 01120.203(B)(1)(f) and In re *G~*, 756 N.Y.S.2d 835, 837 (N.Y. Sur. Feb. 27, 2003) (since the trust was already created by the petitioner, the court could not "establish" the trust through its order; "It had already been established by *Mr. G~* when the trust was signed by him and the trustee and funded, thus completing the acts necessary to create a trust")).

The Amended Trust retained the assets of the Original Trust, and though Robert changed the trust's terms in an attempt to comply with the requirements of a Special Needs Trust, the underlying purpose of the trust remained the same, i.e., the trust would supplement, rather than supplant, public benefits available to Robert. Also, the Amended Trust contained the term "amended" in its title, and claimed to be retroactive to the date the Original Trust was created. The foregoing factors support a conclusion that the order "establishing" the Amended Trust merely served to approve a modification of the Original Trust. [7]

Accordingly, as the Original Trust remained in effect, though with modified terms and a slightly different name, it continued to be the product of Robert's actions, not those of the court. The court can only "establish" a trust if the trust has not already been created. Cf. In re *Conservatorship of Estate of K~*, 137 Cal. App. 4th at 407-408 (a court can "establish" a special needs trust even if the court ordered the action based on the petition of the disabled individual, so long as the trust has not already been created) (citing In re *G~*, 756 N.Y.S.2d at 838).

CONCLUSION

The State court's retroactive modification of Robert's trust exceeded the court's *nunc pro tunc* powers, and therefore, the trust did not meet the requirements of a Special Needs Trust under section 1917(d)(4)(A) of the Act. Moreover, even after the State

court's order, the trust failed to meet the requirements of a Special Needs Trust because the trust was initially established by Robert and not through court action.

B. PS 13-058 Special Needs Trust for Keith

DATE: March 20, 2013

1. SYLLABUS

This opinion reveals the inadequacy of the provisions of a Special Needs Trust to meet the requirements for exception from SSI resource counting. The Regional Chief Counsel's office reveals that this Trust does not satisfy the State Medicaid reimbursement requirement for several reasons. The Trust does not list the State(s) as the primary creditor and it allows other debts to take precedence over the State. The Trust fails again by not adhering to the "sole benefit" provisions when it allows termination prior to death and distribution to the beneficiary's mother or other heirs.

2. OPINION

Question Presented

You submitted a copy of the Keith Special Needs Trust (Trust) with questions about certain trust terms. In particular, you asked: (1) whether the Trust satisfies the State Medicaid Reimbursement Requirement; and (2) whether the Trust was established for the "sole benefit" of beneficiary Keith.

Short Answer

(1) The Trust terms do not satisfy the State Medicaid Reimbursement Requirement.

(2) The Trust is not considered established for Keith's "sole benefit."

BACKGROUND [8] Keith was born on December. He has paraplegia which is expected to be permanent. On February 19, 2004, the Los Angeles County Superior Court issued an Order establishing the Trust. The Trust is titled, "The Keith Special Needs Trust (Payback Trust, Los Angeles County)."

The Trust may be terminated in one of four ways, whichever occurs first: (1) upon Keith's death; (2) if Keith becomes ineligible for public benefits and the trustee determines that termination of the trust would restore eligibility or otherwise be a financial benefit to Keith; (3) if a court orders the Trust to reimburse a government agency; or (4) if the Trust comes under attack from creditors. [9] *See* Trust § 4.8. If the trust is terminated by death, "the Trustee shall pay the State of California up to an amount equal to the total medical assistance paid on behalf of the Beneficiary under the State plan." *See* Trust § 4.8.1.1. The same provision also applies if the Trust terminates after Keith becomes ineligible for public benefits. *See* Trust §§ 4.8.2.1.1, 4.8.2.2.1. However, if the Trustee terminates the Trust in response to court-ordered reimbursement or creditor attack, the remaining Trust property is distributed to Keith's mother or other heirs. *See* Trust §§ 4.8.3, 4.8.4.

In a separate section titled "Rights Upon Termination," the Trust states as follows:

The State of California or any other state shall be entitled to receive all amounts remaining in the Trust up to an amount equal to the total medical assistance paid on behalf of the Beneficiary under the State plan to the extent authorized by federal Medicaid law as provided in 42 U.S.C. § 1396p(d)(4)(A), or successor provisions. The Trust property shall be subject to claims for reimbursement from the State of California Department of Health Services, Department of Mental Health, Department of Developmental Services and any county or city in California to the extent authorized by California law as provided in Probate Code § 3605(b), or successor provisions.

Trust § 5.2. Another section specifies that all references to California's state program called "Medi-Cal" are to be construed as including any other state's Medicaid program equivalent. *See* Trust § 7.9.

Trust funds may be used for "goods and services relating to the Beneficiary's health, protection and welfare" that "enhance the Beneficiary's quality of life." Trust § 4.1. The Trust lists examples of goods and services for which Trust funds may be used, including the following:

- medical and dental services and supplies;

- rehabilitation, training, or education programs;
- therapy, including psychological, physical, occupational, or speech;
- special equipment;
- housing;
- transportation services, including the purchase, modification of, maintenance, and insuring of a vehicle;
- specialized dietary needs;
- personal hygiene expenses;
- attendant and companion care;
- educational aides;
- vacations, camping, athletic contests, travel, recreation, and entertainment; and
- electronic equipment, such as computers, radios, stereo systems, CD players, television sets, and video recorders.

See Trust § 4.1.

DISCUSSION

Because the Trust was established on or after January 1, 2000, it is subject to the statutory provisions of section 1613(e) of the Social Security Act (Act). *See* Act § 1613(e), 42 U.S.C. § 1382b(e); Program Operations Manual System (POMS) SI 01120.201. Generally, under these provisions, a trust established with the assets of an individual is considered a resource for SSI purposes. However, there is an exception for certain trusts established under section 1917(d)(4)(A) of the Act, 42 U.S.C. § 1396p(d)(4)(A), commonly known as the "special needs trust" exception. *See* POMS SI 01120.203. For this exception to apply, a trust must: (1) contain the assets of an individual under age 65 and who is disabled; (2) be established for the sole benefit of such individual through the actions of a parent, grandparent, legal guardian, or a court; and (3) provide that the State(s) will receive all amounts remaining in the trust upon the death of the individual up to the amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan. *See* POMS SI 01120.203(B)(1)(a)-(h).

Here, Keith is under age 65, disabled, and the trust was established by a court on February 19, 2004. [10] You have raised specific concerns as to whether the "payback" and "sole benefit" requirements are met.

1. Does the Trust Meet State Medicaid Reimbursement Requirements?

The special needs trust Medicaid "payback" provision must list the State(s) as the first payee and specify that the State(s) has priority over payment of other debts or administrative expenses (with exceptions for taxes and fees for winding up the trust). *See* POMS SI 01120.203(B)(1)(h); SI 01120.203(B)(3)(a). The trust must allow payback to any State(s) that provided care under the State's Medicaid plan and cannot be limited to any particular State(s). POMS SI 01120.203(B)(1)(h). In addition, payback may not be limited to any particular period of time. *Id.*

Here, the Trust contains two different clauses regarding State Medicaid payback. First, the Trust termination section states that "the Trustee shall pay the State of California up to an amount equal to the total medical assistance paid on behalf of the Beneficiary under the State plan." *See* Trust § 4.8.1.1. This clause does not meet the payback requirement because it: (1) allows payback only to California rather than to any State(s); and (2) does not give that payback priority over other debts or expenses. *See* POMS SI 01120.203(B)(1)(h). In addition, only two of the four possible termination scenarios include this clause; as currently written, the other two seem to disperse funds directly to Keith's mother or heirs. *See* Trust §§ 4.8.3, 4.8.4. Sections 4.8.3 and 4.8.4 therefore do not meet the payback requirement because they omit payback to the State(s) at all. *See* POMS SI 01120.203(B)(1)(h).

Trust Article Five, "Rights Upon Termination," also addresses State Medicaid payback, in a section called "Claims for Reimbursement." Section 5.2 provides that "[t]he State of California or any other state shall be entitled to receive all amounts remaining in the Trust up to an amount equal to the total medical assistance paid on behalf of the Beneficiary under the State

plan to the extent authorized by federal Medicaid law as provided in 42 U.S.C. § 1396p(d)(4)(A), or successor provisions." Trust § 5.2. This provision applies to any termination scenario and provides for payback to any state, rather than solely to California. *See also* Trust § 7.9 (broadening use of term "Medi-Cal" to mean any state Medicaid programs). However, section 5.2 does not identify the state as the first payee or give Medicaid payback priority over payment of other debts or administrative expenses. *See* POMS SI 01120.203(B)(1)(h). Accordingly, the Trust terms do not satisfy the State Medicaid Reimbursement Requirement. *See id.*

2. Is the Trust Established Solely for Keith's Benefit?

As outlined above, to meet the special needs exception, a trust must be established for the sole benefit of an individual, among other requirements. *See* Act § 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(e). If a trust allows disbursements to other individuals or entities during the disabled individual's lifetime, the trust cannot be considered for the "sole" benefit of the disabled individual. *See* POMS SI 01120.203(B)(1)(e). Likewise, the trust is not considered for the beneficiary's sole benefit if, during the disabled individual's lifetime, the terms allow for termination and payment of the trust property to another individual or entity. *See* POMS SI 01120.203(B)(1)(e). In addition to the written trust terms, actual expenditures from a special needs trust must be made for the sole benefit of the individual. *See* POMS SI 01120.203(B)(1)(e); SI 01120.201(F)(2).

Here, the Trust states that funds may be used for goods and services relating to Keith's health, protection and welfare and that enhance his quality of life. *See* Trust § 4.1. The Trust does not identify another individual to whom Trust funds can be paid or for whom Trust funds can be used. Thus, on its face, the Trust would appear to have been established for Keith's "sole benefit. [11]

However, the Trust's termination provisions are not consistent with the sole benefit rules. The Trust permits termination of the Trust prior to Keith's death, and payment of the trust property to another individual or entity. *See* Trust § 4.8; POMS SI 01120.203(B)(1)(e). Specifically, the Trust sets out three possible terminating events prior to Keith's death, two of which allow the trust property to pass to Keith's mother or heirs. *See* Trust §§ 4.8.3, 4.8.4. These lifetime termination and distribution provisions indicate that the Trust is not for the individual's "sole benefit." POMS SI 01120.203(B)(1)(e). Therefore the Trust was not established for Keith's sole benefit.

CONCLUSION

The Trust does not satisfy the State Medicaid Reimbursement Requirement because it does not identify the State(s) as the first payee or provide that Medicaid has priority over other debts or administrative expenses. In addition, the Trust is not considered to have been established for Keith's "sole benefit" because it contains provisions allowing the Trust to be terminated prior to Keith's death and the trust property distributed to another individual, namely Keith's mother or heir.

C. PS 12-130 Legal Opinion on Planned Lifetime Assistance Network of California (PLAN) Master Pooled Trust for SSI Recipient Stephen

DATE: August 27, 2012

1. SYLLABUS

The Planned Lifetime Assistance Network of California Master Pooled Trust examined by the San Francisco Regional Chief Counsel (RCC) counts as a resource because its provisions treat early termination the same as termination by death. The RCC clearly identified the significant fact that this would violate the sole benefit provisions by allowing remainder beneficiaries a way to obtain these trust funds as if the sole beneficiary were dead.

2. OPINION

Question

You asked whether the Planned Lifetime Assistance Network of California (PLAN) Master Pooled Trust (Trust) should be counted as a resource for Supplemental Security Income (SSI) eligibility purposes, given (1) the provisions in the Trust and Joinder Agreement requiring a 25 percent gift of the trust remainder before satisfying any State Reimbursement Claims, and (2) the language of the early termination clause.

Short Answer

The 25 percent gift requirement does not violate the agency's requirements, but the early termination clause does. Thus, the trust is a countable resource.

RELEVANT TRUST AND JOINDER PROVISIONS

PLAN, a nonprofit corporation with tax-exempt status under Internal Revenue Code (I.R.C.) § 501(c)(3), established the Trust with the intention that it qualify as a pooled trust under section 1917(d)(4)(C) of the Social Security Act (Trust Art. 1). [12] PLAN established a master pooled trust in which individual grantors have sub-accounts established by executing joinder agreements (Trust Art. 1). PLAN holds, administers, and distributes assets as the Trustee for the benefit of persons with disabilities (*id.*; *see also* Trust Art. 7.1). The purpose and objective of the Trust is to promote the health, wellness and opportunities for independence by providing the beneficiaries with supplemental services, supervision, goods, and care (Trust Art. 3.2, 3.3).

Trust Art. 12 sets forth provisions under which a sub-account may be terminated (Trust Art. 12.1). The early termination clause states, "Every reasonable attempt" will be made to continue each sub-account, but the Trustee "cannot know how future developments in the law" may affect any sub-account (*id.*). The Trustee "should consider the public benefits consequences" to each Beneficiary before any disbursement of assets in a sub-account (*id.*).

One of the situations in which a sub-account may be terminated early is "[i]f the Trustee has reasonable cause to believe that the assets of a Trust sub-account (other than a court established trust) are or will become liable for basic maintenance, support, or care that has been or would otherwise be provided" via public benefits (*id.*). If a sub-account is terminated early, the Trustee generally has three options for handling any funds in the sub-account: the Trustee may (a) seek court approval to terminate the Trust sub-account and establish a support trust for the affected Beneficiary, funding it with the net benefits after any reimbursement and fees and costs; (b) continue to administer the sub-account "under separate arrangement with the affected Beneficiary or his or her Primary Representative," or (c) "make distributions from the Trust estate" as though the Beneficiary had died (*id.*; *see also* Trust Art. 12.2 ("Early Termination of a Trust Sub-Account Due to the Death of the Beneficiary")). However, for subaccounts established pursuant to "42 U.S.C. § 1396(d)(4)(C), the Trustee shall follow the procedure" set forth in Trust Art. 12.2A, the provisions for distribution after the death of the beneficiary (*id.* & Art. 12.2A). [13] In other words, the terms of the Trust require the Trustee to handle early termination of sub-accounts established under the Social Security Act in only one way—to make distributions as though the beneficiary has died.

Any amounts remaining in the Beneficiary's sub-account after the beneficiary's death are distributed sequentially (Trust Art. 12.2). First, the Trust "retains the portion of the Remainder that has been authorized by the Grantor in the Joinder Agreement to be added to the sub-account retained by and in the name of the Trust (the 'Trust's Remainder Share'), if any, to be used as set forth in Section 12.7" (Trust Art. 12.2(A)(a); *see also* Trust Art. 12.7). Second, the Trust pays any taxes or administrative fees (Trust Art. 12.2(A)(b)). Third, the Trust reimburses the state Medicaid agency, pursuant to the applicable law (Trust Art. 12.2(A)(c)). Fourth, the Trust distributes any remainder to the remainder beneficiaries identified in the Joinder agreement (Trust Art. 12.2(A)(d)).

Trust Art. 12.7 provides that the Trust's Remainder Share is retained by the Trust and distributed according to the sole discretion of the Trustee (Trust Art. 12.7). Besides for "purposes related to PLAN," the Trustee may make discretionary distributions (a) for the benefit of other Beneficiaries who are indigent, disabled persons, as defined in 42 U.S.C. § 1382c(a)(3); (b) to add indigent disabled persons to the Trust as Beneficiaries; or (c) to provide indigent, disabled persons with equipment, medication, or services deemed suitable by the Trustee (*id.*).

Stephen executed the Joinder as Grantor on October 25, 2010 (*id.* at 10). He identified the source of funds as a settlement arising from litigation under the Americans with Disabilities Act (*id.* at 4). He indicated a 25 percent gift to PLAN prior to satisfaction of any State Reimbursement Claims and designated Maria as the sole Remainder Beneficiary (*id.* at 5).

RELEVANT AUTHORITIES

A trust established with the assets of an individual and for his or her benefit is considered a resource under sections 1613 and 1917 of the Social Security Act (the Act) in determining eligibility for SSI. Act §§ 1613, 1917; 42 U.S.C. §§ 1382b, 1396p. A trust established with the assets of a disabled individual that is part of a pooled trust may be exempted as a resource. Act §§ 1613(e)(5), 1917(d)(4)(C); 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(C). To meet this exception,

i. the trust must be managed by a non-profit association;

ii. a separate account must be maintained for each beneficiary of the trust;

iii. accounts in the trust must be established for the sole benefit of the beneficiaries; and

iv. to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, upon the beneficiary's death, the trust must pay the State, from such remaining amounts, the total amount of medical assistance paid on behalf of the deceased beneficiary during the beneficiary's lifetime.

Act §§ 1613(e)(5), 1917(d)(4)(C)(i)-(iv); 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(C)(i)-(iv). Additionally, the account in the trust must be established through the actions of the individual, a parent, grandparent, legal guardian, or a court. POMS SI 01120.203(B)(2)(a)). The trust must contain "specific language that provides that, to the extent that amounts remaining in the individual's account upon death of the individual are not retained by the trust, the trust pays 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)." POMS SI 01120.203(B)(2)(g).

Administrative expenses may be paid from the pooled trust prior to reimbursement to State(s) for medical assistance, including taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary and 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. POMS SI 01120.201(F)(3).

"[U]pon death of the beneficiary, retention of a certain percentage of the funds in a 'pooled trust' established through the actions of a nonprofit association in accordance with the trust agreement" is permitted. POMS SI 01120.201(F)(2), SI 01120.203(B)(2). [14] Because a special needs trust must be established for and used for the sole benefit of the disabled individual, any provision of the trust that "allow(s) for termination of the trust prior to the individual's death and payment of the corpus to an individual or entity (other than the State(s) . . .) will result in disqualification for the special needs trust exception." POMS SI 01120.203(B)(1)(e). Thus, if the trust contains an early termination clause, the terms of this clause must be closely reviewed to determine whether the trust may be excepted as a resource or is countable. *Id.*

"For the purpose of SSI eligibility, a trust that contains an early termination provision or clause may not be excepted from the resource counting rules . . . unless it satisfies either the requirements in Section 1917(d)(4)(A) or (C)," as set forth above. POMS SI 01120.199(F)(1). Additionally, a trust must satisfy the resource counting rules of POMS SI 01120.200(D) and SI 01110.100(B) to not be a countable resource. To meet those requirements, a trust must meet all of the following criteria:

- Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, receives 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);

- Other than payment for those expenses listed in POMS SI 01120.199(F)(3), no entity other than the trust beneficiary can benefit from early termination (i.e., after reimbursement to the State(s), *all* remaining funds are disbursed to the trust beneficiary); and

- The early termination clause gives the power to terminate to someone other than the trust beneficiary.

POMS SI 01120.199(F)(1); *see also* POMS SI 01120.200(D), SI 01110.100(B). Prior to reimbursement of the state medical assistance, the trust may pay taxes due to the State(s) or Federal government due to the early termination of the trust, and reasonable fees and administrative expenses associated with the early termination of the trust. POMS SI 01120.199(F)(3).

A pooled trust with an early termination clause is still excepted if it "(1) solely allows for transfer of the beneficiary's assets" from one special needs pooled trust to another special needs pooled trust, and (2) contains specific language precluding disbursements other than to the secondary trust. POMS SI 01120.199(F)(2).

DISCUSSION

In assessing whether the Trust is a countable resource with respect to Stephen's SSI eligibility, you have raised two concerns. The first relates to the provisions in Joinder § K and Trust Art. 12 for a 25 percent gift of the sub-account trust remainder before satisfying any State Reimbursement Claims. The second relates to the early termination clause in Trust Art. 12. We address each in turn.

The Gift Does Not Render the Trust Countable as a Resource

Under the Act, the Trust may retain a portion of the assets remaining in the subaccount of a deceased beneficiary. *See* Act § 1917(d)(4)(C)(iv), 42 U.S.C. § 1396p(d)(4)(C)(iv) ("*to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust*, upon the beneficiary's death, the trust must pay the State, from such remaining amounts, the total amount of medical assistance paid on behalf of the deceased beneficiary during the beneficiary's lifetime." (emphasis added)). The relevant statutory language suggests that the amount retained is first determined, and then, from the remainder, the State is reimbursed for medical assistance rendered to the deceased beneficiary. *See id.* The POMS tracks this language: "To qualify for the [special needs] trust exception, the trust must contain specific language that provides that*, to the extent that amounts remaining in the individual's account upon death of the individual are not retained by the trust*, the trust pays 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)." POMS SI 01120.203(B)(2)(g) (emphasis added).

In this case, Stephen and the Trust have established a percentage of the assets from his subaccount that the Trust will retain upon his death (Joinder § K(2)). *See* POMS SI 01120.201(F)(2). The Trust will retain that percentage of the remaining assets, adding it to the sub-account retained by and in the name of the Trust (Trust Art. 12(A)(a)). *See id*. Prior to reimbursement of the State Medicaid agency, the Trust may pay taxes due from Stephen's subaccount to the State or Federal government because of Stephen's death and reasonable fees for termination and final administration of the trust (Trust Art. 12(A)(b)). *See* POMS SI 01120.201(F)(3). Then the State Medicaid agency is reimbursed (Trust Art. 12(A)(c)). *See* Act § 1917(d)(4)(C)(iv); 42 U.S.C. § 1396p(d)(4)(C)(iv); POMS SI 01120.203(B)(2)(g). Because this procedure comports with both the Act and the POMS, the 25 percent gift to the Trust provided for in Joinder § K and Trust Art. 12 does not render the Trust countable as a resource.

The Early Termination Clause Renders the Trust Countable as a Resource

The early termination clause of Trust Art. 12 runs afoul of criteria specified in the Act and POMS. While Trust Art. 12.1 does not specifically designate the State for reimbursement, it specifically refers to Trust Art. 12.2 and directs the Trustee to follow the procedures in Art. 12.2 when a subaccount has been created under the Act's special needs trust provision. [15] Thus, the only action that the Trustee will take for section 1917(d)(4)(C) special needs trusts is to follow the termination-upon-death procedures, even on early termination.

Again, under the termination-upon-death procedures, any amounts remaining in the Beneficiary's sub-account after the beneficiary's death are distributed sequentially (Trust Art. 12.2). The Trust first retains its remainder share, then the Trust pays any taxes or administrative fees, next Medicaid reimbursement is made to the states, and, finally, the Trust distributes any remainder to the remainder beneficiaries identified in the Joinder agreement (Trust Art. 12.2(A)).

This early termination sequence violates the Medicaid repayment and sole benefit requirements. If a trust is terminated while the beneficiary is still living, state Medicaid reimbursement must be paid first; only taxes and reasonable fees and administrative expenses associated with the termination of the trust may be paid from the trust prior to reimbursement of State medical assistance. POMS SI 01120.199(F)(1) & (3). The provision of the Trust providing for the Trust to receive its Remainder Share prior to payment of taxes and administrative fees and State Medicaid reimbursement does not comply with this requirement (Trust Art. 12(A)(a)-(c)). In addition, the sole benefit requirement that no entity other than the trust beneficiary can benefit from early termination during the beneficiary's lifetime precludes both retention of the Trust's Remainder Share and distributions to remainder beneficiaries (Trust Art. 12(A)(a), (d)). *See* POMS SI 01120.199(F)(1).

Finally, the early termination provisions do not solely allow for transfer of the beneficiary's assets to another special needs trust or contain language precluding disbursements other than to the secondary trust. *See* POMS SI 01120.199(F)(2).

For all these reasons, the early termination clause renders the trust a countable resource.

D. PS 12-122 California Trust Law: "Heirs" or "Heirs at Law" as Residual Beneficiary

DATE: August 1, 2012

1. SYLLABUS

This opinion clearly establishes California as a state where residual beneficiaries of trusts need not be specifically named.

It suffices to use terms "heirs" and "heirs at law" to maintain the irrevocability of a grantor trust.

2. OPINION

Question

Whether an irrevocable California trust naming "heirs" or "heirs at law" [16] as the only residual beneficiaries may be unilaterally revoked by the settlor such that the trust should be considered revocable.

Short Answer

No. Under current California law, use of the terms "heirs" or "heirs at law" is sufficient to identify residual beneficiaries. Therefore, a settlor may not unilaterally revoke an irrevocable trust that has "heirs" or "heirs at law" named as the only residual beneficiaries. Consequently, the trust is properly considered irrevocable and the settlor who is a current beneficiary of a trust must have consent from his or her heirs in order to modify or terminate the trust.

DISCUSSION

The question posed stems from common law developed from ancient feudal law. Under the common law rule known as "the doctrine of worthier title," passing title to real property through one's descendants (the principles of intestate succession) is preferred over passing it by written devise (will or other conveying instrument). [17] 28 Am. Jur. 2d Estates § 182. Thus, when the doctrine is applied, a settlor cannot transfer a remainder interest generally to his or her heirs; instead, the remainder interest is reclassified as a reversionary interest to the settlor. This would mean that the creator of the trust (the settlor), the current beneficiary, and the future beneficiary (remainder beneficiary) could all be the same person. In this circumstance, where the current and future beneficiary are the same person with presumably identical interests, an irrevocable trust would not truly be irrevocable because it could be changed at any time.

One case, *Bixby v. California Trust Co.*, 33 Cal. 2d 495 (1949), illustrates this doctrine. In *B~*, the plaintiff sought to terminate a self-settled irrevocable trust. *Id.* at 496. The trust provided that the plaintiff settlor was to receive income for life, and that his interest was "inalienable and inaccessible to creditors." *Id.* at 497. Upon the death of the plaintiff, all of the residue and remainder of the trust was to be distributed to his "heirs at law" as determined by the laws of succession then in effect in California. *Id.* at 497. The *B~* court found that the words "heirs at law" were not sufficient to show his intent to create remainder interests in his heirs at law. *Id.* at 498. The court reasoned that, when a person creates a life estate for himself with a future gift to his heirs, "he ordinarily intends the same thing as if he had given the property to his estate," and "he does not intend to make a gift to any particular person." *Id.* The unspoken rationale underlying *B~* was that a residual beneficiary must be a specific person.

However, in 1958, the California Law Revision Commission proposed abolishing the doctrine of worthier title. Cal. Law Revision Comm'n, http://www.clrc.ca.gov/pub/1959/M59-0102.pdf & http://www.clrc.ca.gov/pub/1959/M59-0204.pdf. The California Legislature approved the proposal and enacted Civil Code section 1073 and Probate Code section 109. [18] 1959 Cal. Stat. ch. 122, §§ 1, 2. Under these two sections, the Legislature explicitly abolished the doctrine of worthier title: "The law of this State does not include (1) the common law rule of worthier title that a testator cannot devise an interest to his own heirs or (2) a presumption or rule of interpretation that a testator does not intend, by a devise or bequest to his own heirs or next of kin, to transfer an interest to them." *See also Levy v. Crocker-Citizen Nat'l Bank*, 14 Cal. App. 3d 102, 106 (1971) (recognizing Civil Code section 1073 overturned common law doctrine of worthier title).

More recent code provisions reflect the abolition of the doctrine of worthier title. California Probate Code section 21108, the successor statute to California Civil Code section 1073 and Probate Code section 109, contains identical language. Probate Code section 15404(c) lends further support by implying that "heirs" is a valid beneficiary: "If the trust provides for the disposition of principal to a class of persons described only as 'heirs' or 'next of kin' of the settlor . . . the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances."

Despite these developments in California trust law, a settlor who is the sole beneficiary of the trust (also called a "grantor trust"; *see* POMS SI 01120.200.B.8) still remains able to modify or terminate an irrevocable trust even though the settlor may not do so unilaterally. *See* Cal. Prob. Code § 15403; *B~*, 33 Cal. 2d at 497; 60 Cal. Jur. 3d Trusts § 306; *see also Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, 147 Cal. App. 2d 776, 777, 784 (1957). Because "heirs" or "heirs at law" are valid residual beneficiaries of a trust, under Probate Code section 15404(a), the settlor must have the consent of the heirs in order to modify or terminate the trust, subject to the limitation that such heirs must be reasonably likely to take under the circumstances.

Probate Code section 15403 similarly requires all beneficiaries to consent in order to modify or terminate an irrevocable trust. Thus, the rule for modifying self-settled irrevocable trusts in California is the same as for non-grantor irrevocable trusts.

CONCLUSION

Under the doctrine of worthier title, a trust that named "heirs" or "heirs at law" as the only residual beneficiary would be read as having failed to create any remainder interests. Because the trust would have no beneficiaries other than the settlor, the settlor could revoke even an irrevocable trust unilaterally. However, California no longer follows the doctrine of worthier title, and "heirs" or "heirs at law" are valid beneficiaries of a trust. Consequently, the heirs must consent to any modification or termination of the trust.

E. PS 10-006 California State Law on Empty Trusts

DATE: August 5, 2009

1. SYLLABUS

This guide from the San Francisco Regional Chief Counsel's office informs us that the establishment of "empty" or "dry" trusts are not valid in the state of California with regard to SSI excluded trusts.

2. OPINION

OVERVIEW

You asked whether an unfunded, or "empty," California trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under California law.

BACKGROUND

In general, when determining an individual's eligibility for SSI, all assets in a revocable trust established by the individual, as well as those assets in an irrevocable trust which could be paid to the individual, will be considered a resource. *See* Act § 1613, 42 U.S.C. § 1382b(e)(3); POMS SI 01120.201(D). Assets in a trust may be excluded as a resource, however, if a statutory exception applies.

Section 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A), provides for one such exception, commonly known as the Medicaid payback trust or "special needs trust." To qualify for the exception, a trust must:

1. be established with the property of an individual under age 65 who is disabled;

2. be established for the benefit of such individual by a parent, grandparent, legal guardian, or court; and

3. provide that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

Act § 1917(d)(4)(A); POMS SI 01120.203(B)(1).

Where a parent or grandparent creates such a trust, the parent or grandparent must either (1) create a "seed" trust, i.e., establish a trust using a nominal amount of his or her own funds, after which the disabled individual may transfer his or her own funds to the trust, or (2) create an empty or dry trust, if state law permits, into which the competent disabled adult's funds can be placed. POMS SI 01120.203(B)(1)(f).

Thus, if California law recognizes the validity of an empty trust, trusts created in this manner may be eligible for the Medicaid payback trust exception. Conversely, if California law does not recognize the validity of an empty trust, such trusts will not qualify for the exception.

DISCUSSION

California has not directly addressed whether it would recognize an empty Section 1917(d)(4)(A) trust. As a general rule, however, California law does not recognize empty trusts as valid. The relevant statute on this issue is clear: "[a] trust is created

only if there is trust property." Cal. Prob. Code § 15202. This provision mirrors the rule set forth in section 74 of the Restatement (Second) of Trusts, a well-established authority on trust law. *See* Cal. Prob. Code § 15202, Comments. Longstanding state case law is also consistent with this provision. As a California court explained in 1923, "[t]o the creation of a trust, a trust res or subject-matter is a sine qua non." *Ex Parte Lamb*, 215 P. 109, 112 (Cal. Ct. App. 1923) (citations omitted). "In order for [a] trust[ ] to exist there must be an estate to vest in the trustee, and the property must be clearly and definitely pointed out." *Id.* (quoting In *re J~'s Estate,* 196 P. 385 (Or. 1921)); *see also* In *re R~'s Estate,*37 P.2d 76, 77-78 (Cal. 1934) (holding that uncertainty as to trust res will render a trust invalid).

Recent California case law reinforces the requirement that a trust must contain property in order to be valid. *See Osswald v. Anderson,*49 Cal. App. 4th 812, 818 (Cal. Dist. Ct. App. 1996) (listing trust property as an essential element of a trust and citing Cal. Prob. Code § 15202) (other citations omitted); *accord Chang v. Redding Bank of Commerce,* 29 Cal. App. 4th 673, 684 (Cal. Dist. Ct. App. 1994). Moreover, the future expectation of trust property is insufficient to validate an empty trust under California law. *See Gonsalves v. Hodgson,* 237 P.2d 656, 660 61 (Cal. 1951) ("Trust property" may include interests that could be the subject of a present transfer) (emphasis added). Thus, an expectation that property may eventually fill an empty trust is not sufficient to establish a valid trust.

CONCLUSION

California law does not recognize empty trusts as valid. Consequently, such trusts would not qualify for the exception to counting set forth in Section 1917(d)(4)(A).

F. PS 06-130 Carlotta Living Trust SSI beneficiary: Loretta, DOB 1/19/48

DATE: May 10, 2006

1. SYLLABUS

This opinion examines whether the assets and income of a living trust should be counted when determining the eligibility of an SSI beneficiary. The living trust was established in 2002 by the beneficiary's mother using only the mother's assets. Upon the death of the mother the trust became irrevocable and her sons succeeded her as co-trustees. The assets remaining in the trust post-mortem were to be used for the benefit of the SSI beneficiary at the sole discretion of the trustees. Since the trust is irrevocable and the SSI beneficiary cannot revoke the trust or direct the use of assets the trust principal is excluded from resource counting. Furthermore, income derived from the real property contained in the trust is deposited directly in the trust and is not directly accessible to the SSI beneficiary at any time.

Thus, the rental income is not countable for purposes of determining SSI eligibility and payment amount.

2. OPINION

QUESTION

(1) Whether the assets of the Carlotta Living Trust are resources of Loretta (the "claimant") for purposes of determining her continuing eligibility for Supplemental Security Income (SSI) benefits.

(2) Whether monthly rental income generated by Los Angeles, California is the claimant's income for purposes of determining her continuing eligibility for SSI benefits.

ANSWER

(1) The assets of the Carlotta Living Trust are not the claimant's resources for purposes of determining her continuing eligibility for SSI benefits.(2) Unless distributed to the claimant, monthly rental income generated by Los Angeles, California is not the claimant's income for purposes of determining her continuing eligibility for SSI benefits.

FACTUAL BACKGROUND

The claimant, who was born on January, has received SSI benefits since 1986. The Social Security Administration (SSA) recently discovered that the claimant is a trust beneficiary.

On October 24, 2002, the claimant's mother, Carlotta, established the Carlotta Living Trust as Settlor, Trustee, and beneficiary (Trust at 19). The trust provided that it was subject to revocation and/or modification during the life of Carlotta, and that, upon her death, it would be irrevocable and not subject to modification (Trust at 18-19).

Carlotta died on April 16, 2004. Two of her sons, John and Bernard, succeeded her as co-trustees (John statement).

In pertinent part, the trust provided that, upon the Settlor's death, the successor trustee(s) would distribute all trust property except (1) the real property commonly known as Belmont Avenue, Los Angeles, California (the Belmont Avenue property) and (2) a one-sixth interest in the residual trust estate (Trust at 3-5). The trust further provided that the successor trustee(s) would administer the two remaining trust assets solely for the claimant's benefit as a Supplemental Needs Trust according to Article 4 of the trust (Trust at 4-5). The explicit purpose of the Supplemental Needs Trust is "to provide financial aid that supplements, rather than replaces, government benefits provided to . . . [the claimant], without disturbing government benefits that would be available . . . if the trust did not exist" (Trust at 6). Article 4 also provides that the successor trustee(s) would have sole discretion to apply as much trust income and trust principal as may be necessary or desirable to meet the claimant's supplemental needs and that the successor trustee(s) is/are neither obligated nor compelled to make any distribution from the trust (Trust at 6). Article 4 further provides that no part of the principal or undistributed income of the trust shall be considered available to the claimant and that the claimant essentially cannot compel the trustee to release any part of the principal or undistributed income of the trust (Trust at 7).

The trust conferred general property powers on the successor trustee(s) (Trust at 11). The trust also specifically authorized the successor trustee(s) to collect rent to which the trust is entitled (Trust at 11) and maintain financial trust accounts (Trust at 12). In addition, the trust provided that "[a]ny undistributed income shall be accumulated and added to principal" (Trust at 6).

The successor co-trustees have not made any trust distribution to the claimant and continue to hold the Belmont Avenue property in trust according to Article 4 of the trust (John statement at 1). The successor co-trustees also collect $800 per month in gross rent generated by the Belmont Avenue property (John statement at 1). The successor co-trustees deposit such rental income into a trust account that is not accessible by the claimant, not subject to the claimant's control, and not available to the claimant (John statement at 2).

Although established in the State of Michigan, the trust expressly provides that California law governs the validity and construction of the trust (Trust at 18).

DISCUSSION

(1) The assets of the Carlotta Living Trust are not resources of the claimant for purposes of determining her continuing eligibility for SSI benefits.

The Carlotta Living Trust was established in October 2002 solely with assets of a third person, i.e., the claimant's mother. Accordingly, although established after January 1, 2000, the Carlotta Living Trust is governed by Program Operations Manual System (POMS) SI 01120.200. POMS SI 01120.200.A.2(b).

When Carlotta died, the Carlotta Living Trust became an irrevocable trust. *See* Trust at 18-19 (trust became irrevocable by its terms); and Cal. Prob. Code § 15400 (2006) (trust irrevocable by its terms is irrevocable under California law). In addition, the claimant does not have authority to revoke the trust, does not have authority to direct the use of any trust asset, and otherwise cannot compel the successor co-trustees to take any particular action. Trust at 6-7, 18-19. Accordingly, given such circumstances, "the trust principal is not the individual's resource for SSI purposes." POMS SI 01120.200.D.2 (emphasis in original).

(2) Unless distributed to the claimant, monthly rental income generated by 266 Belmont Avenue, Los Angeles, California is not the claimant's income for purposes of determining her continuing eligibility for SSI benefits.

Trust earnings (e.g., interest, dividends, royalties, or rents) are not income to the SSI recipient unless the trust directs, or the trustee makes, payment to the SSI recipient. POMS SI 01120.200G.1.a. Here, the claimant never received any distribution from the trust. Moreover, the claimant and successor co-trustees all state that the rental income generated by the Belmont Avenue property is deposited in a segregated trust account that is neither accessible by the claimant nor made available to the claimant (John statement at 2). Accordingly, unless a future distribution is made to the claimant, the rental income collected from the Belmont Avenue property is not the claimant's income for purposes of determining her continuing eligibility for SSI benefits. If the successor co-trustees ever distribute such rental income to the claimant, such monies then will be deemed unearned

income to the claimant and assessed according to the regular rules for determining the effect of income on the claimant's continuing eligibility for SSI benefits. POMS SI 01120.200.E.1.

G. PS 01-203 Mark Testamentary Trusts, SSN:~

DATE: August 30, 2001

1. SYLLABUS

The issue in this case concerns whether the modification of the claimant's trust makes the trust a resource for the purposes of SSI eligibility. The special needs trust in this matter allows the trustee to provide for the claimant's special needs, such as health, safety and welfare when such requisites are not being provided by public benefits. However, the claimant cannot direct use of the trust assets for his own support and maintenance. Because the claimant does not have the legal authority to revoke the trust or direct use of the trust assets for his own support and maintenance, the trust is not considered a resource for SSI purposes.

2. OPINION

QUESTION

The question you presented is whether the modification of the Mark Testamentary Trusts rendered the trusts available as a resource for purposes of SSI eligibility.

ANSWER

Mark (hereinafter "Claimant") does not have the legal authority to revoke the modified trusts or direct the use of the trust assets for his own support and maintenance. Therefore, the trust principal is not a resource for SSI purposes.

SUMMARY OF EVIDENCE

In 1986, Claimant's parents died and he became the beneficiary of two Testamentary Trusts.

In August 2000, the trustee obtained an Order for Modification of Trusts on behalf of Claimant, filed in Alameda Superior Court. The modification purports to amend the Testamentary Trusts and replace the distribution terms with Special Needs Trusts (hereinafter "SNTs"), with Claimant as the beneficiary.

ANALYSIS

1. Validity of Modification

On petition by a trustee or beneficiary, a court may modify the dispositive provisions of a trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. *Cal.Prob.Code* § 15409. Accordingly, the trustee in this matter had standing to petition for modification of the disbursement terms of the Testamentary Trusts. Moreover, the court order modifying the trusts is valid.

2. Grantor Trusts

You have asked whether the modification of the trusts transformed them into "grantor trusts." A grantor trust is a trust in which the grantor of the trust is also the sole beneficiary of the trust. POMS SI 01120.200B.8. A grantor is the individual who provides the trust principal or corpus. POMS SI 01120.200B.2. The grantor must have a legal right to transfer the property. *Id.*

Claimant's parents provided the trust principal and were, therefore, the grantors of the Testamentary Trusts. Moreover, under the terms of the Testamentary Trusts, Claimant did not have a right to alienate (transfer) or encumber his interest. *See* Section G. As such, Claimant was not the grantor of the SNTs created by the modification of the Testamentary Trusts.

3. Revocability of SNTs

If an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes. POMS SI 01120.200D.2.

The SNTs in this matter create a discretionary trust wherein the trustee has discretion to provide income or principal to meet Claimant's special needs, such as health, safety and welfare, when, in the discretion of the trustee, such requisites are not being provided by public benefits. *See* Exhibit A, Section C; *see also* POMS SI 01120.200B.10. Claimant cannot direct the use of the trust assets for his own support and maintenance.

The SNTs also have a provision for termination of the trusts by the trustee if a certain contingency occurs, such as Claimant becoming ineligible for SSI benefits or any other program of public benefits. *See* Exhibit A, Section G. Such a provision renders the trusts revocable by the trustee, but not by Claimant, the beneficiary.

CONCLUSION

Claimant does not have the legal authority to revoke the trust or direct the use of the trust assets for his own support and maintenance and, therefore, the trust principal is not a resource for SSI purposes.

Footnotes:

[1] Because Sharon acted under a Power of Attorney, she acted as Robert's agent and her actions were equivalent to Robert's action. *See* Cal. Prob. Code § 4051 (the general law of agency applies to powers of attorney); Cal. Prob. Code §§ 4014, 4022 (a power of attorney is a written instrument granting authority to an attorney-in-fact to act for the principal).

[2] Although the Social Security Act refers to the exception as the Medicaid trust exception, it extends to the consideration of resources for purposes of SSI eligibility.

[3] You indicated that the agency concluded that the Original Trust did not include a state medical reimbursement provision in compliance with section 1917(d)(4)(A) of the Act. We are not certain of the agency's analysis for making this determination, but assume the reimbursement provision was deemed deficient because it provided only for reimbursement to the State of California, did not specify reimbursement for medical assistance paid by the State, and did not anticipate medical assistance that Robert could potentially receive from other states.

[4] Agency precedent opinions reflect that trial courts in multiple jurisdictions have erroneously issued orders *nunc pro tunc* when attempting to modify trusts retroactively. *See, e.g.,* POMS PS 01805.025; PS 01825.011; PS 01825.046; PS 01825.047.

[5] As discussed above, the court's actions were appropriate under California law, to the extent they apply prospectively. *See* Cal. Prob. Code §§ 15409, 17200(b)(13).

[6] We do not have any information indicating that Robert is legally incompetent or that Sharon , the petitioner, was acting as his legal guardian.

[7] Notably, the declaration of the Amended Trust stated that the Court "authorized the establishment" of the trust and the court's order directed the petitioner to "execute the trust as settlor." This language supports the conclusion that the petitioner, Sharon , as opposed to the Court, "established" the trust. As Sharon was acting on Robert's behalf, the agency should deem that, if anyone, Robert "established" the Amended Trust.

[8] We have relied on the Trust document you provided which did not include Schedule A, listing the assets initially used to fund the Trust. Trust § 1.1. We therefore take no position on the ownership or source of the funding or establishment of the trust; these should be evaluated under the applicable program rules.

[9] Court approval is required for all forms of terminations prior to Keith's death. *See* Trust § 4.8.

[10] As mentioned in Note 1, above, we have not evaluated whether the trust contains Keith's assets.

[11] In practice, actual expenditures for items such as vehicle repairs or telephone expenses may or may not be for Keith's benefit, depending on how the items are used and whether Keith receives a good or service from the expense. *See* POMS SI 01120.201(F)(2) ("payments to a third party that result in receipt of goods or services by the individual are considered for the sole benefit of the individual"). As you note, the Field Office is in the process of gathering details on itemized expenses. We do not have enough information to give a definitive opinion on any particular claimed expenses at this time.

[12] Social Security Act section 1917(d)(4)(C), 42 U.S.C. § 1396p(d)(4)(C), describes the conditions required for a trust for a disabled individual not to be counted as a resource in determining eligibility for SSI. Section 1917 of the Act corresponds to 42 U.S.C. § 1396p. The drafter of the Trust conflates the U.S. Code with section 1917 of the Social Security Act and mistakenly provided a reference to 42 U.S.C. § 1917(d)(4)(C). From context, however, the meaning is clear.

[13] 42 U.S.C. § 1396(d)(4)(C) does not exist in the U.S. Code. The drafter of the Trust presumably intended to cite 42 U.S.C. § 1396p(d)(4)(C), corresponding to Act section 1917(d)(4)(C).

[14] Between April and November 2010, SSA implemented a policy prohibiting trusts from retaining and using any portion of a deceased beneficiary's funds for the benefit of individuals who do not have separate accounts in the trust at the time of the beneficiary's death. We have, however, confirmed with the Office of Program Law that this policy remains suspended since November 2010. Because the prohibition on using retained funds has been suspended, Trust Art. 12.7 does not raise any policy concerns.

[15] As mentioned in footnote 2, above, the Trust contains a typographical error and refers to a nonexistent section of the Act. The reference, however, is clear from the context.

[16] The terms "heirs" and "heirs at law" are synonymous. *Black's Law Dictionary,* "Heir" (9th ed. 2009).

[17] The now obsolete rationale behind the doctrine of worthier title was to enable feudal lords to continue to require certain payments on land; these could be exacted from the original holder's descendants but not by unrelated purchasers. *See Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 562 (D.C. Cir. 1966).

[18] As discussed in the text, both Probate Code section 109 and Civil Code section 1073 have since been repealed. *See* Cal. Prob. Code § 109 (West 2012); Cal. Civ. Code § 1073 (West 2012); 31 Cal. Law Revision Comm'n 217–18 (2001) ("Section 1073 is repealed as unnecessary. It repeated Probate Code Section 21108.").

A. PS 12-031 Unprobated California Estate: Tony

DATE: December 19, 2011

1. SYLLABUS

This decision shows that residency in an unprobated house that a recipient is the sole heir to is sufficient to establish the exclusion for home property. The decision also clarifies that the obligation to make mortgage payments is sufficient to prevent in kind support and maintenance (ISM) being charged.

2. OPINION

QUESTIONS

You asked whether a house, belonging to the unprobated estate of Tony's sister, and occupied by Tony as his primary residence, is countable to him as a resource for purposes of determining his eligibility for Supplemental Security Income (SSI). You also asked whether Tony received unearned income through in-kind support and maintenance (ISM) because he lives in the house without paying mortgage or rent.

SHORT ANSWER

The house is not a countable resource to Tony, and his failure to make mortgage payments does not constitute ISM.

SUMMARY OF EVIDENCE

Tony is the sole heir of his sister's estate. His sister owned a home that Tony still occupies as his primary residence. Currently, Tony is not paying mortgage or rent for his use of the house. His sister's house is still in probate because her estate cannot afford to satisfy a city loan secured against the property or pay property taxes amounting to $11,000.00. Additionally, the estate does not have funds to pay accrued attorney fees for probate related services.

ANALYSIS

An individual with resources that exceed the statutory limit are not eligible for SSI benefits. *See* Program Operations Manual System (POMS) SI 01110.003. Unprobated property may be countable as a resource to an individual that has an ownership interest in the property and is an heir of the deceased. See POMS SI 01120.215(A). An ownership interest in unprobated property exists if an individual has use of a deceased's property, or documents indicate that the individual is heir to the property. *Id.* As his sister's sole heir, and as an occupant of the house, Tony has an ownership interest in the real property. However, it is premature to attribute the house to Tony as a resource. California Probate Code § 7001 provides that a decedent's property is subject to administration and is subject to the rights of beneficiaries, creditors, and other persons as provided by law. Cal. Prob. Code § 7001.

Here, the house has at least one outstanding loan and outstanding property taxes. Unless his sister's estate has funds to satisfy those debts, the property may be subject to foreclosure. At the very least, the estate's inability to pay such debts inhibits Tony's ability to sell the house. *See* 20 C.F.R. § 416.1201(a) (for real property to be considered a resource, an individual must be able to liquidate his right to that real property); *see also* POMS PS 01405.006 (noting that, during probate, an individual cannot readily obtain and liquidate estate property because it is subject to sale in order to pay creditors). Accordingly, it would be premature to attribute the house as Tony's current resource.

Moreover, the home exclusion rule precludes the house from being counted as Tony resource. *See* POMS SI 01130.100. An individual's home, regardless of value, is an excluded resource. *See* POMS SI 01130.100(B)(1). An individual's home is property in which he has an ownership interest and serves as his principal place of residence. POMS SI 01130.100(A)(1). As discussed, Tony has an ownership interest in the unprobated house because he occupies the house and he is the only heir to his sister's estate. Additionally, Tony uses the house as his primary residence. Accordingly, the house is excluded as a resource.

Finally, Tony occupation of the house is not considered ISM. Pursuant to Administrative Message (AM) 09060(E)(2), the Agency does not consider nonpayment of mortgage to be ISM because the obligation to pay still exists. Although, the obligation to pay mortgage resides with Ms. D~'s estate rather than Tony, the reasoning remains the same. Whatever ownership interest Tony has in the house is subject to the house clearing probate. The failure of Tony to pay mortgage presents the risk that the secured lender may foreclose on the property, ending Tony interest in and possession of the property. Accordingly, Tony has an interest in seeing that the mortgage is paid, and his failure to satisfy those payments does not forgive the estate's obligation to pay. Thus, finding Tony nonpayment of mortgage to be ISM would not be appropriate.

CONCLUSION

Even if the house would otherwise be a resource to Tony, it falls under the home exclusion rule. Furthermore, Tony occupation of the house without paying rent or mortgage is not ISM because the obligation to pay the mortgage remains, even if that obligation is not satisfied.

A. PS 04-321 Attempt to Transfer Property Pursuant to the Uniform Transfers to Minors Act ("UTMA") for Violeta and Salvador M~, Respectively ~/~

DATE: August 31, 2004

1. SYLLABUS

The issue is whether a retroactive transfer of real property to two minor children to one custodian is a valid transfer of real property and sufficient to create custodial property pursuant to the Uniform Transfers to Minors Act (UTMA) under any state law.

The transfer in this case is not a valid UTMA transfer of real property because it did not comply with the legal requirements to establish a custodianship of the property. A valid custodianship must invoke the law of a particular state. The transfer documents did not invoke any particular state laws. Real property can only be transferred to one child under UTMA. The transfer of real property in this case was to two children which violated the UTMA. An additional document deficiency was the attempt to show the transfer occurred retroactively using the term "nunc pro tunc" which has no legal effect under California state law absent an order by a court of competent jurisdiction. No such court order was presented to SSA.

The transfer of property demonstrated by this case is invalid because it did not follow the requirements of the UTMA and applicable California state laws.

2. OPINION

INTRODUCTION

Violeta and Salvador M~ are children found disabled for SSI purposes. When SSA discovered in May 2003 that the children's father owned real property worth $15,000, the children's SSI benefits were suspended, retroactively to June 2001, on account of excess resources. The father subsequently submitted documents to SSA purporting a transfer of the real property to a custodian for the children pursuant to the Uniform Transfers to Minors Act ("UTMA"), "nunc pro tunc" May 1, 2001.

QUESTION

You requested assistance in determining the validity of the alleged property transfer under the laws of California. Specifically, you asked whether the documents submitted to SSA were sufficient to validly transfer real property and create custodial property pursuant to the UTMA. In addition, you asked if such a transfer could be made retroactive by using the words "nunc pro tunc." Finally, you asked at what age control of the property would pass to the above-named children, assuming the transfer were valid.

ANSWER

The documents submitted to the SSA did not invoke applicable California law, or the law of any other state; therefore, the transfer was not valid under the California Uniform Transfers to Minors Act.

SUMMARY OF EVIDENCE

The documents submitted to the SSA included a "Quitclaim Deed" apparently received by the Kern County Recorder on December 9, 2003, and two documents titled "Transfer of Property." Each of these documents purportedly transferred the interest of the transferor, Lionel M~, in certain real property to a custodian, Blanca G~, pursuant to the Uniform Transfers to Minors Act. The Quitclaim Deed stated that Ms. G~ was custodian for Violeta M~ and Salvador M~. Each Transfer of Property stated that Ms. G~ was custodian for one child or the other. The Quitclaim Deed was dated December 7, 2003, and each Transfer of Property was dated December 6, 2003; however, each of these documents also contained the words "nunc pro tunc" followed by a May 1, 2001 date.

ANALYSIS

A. Applicable Law

In 1983, the Uniform Gifts to Minors Act ("UGMA") was revised and restated by the National Conference of Commissioners on Uniform State Laws as the Uniform Transfers to Minors Act. In 1984, the California Law Revision Commission recommended adoption of the UTMA. In response to the Commission's recommendation, the 1984 Legislature repealed the former UGMA and replaced it with a new Part 9 of Division 4 of the California Probate Code. See Cal. Prob. C. §§ 3900 et seq. (Stats. 1984, Chap. 243).

The law may be cited as the "California Uniform Transfers to Minors Act" (hereinafter the "California UTMA"). Cal. Prob. C. § 3900. The California UTMA establishes procedures whereby a person (the transferor) may transfer property (custodial property) to himself, an adult or a trust company (the custodian) for the benefit of a minor. See Cal. Prob. C. § 3901 (definitions). The California UTMA applies to any interest in property transferred under the Act and to the income and proceeds of that property. Cal. Prob. C. § 3901(f). The California UTMA applies to a transfer (1) if the transfer document under California Probate Code Section 3900 refers to the California UTMA, and (2) if, at the time of the transfer, the transferor, the minor or the custodian is a California resident or the custodial property is located in California. See, generally, B.E. Witkin, Summary of California Law (9th ed. 1987) § 115.

B. Discussion

Here, the documents cited above invoked the UTMA, without specifying the California UTMA, or the law of any other state (California residents may elect application of another state's law if there is a nexus to the chosen state at the time of the transfer). However, the relevant provision of the California UTMA, Probate Code Section 3902, mandates that the transfer

documents required under Probate Code Section 3909 refer to "this part" [Part 9 of Division 4 of the Probate Code], i.e. the California UTMA. For example, Probate Code Section 3909(a)(5) states that:

Custodial property is created and a transfer is made whenever . . . An interest in real property is recorded in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: 'as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act.'

Here, the Quitclaim Deed was apparently recorded, as required by California Probate Code Section 3909(a)(5). It is not apparent whether either of the documents titled "Transfer of Property" was recorded. The Law Revision Commission's Comment to Section 3909 states that paragraph 5 of subdivision (a) is the exclusive method for transfer of real property, and that the transfer must be recorded in the name of the custodian in order for the transfer to be an effective transfer.

Regardless, the California Law Revision Commission's Comment to Probate Code Section 3902 states that the creation of a custodianship must invoke the law of a particular state because of the form of the transfer required under subdivision (a) of Section 3909. This interpretation is consistent with the Comment accompanying the annotated edition of the UTMA, which indicates that the creation of a custodianship must invoke the law of a particular state. The purpose was to resolve uncertainties and conflicts-of-laws questions arising under UGMA because of nonuniformity in various states, which could also arise under the UTMA.

There are no published court decisions interpreting California Probate Code Section 3902. However, the California Law Revision Commission's Comment is persuasive authority that the transfer attempted here is invalid. Further, California Probate Code Section 3911, respecting the validity and effect of California UTMA transfers, makes no exception for failure to comply with section 3902.

Note that there appear to be other defects in the documents submitted to SSA which could also affect the validity of the transfer. Section 3910 of the California Probate Code provides that:

A transfer may be made only for one minor, and only one person may be the custodian. All custodial property held under this part by the same custodian for the benefit of the same minor constitutes a single custodianship.

Here, the Quitclaim Deed purportedly transferred the transferor's interest in real property in question to the custodian for both of the children. However, there are no published court decisions respecting California Probate Code Section 3910. Further, the Comment by the California Law Revision Commission respecting this provision of the California UTMA, and the Comment accompanying the annotated edition of the UTMA, merely emphasize the importance of a single custodian (rather than multiple custodians) for a single minor.

For the reasons stated above, it is our opinion that the attempted transfer is invalid because of failure to comply with the requirements of California Probate Code Sections 3902(a) and 3909(a)(5).

Because the attempted transfer is invalid, your questions about use of the words "nunc pro tunc" and age of majority are moot. However, you may wish to consider the following:

California Evidence Code Section 640 provides that a writing is presumed to have been truly dated. The phrase "nunc pro tunc" (lit., "now for then") is used in reference to an act to show that it has retroactive legal effect. Courts have inherent power to enter judgments and orders "nunc pro tunc." See, e.g., In re Estate of Pillsbury, 175 Cal. 454, 463, 166 P. 11 (1917). The use of the words "nunc pro tunc" has no legal effect absent an order by a court of competent jurisdiction.

Finally, California Probate Code Section 3920 provides that:

The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of the following:

(a) The minor's attainment of 18 years of age unless the time of transfer of the custodial property to the minor is delayed under Section 3920.5 to a time after the time the minor attains the age of 18 years.

(b) The time specified in the transfer pursuant to Section 3909 if the time of transfer of the custodial property to the minor is delayed under Section 3920.5 to a time after the time the minor attains the age of 18 years.

(c) The minor's death.

In this case, there was no indication that transfer was to be delayed until after each minor child's attainment of age 18. If the transfer were valid, the first child to attain age 18 could claim the entire property.

CONCLUSION

The attempted transfer is invalid because of failure to comply with the requirements of California Probate Code Sections 3902(a) and 3909(a)(5). If the transfers were valid, the first child to attain age 18 could claim the entire property. The use of the words "nunc pro tunc" has no legal effect absent an order by a court of competent jurisdiction.

4.4 COLORADO

A. PS 11-143 Treatment of Amendments to Trust for SSI Purposes (Ronald S~)—REPLY

DATE: August 12, 2011

1. SYLLABUS

This decision clarifies that all the essentials of meeting the Special Needs Trust criteria in Section 1917(d)(4)(A) have to be met. This case centers on the revision of a trust previously reviewed and found to be a countable resource by the Regional Chief Counsel (RCC). The present finding of the RCC when they examined this same trust again was that the revision failed to follow the procedures contained in the body of the trust allowing for revisions. Although the revision did correct one provision by allowing any state to seek reimbursement for medical treatment provided by Medicaid, it still failed to meet the sole benefit criteria by allowing others to benefit from an early termination, that is, a termination occurring during the lifetime of the trust beneficiary .

2. OPINION

QUESTION PRESENTED

You asked us to review amendments to the "Ronald L. S~ Disability Trust" (hereinafter referred to as the "Trust") to determine if they remedy deficiencies in the Trust that make it a resource for purposes of determining Ronald's eligibility for Supplemental Security Income (SSI).

SHORT ANSWER

We conclude that the Technical Corrections to the Trust are not effective because Ms. S~ does not have the power to amend the Trust; according to the terms of the Trust, only a court can amend the Trust. However, even if the Technical Corrections were effective, the amendments do not remedy all of the deficiencies identified in our earlier opinion and the Trust is still a resource for SSI purposes. Specifically, the amendments do not adequately address our earlier concern that the early termination clause could result in other people or entities receiving Trust assets during Ronald's lifetime.

BACKGROUND

We previously reviewed the "Ronald L. S~ Disability Trust" to determine whether the Trust is a resource for SSI purposes. We advised that the original trust did not satisfy the statutory criteria to be excepted as a resource under 42 U.S.C. § 1396p(d)(4)(A), for the following reasons:

1. The Trust is not for Ronald's sole benefit, because an early termination provision (in Articles VIII and IX) could allow other individuals or entities to benefit from the trust during Ronald's lifetime;

2. The Trust was not established through the actions of a parent, grandparent, legal guardian or a court, because Ronald's mother did not create a "seed" trust using a nominal amount of her own money, and Colorado does not allow empty or dry trusts;

3. The Trust limits Medicaid reimbursement upon termination of the trust to the state of Colorado.

See Memorandum from OGC Region VIII to ARC-MOS Region VIII, *Treatment of Trust for SSI Purposes* (Ronald S~), December 17, 2010 (hereinafter Memorandum, Ronald S~ Trust).

As explained in our December 2010 opinion, Ronald's mother (Joan S~) established the trust in September 2009, and is also one of the co-trustees. Although the Trust states, "Trustee acknowledges receipt, in trust, of the property described in the attached Schedule A," the documents we reviewed did not include "Schedule A" and we were advised that Ms. S~ established an empty trust, i.e., a trust without any assets, which Ronald later funded with his own assets. Therefore, we presumed there were no assets in the Trust when Ms. S~ established it.

Subsequently, Ms. S~ submitted Schedule A to the Trust, stating the Trust was established with $10.00 in cash. She also submitted "Additional Technical Corrections to the Trust Agreement" (hereinafter "Technical Corrections"), dated April 12, 2011. The Technical Corrections amend Article VIII (regarding termination of the trust) in its entirety. The amendment reads, in relevant part:

This trust shall cease and terminate on the death of Beneficiary. Upon the death of Beneficiary, the Trustee shall provide the state(s), including but not limited to the Colorado Department of Health Care Policy and Financing (CDHCPF), all amounts remaining in the trust, up to the amount equal to the total amount of medical assistance paid on behalf of Beneficiary under the state Medicaid plan(s) before any other distributions are permitted.

Technical Corrections, Art. VIII, ¶ 2.

The amendment also states:

Trustee shall distribute the residue to such persons, estates, and interests that Beneficiary may appoint, on such terms and conditions, whether outright or in trust, as Beneficiary shall exercise in his last will and testament duly admitted to probate, and which specifically refers to this special power of appointment. This special power of appointment shall be exercised by Beneficiary alone, but it may not be exercised in favor of Beneficiary's estate, or for any creditors of Beneficiary or Beneficiary's estate.

If Beneficiary has not exercised such special power of appointment in his last will and testament, the residue shall be distributed to Beneficiary's mother, M. JOAN S~, if living; otherwise, to Beneficiary's brother, WILLIAM M. S~.

Id. at ¶ 3.

Although there is no section 9.04 of Article IX of the Trust, the Technical Corrections "amend[] 9.04 of Article IX of the trust in its entirety" to read as follows:

9.04 Trust Termination:

This trust shall cease and terminate upon the death of Beneficiary. Upon the death of Beneficiary, the Trustee shall provide the state(s), including but not limited to the [CDHCPF], all amounts remaining in the trust, up to the amount equal to the total amount of medical assistance paid on behalf of Beneficiary under the state Medicaid plan(s).

Technical Corrections, Art. IX.

DISCUSSION

As we previously advised, the Trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act for trusts established on or after January 1, 2000. *See* 42 U.S.C.

§ 1382b(e); POMS SI 01120.201. Under these provisions, trusts established with the assets of an individual are considered resources for SSI purposes even if they are irrevocable. However, the Act provides an exception for certain trusts established under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must:

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

POMS SI 01120.203(B)(1)(a)-(h).

We previously advised that the Trust does not comply with these provisions for three reasons:

(1) the Trust is not for Ronald's sole benefit; (2) the Trust was not established through the actions of a parent, grandparent, legal guardian, or court; and (3) the Trust limits Medicaid reimbursement to the state of Colorado. Ms. S~ attempted to correct these problems, by submitting the "Schedule A" showing the assets that funded the trust, and by making "Technical Corrections" to the Trust. As discussed below, Ms. S~ has remedied only one of the problems previously identified.

Based on New Information, the Trust Was Established Through the Actions of a Parent, Grandparent, Legal Guardian, or Court.

The Trust meets the requirement under the special needs trust exception that it be established by the actions of a parent, grandparent, legal guardian, or court. POMS SI 01120.203(B)(1)(f);

42 U.S.C. § 1396p(d)(4)(A). The POMS provides that, 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 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 (e.g., power of attorney) may transfer the individual's assets into the trust. POMS SI 01120.203(B)(1)(f). We previously advised that, based upon the then-available information, Ms. S~ did not create a "seed" trust prior to funding the trust with Ronald's own assets. We also advised that Colorado does not recognize an "empty" or "dry" trust, or a trust with no assets. *See* Memorandum, *Ronald S~ Trust.*

However, new information shows that Ms. S~, in fact, established a "seed" trust. The Trust references that it was established with property listed in Schedule A. Trust, Art. III. Schedule A, submitted with the Technical Corrections, specifically references $10.00 in cash. Upon further inquiry, you informed us Schedule A was erroneously omitted from the Trust documents submitted to the agency prior to our previous opinion. This information establishes that Ms. S~ established the Trust as a "seed" trust, and therefore, the Trust meets the requirement under the special needs trust exception that it be established by the actions of a parent, grandparent, legal guardian, or court. POMS SI 01120.203(B)(1)(f); 42 U.S.C. § 1396p(d)(4)(A).

The Technical Corrections to the Trust Are Not Effective Because Ms. S~ Did Not Follow the Amendment Procedures in Article XII of the Trust.

Ms. S~ has attempted to correct problems identified in the original Trust by making "Technical Corrections" to the Trust. Ms. S~ indicated that she was amending the Trust in her capacity as the settlor (rather than her capacity as a trustee). As a general rule, "[t]he settlor of an inter vivos trust has power to revoke or modify the trust *to the extent the terms of the trust so provide*." Restatement (Third) of Trusts (2003) § 63 (emphasis added, citation omitted). Here, the terms of the Trust do not provide that the settlor has any power to modify or amend the trust; rather, the trust grants such authority only to a court acting on request of a trustee or the state Medicaid agency. [1] Specifically, Article XII of the Trust provides that "*Upon petition by the Trustee or the Medicaid agency, this trust may be amended by a court of competent jurisdiction* in order to satisfy the requirements of law with respect to disability trusts" (emphasis added). Article XII further provides that "if a change in the trust is sought, the Medicaid Agency must be notified if Beneficiary is receiving Medicaid benefits at that time." Here, there is no evidence that Ms. S~ petitioned a court to amend the Trust; she simply executed a document purporting to amend the trust. Because Ms. S~ does not have the power to amend the trust, we conclude that the "Technical Corrections" are not effective. As such, the Trust is still a resource.

Because Ms. S~ is also a trustee, she could petition a court to amend the Trust, as provided in Article XII. She must notify the state Medicaid agency if Ronald is receiving Medicaid. If a court were to amend the Trust using the same terms described in the "Technical Corrections," the amended trust would still be problematic, as discussed below.

If the Technical Corrections Were Effective, the Trust as Amended Would Not Limit Medicaid Reimbursement upon Termination of the Trust to the State of Colorado.

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 the amount equal to the total amount of medical assistance paid on behalf of the individual under the state Medicaid plan(s). 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). *See id.* SI 00120.203(B)(1)(h).

We previously advised that Article VIII of the Trust did not provide Medicaid reimbursement to *any states* that may have provided medical assistance to Ronald under a Medicaid plan and limited reimbursement to the State of Colorado. *See* Memorandum, *Ronald S~ Trust.*

However, the amendment to the Trust provides that, "[u]pon the death of Beneficiary, the Trustee shall provide the *state(s), including but not limited to the [CDHCPF]*, all amounts remaining in the trust, up to the amount equal to the total amount of medical assistance paid on behalf of Beneficiary under the *state Medicaid plan(s)* before any other distributions are permitted." Technical Corrections, Art. VIII, ¶ 2 (emphasis added); *see* Technical Corrections, Art. IX, § 9.04. Thus, the Technical Corrections to the Trust, if effective, would satisfy the requirement under the special needs trust exception that the Trust provide for reimbursement to *any states* that may have provided medical assistance to Ronald under a Medicaid plan.

Even If the Technical Corrections Were Effective, the Trust as Amended Would Not Be for Ronald's Sole Benefit.

In order for a trust to meet the special needs trust exception, it must be established for the "sole benefit" of an individual. *See* POMS SI 01120.203(B)(1)(a). However, if a trust contains provisions that 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 trust corpus to another individual or entity (other than to the state(s) or another creditor for payment for goods and services provided to the individual), it will not be considered for the "sole benefit" of the disabled individual. *See* POMS SI 01120.203(B)(1)(e).

We previously advised that Article VIII, § 8.01 and Article IX, § 9.01 showed that the Trust could terminate during Ronald's lifetime, as these sections allowed a court to terminate the trust prior to Ronald's death. Further, Article VIII, § 8.01 provided that upon termination, after reimbursing the Colorado Medicaid agency, the trust residue would be distributed to such persons as Ronald appoints by will, or if he did not exercise this power of appointment, to Ms. S~ if living or to Ronald's brother. We advised that, as the trust allowed for termination of the Trust prior to Ronald's death with the residue to be distributed to other individuals or entities, the Trust was not for Ronald's sole benefit, and did not qualify for the special needs trust exception. *See* POMS SI 01120.203(B)(1)(e). We further advised that any early termination clause must meet the requirements outlined in POMS SI 01120.199.

The Technical Corrections attempt to remedy this deficiency by replacing Article VIII in full. The corrected/replacement Article VIII eliminates the early termination provision and provides only that "[t]his trust shall cease and terminate on the death of Beneficiary." Technical Corrections, Art. VIII, ¶ 2. However, the Technical Corrections do not amend or correct Article IX, § 9.01, which provides that the "Department of Health Care Policy may invoke the jurisdiction of a proper court. The Colorado Medicaid Agency may request a court to terminate this trust if the trust is no longer required for Medicaid eligibility in Colorado." Thus, while the corrected Article VIII indicates the Trust will terminate on Ronald's death, Article IX still allows the possibility for early termination by a court. These conflicting provisions allow for the possibility of early termination. And upon termination, the corrected Article VIII still provides that the trust residue shall be distributed to such persons, estates, and interests as Ronald appoints by will, or if he does not exercise his power of appointment, to his mother if living, otherwise to his brother. This at least creates the possibility that persons or entities other than Ronald might benefit from the Trust during his lifetime. Thus, even if the Technical Corrections were effective, this would not change our opinion that the Trust is not for Ronald's sole benefit. *See* POMS SI 01120.199, SI 01120.203(B)(1)(e).

CONCLUSION

The Technical Corrections to the Trust are not effective because Ms. S~ did not follow the amendment procedures in Article XII of the Trust. Further, even if effective, the Technical Corrections do not change our opinion that the Trust is not for Ronald's sole benefit. Therefore, the Trust is still a resource for SSI purposes.

John J. L~

Acting Regional Chief Counsel

By:_____

Michael A. T~

Assistant Regional Counsel

B. PS 11-034 Treatment of Trust for SSI Purposes (Ronald S~)

DATE: December 17, 2010

1. SYLLABUS

This decision clarifies several aspects of trust law including early terminations and sole benefit provisions. It illustrates this by indicating how and why this trust fails to meet those criteria for exception. It also indicates that Colorado law does not allow "empty " or "dry" trusts.

2. OPINION

OVERVIEW

You asked us to review the "Ronald L. S~ Disability Trust" (hereinafter referred to as the "Trust") to determine whether the Trust is a resource for purposes of determining Ronald S~'s eligibility for Supplemental Security Income (SSI). You also requested a legal opinion on whether the State of Colorado, along with the other States in our region, allows for the establishment of an "empty" or "dry" trust[2] . Finally, you asked whether the Trust is revocable.

SHORT ANSWER

We conclude the Trust contains Ronald's assets, and that it is a resource for SSI purposes because it does not meet the statutory criteria to be excepted as a resource. Specifically, the Trust is not for the sole benefit of Ronald during his lifetime, because the Trust includes an early termination clause that may result in other people receiving Trust assets during Ronald's lifetime. Further, the Trust was not established through the actions of a parent, grandparent, legal guardian or court. Although Ronald's mother purports to have created the trust, she did not fund the trust with any assets at the time of its creation, and we conclude that Colorado does not allow the establishment of a "dry" or "empty" trust. Finally, the Trust does not meet the statutory exception because it limits Medicaid reimbursement upon termination of the Trust only to the State of Colorado.

BACKGROUND

According to the information you provided, Ronald is a disabled adult SSI recipient. Based on your memorandum, we presume Ronald is under the age of 65. On September 15, 2009, Ms. S~, Ronald's mother, established the Trust. The Trust establishes Ms. S~ and William M. S~ of Sterling, Virginia, as co-trustees. *See* Trust, ¶ 1. The Trust states it is for the "sole benefit" or Ronald, "the 'Beneficiary.'" The Trust states the "Trust acknowledges receipt, in trust the property described in the attached Schedule A." Trust, Art. III. We note "Schedule A" was not included with the documents you submitted to us with your opinion request. However, you advised us that Ms. S~ established an empty trust, i.e., a trust without any assets, and Ronald later funded the trust with his own funds. Therefore, for purposes of this opinion, we presume there were not assets in the Trust when Ms. S~ established it.

The Trust provides it is discretionary, i.e., the Trustee has full discretion as to the time, purposes, and amount of all distributions. "Trustee may pay to or apply for the benefit of the Beneficiary, for Beneficiary's lifetime, such amounts from the principal or income as Trustee in Trustee's sole discretion may from time to time deem necessary or advisable to supplement any public or private benefits or assistance for which Beneficiary is eligible." The Trust also provides that "no part of the principal or income of the trust estate shall be considered available to the beneficiary." *Id.* § 5.02(b).

The Trust further states the "Trustee shall take whatever steps are necessary, including amendment of the trust, to qualify th[e] trust as exempt pursuant to the requirements of 42 U.S.C. § 1382b(e)(5) or any regulations or instructions adopted by the Commissioner of Social Security." Trust, Art. VII.

Regarding termination and disposition, the Trust provides:

"The sole lifetime beneficiaries of the trust are Beneficiary and the Colorado Medicaid Agency. This Trust shall cease and terminate on the death of Beneficiary or by order of a court of competent jurisdiction. Upon the death of Beneficiary or prior termination of the trust, the Colorado Medicaid Agency shall first receive all amounts remaining in the trust up to an amount of Medicaid assistance paid on behalf of Beneficiary before any other distributions are permitted."

Article VIII, § 8.01. The Trust then states the Trustee "shall distribute the residue to such persons, estates, and interests that Beneficiary may appoint . . . in his last will and testament . . .". *Id.* The Trust provides that, if Ronald does not exercise this power of appointment or is incapable of exercising it, then the residue of the Trust shall be paid to Ms. S~. If Ms. S~ does not survive Ronald, then the residue of the Trust shall be paid to Ronald's brother. Id. If at any time there is no person or entity

qualified to receive final distribution of the trust estate or any part of it, then any such portion of the trust estate shall be distributed to those persons who would inherit if Ronald had died intestate (i.e., without a will) owning such property. Article VIII, § 8.03.

Article IX of the Trust includes language pertaining to early termination of the Trust at the request of the Colorado Medicaid Agency. It states, "The Department of Health Care Policy may invoke the jurisdiction of a proper court. The Colorado Medicaid Agency may request a court to terminate th[e] trust if the trust is no longer required for Medicaid eligibility in Colorado." Trust, Art. IX, § 9.01. Article IX also provides that: "No beneficiary shall have any right to anticipate, sell, assign, mortgage, pledge, or otherwise dispose of or encumber all or any part of the trust estate," nor shall any part of the Trust estate "including income, be liable for the debts or obligations . . . of any beneficiary or be subject to attachment, garnishment, execution, creditor's bill or other legal or equitable process. " Trust, Art. IX, § 9.02.

Article XII of the Trust pertains to its revocability. It is entitled "Trust Irrevocable" and expressly states, "No beneficiary may revoke or amend this trust. Upon petition of Trustee or the Medicaid agency, this trust may be amended by a court of competent jurisdiction in order to satisfy the requirements of law with respect to disability trusts." Trust, Art. XII.

Ms. S~ registered the Trust with the court in Jefferson County, Colorado, on September 18, 2009. *See* Trust, Certificate of Deposit of Trust Registration Statement.

DISCUSSION

A. Special Needs Trust Exception.

Based on the information you provided, the Trust was funded with Ronald's own assets. Thus, the Trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual or the individual's spouse are considered resources for SSI purposes even if they are irrevocable. However, there is an exception for certain trusts established under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must:

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

POMS SI 01120.203(B)(1)(a)-(h). Here, the Trust does not meet these requirements for three reasons: (1) it is not for Ronald's sole benefit; (2) the Trust was not established through the actions of a parent, grandparent, legal guardian, or a court; and (3) the Trust limits Medicaid reimbursement upon termination of the Trust to the State of Colorado.

The Trust Contains the Assets of an Individual under Age 65 Who Is Disabled.

In order for a Trust to meet the special needs trust exception, it must contain the assets of an individual under age 65 who is disabled. *See* POMS SI 01120.203(B)(1)(a). Your opinion request gives us no reason to doubt Ronald is under the age of 65. You also refer to

Ronald as Ms. S~'s "disabled adult son." While Ms. S~ established the Trust as a "dry" or "empty" trust, as stated in your opinion request, Ronald later ratified the Trust by transferring his own funds into it.

The Trust Is Not for Ronald's Sole Benefit.

In order for a Trust to meet the special needs trust exception, it must also be established for the "sole benefit" of an individual. *See id.* However, if a trust contains provisions that 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 trust corpus to another individual or entity (other than to the state(s) or another creditor for payment for goods and services provided to the individual), it will not be considered to be for the "sole benefit" of the disabled individual. *See* POMS SI 01120.203(B)(1)(e). Here, the Trust allows for termination of the trust prior to Ronald's death and payment of the corpus to other individuals or entities. The Trust, therefore, is not for Ronald's sole benefit.

Article VIII of the Trust contains an early termination clause, under which the Trust

[S]hall cease and terminate on the death of Beneficiary *or by order of a court of*

competent jurisdiction. Upon the death of Beneficiary *or prior termination of*

the trust, the Colorado Medicaid Agency shall first receive all amounts remaining

in the trust up to an amount of Medical assistance paid on behalf of the Beneficiary ...

Trust, Art. VIII, § 8.01 (emphasis added). The Trust later states in Section 9.01 of Article IX that the "Colorado Medicaid Agency *may request a court to terminate this trust* if the trust is no longer required for Medicaid eligibility in Colorado" (emphasis added). These provisions show the Trust can terminate during Ronald's lifetime. Upon termination of the Trust, after the Colorado Medicaid agency receives reimbursement for amounts of Medical assistance paid on Ronald's behalf, the Trustee shall distribute the residue to the persons, estates or interests that Ronald appoints by will. If Ronald does not exercise this power of appointment, the Trust residue will be paid to Ms. S~, or if she is not surviving, to Ronald's brother. Trust, Art. VIII, § 8.01. As the Trust allows for termination of the Trust prior to Ronald's death with the residue to be distributed to other individuals or entities (other than to the state(s) or another creditor for payment for goods and services provided to the individual), the Trust is not for Ronald's sole benefit, and does not qualify for the special needs trust exception. *See* POMS SI 01120.203(B)(1)(e).

In addition, pursuant to POMS SI 01120.199, in order for an early termination clause in a trust to be acceptable, it must provide that:

(1) 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); and

(2) Other than payment for those expenses listed in SI 01120.199(F)(3) in this section, no entity other than the trust beneficiary may benefit from the early termination (i.e., After reimbursement to the State(s), all remaining funds are disbursed to the trust beneficiary); and

(3) The early termination clause gives the power to terminate to someone other than the trust beneficiary.

Here, the early termination clause provides Medicaid reimbursement only to the state of Colorado, rather than to all states that provided medical assistance. And as discussed above, the early termination clause can benefit individuals other than Ronald, rather than providing that all remaining funds be returned to him. Thus, the early termination provisions here do not comply with POMS SI 01120.199(F)(1).

The Trust Was Not Established Through the Actions of a Parent, Grandparent, Legal Guardian, or a Court.

The Trust also does not meet the special needs trust exception because it was not established by the actions of a parent, grandparent, legal guardian, or court. POMS SI 01120.203(B)(1)(f); 42 U.S.C. § 1396p(d)(4)(A). Although Ms. S~ is identified as the creator of the Trust, the Trust was funded with Ronald's own assets. We assume Ronald is a competent adult since we have no evidence of guardianship proceedings. 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 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 to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust. POMS SI 01120.203(B)(1)(f). Based on the information you provided, Ms. S~ did not create a "seed" trust prior to funding the trust with Ronald's own assets. Thus, the Trust can be considered "established" through the actions of Ms. S~ only if Colorado recognizes the existence of "empty" trusts.

We conclude that Colorado does not recognize an "empty" trust, or a trust with no assets. We did not find any statute or case law expressly addressing the establishment of an "empty" or "dry" trust. And although Colorado statutes do not expressly define a trust, certain statutes recognize that property is an essential element of a trust. For example, in defining a "disability trust," the Colorado Probate Code states a trust is "funded by *assets*" of an individual. *Id.* at § 15-14-412.8(2)(a) (emphasis added). The Colorado Probate Code also states "Registration of a trust which has *no asset other than* the right to receive property upon the occurrence of some future event or a trust *nominally funded with assets* having a value of five hundred dollars or less shall not be required until the occurrence of such event or *assets* having a value of in excess of five hundred

dollars are deposited therein." *Id.* at § 15-16-101(2) (emphasis added). This statute's specific reference to a trust that has "no asset other than" a future interest in property or that is only "nominally funded" indicates that at least some type of property interest is required to have a valid trust. Colorado caselaw also recognizes that property is an essential element of a trust. Colorado courts have explained that to create a valid express trust, there must be a settlor with the capacity and intention to create a trust and who took the necessary steps to do so; *an identifiable trust estate*; a trustee; and an identifiable beneficiary. *See In re Estate of Brenner*, 37 Colo. App. 271, 273, 547 P.2d 938, 941 (1976)) (emphasis added).

Further, a dry or empty trust appears to violate a basic trust principle that a trust governs *property*. The *Restatement (Third) of Trusts* provides that a trust cannot be created unless there is trust property in existence and ascertainable at the time of the creation of the trust. *See* Restatement (Third) of Trusts (2003) § 2, cmt. i. A leading authority on trusts agrees, stating a trust is, among other things, a relationship with respect to property. Mark L. A~, Austin W. S~, William F. F~, *Scott on Trusts* (4th ed. 2001) § 2.3. As Colorado law denotes property as a critical component of a trust, we believe Colorado would follow the *Restatement (Third) of Trusts*, which would preclude the establishment of a "dry" or "empty" trust, particularly in light of the Colorado statutes and caselaw discussed above.

Because Colorado does not recognize an empty trust, and Ms. S~ did not create a seed trust prior to Ronald's transfer of assets to the trust, the trust was not "established" through the actions of a parent. Therefore, it appears the facts here are analogous to a situation where a claimant establishes a trust through his own actions (i.e., Ronald established the Trust himself when he funded the trust with his own assets). However, "[t]he special needs trust exception does not apply to a trust established through the actions of the disabled individual himself." POMS SI 01120.203(B)(1)(f).

The Trust Limits Medicaid Reimbursement upon Termination of the Trust to the State of Colorado.

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 the amount equal to the total amount of medical assistance paid on behalf of the individual under the state Medicaid plan(s). 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). *See id.* SI 00120.203(B)(1)(h). Here, Article VIII of the Trust states that "[t]he sole lifetime beneficiaries of the trust are the Beneficiary and the *Colorado Medicaid Agency*," and, "[u]pon the death of the Beneficiary or prior termination of the trust the *Colorado Medicaid Agency* shall first receive all amounts remaining in the trust up to an amount of Medicaid assistance paid on behalf of Beneficiary before any other distributions are permitted." Trust, Art. VIII, § 8.01 (emphasis added). As the Trust does not provide Medicaid reimbursement to *any states* that may have provided medical assistance to Ronald under a Medicaid plan, and limits reimbursement to the State of Colorado, the Trust fails to meet the final requirement for the special needs trust exception.

B. The Trust is Irrevocable.

You also asked whether a certain provision in the Trust made the Trust revocable. A revocable trust established with the assets of an individual must be counted as a resource. 42 U.S.C.

§ 1382b(e)(3)(A); *see also* POMS SI 01120.200(D)(1)(a).

Article XII of the Trust is entitled "Trust Irrevocable" and expressly provides, "[n]o beneficiary may revoke or amend this trust." Trust, Art. XII. Nonetheless, Colorado follows the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary. *See In re Green Valley Financial Holdings*, 32 P.3d 643, 646 (Colo. Appl. 2001); Memorandum from OGC Region VIII to ARC, SSA VIII, *Validity and Accessibility of Three Trusts in Colorado; State Law in Region VIII, Regarding the Revocability of Grantor or Settlor Trusts* (Nov. 30, 1994). Here, however, Ronald is not the sole beneficiary. The Trust provides that, upon termination, the Colorado Medicaid Agency shall first receive all amounts remaining in the Trust up to an amount of medical assistance paid on behalf of Ronald.[3] After Medicaid reimbursement, the Trust directs the Trustee to distribute the residue to "such persons, estates, and interests that Beneficiary may appoint, on such terms and conditions, whether outright or in trust, as Beneficiary shall exercise in his last will and testament duly admitted to probate." Trust, Art. VIII, § 8.01. If Ronald does not exercise this power, then the residue shall be paid to Ms. S~, and if she does not survive Ronald, then the residue shall be paid to Ronald's brother. *Id.* The Trust further provides that, if at any time there is no person or entity qualified to receive a final distribution of the Trust estate or ny part of it, then the Trust estate shall be distributed to those who would inherit if Ronald had died intestate. Thus, the Trust has several identifiable residual beneficiaries. As the Trust names residual beneficiaries upon termination of the Trust, it is irrevocable.

Nonetheless, even an irrevocable trust must be counted as a resource if it does not satisfy the exception under 42 U.S.C. § 1396p(d)(4)(A).

CONCLUSION

In sum, we conclude the Trust is a resource for SSI purposes. The Trust was not established for the sole benefit of Ronald and limits Medicaid reimbursement upon termination of the Trust to only to the State of Colorado. We also conclude the State of Colorado does not allow for the establishment of a "dry" or "empty" trust, and because Ms. S~ did not create a seed trust, the Trust was not established through the actions of a parent.

John J. L~

Acting Regional Chief Counsel

By: Michael A. T~

Assistant Regional Counsel

Footnotes:

[1] We note that "[i]f the settlor has failed to expressly provide whether the trust is subject to a retained power of . . . amendment, the question is one of interpretation" to which certain presumptions apply. Restatement (Third) of Trusts (2003) § 63, cmt. c. Here, the Trust is not ambiguous or silent on the power of amendment; rather, the Trust expressly contemplates amendment only by a court acting at the request of a trustee or the Medicaid agency. Even if the Trust were viewed as ambiguous on this point, the applicable presumption is that the settlor has no power to amend the trust because she retained no interest in the trust (except for a remainder interest). *See id.*

[2] For purposes of this opinion, we only address the question of whether the State of Colorado allows the establishment of a "dry" or "empty" trust. We will address the question of whether the other States in our region allow the establishment of a "dry" or "empty" trust in a separate opinion.

[3] We note POMS 11120.200(H)(1)(b), which states, "According to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt, *unless the trust instrument reflects a clear intent that the State be considered a beneficiary, rather than a mere creditor*" (emphasis added). Here, the Trust clearly states, *"[t]he sole lifetime beneficiaries of the trust are Beneficiary and the Colorado Medicaid Agency*." Trust, Art. VIII, § 8.01 (emphasis added). Also Colo. Rev. Stat.

§ 15-14-412.8(2)(c) provides a disability trust is valid when, among other things, it provides that "*[t]he sole lifetime beneficiaries* of the trust are the individual for who the trust is established and the state medical assistance program" (emphasis added). As the Trust reflects a clear intent that the State of Colorado is a beneficiary, rather than a mere creditor, and this designation comports with Colorado law, we believe the State of Colorado is a "residual beneficiary" for purposes of the Trust.

4.5 DELAWARE

A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~

DATE: August 27, 2003

1. SYLLABUS

Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

2. OPINION

INTRODUCTION

You requested our advice on whether under the laws of the jurisdictions within Region III, a parent or grandparent can establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. In further conversations with your staff, we were instructed to assume that the trust agreements that you wish us to consider satisfy the requirements of 42 U.S.C. '1382b(e)(5).

SUMMARY

We believe that based on court precedent, every jurisdiction within Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establishes an empty trust or a seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

BACKGROUND

To qualify for supplemental security income (SSI), an individual must not have resources that total more than $2,000. 20 C.F.R. ' 416.1205 (2003). In addition, as a general rule, a trust established with the assets of an individual (or spouse) will be considered a resource for SSI eligibility purposes. 42 U.S.C. '1382b(e)(3). There is, however, an exception to these resource provisions. Under 42 U.S.C. '1382b(e)(5) of the Social Security Act, if any agreement satisfies the criteria found in 42 U.S.C. ' 1396p(d)(4), it is not counted as a resource. Section 1396p(d)(4) provides an exception for counting a trust as a resource if it is a:

trust containing assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

DISCUSSION

Within the state jurisdictions in Region III (including the District of Columbia), neither the courts nor the lawmakers define a trust. Rather, each jurisdiction sets out in court precedent its own test for finding a valid trust. Below is a breakdown by jurisdiction of the applicable case law as applied to your inquiry.

Virginia

According to Virginia precedent:

An express trust is created when the parties affirmatively manifest an intention that certain property be held in trust for the benefit of a third party. *See Peal v. Luther*, 199 Va. 35, 97 S.E.2d 668, 669 (1957); *Broaddus v. Gresham*, 181 Va. 725, 26 S.E.2d 33,35 (1943). An express trust may be created A without the use of technical words.@ *Broaddus*, 26 S.E.2d at 35. All that is necessary are words, *see id*. at 35 (citation omitted), or circumstances, *see Woods v. Stull*, 182 Va. 888, 30 S.E.2d 675, 682 (1944) (citation omitted), A which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . .,@ *Broaddus*, 26 S.E.2d at 35; *see also Schloss v. Powell*, 93 F.2d 518, 519 (4th Cir. 1938).

Old Republic Nat. Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998).

When an agreement satisfies 42 U.S.C. '1382b(e)(5), there will always be a corpus. It is irrelevant that a parent or grandparent sets up an agreement that has little or no funds, because ultimately the disabled individual for whom the trust is established will provide the assets. In addition, in these agreements, the disabled individual will be the settlor. 76 Am. Jur. 2d *Trusts* (1992) (stating that under general trust principles, the person who provides consideration for the trust is the settlor, even though in form the trust is created by another person). Further, the disabled individual will also be a beneficiary, as the trust is established for his/her benefit. Moreover, the essential purpose of the agreement will be to ensure that a trust established with the assets of the settlor is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. In short, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), circumstances unequivocally show an intention that the legal estate be vested in one person, to be held in some manner or some purpose on behalf of another. *Id*. Therefore, Virginia courts will recognize agreements that satisfy 42 U.S.C. ' 1382b(e)(5) as valid trusts.

Delaware

Delaware precedent states that:

No particular words or form are required in order to create an express trust. All that is required is that the parties intended that a relationship, which equity would describe as a trust, exist. “When a question arises as to whether or not an agreement creates a trust, the courts look objectively at the result to determine the matter. . . . The question in each instance is whether the kind of relationship known to the law as a trust has been created.” It is the intent of the settlor as expressed in the agreement itself which is controlling as to whether a trust has been created. It is immaterial that the parties did not know they were creating a trust.

Cravero v. Holleger, Del. Ch., 566 A.2d 8, 13 (1989) (citations omitted).

When an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the settlor's intent will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because the settlor's expressed intent in such an agreement is to establish a trust, a Delaware court would find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5) is a valid trust.

District of Columbia

The District of Columbia Court of Appeals noted that "there must be proof of the settlor's intention to create a trust, which may be manifested “by written or spoken language or by conduct, in light of all surrounding circumstances.” *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983)). The court also added that “[n]o particular form of words or conduct is necessary to manifest an intention to create a trust.” *Id*. at 1136. Rather, the courts in the District of Columbia look to several “evidentiary factors” in determining that intent:

(1) the imperative, as distinguished from precatory, nature of the words used by the settlor to create a trust; (2) the definiteness of the trust property; (3) the certainty of the identity of the trust beneficiaries; (4) the relationship between and financial position of the parties; (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and (6) whether the result reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.

Id.

In an agreement that satisfies the requirements of 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five provides the assets and is the settlor and a beneficiary. The state Medicaid provider(s) will be reimbursed. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI. Logically, the settlor would desire having the agreement construed as a trust. Consequently, when a court within the District of Columbia scrutinizes an agreement established pursuant to 42 U.S.C. '1382b(e)(5) under the evidentiary factors discussed in *Duggan*, it will find a valid trust.

Maryland The Maryland Supreme Court has stated that:

A trust exists where the legal title to property is held by one or more persons, under an equitable obligation to convey, apply, or deal with such property for the benefit of other persons. . . . The creation of a trust depends upon the intention of the settlor. In fact, it is that purpose and intention, rather than the use of any particular term, that determines whether a valid trust has been established. Thus, a trust will not be created where none in fact was contemplated.

From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002) (citations omitted).

In an agreement established pursuant to 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five, provides the assets and is the settlor. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because under Maryland law the settlor's intent ultimately determines whether a valid trust exists, a court within that jurisdiction will find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5), which has a clear intent, is a valid trust.

Pennsylvania The Pennsylvania Supreme Court has discussed the criteria for a valid trust using the following language:

[N]o particular form of words or conduct is necessary to create a trust. Neither the presence nor the absence of words "trust," "trustee," or "beneficiary" is determinative of an intention to create a trust. The question is whether the agreements taken as a whole evidence an intent by [the settlors] "to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another." "To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred."

* * *

'A trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefits of the other. The term 'trust' is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee....'

Buchanan v. Brentwood Federal Savings & Loan Association, 457 Pa. 135, 143, 20 A.2d 117, 122 (1974); *R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Development Inc*., 334 Pa.Super. 72, 77-78, 482 A.2d 1086, 1089 (1984) (quoting *Buchanan*) (citations omitted).

As mentioned in the discussion of Virginia law, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the property, the settlor, a beneficiary, and the purpose will be known. In other words, an agreement that satisfies the requirements established in 42 U.S.C. '1382b(e)(5) would evidence intent by a settlor to impose upon a transferee of property equitable duties to deal with the property for the benefit of another. *Id*. Therefore, under Pennsylvania law such an agreement amounts to a valid trust.

West Virginia

In West Virginia, courts will determine whether a valid trust is created based upon the intent of the parties. *Bowne v. Lamb*, 119 W.Va. 370, 193 S.E. 563, 565 (1937). Further, "[w]hether the parties intended to create a trust is determined not solely from the wording of the agreement but also from their actions under it and the way the fund is handled." *Id*. When an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), the parties unquestionably intend to create a trust to ensure that the settlor does not have his/her assets in the agreement counted as a resource for purposes of SSI and that the state will be reimbursed for medical assistance that it paid to the settlor. Because the parties' intent will be apparent when an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), a West Virginia court will find that such an agreement is a valid trust.

CONCLUSION

It is our opinion that every jurisdiction within Region III would recognize as a valid trust any agreement established pursuant to 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

James A. W~
Regional Chief Counsel

By:_____
Andrew C. L~ Assistant Regional Counsel

4.6 DISTRICT OF COLUMBIA

A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~

DATE: August 27, 2003

1. SYLLABUS

Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

2. OPINION

INTRODUCTION

You requested our advice on whether under the laws of the jurisdictions within Region III, a parent or grandparent can establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. In further conversations with your staff, we were instructed to assume that the trust agreements that you wish us to consider satisfy the requirements of 42 U.S.C. '1382b(e)(5).

SUMMARY

We believe that based on court precedent, every jurisdiction within Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establishes an empty trust or a seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

BACKGROUND

To qualify for supplemental security income (SSI), an individual must not have resources that total more than $2,000. 20 C.F.R. ' 416.1205 (2003). In addition, as a general rule, a trust established with the assets of an individual (or spouse) will be considered a resource for SSI eligibility purposes. 42 U.S.C. '1382b(e)(3). There is, however, an exception to these resource provisions. Under 42 U.S.C. '1382b(e)(5) of the Social Security Act, if any agreement satisfies the criteria found in 42 U.S.C. ' 1396p(d)(4), it is not counted as a resource. Section 1396p(d)(4) provides an exception for counting a trust as a resource if it is a:

trust containing assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

DISCUSSION

Within the state jurisdictions in Region III (including the District of Columbia), neither the courts nor the lawmakers define a trust. Rather, each jurisdiction sets out in court precedent its own test for finding a valid trust. Below is a breakdown by jurisdiction of the applicable case law as applied to your inquiry.

Virginia

According to Virginia precedent:

An express trust is created when the parties affirmatively manifest an intention that certain property be held in trust for the benefit of a third party. *See Peal v. Luther*, 199 Va. 35, 97 S.E.2d 668, 669 (1957); *Broaddus v. Gresham*, 181 Va. 725, 26 S.E.2d 33,35 (1943). An express trust may be created A without the use of technical words.@ *Broaddus*, 26 S.E.2d at 35. All that is necessary are words, *see id*. at 35 (citation omitted), or circumstances, *see Woods v. Stull*, 182 Va. 888, 30 S.E.2d 675, 682 (1944) (citation omitted), A which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . .,@ *Broaddus*, 26 S.E.2d at 35; *see also Schloss v. Powell*, 93 F.2d 518, 519 (4th Cir. 1938).

Old Republic Nat. Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998).

When an agreement satisfies 42 U.S.C. '1382b(e)(5), there will always be a corpus. It is irrelevant that a parent or grandparent sets up an agreement that has little or no funds, because ultimately the disabled individual for whom the trust is established will provide the assets. In addition, in these agreements, the disabled individual will be the settlor. 76 Am. Jur. 2d *Trusts* (1992) (stating that under general trust principles, the person who provides consideration for the trust is the settlor, even though in form the trust is created by another person). Further, the disabled individual will also be a beneficiary, as the trust is established for his/her benefit. Moreover, the essential purpose of the agreement will be to ensure that a trust established with the assets of the settlor is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. In short, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), circumstances unequivocally show an intention that the legal estate be vested in one person, to be held in some manner or some purpose on behalf of another. *Id*. Therefore, Virginia courts will recognize agreements that satisfy 42 U.S.C. ' 1382b(e)(5) as valid trusts.

Delaware

Delaware precedent states that:

No particular words or form are required in order to create an express trust. All that is required is that the parties intended that a relationship, which equity would describe as a trust, exist. “When a question arises as to whether or not an agreement creates a trust, the courts look objectively at the result to determine the matter. . . . The question in each instance is whether the kind of relationship known to the law as a trust has been created.” It is the intent of the settlor as expressed in the agreement itself which is controlling as to whether a trust has been created. It is immaterial that the parties did not know they were creating a trust.

Cravero v. Holleger, Del. Ch., 566 A.2d 8, 13 (1989) (citations omitted).

When an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the settlor's intent will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because the settlor's expressed intent in such an agreement is to establish a trust, a Delaware court would find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5) is a valid trust.

District of Columbia

The District of Columbia Court of Appeals noted that "there must be proof of the settlor's intention to create a trust, which may be manifested “by written or spoken language or by conduct, in light of all surrounding circumstances. ”*Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983)). The court also added that “[n]o particular form of words or conduct is necessary to manifest an intention to create a trust.” *Id*. at 1136. Rather, the courts in the District of Columbia look to several “evidentiary factors” in determining that intent:

(1) the imperative, as distinguished from precatory, nature of the words used by the settlor to create a trust; (2) the definiteness of the trust property; (3) the certainty of the identity of the trust beneficiaries; (4) the relationship between and financial position of the parties; (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and (6) whether the result reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.

Id.

In an agreement that satisfies the requirements of 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five provides the assets and is the settlor and a beneficiary. The state Medicaid provider(s) will be reimbursed. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI. Logically, the settlor would desire having the agreement construed as a trust. Consequently, when a court within the District of Columbia scrutinizes an agreement established pursuant to 42 U.S.C. '1382b(e)(5) under the evidentiary factors discussed in *Duggan*, it will find a valid trust.

Maryland

The Maryland Supreme Court has stated that:

A trust exists where the legal title to property is held by one or more persons, under an equitable obligation to convey, apply, or deal with such property for the benefit of other persons. . . . The creation of a trust depends upon the intention of the settlor. In fact, it is that purpose and intention, rather than the use of any particular term, that determines whether a valid trust has been established. Thus, a trust will not be created where none in fact was contemplated.

From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002) (citations omitted).

In an agreement established pursuant to 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five, provides the assets and is the settlor. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because under Maryland law the settlor's intent ultimately determines whether a valid trust exists, a court within that jurisdiction will find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5), which has a clear intent, is a valid trust.

Pennsylvania

The Pennsylvania Supreme Court has discussed the criteria for a valid trust using the following language:

[N]o particular form of words or conduct is necessary to create a trust. Neither the presence nor the absence of words "trust," "trustee," or "beneficiary" is determinative of an intention to create a trust. The question is whether the agreements taken as a whole evidence an intent by [the settlors] "to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another." "To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred."

* * *

'A trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefits of the other. The term 'trust' is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee….'

Buchanan v. Brentwood Federal Savings & Loan Association, 457 Pa. 135, 143, 20 A.2d 117, 122 (1974); *R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Development Inc*., 334 Pa.Super. 72, 77-78, 482 A.2d 1086, 1089 (1984) (quoting *Buchanan*) (citations omitted).

As mentioned in the discussion of Virginia law, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the property, the settlor, a beneficiary, and the purpose will be known. In other words, an agreement that satisfies the requirements established in 42 U.S.C. '1382b(e)(5) would evidence intent by a settlor to impose upon a transferee of property equitable duties to deal with the property for the benefit of another. *Id*. Therefore, under Pennsylvania law such an agreement amounts to a valid trust.

West Virginia

In West Virginia, courts will determine whether a valid trust is created based upon the intent of the parties. *Bowne v. Lamb*, 119 W.Va. 370, 193 S.E. 563, 565 (1937). Further, "[w]hether the parties intended to create a trust is determined not solely from the wording of the agreement but also from their actions under it and the way the fund is handled." *Id*. When an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), the parties unquestionably intend to create a trust to ensure that the settlor does not have his/her assets in the agreement counted as a resource for purposes of SSI and that the state will be reimbursed for medical assistance that it paid to the settlor. Because the parties' intent will be apparent when an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), a West Virginia court will find that such an agreement is a valid trust.

CONCLUSION

It is our opinion that every jurisdiction within Region III would recognize as a valid trust any agreement established pursuant to 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

James A. W~
Regional Chief Counsel

By:_____
Andrew C. L~ Assistant Regional Counsel

4.7 FLORIDA

A. PS 12-011 Interest Held in a Florida Trust by a Supplemental Security Income Applicant and Effect of a Florida State Court Order Entered Nunc Pro Tunc and Purporting to Modify the Trust

DATE: November 3, 2011

1. SYLLABUS

This decision centers on the issue of the State approving modifications to an otherwise SSI countable trust that allowed the trust to meet the Federal SSI exceptions for trusts. The Regional Chief Counsel determined that the State court correctly modified the trust allowing it to meet Federal trust exceptions, but the State court had no authority under State law to issue a *nunc pro tunc* order. The trust only qualifies for exception retroactively from the date the court amended the trust language.

2. OPINION

QUESTION

You asked whether a Supplemental Security Income (SSI) applicant's trust is irrevocable for SSI purposes. You also asked whether a Florida state court order binds the Social Security Administration (SSA), where the order purportedly modified the trust and operated *nunc pro tunc*, that is, effective as of the date the trust was created.

BACKGROUND

SSA found Joan (Applicant) entitled to SSI beginning in May 1986. In December 2007, SSA notified Applicant it was stopping her payments because it needed correct information about her name, address, and/or bank account.

Applicant's father, James (Grantor), a resident of Broward County, Florida, executed his Last Will and Testament (Will) in January 1991. In his Will, Grantor devised one share of his estate to a trust for the benefit of Applicant (Will, Art. 2 ¶ E). Grantor designated Richard (Grantor's son and Applicant's brother) as the trustee. Grantor also directed the trustee to use the income and principal of the trust for Applicant's "support and maintenance" (Will, Art. 2 ¶ E(1)). The Will did not expressly prohibit judicial modification (Order Granting Verified Petition to Reform Irrevocable Testamentary Trust (Order), ¶ K).

Grantor died in October 2004 (Order, ¶ A). Richard, as trustee, subsequently petitioned the Circuit Court for Broward County, Florida, to reform the trust (Order, Preamble). In support of his petition, Richard stated Applicant had been diagnosed with schizophrenia (Order, ¶ D). Richard also said Applicant received government assistance in the past, including SSI and Medicaid benefits; however, she was not receiving any government assistance at the time of the petition and would not qualify for government assistance if the trust remained as drafted (Order, ¶¶ E-F). Richard also submitted an affidavit from the drafter of the Will, who stated he was unaware that Applicant was disabled and had been receiving government assistance (Order, ¶ H). According to the drafter, if he had been aware of these facts, he would have recommended a special needs trust and drafted the Will to avoid interference with Applicant's continued eligibility for government assistance (Order, ¶ H). Richard proposed to reform the trust as a "special needs trust" that would "[m]aintain the intention of the Grantor as to the disposition of the remaining trust assets." (Order, ¶ I).

In an order dated May 18, 2011, the court found Richard, as trustee, was entitled to judicial modification of the trust under Florida law (Order, ¶ 1). The court replaced the provisions of Article 2, paragraph E, of the Will regarding the distributions of Applicant's trust share with the modifications Richard had proposed in his petition (Reformed Trust, Preamble). The court modified the trust *nunc pro tunc* "as of [Grantor's] date of death in October 2004" (Order, ¶ 3).

As modified by the court, the Will established a trust "to supplement [Applicant's] needs only" (Reformed Trust, ¶ A). The modified trust is "not intended for [Applicant's] primary support" (Reformed Trust, ¶ A). According to the terms of the trust, Applicant "has no entitlement to the income or corpus of this trust, except as my Trustee, in his complete, sole, absolute and unfettered discretion elects to disburse" (Reformed Trust, ¶ B). The trust also directs that "under no circumstances may [Applicant] compel distributions from this trust" (Reformed Trust, ¶ E). Additionally, "[d]istribution to or for the benefit of [Applicant] shall be limited so that [she] is not disqualified from receiving public benefits to which [she] is otherwise entitled" (Reformed Trust, ¶ D). Section L of the trust, titled "Trustee's Authority to Terminate Trust," provides that upon the death of

Applicant or the trust's earlier termination, the trust "shall be distributed in equal shares to [several remainder beneficiaries]" (Reformed Trust, ¶ L). The terms of the trust provide that it will be administered under Florida law (Reformed Trust, ¶ N).

Applicant's brother and legal guardian, Jameson, applied on Applicant's behalf for SSI on July 22, 2011. In the application, Jameson stated Applicant's resources included a checking account containing $44,972.15. Jameson described this account as a "special needs trust account." SSA denied Applicant's application on July 29, 2011, because her resources were worth more than $2,000.00. On September 14, 2011, Applicant requested reconsideration.

DISCUSSION

SSI is a general public assistance program for aged, blind, or disabled individuals who meet certain eligibility requirements, including income and resource restrictions. *See* Act §§ 1602, 1611(a); 20 C.F.R. §§ 416.110, 416.202 (2011). [1] "Resources" include cash, other liquid assets, or any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. *See* Act § 1613; 20 C.F.R. § 416.1201(a). "If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual . . . ." 20 C.F.R. § 416.1201(a)(1).

Trusts may be countable as an individual's resource for SSI purposes. *See* Act, § 1613(e). Even if a trust is established with the assets only of a third-party, the trust will be countable as an individual's resource if he or she "has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust." Program Operations Manual System (POMS) SI 01120.200.D.1.a. [2] "Additionally, if the individual can sell his or her beneficial interest in the trust, that interest is a resource." *Id.*

Conversely, "[i]f an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his/her own support and maintenance, the trust principal **is not** the individual's resource for SSI purposes." [3] *See* POMS SI 01120.200.D.2 (emphasis in the original). Generally, one determining whether a beneficiary can revoke, terminate, or direct the use of a trust should not impute to the beneficiary a trustee's discretion to use or direct the use of the trust. *See* POMS SI 01120.200.D.1.b ("While a trustee may have discretion to use the trust principal for the benefit of the beneficiary, the trustee should be considered a third party and not an agent of the beneficiary, i.e., the actions of the trustee are not the actions of the beneficiary, unless the trust specifically states otherwise."). "If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance . . . it **is not** a resource." *Id.* (emphasis in the original).

You asked whether the trust is an irrevocable trust for the purposes of SSI. To answer this question, we first address whether Florida law permitted the court to modify the trust in 2011. Then, we address whether Applicant can revoke the modified trust.

The governing law section of Florida's Trust Code states in pertinent part: The meaning and effect of the terms of a trust are determined by: (1) The law of the jurisdiction designated in the terms of the trust, provided there is a sufficient nexus to the designated jurisdiction at the time of the creation of the trust or during the trust administration, including, but not limited to, the location of real property held by the trust or the residence or location of an office of the settlor, trustee, or any beneficiary. . . . (2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction where the settlor resides at the time the trust is first created. Fla. Stat. Ann. § 736.0107 (West 2011); [4] *see also* Fla. Stat. Ann. § 736.0202 (stating Florida courts have jurisdiction over trustees and beneficiaries of a trust having its principal place of administration in Florida). Grantor resided in Florida when he executed the Will that contained the original terms of the trust (Will, Preamble). Applicant, the beneficiary of the trust, resides in Florida (Order, ¶ D), thereby creating a sufficient nexus to Florida. Therefore, we look to Florida law to determine whether the circuit court had the authority to modify the trust and whether the trust as modified by the court, is revocable.

The court found the trustee was entitled to judicial modification of the trust under Florida Statute §§ 736.04113 or 736.04115 (Order, ¶ 1). These sections permit a court to modify a trust created by a deceased settlor when it meets certain conditions. *See* Fla. Stat. Ann. §§ 736.0103(15)-(16), 736.04113(1), 736.04115(1), 736.0601; *Robinson v. Robinson*, 805 So. 2d 94, 95 (Fla. Dist. Ct. App. 2002).

Under Florida Statute § 736.04113, a court may modify the terms of a trust created by a deceased settlor upon the application of a trustee or any qualified beneficiary where, "[b]ecause of circumstances not anticipated by the settler, compliance with the terms of the trust would defeat or substantially impair accomplishing the material purpose of the trust." *See* Fla. Stat. Ann. § 736.04113(1)(b). A court modifying a trust under this section must consider the terms and purposes of the trust, the facts and

circumstances surrounding the creation of the trust, and any extrinsic evidence relevant to the proposed modification. *See* Fla. Stat. Ann. § 736.04113(3)(a).

We believe the court properly complied with Fla. Stat. Ann. § 736.04113 in granting Richard's petition to modify the trust. Richard was the trustee, and the court modified the trust upon his petition (Order, Preamble) because compliance with the terms of the trust would defeat or substantially impair accomplishing the material purpose of the trust (Order, ¶ 1).

The material purpose of the trust "generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary's management skills, judgment, or level of maturity." Restatement (Third) of Trusts, § 35 (2003). "Sometimes . . . the very nature or design of a trust suggests its protective nature . . . ." *Id.* The Will directed the trustee to use the trust "for the support and maintenance of [Applicant] . . . taking into consideration her standard of living at the time of my death and any other sources of income of [Applicant]" (Will, Art. 2 ¶ E). *See* Fla. Stat. Ann. § 736.0404 ("A trust and its terms must be for the benefit of its beneficiaries."). Applicant has been diagnosed with schizophrenia (Order, ¶ D). Given the terms of the trust and Applicant's schizophrenia, we believe the court could properly find the trust's material purpose was to protect and maximize Applicant's means of support, including her eligibility for government assistance.

The available information does not indicate Grantor anticipated the trust would affect Applicant's eligibility for SSI. Richard submitted an affidavit from the drafter of the Will showing he had been unaware that Applicant received government assistance and, if he had been aware, he would have drafted the Will to avoid jeopardizing Applicant's continued eligibility for government assistance (Order, ¶ H).

We believe the court could reasonably have found that compliance with the original terms of this trust would defeat or substantially impair the material purpose of the trust. Richard stated Applicant used to receive government assistance, including SSI and Medicaid benefits; however, she was not receiving any government assistance at the time of the petition and would not qualify for government assistance if the trust remained as it was drafted (Order, ¶¶ E-F). Therefore, the court could find that compliance with the original trust would diminish Applicant's means of support, substantially impairing the material purpose of the trust. We believe the court properly elected to modify the terms of the trust under Florida Statute § 736.04113.

Because we believe the court could properly modify the trust under Florida Statute § 736.04113, we believe its ability to modify the trust under Florida Statute § 736.04115 is immaterial. Nevertheless, we believe the court could modify the trust also under Florida Statute § 736.04115. [5] A court may modify a trust under this section "if compliance with the terms of a trust is not in the best interests of the beneficiaries." Fla. Stat. Ann. § 736.04115(1). We believe the court could properly determine that compliance with the terms of the trust was not in Applicant's best interests because it would jeopardize her eligibility for government assistance (Order, ¶ F). Therefore, we believe the court could properly modify the trust under this section.

We also believe the modified trust is irrevocable with respect to Applicant. "The revocability of a trust and the ability to direct the use of the trust principal depend on the terms of the trust agreement and/or on State law." POMS SI 01120.200.D.2. "[A] valid trust cannot be altered, amended, or revoked except by the exercise of a power identified in the trust." *Roberts v. Sarros*, 920 So. 2d 193, 195 (Fla. Dist. Ct. App. 2006) (quoting *L'Argent v. Barnett Bank*, 730 So. 2d 395, 397 (Fla. Dist. Ct. App. 1999)). In determining whether the trust identifies a power to alter, amend, or revoke the trust, "[t]he polestar of trust . . . interpretation is the settlor's intent." *Bryan v. Dethlefs*, 959 So. 2d 314, 317 (Fla. Dist. Ct. App 2007); *accord* Fla. Stat. Ann. § 736.1101(1) ("The intent of the settlor as expressed in the terms of the trust controls the legal effect of the dispositions made in the trust."). "In determining the settlors' intent, the court should not resort to isolated words and phrases; instead, the court should construe the instrument as a whole, taking into account the general dispositional scheme." *R~*, 920 So. 2d at 195 (internal quotation marks omitted); *see Littell v. Law Firm of Trinkle, Moody, Swanson, Byrd & Colton*, 345 F. App'x 415, 419 (11th Cir. 2009); *B~*, 959 So. 2d at 317; *L~*, 730 So. 2d at 397. When the terms of a trust are clear and unambiguous, "the settlors' intent as expressed in the trust controls and the court cannot resort to extrinsic evidence." [6] *L~*, 345 F. App'x at 419; *see B~*, 959 So. 2d at 317 n.2; *L~*, 730 So. 2d at 397. If a provision of a trust is unenforceable, a court may sever the unenforceable provision and preserve the trust as a whole, provided the severance is compatible with the settler's intent. *See McLemore v. McLemore*, 675 So. 2d 202, 205 (Fla. Dist. Ct. App. 1996).

We believe that the terms of the modified trust, when construed as a whole, show that Applicant could not revoke it. *See R~*, 920 So. 2d at 195. First, the trust does not appear to grant Applicant any power to amend, modify, or revoke the trust. *See id.* ("'[A] valid trust cannot be altered, amended, or revoked except by the exercise of a power identified in the trust.'" (quoting *L~*, 730 So. 2d at 397)). Rather, the trust states that Applicant, as beneficiary of the trust, "has no entitlement to the income or corpus of this trust, except as my Trustee in his complete, sole, absolute and unfettered discretion elects to disburse" (Reformed Trust, ¶ B). In this regard, the trust permits the trustee to "act unreasonably and arbitrarily as [Grantor] could do

[him]self if living and in control of these funds" (Reformed Trust, ¶ B). One should not impute to Applicant the trustee's ability to use or direct the use of the trust because the trustee, Richard , is not Applicant's agent. *See* POMS SI 01120.200.D.1.

The trust also contains a spendthrift provision that states "under no circumstances may [Applicant] compel distributions from this trust" (Reformed Trust, ¶ E). Further, the modified trust does not direct any mandatory periodic payments and states Applicant has no right to direct the distribution of any part of the Trust (Reformed Trust, ¶¶ B, E). *See* POMS SI 01120.200.D, E.1. Nothing in the modified trust grants Applicant the ability to control her trust share, revoke her trust share, or sell her income from her trust share (Reformed Trust). *See* Fla. Stat. Ann. § 736.0103(15); *L~*, 730 So. 2d at 397; *Fla. Nat'l Bank of Palm Beach Cty. v. Genova*, 460 So. 2d 895, 897 (Fla. 1984).

Because the trust instrument after the 2011 modification confirms Grantor's intent to make the trust irrevocable by Applicant, we believe the modified trust is irrevocable with respect to Applicant. *See L~*, 345 F. App'x at 419; *B~*, 959 So. 2d at 317 n.2; *R~*, 920 So. 2d at 195; *L~*, 730 So. 2d at 397.

Although the modified trust is irrevocable, the court's order that modified the trust did not have a retroactive effect. The court stated the modified trust was effective *nunc pro tunc*, meaning the court intended to modify the trust effective from the date of Grantor's death, October 21, 2004 (Order, ¶ 3). Although we believe the court's order modified the trust as of the date of the court order, we do not believe the court had the authority under Florida law to issue an order modifying the trust effective as of the date the trust was originally created.

Nunc pro tunc is a Latin term meaning "now for then." *Becker v. King*, 307 So. 2d 855, 859 (Fla. Dist. Ct. App. 1975). "When applied to the entry of a legal order, *nunc[pro tunc*] normally refers, not to a new . . . decision, but to the trial judge's previous action of which there is not a sufficient record." *Whack v. Seminole Memorial Hosp.*, 456 So. 2d 561, 563-64 (Fla. Dist. Ct. App. 1984). For example, an order may be entered *nunc pro tunc* to correct clerical errors. *See Wells v. State*, 796 So. 2d 1276, 1277 (Fla. Dist. Ct. App. 2001) (permitting a *nunc pro tunc* order to add "Jr." to a name recorded on an earlier judgment). "A *nunc pro tunc* order is also used to supply an omission in the record of an action previously done but omitted through inadvertence or mistake." *Luhrs v. State*, 394 So. 2d 137, 138 (Fla. Dist. Ct. App. 1981). In such a case, "[t]he later [*nunc pro tunc*] record-making act constitutes but later evidence of the earlier effectual act." *Briseno v. Perry*, 417 So. 2d 813, 814 (Fla. Dist. Ct. App. 1982).

Thus, "[a] *nunc pro tunc* order can relate back only to supply a record of something actually done or determined at the earlier time." *Wally v. Fla. Game & Fresh Water Fish Comm'n*, 501 So. 2d 671, 673 (Fla. Dist. Ct. App. 1987) (citing *Riha v. Harding*, 369 So. 2d 404 (Fla. Dist. Ct. App. 1979)). "[W]here the court has wholly omitted an order, which it might or ought to have made, it cannot afterward be entered *nunc pro tunc*." *Nichols v. Walton*, 90 So. 157, 386 (Fla. 1921). Accordingly, "where an order does not merely correct clerical errors or omissions, but actually modifies the substance of a prior ruling or of itself constitutes a ruling not previously made in fact, it should not be given retrospective effect." *De Baun v. Michael*, 333 So. 2d 106, 108 (Fla. Dist. Ct. App. 1976).

In this case, we do not believe the court had the authority to enter its order *nunc pro tunc*. The court did not issue its order to correct a clerical error. *See W~*, 796 So. 2d at 1277. The court also did not issue its order to "supply a record of something actually done or determined." *W~*, 501 So. 2d at 673. Rather, the court attempted to retroactively structure the trust so that compliance with it would be in Applicant's best interests or as the drafter "would have drafted the trust," if he had been aware of Applicant's government assistance (Order, ¶ H). The drafter's affidavit that he would have drafted the trust differently further shows that the court's modification of the trust was not "suppl[ing] a record of something actually done or determined." *W~*, 501 So. 2d at 673. Moreover, the information provided does not show any previously entered judgments regarding the Will, further suggesting that the court's order "itself constitutes a ruling not previously made in fact." *D~*, 333 So. 2d at 108. Therefore, the court could not enter the order *nunc pro tunc*, and SSA should not give the order retroactive effect. *See id.*

We also believe the relevant sections of the Florida Trust Code do not permit the court to modify the trust retroactively. The court determined Richard, as trustee, was entitled to "judicial modification of a trust under Florida Statute 736.04113 or 736.04115." Unlike other sections of the Florida Trust Code, the sections cited by the court do not contain any provisions authorizing it to modify the trust retroactively. *Compare* Fla. Stat. Ann. §§ 736.04113(2), 736.04113(5), *with* Fla. Stat. Ann. § 736.0416 (permitting court modifying trust to achieve settlor's tax objectives to give the modification "retroactive effect").

CONCLUSION

The trust is a third-party irrevocable trust since its modification in May 2011. Additionally, we believe the State court did not have the authority under Florida law to enter its order *nunc pro tunc*. Therefore, SSA is not bound by the court's order to the extent the order attempted to modify the trust retroactively, and SSA should consider the trust modified only as of the date the court entered its order, May 18, 2011.

Very truly yours,
Mary Ann Sloan
Regional Chief Counsel
Kevin M. Parrington
Assistant Regional Counsel

B. PS 07-087 Effect of Trust as Resource for SSI Eligibility Purposes - Florida Number Holder - Mary , SSN ~

DATE: March 12, 2007

1. SYLLABUS

Note: This opinion is only valid for trusts created prior to 1/1/00.

This opinion discusses a trust agreement executed in 1966, and an Amendment executed in 1974, that established a trust for an individual SSI beneficiary. The Amendment directed the trustees (the beneficiary's parents) to purchase a $100,000 annuity contract to provide monthly payments during the beneficiary's life. While a declaration of trust annuity was executed in 1981, an annuity has not been purchased as directed in the trust. The trust provides that the trustees retain sole judgment over disbursements and names contingent beneficiaries. Under Florida law, the beneficiary does not have the legal authority to revoke the trust or direct the trustees to use the principal for her support. Since the trust is irrevocable and the beneficiary cannot direct the use of its contents, the trust is not a resource. Moreover, since the trustees never carried out the provision of the trust to establish an annuity, the beneficiary cannot anticipate, assign, or sell the right to future payments. Until some action is taken to provide for regular, anticipated payments, the prospective future payments are not a resource to the beneficiary.

2. OPINION

QUESTION

You asked whether a trust annuity arrangement is a countable resource for Supplemental Security Income (SSI) purposes.

ANSWER

For the reasons stated below, we believe that the trust annuity arrangement in question is not a resource for SSI purposes.

BACKGROUND

Nathanial (Nathaniel) and Grace (Grace) were the grandparents of number holder Mary (NH). On October 16, 1966, and November 16, 1966, Nathaniel and Grace, respectively, created separate trust agreements. Neither of the original trust agreements is available. However, the file does contain a document entitled "First Amendment to Trust Agreement" (Amendment), dated March 12, 1974, and executed by Nathaniel. For the most part, this document allocated the trust principal to pay the legal obligations of Nathaniel's estate following his death and to provide for Grace, should she survive him. With respect to NH, the Amendment directed the trustees, William and Dorothy, NH's parents, to purchase a $100,000.00 annuity contract for NH's benefit to provide monthly payments during NH's life. The Amendment states that the trust shall be governed by the laws of the State of Florida.

Subsequently, NH's parents executed a "Declaration of Trust Annuity, Annuity for [NH]" (Trust Annuity Arrangement) dated December 7, 1981. This document states:

The assets comprising the corpus of this Trust shall be held for the benefit of [NH] under the described annuity arrangement. Annuity payments shall become payable to and for her benefit on a deferred basis commencing on the 15th day of January 1989. Prior to that date income earned on the Trust assets shall be accumulated and reinvested, subject to the authority of the

Trustees, however, in the event of demonstrated need or emergency, in their sole judgment and discretion, to pay funds to or for the benefit of [NH]. Such payments may be made as the Trustees determine are necessary and proper for her care, maintenance and support.

The Trust Annuity Arrangement states the trust and the rights of the parties to the trust are governed by laws of the State of Florida. The document also named contingent beneficiaries, NH's two sisters - Nancy and Susan, who were to be paid the remaining balance of the trust fund in the event of NH's death. It does not appear that the trustees ever actually purchased the annuity contract and at any rate, NH never received the monthly annuity payments that were to commence in January 1989.

During 2005, NH received $1,023.31 in payments from the trust for automobile insurance premiums, renter's and property insurance premiums, automobile brake repair, and other automobile related expenses. NH has never received any annuity payments from the trust. The trust's investment account is held at Wachovia Securities, and a statement for the period ending July 31, 2006, shows the value of the trust's Wachovia Securities account to be $132,073.70.

DISCUSSION

The Social Security Act provides SSI eligibility for aged, blind, or disabled individuals who meet certain income and resource limitations. *See* Social Security Act (Act) '1611(a), 42 U.S.C. '1382(a). A resource is cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for her support or maintenance. 20 C.F.R. ' 416.1201(a) (2006). If the individual has the right, authority or power to liquidate property or her share in the property, it is considered a resource. 20 C.F.R. ' 416.1201(a)(1). Liquid resources are resources in the form of cash or other property that can be converted to cash within 20 days. 20 C.F.R. ' 416.1201(b). If a property right cannot be liquidated, the property will not be considered a resource of the individual. 20 C.F.R. ' 416.1201(a)(1).

Generally, if trust principal is available to the trust beneficiary, it will be considered a resource to her for purposes of determining her SSI eligibility. *See* Act, ' 1613(e), 42 U.S.C. ' 1382b; 20 C.F.R. ' 416.1201. Interpretive guidelines in the Programs Operations Manual System (POMS) further discuss the meaning of resource. With respect to trust instruments established prior to the year 2000, the POMS provides that if the individual has the legal authority to revoke the trust and use the funds to meet her food, clothing or shelter needs, or if the individual can direct the use of the trust principal for her support and maintenance under the terms of the trust, then the trust principal is a resource for SSI purposes. POMS SI 01120.200D.1.a. However, if the individual does not have the legal authority to revoke the trust or direct the use of the trust assets for her own support and maintenance, then the trust principal is not the individual's resource for SSI purposes. POMS SI 01120.200D.2. The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or by State law. POMS SI 01120.200D.2.

In the present case, the Amendment and the Trust Annuity Arrangement state that the trust and the rights of the parties to the trust are governed by Florida law. Under Florida law, NH does not have the legal authority to revoke the trust and use the trust principal for her support; nor does she have the right to direct the use of the trust principal. Neither the trust annuity instrument itself (Amendment or Trust Annuity Arrangement), nor Florida law provides her with this option. *See L'Argent v. Barnett Bank*, N.A., 730 So.2d 395, 396 (Fla. Dist. Ct. App. 1999) (once created, valid trust cannot be altered, amended, or revoked except by exercise of power identified in trust); *Watson v. St. Petersburg Bank & Trust Co.*, 146 So.2d 383, 386 (Fla. Dist. Ct. App. 1962) (in absence of express directions to contrary, power to revoke is personal to trustor when reserved by him); *Siegel v. Novak*, 920 So.2d 89, 94 (Fla. Dist. Ct. App. 2006) (central characteristic of a "revocable trust" is that the settlor has the right to recall or end the trust at any time, and thereby regain absolute ownership of the trust property); *see also* FLA. STAT. ' 733.707(3)(e) (2006) ("right of revocation" defined).

Here, it appears that the settlor, Nathaniel, retained the right of revocation of the trust. This is evidenced in his March 12, 1974, Amendment, in which he directed that the trust principal be used to pay the legal obligations of his estate and to care for Grace should she survive him. *See* FLA. STAT. ' 733.817(5)(h)(2), (3) (2006) (discussing right of revocation held by decedent settlor to allocate revocable trust to pay death taxes); *Bank of Palm Beach County v. Genova*, 460 So. 2d 895, 897 (Fla. 1984) ("If the settlor reserves the power to revoke the trust but does not specify any mode of revocation, the power can be exercised in any manner which sufficiently manifests the intention of the settlor to revoke the trust. Any definitive manifestation by the settlor of his intention that the trust should be forthwith revoked is sufficient"). In the Amendment, Nathaniel provided for NH by instructing the trustees to purchase a $100,000.00 trust annuity contract on her behalf. At no time did NH have any right to revoke the trust, nor any right to the principal in the trust account. Evidence of NH's inability to revoke the trust and use the principal for her benefit is further emphasized by the Trust Annuity Arrangement's provision that "[i]n the event of the death of [NH] before the Trust fund is totally distributed, the remaining balance of the Trust Fund shall be distributed in equal shares to

Nancy . . . and Susan ." Thus, the Amendment and the Trust Annuity Arrangement make it clear that NH would have no right to the trust principal beyond receiving monthly annuity payments. Her sisters' interest in receiving the balance of the Trust principal following NH's death precludes NH from having any authority to revoke the trust and use the principal for her benefit.

The POMS further states that if a trust provides for mandatory disbursements to the beneficiary and the beneficiary is not prohibited from anticipating, assigning, or selling the right to future payments, the current value of these payments may be a resource to the beneficiary. POMS SI 01120.200D.1.a. In the present case, the Trust Annuity Arrangement did provide that "Annuity payments shall become payable to or for [NH's] benefit on a deferred basis commencing on the 15th day of January 1989." However, the trustees never carried out this provision of the Trust Annuity Arrangement, and thus NH has never received monthly annuity payments. Until the trustees take the affirmative step of purchasing an annuity contract as they were directed to do under Nathaniel's 1974 Amendment, NH cannot anticipate, assign, or sell the right to any such future payments, and there is no current value of any such payments to count as a resource to NH. *See* POMS SI 01120.200D.1.a. Although it seems likely that NH could sue to have this provision of the Trust Annuity Arrangement enforced, *see Davis v. Rex*, 876 So. 2d 609, 613 (Fla. Dist. Ct. App. 2004); *Popp ex rel. Estate of Davis v. Rex*, 916 So. 2d 954, 958 (Fla. App. 2005) (trial court could reform trust to carry out settlor's intent), until some action is taken to provide for regular, anticipated payments, we do not believe these prospective future payments can be counted as a resource to NH.

CONCLUSION

For the foregoing reasons, we believe that the trust in question is not a countable resource to NH for the purpose of determining eligibility for SSI.

Sincerely,
Mary Ann Sloan
Regional Chief Counsel
Richard V. Blake
Assistant Regional Counsel

C. PS 06-043 Effect of Null and Void Clause in Special Needs Trust, Florida Beneficiary - Austin

DATE: January 13, 2006

1. SYLLABUS

This opinion addresses whether or not the Special Needs Trust (SNT) in question is a countable resource for SSI purposes. To be excluded from resource counting, a SNT must:
1) contain the assets of a disabled individual under age 65,
2) be established for the benefit of the individual by a parent, grandparent, legal guardian or a court, and
3) provide that the State 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. In this case, the SNT appears to satisfy the criteria to meet the SNT exception, except that the trust could be terminated and the assets distributed to the remainder beneficiaries during the claimant's lifetime. This would prevent the trust from being an excludable resource; however, the trust also stipulates that any provision of the trust that prevents compliance with the SNT exception is null and void. Florida law allows the null and void clause to override the provisions that might allow disbursements to remainder beneficiaries during the claimants lifetime, thus the SNT is not a countable resource.

2. OPINION

You asked whether a Special Needs Trust (SNT) established for SSI beneficiary Austin (Claimant) would be a countable resource. You stated that the trust in question appeared to satisfy all the criteria to meet the SNT exception to resource counting, except that the trust could be terminated and the assets distributed to the remainder beneficiaries during Claimant's lifetime, which might prevent the trust from meeting the requirement that trust be for the benefit of the disabled individual. However, the trust in question also stipulated that any provision of the trust that prevented compliance with the SNT exception would be null and void. Your specific question, therefore, was whether Florida law would give this null and void clause effect, thus allowing the trust to satisfy the exception to resource counting. For the reasons explained below, we believe Claimant's SNT would not be a countable resource.

BACKGROUND

Generally, trusts established with the assets of an individual will be considered resources for Supplemental Security Income (SSI) purposes. *See* Section 1613(e) of the Social Security Act (the Act) (42 U.S.C. 1382b(e)). However, the statute provides certain exceptions. Section 1613(e)(5) of the Social Security Act (the Act) (42 U.S.C. 1382b(e)(5)) excludes the "Medicaid payback trusts" incorporated by reference from sections 1917(d)(4)(A) and (C) of the Social Security Act (the Act) (42 U.S.C. 1396p(d)(4)(A) and (C)), which are part of Title XIX, "Grants to States for Medical Assistance Programs." Similarly, section 1612(a)(2)(G) of the Act (42 U.S.C. 1382a(a)(2)(G)) includes income from a trust as defined in 1613(e), which in turn incorporates the Medicaid payback trust exceptions.

The first of the two Medicaid payback exceptions is the SNT, which is at issue here; and the second, the Pooled Trust. The statutory requirements for resource exemption for an SNT are that the trust must be established "for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter." 42 U.S.C. 1396p(d)(4)(A).

On July 27, 2005, an SNT was established for Claimant. The Order establishing the SNT states as its first finding, "It is in the best interests of [Claimant] to be eligible for Social Security and Medicaid benefits." The Order's first direction is as follows: "The Court hereby approves of the establishing of the attached Special Needs Trust pursuant to Florida and Federal Medicaid Law under 42 U.S.C. 1396 (p) (d) (4) (a) . . . ." The introductory paragraph of the Special Needs Trust Agreement (Trust) states, "This Trust is written pursuant to 42 U.S.C. § 1396(d)(4)(A) [sic] . . . ." The Agreement further states, "[I]t is expressly intended that this Trust will provide benefits to supplement those which may otherwise be available to [Claimant] . . . and also satisfy the requirements of Title 42 of the U.S.C. § 1396p(d)(4)(A)." Trust Article 1.2.1. The "Intention" article states, "The purpose of this Trust is to permit the use of trust assets to supplement, and not to supplant, impair or diminish any benefits or assistance of any Federal, State, or other governmental entity . . . . " This article further states, "All provisions of this Trust shall be interpreted to qualify this trust under the provisions of 42 U.S.C. § 1396p(d)(4)(A). Any provision of this Trust which may prevent this Trust from satisfying full compliance with 42 U.S.C. § 1396p(d)(4)(A) shall be null and void." Trust Article 1.2.3.

During Claimant's lifetime, the Trustee has "absolute and unfettered discretion" to distribute from the principle or income of the Trust, or both, such amounts as the Trustee deems reasonable or advisable. Trust Article 2.1. Claimant has no right to direct a distribution. Trust Article 2.2.3. The Trustee is to distribute amounts for Claimant's "Special Needs," defined as the requisites for maintaining Claimant's health, safety, and welfare when such requisites are not provided by any other sources, including government agencies. Trust Articles 2.2.1, 2.3.1. Neither the Grantor, Trustee, nor Beneficiary may revoke the Trust. Trust Article 5.1.1.

Upon Claimant's death "any assets remaining in the Trust shall first be used to reimburse the Department of Medical Assistance and Health Services of the State of Florida for medical assistance paid on behalf of [Claimant] during his lifetime, as consistent with federal and state law." Trust Article 2.6.1.1. However, the Trustee may deplete the Trust corpus prior to Claimant's death. In doing so, the Trustee is directed to give "preference to the interests of [Claimant] while simultaneously considering the interests of the Remainder Beneficiary(ies)." Trust Article 2.3.1. Furthermore, the Trustee has the option to terminate the Trust during Claimant's lifetime if the amount thereof does not warrant the cost of continuing said trust or if its administration would be otherwise impractical. Upon such termination, Trustee shall pay the principal and any accumulated or undistributed income of such trust share to the Remainder Beneficiary(ies) in the proportions to which they would be entitled to receive distributions upon the death of [Claimant] . . . ."

Trust Article 5.6.

Analysis

As explained above, the statute provides certain exceptions to the general rule that trusts created with the assets of an individual are countable as resources of the individual. Among these exceptions are the "Medicaid trusts," or "Medicaid payback trusts," so called because they are designed to give state Medicaid plans a lien on the trust as first payee upon the death of the beneficiary. The lien is not enforced during the beneficiary's lifetime. *See generally* POMS SI 01120.203. The SNT is such a trust and has the following requirements:

1. it must be established for a disabled individual under age 65;

2. it must be established for the benefit of the disabled individual;

3. it must be established by the disabled individual's parent(s), grandparent(s), legal guardian(s), or a court; and

4. it must contain specific language that provides for Medicaid reimbursement upon the death of the disabled individual.

See POMS SI 01120.203(B)(1)(a-f). You advised us that the Trust appeared to satisfy all these requirements, with the possible exception of (2) above, due to the power of the Trustee to terminate the Trust and distribute assets to remainder beneficiaries. Based on your question to us, we presume the facts of Claimant's situation meet the other requirements; that is, that Claimant is under age 65 and is disabled. The Trust is established by a court, therefore satisfying (3) above. We note that Keith is both the guardian and trustee, and that the grantor is Claimant himself. Trust Declaration by the Grantor & Acceptance by the Trustee. Florida law allows a guardian to act as trustee. *See* § Fla.Stat. §774.441(2). We do not address here the nature of the property transferred or the relationship of Mr. C~ to Claimant. Indeed, a factual analysis of Claimant's case would not address your concern, since you indicated this opinion would be applied to other similar cases of SNT's in Florida. Therefore, we only address here whether the Trust on its face meets the requirements for the SNT exception to resource and income counting.

The Trust contains the necessary specific language that provides for Medicaid reimbursement upon the death of the disabled individual. Trust Article 2.6.1.1. However, as you note, the Trust may also benefit others, thus potentially defeating requirement (2). This could have the effect of depleting the Trust, thus limiting the capacity of the Trust to pay back Medicaid fully in the event of Claimant's death. However, the Trust also contains the "null and void clause," Trust Article 1.2.3, which, if effective, could remove the offending clauses. We first address whether the null and void clauses might be needed at all to satisfy the exemption requirements. We then address whether the null and void clause would be effective under Florida law. Finally, we address whether the Trust would remain viable if the null and void clause were invoked and the offending clauses removed.

Two articles are off concern. The Trustee has the option to terminate the Trust during Claimant's lifetime if the amount thereof does not warrant the cost of continuing said trust or if its administration would be otherwise impractical. Upon such termination, Trustee shall pay the principal and any accumulated or undistributed income of such trust share to the Remainder Beneficiary(ies) in the proportions to which they would be entitled to receive distributions upon the death of [Claimant] . . . .

Trust Article 5.6. If, for example, the trustee terminated the Trust shortly before Claimant died, the Medicaid payback provision would be defeated In addition, the Trustee may deplete the Trust corpus prior to Claimant's death. In doing so, the Trustee is directed to give "preference to the interests of CLAIMANT while simultaneously considering the interests of the Remainder Beneficiary(ies)." Trust Article 2.3.1. This language is vague because it directs the thought process of the trustee and is essentially unreviewable. The language indicates that the trustee is to consider the interests of the remainder beneficiaries in making decisions about whether to expend amounts that might deplete the Trust and thus leave nothing for the remainder beneficiaries upon Claimant's death. If the trustee were to follow the guidance of this Article, the trustee might refrain from depleting the Trust so as to preserve inheritance for the remainder beneficiaries. Oddly, the Medicaid payback might actually be preserved under such a scenario, because if and when Claimant died, Medicaid would be the first payee ahead of the remainder beneficiaries. Trust Article 2.6.1.1.

Trust Articles 5..6 and 2.3.1 are not necessarily inconsistent with the requirements for exemption. Significantly, the two types of Medicaid payback trusts differ in their requirements about exclusive benefit to the disabled individual. The statute requires that accounts in a pooled trust be "*solely* for the benefit of individuals who are disabled." 42 U.S.C. § 1396p(d)(4)(C)(iii)(emphasis added). The statute requires that assets in an SNT be "for the benefit of such individual." 42 U.S.C. § 1396p(d)(4)(A). The POMS reflect this difference. POMS SI 01120.203(B)(1), (B)(2)(a). As a matter of statutory construction, we presume that the difference is meaningful, and that SNT's therefore are not required to be "solely" for the benefit of the disabled individual. However, establishing the exact contours of the interests of remainder beneficiaries is beyond the scope of this memorandum. Therefore, we will assume conservatively that Trust Articles 5.6 and 2.3.1 could be used in a ways that would trigger the necessity for the null and void clause.

Florida law controls in this case because the Trust was established in the Circuit Court for Palm Beach County, Florida, and the Trust provides that the 15th Judicial Circuit Court for the State of Florida retains jurisdiction over the Trust. Trust Article 5.11.2. Florida law strongly emphasizes the intention of the grantor when interpreting trust agreements. "In construing the provisions of a trust, the cardinal rule is to try to give effect to the grantor's intent, if possible." *Parker v. Shullman*, 906 So.2d 1236, 1237 (Fla. 4th DCA 2005), citing *Vetrick v. Keating*, 877 So.2d 54, 58 (Fla. 4th DCA 2004). Here, the grantor intended unambiguously to prioritize qualification of the Trust as a SSI exemption. The Order establishing the SNT states as its first finding, "It is in the

best interests of [Claimant] to be eligible for Social Security and Medicaid benefits." The Order's first direction is as follows: "The Court hereby approves of the establishing of the attached Special Needs Trust pursuant to Florida and Federal Medicaid Law under 42 U.S.C. 1396 (p) (d) (4) (a)[sic] . . . ." The introductory paragraph of the Special Needs Trust Agreement (Trust) states, "This Trust is written pursuant to 42 U.S.C. § 1396(d)(4)(A) [sic] . . . ." The Agreement further states, "[I]t is expressly intended that this Trust will provide benefits to supplement those which may otherwise be available to CLAIMANT . . . and also satisfy the requirements of Title 42 of the U.S.C. § 1396p(d)(4)(A)." Trust Article 1.2.1.

Florida law also allows provisions of a trust to be severed from the trust, without invalidating the entire trust. *See V~*, 877 So.2d at 55-56. In *V~*, the testator attempted to distribute assets of her deceased husband's trust through a new trust for her daughter, but in doing so impermissibly expanded the class of beneficiaries to include her daughter's children. The court severed that portion of the new trust that expanded the class in order to allow the trust to stand, rather than disqualifying the new trust entirely and allowing the assets to pass from the original trust directly. *See* 877 So.2d at 55-56.

A problem remains with Trust Article 2.3.1 due to its vagueness. This article admonishes the trustee to consider the interests of remainder beneficiaries if depleting the Trust. If the trustee were to make a direct disbursement to a remainder beneficiary under Trust Article 5.6, the act would be apparent. However, Article 2.3.1 involves a mental process; the trustee could conceivably make decisions to disburse less to Claimant than his sole interests require in order to preserve assets for disbursement to the remainder beneficiaries after Claimant's death. As noted above, this scenario would have the odd effect of preserving assets for the Medicaid payback, but would be a use of the assets other than for the benefit of Claimant. The issue then is whether the lack of clarity and accountability renders the null and void clause ineffectual in neutralizing the offending clause.

Florida law permits severance of a trust provision that suffers from vagueness that would otherwise invalidate the trust. *See Davis v. Rex*, 876 So.2d 609 (Fla. 4th DCA 2004). The Court addressed the treatment of this issue under Florida law:

[W]e believe that, absent reformation, the controlling case law, which neither party has advanced, is as stated below:

If the designation of beneficiaries is deemed too indefinite for enforcement of the provisions of a trust, the usual result is that the trust is void and "the designated trustee holds the corpus under a resulting trust in favor of the estate of the settlor." ··· Where it is compatible with the settlor's intent, it may be possible to sever the uncertain provision from an accompanying enforceable one, "so that the remaining provision, and the trust as a whole, may be preserved." *McLemore v. McLemore, 675 So.2d 202, 205 (Fla. 1st DCA 1996*)(citing *Kunce v. Robinson, 469 So.2d 874, 877 (Fla. 3d DCA 1985)*).

In *K~*,, the court stated that the provision there, which permitted the trustee to make distributions to such "others as the Trustee in his discretion may deem appropriate," did not identify any particular entity, person or class which could enforce the trust. "It must therefore be deemed void for indefiniteness." 469 So.2d at 877. However, because the settlor's primary intent was apparently to benefit the other named beneficiaries, the court severed this provision rather than invalidate the trust altogether.

This seems the correct result in this case if reformation fails. Scott died without issue, so there is nobody to enforce the terms of that half of the trust. That gift should be held void and held by the trustee on a resulting trust for the settlor's estate. Of course, there is no reason to invalidate Stephen's half of the trust, which can be severed and enforced.

876 So.2d at 613-14.

Florida law therefore should allow the null and void clause to be implemented against Trust Articles 5.6. and 2.3.1. The remaining issue is whether, absent these clauses, the Trust would still be viable. If the offending part of Article 5.6 were removed, the trustee would not have the option of distributing trust assets to remainder beneficiaries during Claimant's lifetime. Thus, the assets would revert to Claimant and would qualify as a changed circumstance, triggering the requirement to inform the Agency, which could then determine if Claimant continues to meet resource requirements. *See* POMS SI 02301.005(B)(2). Furthermore, the trustee could not carry out the intent of the Trust by terminating the Trust under circumstances that would cause Claimant to exceed resource limits. Thus, deleting the problematic portion of Article 5.6 would not appear to harm the Trust. Similarly, deleting the offending sentence in Article 2.3.1 would only require the trustee to consider Claimant's sole benefit in depleting the Trust. Such deletion would likewise not invalidate the Trust.

We agree that the Trust appears to meet the remaining requirements for SNT exemption to resource counting, as these requirements are described at POMS SI01120.203(D) "Procedure--Developing Exceptions to Resource Counting." As noted

above, we presume Claimant is under age 65 and is disabled. The trust appears to be established with Claimant's own assets, as he is the Grantor. *See* Declaration by the Grantor & Acceptance by the Trustee. Claimant is the beneficiary; and, with the null and void clause implemented against portions of Articles 5.6 and 2.3.1, is the sole beneficiary. A court established the Trust. The Trust provides specific language to reimburse the state for Medicaid upon the death of Claimant. Finally, the trust is irrevocable, so that consideration under SI 01120.200, "Countable Resources," does not apply. *See* POMS SI 01120.203(B)(1).

CONCLUSION

We conclude that Florida law would allow the null and void clause to operate against those clauses that might allow disbursements to remainder beneficiaries during Claimant's lifetime. The Trust appears to contain the proper language for the other requirements for exemption from resource counting under 42 U.S.C. 1396p(d)(4)(A).

Sincerely,
Mary Ann Sloan
Regional Chief Counsel
Rollin Mathis
Assistant Regional Counsel

Footnotes:

[1] All references to the Code of Federal Regulations are to the 2011 edition.

[2] "A third-party trust is a trust established with the assets of someone other than the beneficiary." POMS SI 01120.200.B.17. To "revoke" a trust means to "reclaim or take back[] the assets deposited in the trust." POMS SI 01120.200.B.19. To "terminate" a trust means to "end[] a trust and obtain the assets for [the person terminating the trust]." POMS SI 01120.200.B.20.

[3] The Act also states that a trust is not an individual's resource if the trust meets the requirements for a special needs trust in section 1917(d)(4)(A), even though payments could be made from the trust to or for the benefit of the individual. *See* Act §§ 1613(e)(5), 1917(d)(4). You did not ask us to provide an opinion regarding whether the trust meets the requirements of a special needs trust.

[4] All references to the Florida Statutes Annotated are to the 2011 edition.

[5] A court may not modify a trust under this section if the trust was created after December 31, 2000, and its terms require all beneficial interests in it to vest or terminate within the period prescribed by Florida's "Uniform Statutory Rule Against Perpetuities" and "expressly prohibit judicial modification." Fla. Stat. Ann. §§ 736.04115(3)(b)(1) (citing Fla. Stat. Ann. § 689.225(2) (requiring a nonvested property interest to vest or terminate "no later than 21 years after the death of an individual . . . alive [when the interest is created]," or "within 90 years after its creation")), 736.04115(3)(b)(2). However, as the court noted, "[t]he Last Will and Testament does not expressly prohibit judicial modification" (Order, ¶ K). Therefore, we believe the court could modify the trust under this section, even though it was created when Grantor died in October 2004 (Order, ¶ A) and required all interests in it to vest or terminate no later than "twenty-one (21) years after the death of the survivor of those beneficiaries living at the time of my death" (Will, Art. 2, ¶ E(5)(f)). *See* Fla. Stat. Ann. §§ 736.0401(1) (stating a trust may be created by a "[t]ransfer of property to another person as trustee . . . by will or other disposition taking effect on the settlor's death"), 736.04115(4) (stating that for judicial modification under this section, a revocable trust is "created" when "the right of revocation terminates").

[6] However, Florida law states that the terms of a trust do not prevail over the "power of a court to modify . . . a trust under [Florida Statute §§ 736.04113 and 736.04115]." Fla. Stat. Ann. §§ 736.0105(2), (2)(j). A court modifying a trust under these sections may consider extrinsic evidence relevant to the proposed modification. *See* Fla. Stat. Ann. §§ 736.04113(3)(a), 736.04115(2)(b).

A. PS 05-078 Request for Legal Opinion Number Holder - Eleanor G~, SSN ~

DATE: January 25, 2005

1. SYLLABUS

The beneficiary gave 50,000.00 to a relative. In exchange for the 50,000.00, a private annuity was created between the beneficiary and the relative. The annuity stated that the beneficiary would receive a specified amount of money over a specified period of time. This agreement was irrevocable and the beneficiary did not have the right to sell her interest in the private annuity. Florida law stated that the private annuity established between the beneficiary and her relative was valid under state law. The resource transfer was developed Per SI 01150.003 and SI 01150.005. It was found that the beneficiary did receive the fair market value for the resource transfer. Therefore, a period of ineligibility did not apply and the annuity was a not a countable resource.

2. OPINION

You have requested our opinion as to whether a private annuity contract between two individuals is permitted under Florida law. We believe that such a contract is permitted.

Eleanor G~, NH, and her sister entered into a private annuity agreement that NH funded with $50,000 that she received from a personal injury suit. The terms of the agreement provide her with monthly income of $5.00 for the first 123 months of the contract, with the remaining $60,682.70 to be paid in the final month. NH was approximately 78 years of age when she entered into the contract. Based upon the actuarial tables in POMS (SI 01150.005), a 78 year old female has a life expectancy of approximately 10.25 additional years. The annuity contract is based on a life expectancy of 10.24 years. Accordingly, it appears that NH is receiving a fair market value in return for the funds she used to establish the annuity contract.

Florida insurance regulations apply only to “insurers,” which is defined as a person engaged “in the business of entering into contracts of insurance or of annuity.” West's F.S.A. Sec. 624.03. Florida courts have held that individual self-insurers or out-of-state benefit societies are not “insurers” within the meaning of Florida law and therefore are not required to qualify under Florida insurance statutes. *See Government Employees Insurance Company v. Wilder*, 546 So.2d 12 (Fla. 1989) (self-insurer); *Brotherhood's Relief and Compensation Fund v. Cagnina*, 155 So.2d 820, 823 (Fla. 1963) (benefit society). A family member engaged in an isolated transaction would not be an “insurer” and accordingly would not be subject to Florida's insurance laws, which require a certificate of authority, among other requirements. F.S.A Sec. 624.11. According to an attorney in Florida's Department of Financial Services, which regulates the insurance industry in Florida, there is no specific prohibition against private annuity contracts in Florida.

This contract, however, like other insurance contracts, would be subject to laws generally pertaining to insurance contracts. *Brotherhood's Relief and Compensation Fund*, 155 So.2d at 823-24. This contract appears to meet these requirements as NH is getting a fair return on her investment and the obligor (sister) cannot change the contract to modify NH's benefits.

Because we believe the private annuity contract would be valid in Florida, the annuity would be an excluded resource for SSI purposes. *See generally*, 20 C.F.R. Sec. 416.420 (2004); SI 01110.115 (assets that are not a resource); SI 01110.100 (distinction between assets and resources).

Very truly yours,

Mary A. S~
Regional Chief Counsel

Laurie G. R~
Assistant Regional Counsel

A. PS 13-065 Supplemental Security Income Resource Determination—Validity of Personal Services Contract

DATE: April 17, 2013

1. SYLLABUS

The office of Regional Chief Counsel (RCC) determined that this case represented a transfer of resources without due compensation. The person receiving the resources is the niece of the SSI applicant. This niece, a resident of New Jersey, failed to sign the agreement of transfer and therefore no legally binding agreement exists. The transferred funds count as a resource. In addition, the niece failed to convince the RCC that undefined services she would be prepared to perform from a location over a thousand miles away justified the transfer of $37,000 to her. The 72 year old applicant's basic needs are presently being met as a resident of a nursing home in Florida.

2. OPINION

QUESTION

You have asked whether a transfer of resources by an applicant for Supplemental Security Income (SSI) constitutes a transfer for less than fair market value, or is excludable as a valid contract for services.

OPINION

The contract is not a valid contract for services nor does the contract establish that the services to be exchanged constitute fair market value for the resources purportedly transferred.

BACKGROUND

Based on the information provided, we understand the facts to be as follows: Ann filed an application for SSI on behalf of her uncle, David (Applicant). Applicant is a resident of a nursing home in St. Petersburg, Florida, and has no spouse. He was born in 1940 and is presently seventy-two years old. On January 29, 2013, Applicant appointed his niece, an attorney residing in New Jersey, to be his representative for purposes of obtaining SSI. On February 19, 2013, the Social Security Administration (SSA) selected Applicant's niece as his representative payee. That same day, Applicant's niece faxed the agency documentation of Applicant's assets, including a mutual fund account valued at $25,265.06 and an IRA valued at $12,266.68.

Applicant's niece advised SSA that she had transferred approximately $37,000 of Applicant's assets, the sums in the mutual fund and IRA, to herself, pursuant to a "Contract for Services." Applicant purportedly entered into this contract with his niece on January 29, 2013.

The one-page contract states Applicant's niece will perform the following services for Applicant: "act as a Power of Attorney; serve as a Health Care Representative; serve as a representative for Social Security; serve as a representative for Medicare/Medicaid; communicate with any and all doctors and/or other hospital/facility representatives on behalf of [Applicant]; and communicate with social services regarding living arrangements for [Applicant]." The contract states Applicant's life expectancy is 12.1 years. It further states that the consideration for the services Applicant's niece is to render is payment of $20.00 per hour. The contract states Applicant's niece is anticipated to provide services, on average, six hours per week. It states Applicant is paying his niece for services rendered and the payment should not be construed as a gift. The contract was executed by Applicant in Pinellas County, Florida, before a notary public. Applicant's niece did not sign the contract.

DISCUSSION

SSI is a general public assistance program for aged, blind, or disabled individuals who meet certain income and resource restrictions and other eligibility requirements. See Social Security Act (Act) §§ 1602, 1611(a); 20 C.F.R. §§ 416.110, 416.202 (2012). 1 "Resources" include cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. See Act § 1613; 20 C.F.R. § 416.1201(a). The Act and regulations establish the dollar amount that an individual's nonexcluded resources cannot exceed. See Act § 1611(a)(1)(B); 20 C.F.R. § 416.1205(a).

An individual's eligibility for SSI may depend or be conditioned on the disposal, at fair market value, of resources that exceed the resource limitations, and the failure to dispose of property in an appropriate manner may render the individual ineligible for SSI. See Act § 1613(b)(1); 20 C.F.R. § 416.1240. An individual who gives away or sells a nonexcluded resource for less than fair market value is ineligible for SSI for a prescribed period. See Act § 1613(c)(1)(A)(i). Resource transfers for less than fair market value made after December 14, 1999, may result in a period of ineligibility of up to thirty-six months. See Act § 1613(c)(1)(A)(ii)(I); Program Operations Manual System (POMS) SI 01150.001(A), (C)(3); POMS SI 01150.110(A). The agency evaluates transfers of cash for services based on the current market value (CMV) of the services and the frequency and duration of the services under the agreement. See POMS SI 01150.005.

A valid transfer of resources is based on a legally binding agreement. If a transfer is not valid, the individual still owns the property, and the property counts as a resource for SSI purposes. See POMS SI 01150.001 (B)(1). Accordingly, the validity of the contract is of primary importance.

Applicant executed the contract in Florida. Florida courts follow the general principle that the place where the contract is made governs the validity, interpretation and obligations of a contract . See Jemco, Inc. v. United Parcel Service, Inc., 400 So. 2d 499, 501 (Fla. Dist. Ct. App. 1981). Therefore, Florida law governs the construction of the contract.

Florida law provides that a valid contract is based on an offer, acceptance and exchange of consideration. See Med-Star Central, Inc. v. Psychiatric Hospitals of Hernando County, Inc., 639 So. 2d 636, 637 (Fla. Dist. Ct. App. 1994). Acceptance of the contract may be shown by signing it. See Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus, 853 So. 2d 500, 503 (Fla. Dist. Ct. App. 2003) ("the object of a signature is to show mutuality or assent"). Assent may also be shown by the acts or performance of the party. Id. (citing Gateway Cable T.V., Inc., v. Vikoa Construction Corp., 253 So.2d 461, 463 (Fla. Dist. Ct. App. 1971)).

The contract at issue provides for services to be performed over Applicant's lifetime, stated to be 12.1 years. Under Florida law, a contract for services that cannot be performed within one year is not enforceable unless signed by the person who must perform the services.

No action shall be brought ... upon any agreement that is not to be performed within the space of 1 year from the making thereof ... unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

Fla. Stat. Ann. § 725.01 (West 2012). Applicant's niece did not sign the contract, therefore, it is unenforceable against her as it cannot be performed within one year. Fla. Stat. Ann. § 725.01 (West 2012). The doctrine of partial performance under a contract may cure the lack of a valid writing in some circumstances, but under Florida law, partial performance of a contract for personal services does not cure its invalidity. See Johnson v. Edwards, 569 So. 2d 928, 929 (Fla. Dist. Ct. App. 1990). Therefore, the fact that Applicant's niece performed some services for Applicant, such as filing his SSI application, does not cure the lack of a valid contract. As the contract is unenforceable it does not constitute a valid transfer of resources, and Applicant remains the owner of the property purportedly transferred. See POMS SI 01150.001 (B)(1). 2

Even if the contract were a legally binding agreement and constituted a valid transfer of resources, Applicant's niece has presented no evidence of the fair market value of the services she is to render. The contract submitted by Applicant's niece presents little detail of the services she is to provide and no explanation of how she will provide them to Applicant in Florida while she maintains her residence in New Jersey. It does not appear probable that Applicant's niece will be aware of Applicant's needs and able to communicate on his behalf with doctors and facilities in Florida while she remains in New Jersey. By comparison, in R~, the contract set out in great detail the services the daughter would provide in person. R~, 193 S.W. 3d at 840-41. ("The Contract set out duties of the [daughter] such as preparation of nutritious, appropriate meals, house cleaning and laundry; assistance with grooming, bathing, dressing, and personal shopping, including purchase of clothing, toiletries and other personal items; assistance with purchasing hobby, entertainment or other goods for R~'s use and enjoyment, taking into account R~'s ability to pay for such items; monitoring of R~'s physical and mental condition and nutritional needs in cooperation with health care providers; arranging for transportation to health care providers and to the physician of R~'s choice, as well as arranging for assessment, services and treatment by appropriate health care providers for R~; assisting R~ in carrying out the instructions and directives of R~'s health care providers; arranging for social services by social service personnel as needed; visiting at least weekly and encouraging social interaction; arranging for outings and walks, if reasonable and feasible for R~; and interacting with and/or assisting any agent of R~ in interacting with health professionals, long-term care facility administrators, social service personnel, insurance companies, and government workers in order to safeguard R~'s rights, benefits, or other resources as needed.")

The contract states Applicant's niece will provide, on average, approximately six hours per week of services to Applicant, but does not set forth the basis for this average. If she provided six hours of services per week, that would amount to three hundred twelve hours per year. Making an occasional phone call or sending an occasional e-mail from New Jersey would not likely require three hundred twelve hours per year. Without a reasoned basis for the estimated number of hours of services, it appears the number was selected at random. By comparison, in R~, the daughter made three to four sixty-mile round trips weekly to attend to her mother. Id. at 843. Thus, while the contract recites the frequency and duration of the services to be provided, Applicant's niece has not established that this estimate is accurate.

Further, the contract recites that Applicant has an average life expectancy of 12.1 years. However, the life expectancy table in POMS SI 01150.005 governs the calculation of the value of compensation of services for life. The life expectancy for a 72-year-old male set forth in POMS SI 01150.005 is 11.24 years. The contract's use of a longer life expectancy than that set forth in POMS renders the estimated duration of the contract inaccurate, and would also impact the hourly rate. Thus, the contract is inaccurate. Applicant has not established it requires payment of fair market value for the services to be rendered.

CONCLUSION

Because Applicant's niece did not sign the personal services contract, which anticipates she will provide services for more than one year, the contract is unenforceable under Florida law and is not valid. Moreover, the contract does not include sufficient detail of the services to be provided, does not provide any support for the number of hours of services to be provided, explain how Applicant's niece could provide the services to Applicant from a remote location and uses an incorrect life expectancy for Applicant. Applicant has not established the services to be exchanged constitute fair market value for the resources allegedly transferred.

Sincerely,

Mary Ann Sloan

Regional Chief Counsel

By: _____

Megan E. Gideon

Assistant Regional Counsel

Footnotes:

[1] All subsequent references to the Code of Federal Regulations are to the 2012 edition unless otherwise noted.

[2] Florida will recognize the validity of personal services contracts in general and under the proper circumstances. See Thomas v. Florida Dep't of Children and Families, 707 So. 2d 954 (Fla. Dist. Ct. App. 1998) (lifetime contract between a mother and daughter whereby daughter agreed to supervise mother's health care and provide personal services in exchange for $67,725 was valid). In a case similar to T~, Missouri recognized the validity of personal services contracts. See Reed v. Missouri Dep't of Soc. Serv., Family Support Div., 193 S.W. 3d 839, 842-43 (Mo. Ct. App. 2006) (evidence showed valid contract where daughter assisted mother with feeding, purchased correct size equipment and clothing, kept track of mother's belongings, took her on drives, helped her attend events at nursing home, noted medication errors and corrected them and performed services over an eleven-year period in exchange for $11,000).

4.8 GEORGIA

A. PS 08-109 Requirements for an irrevocable Special Needs Trust according to Georgia Law

DATE: May 9, 2008

1. SYLLABUS

This opinion examines whether or not the trust in question (established in 1996) is considered irrevocable under Georgia law. A trust is a countable resource for SSI purposes if an individual has legal authority to revoke the trust and then use the funds to meet his/her food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance. The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or State law. In this case, the trust identifies the claimant's "heirs" as the residual beneficiary. Under Georgia law, a trust must specify a particular person or entity as the residual beneficiary. The reference to "heirs" in this trust is too indefinite to create a residual interest under Georgia law thus making the trust revocable and a countable resource for SSI purposes.

2. OPINION

QUESTION

You asked whether a the "Jaime M. N~ Irrevocable Trust" (the N~ Trust) established under Georgia law is irrevocable when it only designates that, upon the death of Jaime M. N~ (Claimant), the residual funds in the trust pass to the State of Georgia and then to "the heirs of" Claimant. You also asked whether Program Operations Manual System (POMS) SI ATL 01120.201 correctly interprets Georgia law regarding when a trust should be considered revocable.

ANSWER

Although the trust meets requirements under the Agency's special needs trust exception, it is countable as a resource available to Claimant under ordinary resource rules, because it is not irrevocable under Georgia law. As stated in POMS SI ATL 01120.201, a trust in Georgia is considered revocable when the trust states that the residual of the trust will go "to my estate" or "to my heirs."

FACTS

Claimant is child of Geoffrey and Diane N~ (Claimant's parents). On September 21, 1991, when Claimant was five years old, she experienced an anoxic brain injury, which left her with extensive brain damage, primarily on the left side of her brain. On August 15, 1996, when Claimant was about ten years old, Claimant's parents established a trust for Claimant. The trust corpus was comprised of an initial $10.00 and settlement funds that were payable to Claimant because of a lawsuit her parents filed on her behalf against an ambulance company. The N~ Trust, Art. 2, §§ 1, 2. The provisions state that its intended purpose is "to be in full compliance with . . . the provisions and requirements contained in 42 U.S.C. Section 1396p or related Statutes . . . ." *Id.*, Art. 3, § 1. The trust provisions further indicates that the trustee "shall pay to . . . [Claimant] in monthly or other convenient installments, that amount of *net income* that will not cause [Claimant] to be ineligible for governmental financial assistance" in the event that she receives such assistance. *Id.*, Art. 4, § 1.1 (emphasis supplied). The trust provisions also state that the trustee "may distribute discretionary amounts of *principal* for [Claimant's] special needs" that are not otherwise provided by governmental financial assistance and benefit providers. *Id.*, Art. 3, § 1.2 (emphasis supplied). Finally, the trust provisions state that, upon Claimant's death, the Trustee shall distribute "the balance of the trust property to the Department of Human Services, or its successor agency, as reimbursement to the Medical Assistance Program of the State of Georgia, for benefits provided by them to the Beneficiary during the Beneficiary's lifetime." *Id*., Art. 4, § 1.3. If any assets remain after reimbursing the State of Georgia for medical assistance, "the remainder, after reasonable expenses and costs for maintaining the trust, shall be distributed to the estate of [Claimant]." *Id.* The same distribution plan to the State and then to Claimant's "estate" would occur if the trust were to terminate; and if there are no other persons to receive such property, the trust balance would be distributed under the law of Georgia to Claimant's heirs as if she died intestate. *Id.*, Art. 5.

Claimant applied for SSI on August 9, 2004, and the Agency subsequently approved her application. After a "limited issue" redetermination, the Agency found that Claimant's trust was revocable due to the general language designating beneficiaries. According to POMS SI ATL 01120.201, the residual beneficiary language in Claimant's trust was too non-specific to render the trust, funded mostly with Claimant's assets, irrevocable under Georgia law. Thus, Claimant was no longer eligible for SSI due to

the value of her trust, which, per the Agency's interpretation, was a countable resource. Claimant disagrees with the redetermination finding and contends that her trust is irrevocable.

BACKGROUND

Under the Social Security Act (Act), aged, blind, or disabled individuals who meet certain income and resource limitations are eligible for SSI. *See* Act § 1611(a) (42 U.S.C. § 1382(a)). "Income" is defined as funds that are earned as wages or other employment-type compensation or as unearned income from a variety of sources, which can be used to meet a claimant's food and shelter needs. *See* Act at § 1612(a)(1)-(2) (42 U.S.C. § 1382a(a)(1)-(2)); *accord* 20 C.F.R. § 416.1102 (2007). Resources are cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. *See* 20 C.F.R. § 416.1201(a) (2007).

The Act did not contain a specific SSI resource provisions for trusts created prior to December 30, 1999; however, the Act contained other provisions for Medicaid trusts. The Omnibus Budget Reconciliation Act of 1993 (OBRA) amended § 1917 of the Act to incorporate new provisions for the treatment of trusts established on or after August 11, 1993. *See* OBRA, Pub. L. 103-66, 107 Stat 312, § 13611 (Aug. 10, 1993). Of relevance here, a trust could be established for the purpose of an individual's Medicaid eligibility, if: (1) the trust is composed only of pension, Social Security, and other income to the individual, including accumulated income in the trust; (2) upon the death of the individual, funds remaining in the trust are paid to the State in an amount equal to the total medical assistance paid on behalf of the individual; and (3) the state makes Medicaid available to individuals with incomes at or below a special income level, but does not make Medicaid available to medically needy individuals for nursing facility services. Act at § 1917(d)(4)(B) (42 U.S.C. § 1396p(d)(4)(B)); *accord* POMS § SI 0730.048 Medicaid Trusts.

For trusts created with an individual's assets before January 1, 2000, the principal is countable as a resource for SSI purposes "if an individual (claimant, recipient, or deemor) has legal authority to revoke the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use to the trust principal for his/her support and maintenance . . ." or if the trust provides for mandatory disbursements to the beneficiary that the beneficiary could assign. *See* POMS SI 01120.200D. However, if the individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his or her own support and maintenance, then the trust principal is not the individual's resource for SSI purposes. *See id.* The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or State law. *See* POMS SI 01120.200D.2.

DISCUSSION

Our analysis applies through September 11, 2007 only. On September 12, 2007, Claimant's representative amended her trust to read that upon her death, after Medicaid reimbursement, taxes, etc., the remaining funds would be distributed to the Claimant's spouse and descendents, per stirpes, and, if none, to Claimant's parents in equal shares, per stirpes.

Georgia law controls in this case because this trust was established in Fulton County, Georgia. *See* The N~ Trust, p. 10-8. Georgia law defines a trust as an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him or her, to apply or deal with property for the benefit of some other person, or for the benefit of himself or herself and another or others, according to such confidence. *See Peach Consolidated Properties, L.L.C. v. Carter*, 628 S.E.2d 680 (2006) (citing *Smith v. Francis*, 144 S.E.2d 439 (1965)). In Georgia, an express trust, as is present here, requires the following:

> (a) An express trust shall be created or declared in writing;
>
> (b) An express trust shall have each of the following elements, ascertainable with reasonable certainty;
>
> > (1) An intention by a settlor to create a trust;
> >
> > (2) Trust property;
> >
> > (3) A beneficiary;
> >
> > (4) A trustee; and
> >
> > (5) Active duties imposed on the trustee, which duties may be specified in the writing or implied by law.

CODE OF GA. ANN., § 53-12-20 (1991). Also, Georgia law states that a settlor is not empowered to modify or revoke trust without reservation of such power -- specifically, that "a settlor shall have no power to modify or revoke a trust in the absence of an express reservation of such power. A power to revoke will be deemed to include a power to modify and an unrestricted power to modify will be deemed to include a power to revoke. Any revocation or modification of an express trust must be in writing." CODE OF GA. ANN., § 53-12-150 (1991).

Despite these general provisions within the Georgia Code, however, longstanding caselaw has held a settler, who is the sole beneficiary of a trust, has the right to termination the trust despite language in the trust instrument that states the trust is irrevocable. *See Moore v. First Nat'l Bank & Trust Co. of Macon*, 130 S.E. 2d 718, 721-22 (Ga. 1963). This holding was reiterated in a later Georgia case. *See Woodruff v. Trust Co. of Ga.*, 210 S.E. 2d 321, 324 (Ga. 1974). In 1996, several years after the current Georgia trust law had been in effect, the court again cited with favor the holding from *Moore*, but distinguished that holding on the basis that the settler in that case was another party, the beneficiary's father. *See Ivey v. Ivey*, 465 S.E. 2d 434, 438 (Ga. 1996). Thus, even after the 1991 law went into effect, the concept from *Moore* persists that a settler/sole-beneficiary trust is revocable.

Regional POMS state that, in Georgia, the language of a trust must specify a particular person or entity as the residual beneficiary. *See* POMS SI ATL 01120.201. A trust provision that states that after death of the individual the trust will go to a specifically named person or entity or states that the trust is to go "to my children, or issue, or descendants" is specific enough to identify a person and the trust is irrevocable. *See id.* On the other hand, trust language that says that after the individual's death, the trust will go "to my estate" or "to the heirs" of the primary beneficiary (or some other non-specific general term) is too indefinite to create an interest in someone who could prevent revocation. *See id.* Given the review of the above caselaw, this POMS remains unchanged with regard to Georgia.

Here, while the Claimant's trust intended to create an irrevocable trust per the specific language of the trust instrument, this trust is revocable under the laws of Georgia as established in *Moore.* Thus, even though the trust indicates that Claimant, as the true grantor, shall have no power to control and direct payment, remove trust property, or alter, amend, revoke, or terminate this trust, *see* The N~ Trust, Art. 1, § 3, Claimant as the grantor and sole beneficiary of the trust had unrestricted ability to revoke the trust and use the funds for her support. Her actions of amending and reforming this trust to include appropriate residual beneficiaries as of September 12, 2007, provides further evidence that this trust was not irrevocable.

Finally, even though this trust provides that, either at Claimant's death or at the termination of the trust, the trustee shall first reimburse the State of Georgia for medical assistance Claimant received for medical care, before distributing any remaining trust amounts Claimant's estate or heirs," *see* The N~ Trust, Art. 4, Art. 5, those provision do not create any remainder interest for the state. Instead, these provisions creates a "creditor" interest in the state. *See Carden v. Astrue*, 2008 WL 867942, *4 (S.D. W.Va. 2008) (finding that West Virginia had not indicated that the state was a beneficiary). The state's interest is only payable if there are funds left in the trust when Claimant dies, after administrative costs are paid. If nothing is left, nothing is owed the state(s). As in *Carden*, no Georgia statute or caselaw indicates that the state should be a residual beneficiary rather than a creditor.

CONCLUSION

For the reasons stated above, this trust is countable as a resource available to Claimant under ordinary resource rules because it is not irrevocable under Georgia law. Also, the guidance stated in POMS SI ATL 01120.201 remains in force with regard to Georgia trusts.

Sincerely,
Mary A. S~
Regional Chief Counsel
Jerome M. A~
Assistant Regional Counsel

4.9 HAWAII

A. PS 10-007 Hawaii State Law on Empty Trusts

DATE: August 5, 2009

1. SYLLABUS

This opinion examines whether or not the trust in question (established in 1996) is considered irrevocable under Georgia law. A trust is a countable resource for SSI purposes if an individual has legal authority to revoke the trust and then use the funds to meet his/her food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance. The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or State law. In this case, the trust identifies the claimant's "heirs" as the residual beneficiary. Under Georgia law, a trust must specify a particular person or entity as the residual beneficiary. The reference to "heirs" in this trust is too indefinite to create a residual interest under Georgia law thus making the trust revocable and a countable resource for SSI purposes.

2. OPINION

OVERVIEW

You asked whether an unfunded, or "empty," Hawaii trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under Hawaii law.

BACKGROUND

In general, when determining an individual's eligibility for SSI, all assets in a revocable trust established by the individual, as well as those assets in an irrevocable trust which could be paid to the individual, will be considered a resource. *See* Act § 1613, 42 U.S.C. § 1382b(e)(3); POMS SI 01120.201(D). Assets in a trust may be excluded as a resource, however, if a statutory exception applies. Section 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A), provides for one such exception, commonly known as the Medicaid payback trust or "special needs trust." To qualify for the exception, a trust must:

1. be established with the property of an individual under age 65 who is disabled;

2. be established for the benefit of such individual by a parent, grandparent, legal guardian, or court; and

3. provide that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

Act § 1917(d)(4)(A); POMS SI 01120.203(B)(1).

Where a parent or grandparent creates such a trust, the parent or grandparent must either (1) create a "seed" trust, i.e., establish a trust using a nominal amount of his or her own funds, after which the disabled individual may transfer his or her own funds to the trust, or (2) create an empty or dry trust, if state law permits, into which the competent disabled adult's funds can be placed. POMS SI 01120.203(B)(1)(f).

Thus, if Hawaii law recognizes the validity of an empty trust, trusts created in this manner may be eligible for the Medicaid payback trust exception. Conversely, if Hawaii law does not recognize the validity of an empty trust, such trusts will not qualify for the exception.

DISCUSSION

Hawaii has not directly addressed whether it would recognize an empty Section 1917(d)(4)(A) trust. Hawaii recognizes special needs trusts and Section 1917(d)(4)(A) trusts, but does not specify whether such trusts may be unfunded. *See, e.g.,* Haw. Rev. Stat. § 490:9-109(d)(16) (acknowledging Section 1917(d)(4)(A) trusts); *Nacino v. Chandler*, 71 P.3d 424, 427 n.5 (Haw. Ct. App. 2002) (discussing creation of exemption under 42 U.S.C. § 1396p(d)(4)(A); *Lee v. Transamerica Occidental Life Ins. Co.,* 2006 WL 906135, at *1 (Haw. Ct. App. 2006) (analyzing a "special needs trust").

As a general rule, however, Hawaii does not recognize empty trusts as valid. Longstanding Hawaii case law requires trust property for the creation of a trust. *See Kinney v. Robinson*, 30 Haw. 246, 253-54 (Haw. 1927) (listing "a definite subject," or property, as an essential element of a valid trust). In addition, a trust must use language specific enough to adequately identify trust property. *See id.* (providing that to constitute a valid trust, the trust terms, including the "subject-matter" of the trust (trust property), must be "reasonably certain"); *Black's Law Dictionary* 870 (8th ed. 2004) (defining "subject-matter" as the "corpus," i.e., trust property).

Recent case law reiterates the fundamental requirement that a trust must contain property in order to be valid. *See Trust Created Under Will of Damon*, 869 P.2d 1339, 1344 n.4 (Haw. 1994) (listing "a definite subject" as an essential element of a valid trust). Although Hawaii has not enacted a statute addressing the issue, the case law indicates that an empty trust would not be considered valid under Hawaii law.

CONCLUSION

Hawaii does not recognize empty trusts as valid. Consequently, such trusts would not qualify for the exception to counting set forth in Section 1917(d)(4)(A).

4.10 Illinois

A. PS 09-104 SSI - Request for Six State Legal Opinion on Spendthrift Clauses - REPL Your Reference: S2D5G6, SI 2-1-3 (Spendthrift) Our Reference: 08-0141

DATE: May 8, 2009

1. SYLLABUS

This opinion addresses whether spendthrift clauses are recognized in the six states that compose the Chicago region and whether these states allow for a settler to establish a spendthrift trust for his or her own benefit. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. All states in the Chicago region recognize a spendthrift provision in a third-party trust. Likewise, all states in the Chicago region recognize that a beneficial interest in a self-settled discretionary trust would typically not be a countable resource as it would have little, if any, market value. In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursements, regardless of whether the trust has a spendthrift provision. Due to a lack of precedent, self-settled trusts with a spendthrift provision in Indiana or Ohio should be submitted to the Regional Chief Counsel's office for evaluation.

2. OPINION

You have asked whether spendthrift clauses are recognized in the six states in the Chicago Region and, if so, whether these states allow for a settlor to establish a spendthrift trust for his or her own benefit. Each of the six states in Region V recognizes spendthrift clauses as valid when they are established by a settlor for a third party. Therefore, the beneficiary of a third party trust could not sell the beneficial interest in that trust if it has a spendthrift provision. The validity and effect of a spendthrift provision in a self-settled trust varies somewhat from state to state. However, in all six states, the settlor's interest in a discretionary trust would not be a countable resource, regardless of any spendthrift provision, because in the laws of those states, even if the settlor can sell the interest, it would have no significant market value, since the transferee could not demand any payments. In Illinois, Michigan, Minnesota and Wisconsin, the settlor could sell the right to receive future mandatory disbursements, even if the trust includes a spendthrift clause, and the current market value of those disbursements would be a resource. In Indiana and Ohio, it appears that a spendthrift clause may effectively prevent a settlor from selling future mandatory disbursements such that the right to those future disbursements would not be a resource. However, since the law has not yet been interpreted clearly, we recommend that you send any self-settled trusts with mandatory disbursements and spendthrift provisions to our office for evaluation if they are governed by Indiana or Ohio law.

DISCUSSION

A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. POMS SI 01120.200(B)(16). If a state recognizes the validity of a spendthrift clause, the beneficial interest in the trust, or the right to payments as a beneficiary, is not a countable resource because the beneficiary may not sell his or her beneficial

interest in the trust. 1_/ *Id.* In the Chicago Region, all of the states recognize the validity of a spendthrift clause where the trust is established by a settlor for a third party.

However, if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the spendthrift clause may be considered invalid. All of the states in the Chicago Region view such self-settled spendthrift trusts to be invalid with respect to creditors. However, in determining whether an interest in a trust is a resource, the focus is on whether the individual can sell his or her beneficial interest in the trust. The states vary with respect to whether a spendthrift clause would prevent a settlor from selling his or her beneficial interest in the trust. The majority of states in the region, namely Illinois, Michigan, Minnesota and Wisconsin, are likely to follow the Restatement (Third) of Trusts, which indicates that a spendthrift clause in a self-settled trust is invalid with respect to any interest retained by the settlor. RESTATEMENT (THIRD) OF TRUSTS § 58, cmt. e. Under the Restatement, the spendthrift clause would not prevent the settlor's interest from being reached by the creditors or from being sold. *Id.* However, the most a transferee could receive are the rights the settlor has under the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 60, cmts. b, f. Therefore, we would typically not consider a discretionary interest in a self-settled spendthrift trust to be a countable resource, since such an interest would have little, if any, market value. However, the right to receive mandatory disbursements from such trusts would generally be considered a resource, since the spendthrift clause would not prevent the individual from selling the interest and that interest would generally have market value.

In contrast, Indiana and Ohio law could be read to view self-settled spendthrift clauses to be invalid only with respect to the rights of creditors. Therefore, a spendthrift clause governed by the laws of those states may effectively prevent a settlor from selling his or her interest in the trust. If that is the case, then the right to both mandatory and discretionary disbursements from such trusts may not be considered a resource for SSI purposes in those states. However, we have not encountered any cases actually interpreting these provisions to prevent a settlor from selling the right to mandatory disbursements from a trust. Therefore, we recommend that self-settled trusts with spendthrift provisions that are governed by the law of Indiana and Ohio be referred for an opinion at least where the settlor has a right to mandatory disbursements.

Illinois

In Illinois, a spendthrift clause in a trust established by a third party will effectively prevent the beneficiary from selling his or her beneficial interest. 2_/ *See Danning v. Lederer*, 232 F.2d 610, 612 (7th Cir. 1956); *Hopkinson v. Swaim*, 119 N.E. 985, 990 (Ill. 1918). However, a settlor may not establish a spendthrift trust for his or her own benefit. In re *Marriage of Chapman*, 297 Ill. App. 3d 611 (Ill. App. 1998). Therefore, in a self-settled trust, the settlor could sell the right to mandatory future disbursements for their current market value, despite any spendthrift provision. However, the settlor's beneficial interest in a discretionary trust would not be a countable resource, even though the spendthrift clause would not prevent the settlor from selling the interest because the right to receive discretionary disbursements would have no significant market value. Although we were unable to find any case law which directly addressed this issue, we found that the Illinois courts have relied upon the Restatement (Third) of Trusts as persuasive authority in interpreting trusts. *See* In Re *Estate of Feinberg*, 891 N.E.2d 549 (Ill. App. 2008) (generally recognizing Restatement (Third) of Trusts as persuasive authority). Therefore, we believe that Illinois would adopt the Restatement (Third) approach --that a transferee would receive only the rights the settlor had under the trust, i.e., to receive mandatory or discretionary disbursements when the trust is self-settled and contains a spendthrift provision. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e. Therefore, the right to receive discretionary disbursements would not be considered a countable resource, as it is unlikely the right to discretionary disbursements would have any significant market value.

Indiana

Indiana law recognizes spendthrift trusts as generally valid against both voluntary and involuntary transfers. Ind. Code § 30-4-3-2(a). When the settlor is also the beneficiary of the trust, Indiana law recognizes an exception to this rule with respect to the rights of creditors. Ind. Code § 30-4-3-2; *see also Matter of Cook*, 43 B.R. 996 (N.D. Ind. 1984) (recognizing that if a settlor is also the beneficiary of the spendthrift trust, creditors may reach the trust corpus). Because Indiana law expressly addresses only the validity of a spendthrift clause in a self-settled trust with regard to creditors' rights, it is possible that Indiana would recognize a spendthrift provision to be valid to the extent that it would prevent the settlor from selling his beneficial interest in a self-settled trust. *See* POMS PS 01825.01 (PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~) (concluding that even if the settlor could sell the interest, it would have no value because the trust was discretionary). However, the comments to the section state that it follows the rule in the Restatement (Second) of Trusts section 156, which states that a self-settled spendthrift clause is ineffective against both creditors and transferees. *See* Ind. Code § 30-4-3-2(b); *see also* RESTATEMENT (SECOND) OF TRUSTS § 156(2). If you encounter a self-settled trust governed by Indiana law with a spendthrift provision and

with the right to future mandatory disbursements, we recommend that you refer the case to our office for a legal opinion, since the law is not clear at this time.

Michigan

Michigan recognizes the validity of spendthrift trusts, in general, by statute and common law. Mich. Comp. Laws Ann. § 700.2902(2); Matter of *Estate of Edgar*, 389 N.W.2d 696 (Mich. 1986). However, under Michigan law, a person cannot create a true spendthrift trust for himself. *See* In re *Hertsberg Intervivos Trust*, 578 N.W.2d 289, 291 (Mich. 1998) (adopting RESTATEMENT (SECOND) OF TRUSTS § 156). In *Hertsberg Intervivos Trust*, the Michigan Supreme Court adopted Restatement (Second) of Trusts section 156, which states that a creditor or transferee could reach the entire amount of the trust that the trustee could, in his or her discretion, pay to or for the benefit of the settlor of the trust. *See id.* at 291. However, that case involved only the rights of a creditor, and we have previously advised that we think it likely that Michigan would adopt the Restatement (Third) approach--that a transferee, unlike a creditor, would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* POMS PS 01825.025 (PS 09-062 Michigan - SSI-Review of the Annuity and Special Needs Trust for Jeri L. K~) (citing RESTATEMENT (THIRD) OF TRUSTS § 60 and cmts. e, f (2003)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource despite any spendthrift clause; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the right to discretionary disbursements would have any market value.

Minnesota

Minnesota recognizes the validity of spendthrift trusts though common law; there is no Minnesota statute which expressly deals with spendthrift provisions. *See Morrison v. Doyle*, 582 N.W.2d 237, 240 (Minn. 1998); In re *Mack*, 269 B.R. 392 (D. Minn. 2001). Under Minnesota law, cases involving enforcement of spendthrift provisions have always involved protection of the interest of a beneficiary who is not the settlor of the trust; therefore, in Minnesota, it appears that a spendthrift clause in a self-settled trust would likely be considered void and unenforceable. In re *Mack*, 269 B.R. at 399 (citing *Simmonds v. Larison*, (B.A.P. 8th Cir. 1999)). In reaching its holding in *Mack*, the court looked to the Restatement (Second) of Trusts § 156. 3_/ While there is no Minnesota case specifically adopting the Restatement (Third) of Trusts on this issue, we believe it is likely that a Minnesota court would follow the Restatement (Third) approach in determining the extent to which the settlor's interest can be transferred. *See Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571 (Minn. Ct. App. 2003) (relying upon Restatement (Third) of Trusts in determining the role of a trustee); compare In re *Syverson Trust*, 2003 WL 22016795 (Minn. Ct. App. 2003) (unpublished) (declining to adopt the Restatement (Third) of Trusts where doing so would change existing law in Minnesota, noting such change was reserved for the Minnesota Supreme Court or the legislature). Therefore, the settlor's right to mandatory disbursements would be considered a resource; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the discretionary disbursements would have any significant market value. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e.

Ohio

Ohio recognizes the validity of a spendthrift clause through statute and case law. *See* Ohio Rev. Code Ann. § 5805.01; *see also Scott v. Bank One Trust*, 577 N.E.2d 1077 (Ohio 1991). Ohio adopted the Uniform Trust Code in 2007, and the controlling provisions are applicable to spendthrift trusts created before and after 2007. *See* Ohio Rev. Code Ann. §§ 5805.01(A), 5805.06(A)(2), and 5811.03(A)(1). Ohio law recognizes the validity of spendthrift provisions in general, and states that "[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter and in section 5810.04 of the Revised Code, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary." Ohio Rev. Code Ann. § 5801.01(C). This suggests that, even in a self-settled trust, a spendthrift provision will prevent the settler from transferring his or her interest in the trust. The only exceptions to the effectiveness of a spendthrift provision relate to when a creditor or assignee of the beneficiary can reach an interest in or a distribution from the trust. Ohio law further states that whether or not a trust contains a spendthrift provision, the settlor's creditor or assignee may reach the maximum amount that can be distributed to or for the settlor's benefit. *See* Ohio Rev. Code Ann. §§ 5805.06(A)(2), 5811.03(A)(1). Indeed, the official comment notes, "[W]hether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created." *Id.* Because Ohio law allows such liberal access to the trust assets by "assignees," section 5805.06 could be read to suggest that the beneficiary of a self-settled trust could sell his beneficial interest in the trust and the purchaser could obtain the maximum amount that the

trustee could distribute to or for the settlor's benefit. However, the Office of General Counsel has determined that the better reading of this provision presumes that only an assignee who is a creditor, not a purchaser for value, could reach the maximum amount the trustee could distribute for the settlor's benefit. *See* POMS 01825.039 Ohio (PS 08-159 SSI Review of the Trust and Annuity for Dustin J. E~). Therefore, it appears that spendthrift provisions in self-settled trusts governed by Ohio law may be fully valid with respect to the limitation on selling the settlor's beneficial interest in the trust. This interpretation of Ohio law would not have a significant impact where a trust is wholly discretionary. Even if the settlor could sell that interest, it would have no significant value. However, this interpretation would also mean that even the right to future mandatory disbursements could not be sold and therefore would not be a resource. This would be a significant departure from the Restatement (Third) of Trusts, as well as the Restatement (Second) of Trusts, both of which state that a spendthrift provision restraining the voluntary and involuntary alienation of the settlor's interest in the trust is invalid. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(1), RESTATEMENT (THIRD) OF TRUSTS § 58(2). In fact, Ohio adopted the comment to Uniform Trust Code provision, which specifically cites to the Restatement (Second) of Trusts § 58(2) and states that "[a] spendthrift provision is ineffective against a beneficial interest retained by the settler." Ohio Rev. Code Ann. § 5805.01, cmt.; Unif. Trust Code § 502, cmt. It would seem odd, therefore, if the Ohio code (and the uniform code) intended to deviate from the Restatement in this important way. Since the law is not entirely clear, and since there are not yet any cases interpreting the Ohio provisions, we recommend that you refer to our office any self-settled trust governed by Ohio with a spendthrift provision and provisions for mandatory disbursements.

Wisconsin

Wisconsin recognizes spendthrift trusts as valid and not subject to voluntary or involuntary alienation only where the beneficiary is a person other than the settlor. Wisc. Stat. Ann. § 701.06(1)-(2). Therefore, it appears that a spendthrift provision would not prevent a settlor from selling his beneficial interest in the trust when he is also the settlor of the trust. Wisc. Stat. Ann. § 701.06(1)-(2)._4 However, we believe that Wisconsin would likely follow the Restatement (Third) approach--that a transferee would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* In re *Walters Family Trust*, 685 N.W.2d 172 (Wis. Ct. App. 2004) (unpublished) (parties recognizing Restatement (Third) of Trusts as controlling law); *see also* POMS PS 01825.055 (PS 08-156 - Wisconsin - Review of the Trust for Brian G~) (citing to Restatement (Third) of Trusts as controlling authority in Wisconsin)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource; however, the right to discretionary disbursements would not be considered a resource, as it is unlikely the right would be of any significant market value.

CONCLUSION

In sum,

o All states in the Chicago region would recognize the validity of a spendthrift provision in a third party trust.

o In all states in the Chicago Region, the beneficial interest in a self-settled discretionary trust would not be a countable resource because even if the individual can sell the interest, it would have no significant market value.

o In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursement, regardless of whether the trust has a spendthrift provision.

o Trusts governed by Indiana or Ohio law should be referred for a legal opinion if the trust is self-settled and provides for mandatory disbursements and has a spendthrift clause.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Anne M~
Assistant Regional Counsel

/_1 The trust may still be a resource for other reasons.

/_2 In *Matter of Perkins*, 902 F.2d 1254 (7th Cir.1990), the Seventh Circuit Court of Appeals noted the following considerations in determining whether a trust under Illinois law qualifies as a spendthrift trust: "(1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust, and (3) whether the beneficiary has exclusive and effective dominion and control over

the trust corpus, distribution of the trust corpus and termination of the trust." *See*, e.g., In re *Silldorff*, 96 B.R. 859, 864 (C.D.Ill.1989). The degree of control which a beneficiary exercises over the trust corpus is the principal consideration under Illinois law.

/_3 This provision states:(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest. (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

/_4 Wisconsin law indicates that where a settlor is a beneficiary of a trust regardless of whether it has a spendthrift provision, a creditor may, at the discretion of the court, receive payments from the income or principal of the trust to satisfy a judgment. Wisc. Stat. Ann. 701.06(6)(a).

B. PS 08-080 SSI - Illinois: Review of the Life Insurance-Funded Burial Contract of Marilyn M~, ~ -Reply Your Reference: S2D5G6 (M~, Marilyn) Our Reference: 08-082-NC

DATE: March 14, 2008

1. SYLLABUS

This opinion evaluates a life insurance funded burial contract to determine if it is a countable resource for SSI purposes. The contract was signed in January, 2008 and the SSI beneficiary attempted to irrevocably assign the life insurance policy to fund the contract. Irrevocable assignment of a life insurance policy to fund a burial contract is permissible under Illinois state law, however, certain conditions must be met. One such condition is that the burial contract must specify whether the price of merchandise and services is guaranteed. In this case, the contract itself fails to meet that criteria and several others dictated by Illinois law. Failure to meet the required criteria means that the burial contract in this case may be void and unenforceable and, in any case, the life insurance policy has not been irrevocably assigned. Since the beneficiary can revoke the assignment and access the cash surrender value of the life insurance policy it is considered a resource for SSI purposes.

2. OPINION

This opinion is in reply to your February 1, 2008, inquiry concerning whether claimant Marilyn M~'s life insurance funded "Funeral Purchase Contract" constitutes a resource for purposes of SSI eligibility. For the following reasons, we conclude that the policy designed to fund the contract constitutes a resource.

Background

Ms. M~ signed a document, apparently in January 2008, entitled "Funeral Purchase Contract." The document outlines funeral services for Ms. M~ in the amount of $8,734.25, to be arranged by Solon Baker & Telford Funeral Home ("Solon"), of Streator, Illinois. Ms. M~ funded the Funeral Purchase Contract with a life insurance policy that she purchased from Great Western Insurance Company ("Great Western") for $8,734.25. The face value of the policy is $9,098, and the cash surrender value is currently $3,812.52, and increases annually. Ms. M~ had the right to cancel the policy within 30 days after it was issued on January 22, 2008. The policy states that if there has been an irrevocable assignment of the policy, the cash value cannot be paid out. Ms. M~ attempted to irrevocably assign the policy to Solon, which agreed to transfer ownership immediately to the Great Western Funeral Trust.

DISCUSSION

A life insurance policy funded burial contract involves an individual purchasing a life insurance policy in her name and then assigning, revocably or irrevocably, either the proceeds or ownership of the policy to a third party, generally a funeral provider. The purpose of the assignment is to fund a pre-arranged burial contract. *See* POMS § SI 01130.425 (A)(1). We assume in these cases that the burial agreement itself is not a resource since it is tied to an insurance policy on the life of that individual. *See* POMS SI 01130.425(B)(1). The policy and its value, though, may be a resource. An asset is a resource for purposes of SSI eligibility if the claimant owns it and can convert it to cash to be used for his or her support and maintenance. *See* 20 C.F.R. § 416.1201(a). Thus, a life insurance policy may be a resource if a claimant can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. § 416.1230.

Here, the policy was a resource for the first 30 days after it was issued because Ms. M~ had the absolute right to cancel the policy and recover the $8,735 premium paid during that time period. Further, the policy would continue to be a resource after the first 30 days, unless the policy was validly irrevocably assigned to the funeral home that put it into the trust. *See* POMS SI 01130.425(E); POMS SI 01120.201(H)(1) (statutory trust-counting provision would not apply if funeral provider placed funds for funeral in trust); POMS SI 01120.200(D) (trust established by a third party not a resource if individual cannot terminate the trust and recover the assets; directs trustee to provide for support and maintenance; or sells the right to mandatory future disbursements from the trust).

Ms. M~ attempted to irrevocably assign to Solon ownership and all benefits and proceeds of the policy used to fund her funeral services in exchange for Solon's promise to deliver funeral services. Further, such assignments are in accordance with Illinois law, and, indeed, when made irrevocable, protect the benefits and proceeds assigned from being deemed resources for purposes of SSI eligibility: "Nothing shall prohibit the purchaser [of a life insurance funded pre-need contract] from irrevocably assigning ownership of the policy or annuity used to fund a guaranteed price pre-need contract to a person or trust for the purpose of obtaining a favorable consideration for . . . Supplemental Security Income . . . . The seller or contract provider may be named a nominal owner of the life insurance policy only for such time as it takes to immediately transfer the policy to trust." 225 ILCS 45/2a(c). Nevertheless, while sanctioning life insurance funded pre-need burial contracts, the Illinois "Funeral or Burial Funds Act" ("the Act") considers such contracts "unlawful" and forbids a seller from "accept[ing] sales proceeds" where a pre-need contract fails to meet each of several requirements. 225 ILCS 45/1a-1. Here, the pre-need contract does not meet those requirements and is revocable and invalid. Therefore, the assignment of the policy to fund the agreement is revocable and invalid, and Ms. M~ can access the cash surrender value of the policy.

A. The Pre-Need Contract Is Not Price-Guaranteed, Making it Impossible

Under Illinois Law to Irrevocably Assign the Policy Used to Fund It and, Consequently, Rendering the Assignment of the Policy Revocable.

Ms. M~'s Funeral Purchase Contract-which, after Agency follow-up with Solon, appears to be the only pre-needs contract-related document among the parties-does not meet most of the requirements set forth in the Act. Among other things, and perhaps most importantly, the purchase contract does not specify whether the "price of the merchandise and services is guaranteed or not guaranteed as to price." 225 ILCS 45/1a-1(3). Also, whether the price is guaranteed or not, a pre-needs contract must include one of two different "12 point bold type" clauses that elaborate additional conditions depending on whether the price is guaranteed or not. *See* 225 ILCS 45/1a-1(3). Ms. M~'s purchase contract contains neither clause, and without this necessary language the contract cannot be considered price-guaranteed. Thus, because under Illinois law only a policy used to "fund a guaranteed price pre-need contract" may be irrevocably assigned, Ms. M~ could not have validly irrevocably assigned the policy at stake here. Further, where a pre-needs contract is not price-guaranteed, and therefore revocable, the assignment of the policy used to fund the contract must also be revocable. *See* 225 ILCS 45/2a(c), (d). Accordingly, Ms. M~ would be entitled to the policy's cash surrender value.

B. The Pre-Need Contract May Be Void and Unenforceable.

When a statute declares that it shall be unlawful to perform an act, and imposes a penalty for its violation, contracts for the performance of such acts are generally void and incapable of enforcement. *See Broverman v. City of Taylorville*, 381 N.E.2d 373, 376-77 (Ill. App. Ct. 1978); *but see, Dixon v. Mercury Finance Company of Wisconsin*, 694 N.E.2d 693, 697 (Ill. App. Ct. 1998) (refusing to invalidate a contract where the Sales Finance Agency Act did "not allow a plaintiff to declare a contract void; it only allow[ed] a plaintiff to recover damages for losses incurred due to a violation of the Act."). Here, the pre-need agreement may be void and unenforceable because it unlawfully failed to address several key aspects, including, as explained above, specifying whether the price was guaranteed and whether the agreement was revocable. Given the possibly unlawful and unenforceable nature of the policy, Ms. M~ would likely be entitled to restitution. *See* RESTATEMENT (SECOND) CONTRACTS § 198, CMT. B (1981) (noting that restitution applies where the public policy violated was intended for the claimant's protection). Therefore, she could recover the insurance policy she assigned to fund the agreement.

In addition, it is not clear whether Ms. M~ was informed of her rights under the agreement and given a copy of the "Illinois Consumers Guide, Pre-Need Funeral and Burial Purchases"; there is no copy of this, or a similar booklet, in the file, and the contract does not contain a required statement "confirming that the seller has explained the terms of the contract prior to the purchaser signing." 225 ILCS 45/1a-1(e). Among other things, the booklet spells out that Ms. M~ may seek restitution through the Illinois Office of the Comptroller and the Attorney General's office if she believes that she has been treated unfairly. *See* Ill. Admin. Code, Title 38, § 610, Exh. A (2008).

CONCLUSION

In sum, the life insurance policy was a resource for the first 30 days after it was issued because Ms. M~ could cancel the policy and recover the $8,734.25 premium paid. After that time, the policy was still a resource because the pre-need funeral contract was revocable and invalid. Therefore, the assignment of the insurance policy to fund the agreement is revocable and invalid, entitling Ms. M~ to policy's cash surrender value (currently $3,812.52). The $1500 burial funds exclusion, however, may be applied. *See* POMS SI 01130.412(C)(1)(b).

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Kyle K~
Assistant Regional Counsel

C. PS 08-061 SSI-Illinois-Review of Annuity Payments for Krysten M~, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 IL (M~) Our Ref: 07-0337-nc

DATE: February 11, 2008

1. SYLLABUS

This opinion addresses whether or not the periodic payments made to the special needs trust in question are income for SSI purposes. A legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. If the assignment is revocable, then the payments are income to the individual legally entitled to receive them. In this case, while the SSI recipient is a minor, the payments were effectively irrevocably assigned to the trust, and thus they are not income for SSI purposes. However, once the recipient reached the age of majority in Illinois (18 years old), the recipient was entitled to directly receive the periodic payments. The entitlement to direct payments means the assignment is revocable and thus the payments are considered income to the recipient upon reaching the age of majority.

2. OPINION

You asked us whether certain periodic payments made to the Krysten M~ Supplemental Needs Trust are income for SSI purposes. You indicated that you have already determined that the trust is not a resource. We conclude that the annuity payments should not be considered income prior to the date that Krysten became an adult, January 12, 2007. However, beginning January 2007, when Krysten became an adult, the payments should be considered income.

Background

On October 24, 1997, when Krysten was a minor (Krysten is currently 19 years old, having been born in January 1989), Magna B~, then the guardian of Krysten's estate, entered into a personal injury settlement agreement that provided for monthly payments of $1,500 to Magna B~, as guardian. The payments began in November 1997, and will increase to $2,000 per month in 2011, and they continue for Krysten's lifetime. In addition, the payments are guaranteed through 2047, even if Krysten were to die. The guaranteed payments would go to Krysten's parents or as designated by Magna B~, as guardian. The settlement agreement provides that payments cannot be sold, anticipated or assigned.

Also on October 24, 1997, the Krysten M~ Special Needs Trust (hereinafter trust) was established by Krysten's parents and Magna B~, as guardian. The trust states that the trustee (Magna B~) shall receive monthly payments in accordance with the attached schedule of payments commencing in November 1997 and lasting for Krysten's lifetime.

The trust further states that it was established pursuant to a state probate court order, and, indeed, the record contains a probate court order dated October 24, 1997, that approves the creation of a supplemental needs trust as set forth in a petition filed by Krysten's parents and Magna B~, as guardian, and finds that the trust is fair, equitable and in the best interests of Krysten. The petition states that the purpose of the trust is to provide a system for the management of the settlement funds, and a copy of the trust was attached as an exhibit. In addition, at this same time, Magna B~, as guardian, also filed a petition seeking court approval for distribution of Krysten's estate that stated, in part, that the settlement funds and periodic payments would be deposited into the trust. The court also approved this petition.

At some point thereafter, Magna B~ was acquired by Regions B~, and Regions B~ assumed the duties of Krysten's guardian and trustee.

On January 12, 2007, Krysten turned 18 years old.

The monthly periodic payments were originally and continue to be made payable to Magna B~, as guardian. The payments are mailed to the attention of one of the trust officers at Regions B~, and then deposited into Krysten's trust account at Regions B~.

There has been no court activity at any time since the October 1997 order approving the creation of the trust.

DISCUSSION

As you know, under the resource rules, a legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. POMS SI 01120.200(G)(1)(d). If the assignment is revocable, then it is income to the individual legally entitled to receive it. Because the treatment of the periodic payments differs depending on whether Krysten was a minor or an adult, we address the revocability question in two sections.

Treatment of the Periodic Payments During the Time that Krysten Was a Minor

Here, the probate court order approved the creation of a special needs trust as set forth in and attached to the petition filed by Magna B~, as guardian, and Krysten's parents. *See* 755 ILL. COMP. STAT. 5/11-13(b) (West 2008) (court, upon petition of guardian, may permit guardian to create irrevocable trust for minor). And, the trust states that the trustee (Magna B~) shall receive monthly payments in accordance with an attached schedule of payments commencing in November 1997 and lasting for Krysten's lifetime. Moreover, in the petition seeking approval for distribution of Krysten's estate, which was approved by the court, Magna B~, as guardian, stated that the periodic payments would be deposited into the trust. Thus, although the settlement agreement provides that the payments go to Magna B~, as guardian, and that the payments cannot be sold, anticipated or assigned, the probate court order would require that Magna B~, as guardian, turn over the payments to Magna B~, as trustee. *See* 755 ILL. COMP. STAT. 5/11-13(b) (guardian shall apply income and principal of minor's estate for any purpose which the court deems to be in the best interests of the ward.). As such, Magna B~ (or Regions B~), as guardians of Krysten's estate, would be blocked from using the periodic payments for the support and maintenance of Krysten. *See* POMS SI CHI01140.215. And, it follows that any change in this court-ordered disposition of the periodic payments would also require a showing that such a change was in the best interests of Krysten. 755 ILL. COMP. STAT. 5/11-13(b). This, however, would be unlikely since we are not aware of any change of circumstances since the probate court order was entered that would cause the court to reconsider its finding that directing the periodic payments to the trust was in Krysten's best interests. Therefore, during the time that Magna B~, or its successor, Regions B~, was obligated by the probate court order to deposit the periodic payments into the trust (which, as we discuss below, was only during Krysten's minority), the payments were effectively irrevocably assigned to the trust, and thus were not income under POMS SI 01120.200(G)(1)(d). *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, Review of the Marital Settlement Agreement for Patricia J. H~ and Floyd A. H~ and the Patricia J. H~ Special Needs Trust, at 3-4 (Dec. 4, 2003).

Treatment of the Periodic Payments After Krysten Became an Adult

In Illinois, upon reaching the age of majority (18 years old), a guardianship established during minority is automatically terminated, without the need for court involvement. *See* In re Estate of W~, 673 N.E.2d 272, 277 (1996) ("The Probate Act of 1975 does not provide for the automatic termination of a guardianship for a disabled ward as in the case of a minor ward who reaches the age of majority (*see* 755 ILCS 5/11-14.1 (West 1992))." (emphasis in original)); 755 ILL. COMP. STAT. 5/11-14.1 (West 2008) ("Upon the minor reaching the age of majority, the letters of office shall be revoked . . . and the guardianship over that minor shall be terminated."). Thus, as of Krysten's eighteenth birthday, in January 2007, her guardianship terminated. As such, she was then entitled to receive the periodic payments directly. In re Estate of W~, 673 N.E.2d at 277 (Upon restoration of a ward, the ward has the right to be put in possession of his or her property, "and to ask the court to order the guardian to deliver to the ward all of the ward's money and property that the guardian has, or the money and property to which the ward is entitled."). Thus, even though Regions B~ continued to receive and deposit the periodic payments into Krysten's trust account, because Krysten, as of the time she became an adult, could have requested that the payments be turned over to her directly, the assignment was revocable and the payments were income to her as of January 12, 2007.

Finally, we note that the settlement agreement provided that the periodic payments were guaranteed through 2047, even if Krysten should die sooner, and that Magna B~, as guardian, could decide who would receive these guaranteed payments. After

Krysten turned 18, this right to designate who would receive the guaranteed payments, like the right to receive the periodic payments while she was alive, would also belong to her. It is possible that this right has some market value; however, given Krysten's young age and without any indication that she has a reduced life span due to her impairment (double leg amputee), the value of this right would likely be insignificant, and thus further development of this issue is probably unnecessary.

CONCLUSION

For the reasons discussed above, we conclude that the periodic payments are income to Krysten as of her eighteenth birthday, in January 2007, but not before.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Todd D~
Assistant Regional Counsel

D. PS 08-054 SSI-Illinois-Review of the Ani M. H~ OBRA Pay Back Trust, SSN ~ - REPLY Your Reference: S2D5G6, SI 2-1-3 IL (H~) Our Reference: 08-028

DATE: January 28, 2008

1. SYLLABUS

This opinion evaluates a trust established for a disabled SSI beneficiary. The trust is intended to meet the requirements for the Medicaid trust exception. It was established for the benefit of the SSI beneficiary with the assets of the beneficiary's parents and subsequently funded with the beneficiary's assets. While the trust meets the first two requirements under the Medicaid trust exception, it does not meet the third requirement pertaining to Medicaid reimbursement upon death. The terms of the trust state that the beneficiary's home state of Illinois must be reimbursed for Medicaid expenditures, but do not require reimbursement to other states. Instead, the terms establish a complicated process of reimbursement for other states that may not ultimately result in repayment to those states. Specifically, the two sections of the trust require other states to respond to one of the first two requests within a specified timeframe or the remainder of the trust will be distributed to the beneficiary or their heirs-at-law. Since the trust does not comport to the requirements of the Medicaid trust exception, it is determined to be a countable resource.

2. OPINION

You have asked whether the trust established for the benefit of Ani M. H~ is a countable resource for purposes of determining Ani's eligibility for Supplemental Security Income (SSI). For the reasons explained below, we conclude that the portion of the trust attributable to Ani's contribution to the trust should be considered a countable resource when determining Ani's eligibility for SSI.

BACKGROUND

The Ani M. H~ OBRA Pay Back Trust (the trust) was established for the benefit of Ani, who is disabled. Ani's parents established the trust with a gift of $10.00, but we assume that the rest of the trust was funded with Ani's assets. The stated purpose of the trust is to maintain Ani's qualifications for all applicable government benefits and to enable Ani to lead as normal, comfortable, and fulfilling life as possible. *See* Trust, Article I, section 1.2.

Distribution of the income and principal of the trust is made by the Trustees, David and Shirley H~. The Trustees are to distribute the income and principal for Ani's benefit, but shall make no distributions which could result in the disqualification of Ani receiving state provided funds or charity provided funds. *See* Trust, Article II, section 2.1. The Trustees are authorized to reimburse the Grantor or a family member for any and all federal, state, and municipal income taxes which the Grantor or such family member may be required to pay for taxable income allocable to Ani which is taxable to the Grantor or a family member. *See* Trust, Article II, section 2.2. Ani may, upon her death, appoint all or any part of the trust estate for the benefit of any one or more persons other than herself, her estate, her creditors or the creditors of her estate, subject to sections 3.1 and 3.2. *See* Trust, Article II, section 2.3.

The Trust specifies that it may terminate: upon Ani's death; in the event that Ani no longer qualifies as a disabled person; or in the event that the relevant statutes authorizing the execution of the trust are revoked and such revocation is applicable to the trust. *See* Trust Article 3, section 3.4. Upon termination of the trust, the Trustee shall pay: the Illinois Department of Healthcare and Family Services any amounts due and owing; reasonable fees for the administration of the Beneficiary's guardianship, trust, or probate estate; and all taxes due from the trust to the State or Federal government. *See* Trust, Article III, Section 3.1. Section 3.2 includes a requirement that the Trustee obtain an accounting from any and all appropriate state agencies of payments made under public benefits programs on behalf of the Beneficiary during her lifetime. *See* Trust, Article III, Section 3.2. The Trustee is directed to send in writing by certified mail notification at any state agency of Ani's death and subsequent good faith attempts to contact the agencies. If the agencies respond, the Trustee shall pay them any reimbursement owed. However, if the Trustee does not receive a response after two attempts to contact the agency over one year, the Trustee shall send a final notice to the agency and shall disburse the remainder of the trust to the person(s) appointed under Section 2.3 or to Ani or her heirs-at-law within 30 days. *See* Trust, Article III, Section 3.3, 3.4.

The Trust is described as "irrevocable" and is intended to be irrevocable pursuant to SI-01120.200.D.2 of the POMS. *See* Trust, Article V, section 5.1.

DISCUSSION

Pursuant to POMS SI 001120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual, unless one of the exceptions applies in POMS SI 01120.203 (listing Medicaid trust exceptions for individuals).

Although the trust purports to fall under the Medicaid payback trust exception, the trust does not meet all of the requirements to qualify for a Medicaid payback trust exception. The Medicaid payback trust exception for individual trusts applies where the trust is: (1) established with assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. 42 U.S.C.§ 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

While the trust meets the first two requirements of the Medicaid payback trust exception, it fails to meet the third requirement, namely that the state be reimbursed for Medicaid payments made for Ani's benefit during her lifetime. The statute provides that a trust is excepted only "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State [Medicaid] plan . . . ." 42 U.S.C. § 1396p(d)(4)(A). POMS SI 01120.203 (B)(1)(f) explains that, "[t]o qualify for the special-needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State 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. This State must be listed as the first payee and have priority over payment of other debts and administrative expenses," subject to specific exceptions. The POMS directs that the trust at issue "must contain language substantially similar to" the above-quoted language. POMS SI 001120.203(B)(1)(f).

The Trust in this case does not identify the state as the primary beneficiary and requires only that the Illinois Department of Healthcare and Family Services be reimbursed for Medicaid expenses made for Ani's benefit during her lifetime. The trust does not require the Trustee to reimburse any other states for Medicaid expenses they have made for Ani automatically. Instead, Sections 3.2 and 3.3 require a complicated process of reimbursement for any state other than the State of Illinois and allow for the possibility that those states could forfeit any amount owed if the state is dilatory in responding to the Trustee's two written notifications. *See* Trust, Article III, Section 3.2 and 3.3. Sections 3.2 and 3.3 require the State to respond within a specific timeframe to the Trustee's correspondence and, if no response is received, the Trustee is directed to distribute the remainder of the trust to Ani or her heirs-at-law. This provision is at odds with the Medicaid payback trust exception which requires states to be reimbursed for medical assistance paid on behalf of the individual under the State Medicaid plan. The Medicaid payback trust exception does not allow for the possibility of forfeiture of the state's entitlement to costs and, therefore, the trust does not qualify under the exception.

Moreover, it appears that the trust allows for other payments prior to the reimbursement to states other than Illinois which are not allowable expenses. This is inconsistent with the requirement that the State be listed as the first payee and have priority over payment of other debts and administrative expenses. *See* 42 U.S.C. 1396p(d)(4)(A); *see also* POMS SI 001120.203(B)(1)(f). While the trust provides for payment to the Illinois Department of Healthcare and Family Services any amounts due and owing upon termination of the trust, it then allows for reasonable fees to be paid for the administration and termination of the

Beneficiary's guardianship prior to reimbursement to any other state which may be entitled to reimbursement under the Medicaid payback exception. *See* Trust, Article III, Section 3.1. While taxes due from the trust and fees for trust administration may be paid prior to reimbursing the State Medicaid expenses, payments of debts to third parties prior to Medicaid reimbursement are specifically prohibited. POMS SI 001120.203(B)(3)(a), POMS SI 001120.203(B)(3)(b). As such, the allowance of payment owed for the administration and termination of the guardianship may not be made prior to reimbursement of the State.

Additionally, the trust's provision allowing for the Grantor or Ani's family members to be reimbursed for income taxes they are required to pay for taxable income allocable to Ani which is taxable to the Grantor or such family member is problematic because it could allow for reimbursement which could benefit someone other than Ani during Ani's lifetime. *See* Trust, Article II, Section 2.2. In order to qualify for the Medicaid payback exception, the trust must be established for the *sole benefit* of the disabled individual (during his or her lifetime). POMS SI 01120.203(B)(1)(a); POMS PS 01825.016 Illinois - Review of the Brian V~ Irrevocable OBRA Pay Back Trust Our Reference: 04S044 Your Reference: S2D5G6, S1 2-1-3 IL (V~). This provision is too broad as it allows for relief of another individual's tax burden which is not necessarily associated with the trust itself, even if the income is allocable to Ani.

Finally, you have questioned whether the trust would be a countable resource for SSI purposes under the regular resource rules. As we have previously advised, the rules governing when trust assets affect eligibility for Medicaid are different from SSI rules for determining when assets are countable resource. Even if the trust is amended such that it is consistent with the provisions of the Medicaid payback exception, it may still be a resource for SSI purposes. *See States Named as Beneficiary of a Trust*, OGC-V (D~) to Gloria P~, ARC-MOS (June 24, 1997). Assets are a resource for SSI purposes if the individual owns them and can convert them into cash to be used for her support and maintenance. *See* 20 C.F.R. § 416.1201(a). Trust assets are a resource if the individual can revoke the trust and use the assets to meet her needs for food, clothing and shelter, or if the individual can direct the use of the trust assets to be used for her support and maintenance. *See* POMS SI 01120.200(D). An individual's beneficial interest in a trust may also be a resource if the individual can sell that interest. *See Zebley Trust as an SSI Resource-Wisconsin, Bernard W~*; OGC V (M~) to M~, Acting ARC-POS (Feb. 23, 1993) at 5.

Here, we conclude that if the trust were amended so that it met the Medicaid payback exception, it would not be a countable resource for SSI purposes. Under the terms of the trust, Ani cannot direct the Trustees to use the assets in the trust for her support and maintenance. Rather, the trustees have sole discretion to disburse such funds and disbursements are to be made only for the beneficiary's supplemental care. *See* Trust, Article I, Section 1.2, and Article II, Section 2.1.

Ani also lacks the right to revoke the trust. The trust expressly provides that it is irrevocable pursuant to SI-01120.200.D.2 of the POMS. *See* Trust, Article V, section 5.1. And, indeed, there are remainder beneficiaries to the trust whose assent would be required in order to revoke the trust. *See* Trust, Article 3, Section 3.5.

We do not believe that the limited power of appointment afforded to Ani in sections 2.3 and 8.2 constitutes the ability to sell her interest in the trust. *See* Trust, Article II, section 2.3 and Article VIII, Section 8.2. Although these sections allow for the possibility that Ani could assign a future heir of her choosing the right to receive the proceeds of her trust in exchange for money in the present day, there is no real likelihood of that occurring because the trust is valued at only about $40,000.00, and the trust will likely be exhausted by obligations to reimburse the state, as Ani is only 19 years old.

CONCLUSION

For the above reasons, we conclude that any portion of the trust that was established with Ani's funds is a countable resource and does not satisfy the requirements of a Medicaid payback trust because it does not require reimbursement to all states for Medicaid expenses and it allows for payments relating to Ani's guardianship to be made prior to state reimbursement. For these reasons, we conclude that trust does not comply with the Medicaid trust payback exception and therefore is a resource. If the trust is amended to comply with the Medicaid trust payback exception, we conclude that it would not constitute a resource for SSI purposes.

E. PS 08-017 SSI- Illinois-Review of the Life Insurance Funded Burial Contract of Connie T~, ~-REPLY Your Ref: S2D5G6, SI 2-1-4 IL Our Ref: 07-0329-NC

DATE: October 31, 2007

1. SYLLABUS

In this case the assignment of a life insurance policy as collateral to a funeral home does not meet the requirement to be non-countable because there is no written contract. A written contract is a required element of a pre-need funeral arrangement under the Illinois Funeral or Burial Funds Act. In fact, the absence of a written contract in this situation is unlawful under Illinois law. Being unlawful at the outset the owner of the policy has a right to request that the funeral home surrender the life insurance policy to her and therefore, the policy is considered a countable resource.

2. OPINION

You asked us whether a life insurance policy originally owned by the claimant, but recently assigned as collateral to a funeral home, should be considered a resource. For the reasons discussed below, we conclude that it should.

BACKGROUND

In March 2007, the claimant, Connie T~, signed a document that purports to assign to Templeton Funeral Homes, Paris, IL, ("Templeton") an interest in Country insurance policy number ~. The document states that it "protects [Templeton] in case [Ms. T~ does] not live up to [her] obligations." The document also states that most rights under the policy are being assigned, including the right to collect the surrender value, the right to collect the proceeds when they become payable, and the right to borrow on the policy. The document adds that Templeton will not cash in the policy or borrow on it unless Ms. T~ is in "default," which is defined as occurring (1) when Ms. T~ fails to pay any obligations to Templeton as they become due, (2) when Ms. T~ files for bankruptcy, or (3) when Ms. T~ dies.

The Country insurance policy that was assigned listed Ms. T~ as both the owner and the insured. The policy apparently has a net value, as of May 9, 2007, of $3,486.65 (cash value plus paid-up additions minus a loan amount of $1,180.40).

In response to your concern about the absence of a contract with Templeton, an individual from the Field Office contacted Templeton, but was told that all they had in Ms. T~'s file was the assignment document and some personal identifying information.

DISCUSSION

It appears that Ms. T~ intended to enter into a prepaid burial contract with Templeton, which would be funded with her life insurance policy. *See* generally POMS SI 01130.420, 01130.425 (describing prepaid burial contracts and life insurance funded burial contracts). Unfortunately, although Ms. T~ assigned her life insurance policy as collateral for the arrangement, which is acceptable in Illinois, *see, e.g., Winstead v. Peoples Bank of Bloomington*, 493 N.E.2d 1183 (Ill. App. Ct. 1986), it does not appear that Ms. T~ ever entered into a contract for goods or services-at least not a written contract.

A written contract, however, is a required element of a pre-need funeral arrangement under the Illinois Funeral or Burial Funds Act, 225 ILL. COMP. STAT. ANN. § 45/1a-1(a)(3), (d) (West 2007). Indeed, the Act states that it "shall be unlawful . . . to accept sales proceeds . . . unless the seller enters into a [written] pre-need contract with the purchaser." *Id.* "Sales proceeds" is defined as "the entire amount paid to a seller . . . for the purpose of performing funeral services or furnishing . . . property . . . of any nature in connection with the final disposition of a dead human body, including, but not limited to, the retail price paid for such services and . . . property." 225 ILL. COMP. STAT. ANN. § 45/1a (West 2007). We believe that this broad definition of "sales proceeds" would encompass the assignment of an insurance policy that was clearly intended to be used to pay for the claimant's funeral, if she has one, and thus, Ms. T~'s pre-need arrangement is unlawful under Illinois law.

Contracts of insurance, including assignments thereof, are governed by the principles of contract law generally. *In re Cohen's Estate*, 163 N.E.2d 533, 536-37 (Ill. App. Ct. 1959). And, under contract law, "when a statute declares that it shall be unlawful to perform an act, and imposes a penalty for its violation, contracts for the performance of such acts are void and incapable of enforcement." *Frankel v. Allied Mills*, 17 N.E.2d 570, 583 (Ill. 1938); *Broverman v. City of Taylorville*, 381 N.E.2d 373, 376-77 (Ill. App. Ct. 1978); *see also* RESTATEMENT (SECOND) CONTRACTS §§ 178, 179 (1981) (discussing unenforceability on grounds of

public policy). Here, the statute has a penalty provision, 225 ILL. COMP. STAT. ANN. § 45/8 (West 2007), and thus the assignment was void at the outset, at least in terms of Templeton's ability to enforce the arrangement.

Notwithstanding the unlawful nature of the arrangement entered into by Ms. T~, she might be able to enforce it despite the absence of a written contract, if she could prove that the parties had a contract for the provision of goods and/or services. *Broverman*, 381 N.E.2d at 376 ("Exceptions to the rule may be applicable where the parties are not In pari delicto, or where the law which makes the agreement unlawful is intended for the protection of the party seeking relief."). In any case, what is critical here is that Ms. T~ would also have the alternative remedy of restitution, meaning she could ask for the insurance policy to be returned to her. RESTATEMENT (SECOND) CONTRACTS § 198, cmt. b (1981) (noting that restitution applies where the public policy that was violated was intended to protect the claimant, as is the case with the Illinois Funeral or Burial Funds Act). Because of this right to request that Templeton surrender the insurance policy, the policy is a resource to the extent of its cash surrender value, $3,486.65, although the $1,500 exclusion should be applied, if applicable. POMS SI 01130.300(B)(1), (2).

CONCLUSION

For the reasons discussed above, the Trust should be considered a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Todd D~
Assistant Regional Counsel

F. PS 07-153 SSI- Illinois - review of the David C~ f/k/a K~ Supplemental Care and Needs Trust, ~ - REPLY Our Ref: 07-0266 Your Ref: S2D5G6; SI 2-1-3 IL (C~)

DATE: June 11, 2007

1. SYLLABUS

This opinion evaluates whether a self-funded trust meets the statutory requirements to be excluded under section 1917(d)(4)(A) of the Social Security Act. The trust in question was funded by a settlement awarded to an SSI eligible minor child and established by the child's guardian. The trust recognizes that the child may, at some point, move to another state, but fails to provide for potential payback for Medicaid services provided in any state other than Illinois. This type of provision does not satisfy the statutory requirements because it would frustrate any other state's ability to receive reimbursement. Further, even if that language was amended, the trust is countable resource due to the ability of the child's guardian to revoke the trust in her capacity as the child's agent.

2. OPINION

You have asked whether the David C~ f/k/a K~ Supplemental Care and Needs Trust (Trust) is a resource. We have reviewed the Trust documents and determined that the Trust is a resource to David C~, a disabled minor (David), because the Trust does not meet the Medicaid payback requirements. In addition, even if the Trust were amended to meet these requirements, it would still be a resource because it can be revoked and/or amended by the guardian of David's estate.

BACKGROUND

On February 20, 2007, the Trust was established by Tina M~, David's mother and guardian, and Trust and Investment Group of Belvidere Bank (Bank), guardian of David's estate. *See* Trust, introductory paragraph. The Bank was also named as trustee of the Trust. *Id.* Although the Trust does not state the source of the corpus, we are aware that the Trust was funded with proceeds of a malpractice settlement on David's behalf. The purpose of the Trust is to provide for David's supplemental needs and is designed to meet the Medicaid Trust Exception under section 1917(d)(4)(A) of the Social Security Act, commonly referred to as the special needs trust exception. *See* Trust, Art. One. Although David cannot revoke or amend the Trust directly, the Trust can be revoked and/or amended by the Bank as grantor of the Trust. *See* Trust, Art. One, § 1.03; Art. Two, § 2.05. The Trust is to be interpreted by Illinois law or the state "in which the Trust Corpus is present." Trust, Art. Seven, § 7.01.

At David's death, the Trust provides that the principal is to be distributed as follows:

a. Pay back to the State of Illinois, or its successor government agency, the amount expended on David's behalf for medical assistance under the State of Illinois Medicaid Plan;

b. The remaining principal is to be distributed to Tina M~;

c. If Tina M~ predeceases David (or does not survive him for more than thirty days), the remainder shall be divided equally and distributed to Linda L~ and Debra H~.

Trust, Art. Four.

APPLICABLE LAW

Under the statutory trust resource rules, 42 U.S.C. § 1382b(e), a self-funded trust is generally considered a resource to the individual unless it satisfies one of the Medicaid trust exceptions or the waiver for undue hardship. POMS SI 01120.203.

The Medicaid trust exception for individual trusts requires that the trust (1) be established with the assets of a disabled individual under age sixty-five; (2) be established for the [sole] benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) expressly provide that any amounts remaining in the trust upon the death of the individual will be distributed first to the State, up to an amount equal to the total medical assistance paid on behalf of the individual under a state Medicaid plan. *See* 42 U.S.C. §§ 1382b(e)(1) and (5), 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(a).

The trust must also satisfy the regular trust resource rules. POMS S 01120.200 (B)(1)(a). Thus, regardless of whether the statute applies, or whether the trust qualifies for the Medicaid payment trust exception, the trust must be irrevocable and satisfy the regular resource rules or it will be considered a resource for purposes of SSI eligibility. *Id.*

DISCUSSION

This Trust Does not Satisfy the Medicaid Trust Exception for Individual Trusts.

To meet the Medicaid trust exception, a trust must contain the assets of a disabled person. David is disabled and receiving SSI. The Trust is funded with the assets from David's Settlement Agreement. The individual must be younger than sixty-five and David was born in 1993, so he is younger than sixty-five. The trust must have been established by a parent, grandparent, legal guardian or court. In this case, the Trust was established by both David's mother and the guardian of his estate. An additional requirement is that the trust must be established for the sole benefit of the beneficiary. Here, the Trust repeats several times that the purpose of the Trust is for David's benefit. No other individual is named as receiving any benefit during David's lifetime.

However, the key element of the Medicaid trust exception is that, at the death of the beneficiary, all amounts remaining in the trust must be distributed ***first*** to the State as payback for prior medical assistance. At David's death, the Trust provides that the principal is to be distributed to the State of Illinois as payback for prior medical assistance. Although the Trust recognizes that the Trust may, at some point, move to a different state, *see* Trust § 7.01, the Trust does not provide for the payment of medical assistance paid by any other state if David were to move. The Office of Income Security Programs advised that the agency does not consider this type of provision to satisfy the statutory requirements because it would frustrate any state's (other than Illinois') ability to receive medical assistance paid to David during his lifetime. The Statute requires that the trust must provide for reimbursement of "the total medical assistance paid on behalf of the individual under a State plan under this subchapter." 42 U.S.C. § 1396p(d)(4)(a). Because this Trust permits reimbursement only to payments made under Illinois' plan, it does not meet this standard. Thus, we believe that not all of the elements of the Medicaid trust exception are satisfied. POMS SI 01120.203(B)(1)(a).

This is a Revocable Trust: David can Revoke the Trust Through his Guardian .

However, even if the Trust satisfied the Medicaid Payback provisions, the Trust would still be a resource if (1) David can revoke the Trust and use the assets for his support and maintenance, or (2) he can direct the Trustee to pay him the funds or use the funds for his support and maintenance. POMS SI 01120.200(D). In addition, David's interest in the Trust is a resource if it can be sold. *Id.*

The Trust provides that David does not have the right or ability to obtain Trust assets, to direct the Trustee to use the Trust assets for his support or maintenance; and does not have the authority to liquidate the beneficial interest in the Trust or otherwise alienate the beneficial interest of the Trust. *See* Trust, Art. Two, § 2.05; Art. Five, §§ 5.01, 5.03, 5.04.

Thus, the only consideration is whether the Trust is revocable. If so, it would be considered a resource. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1)(a); *see also, generally*, 20 C.F.R. § 416.1201(a) (defining resources for SSI purposes). Here, the plain language of the Trust states that the Trust is revocable and can be amended. *See* Trust Art. One, § 1.03. However, this power appears to be limited to the Bank, as the named grantor of the Trust and guardian of David's estate. The Trust specifically states that David, as the Trust beneficiary, is unable to revoke or amend the Trust. *See* Trust Art. Two, § 2.05.

For SSI purposes, an agent is a person or organization acting on behalf of and/or with the authorization of another person. The term applies to anyone acting in a fiduciary capacity, whether formal or informal, and regardless of the applicable title, which, in this case, is guardian of David's estate. *See* POMS SI 01120.020(B)(1). An action by David's guardian of his estate is equivalent to an action by David. *See* POMS SI 01120.020(C)(1) (action of an agent is equivalent to an action by the individual for whom he acts). Thus, since the guardian of David's estate is presumed to act on his behalf, the question is whether the Trust, notwithstanding its provision that David is unable to revoke the Trust, can be revoked indirectly by David. Because the Trust clearly allows the guardian to amend and/or revoke the Trust, the Trust is revocable. Since the Trust is revocable, it is a resource to David.

CONCLUSION

For the reasons discussed above, the Trust should be considered a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Janet M. G~
Assistant Regional Counsel

G. PS 07-069 SSI-Illinois Review of the Second Amendment to the Illinois Disability Pooled Trust - ACTION, Your Ref: SI 2-1-3 IL, Our Ref: 06-0064

DATE: February 14, 2007

1. SYLLABUS

This opinion addresses whether or not a sub-account in the Illinois Disability Pooled Trust can be excluded from resources for SSI purposes. To be excluded from resources under the Medicaid trust exception a pooled trust must satisfy several criteria. Two of the criteria are that the trust must be established for the sole benefit of the beneficiary and that to the extent that the trust does not retain funds remaining in the sub-account, the State Medicaid Agency must be listed as first payee. The amended trust below contains several provisions that could allow for third-parties to benefit from the trust during the beneficiary's lifetime. In addition, the trust also contains provisions that frustrate the Medicaid payback requirement. While these provisions would preclude the trust from being excluded from resources for SSI purposes, the trust contains a null and void clause. This clause renders the offending provisions as void and thus the trust can be excluded under the Medicaid pooled trust exception.

2. OPINION

You asked whether the Second Amendment to the Illinois Disability Association's Pooled Trust (Trust) corrects the defects which, but for the Trust's "null and void" clause, would have prevented the Trust from meeting the Medicaid payback exception for pooled trusts as discussed in the legal opinion dated May 4, 2005, for the sub-account of Robert K~. *See* Memorandum from OGC Region V to SSA-ARC-MOS, SSI-Illinois-Review of the Sub-Account of Robert K~ In the Illinois Disability Pooled Trust - REPLY, (May 4, 2005). For the reasons discussed below, it is our opinion that, despite the changes made by the Second Amendment to the Trust, the Trust still would not meet the pooled trust exception to counting sub-trust accounts as resources under the statute. However, the "null and void" clause still enables the Trust to qualify for the statutory exception, since that clause nullifies the offending language in the Trust.

BACKGROUND

On July 17, 1998, the Illinois Disability Association, an Illinois not-for-profit corporation, established the Illinois Disability Pooled Trust ("Trust"). *See* Trust at 1, 3, 21. The purpose of the Trust is to provide for each beneficiary's supplemental care, and not to

provide for a "disabled" beneficiary's basic support and maintenance. *See* Trust at 3-4. The Trust identifies the beneficiaries as disabled persons as defined by Section 1614(a)(3) of the Social Security Act ("Act"), 42 U.S.C. § 1382c(a)(5). *See* Trust at 4.

Within the Trust, individual trust accounts, called sub-accounts, are created and maintained for each beneficiary, but the funds from each sub-account are pooled for investment and management of funds. *See* Trust at 9. The Trust is activated for an individual beneficiary when a Joinder Agreement is signed by a grantor (defined under the Trust as a parent, grandparent, guardian, the beneficiary himself, any court, or any person that establishes a sub-account for the benefit of a beneficiary or contributes assets to an existing sub-account) and a trustee. *See* Trust 2, 8. Upon approval of the Joinder Agreement by the trustee and acceptance of assets from the grantor by the trustee, the sub-account is established, and the trustee has sole discretion to handle all funding matters. *See* Trust at 8. The Trust states that the Trust and each sub-account are irrevocable, and a spendthrift provision provides that, to the extent permitted by law, a beneficiary cannot assign or transfer his or her interest in the Trust. *See* Trust at 7-8.

At the time of the original signing, July 17, 1998, the Trust provided that upon the death of a beneficiary, any amounts remaining in the beneficiary's sub-account, would be distributed first to pay the beneficiary's funeral and estate administration expenses; then to the Trust, to the extent the beneficiary authorized in the Joinder Agreement that funds be retained by the Trust to be used for the benefit of other trust beneficiaries who are indigent; then, to the extent that the deceased beneficiary's sub-account was funded with his or her own money, to reimburse the State for any benefits provided under the Medicaid program. *See* Trust at 18. Any funds remaining after this would be paid to remainder beneficiaries as named in the Joinder Agreement. *See* Trust at 18. The Joinder Agreement further provides, in an anti-lapse clause, that "if a lapse occurs in distribution, all remaining funds shall be retained as part of the Trust's Remainder Share." Joinder Agreement at 19.

On April 30, 2002, the Trust was amended. *See* Trust at 17 (permitting amendments by trustee). This "First Amendment" revised the payment of any monies that had been authorized by the Grantor upon the death of the Beneficiary. *See* First Amendment to the Illinois Disability Pooled Trust (First Amendment). In particular, the First Amendment deletes the language that would require or allow payment of funeral expenses before any amounts are retained by the Trust or used to reimburse Medicaid.

In 2005, the Agency informed the Illinois Disability Pooled Association that there were some provisions in the Trust that were inconsistent with the Program Operations Manual System ("POMS") provisions discussing and interpreting statutory provisions at 42 U.S.C. § 1396p. *See* POMS PS 01825.016(D) (PS 05-225 SSI - Review of the Sub-Account of Jesus C~(~) in the Illinois Disability Pooled Trust). However, the Agency concluded at that time that sub-accounts in the Trust nevertheless would not be resources under the statute because a provision in the Joinder Agreement incorporated the provisions of the statute and states that if there is a conflict between the trust and the statutory provision, the statutory provisions apply. *Id.* We advised that this provision rendered null and void any trust provision that is inconsistent with the statute. *Id.*

In July 2006, the Illinois Disability Association sent the Agency a draft of a Second Amendment to the Illinois Disability Pooled Trust (Second Amendment). *See* Trust at 17 (permitting amendments by trustee). In particular, the Second Amendment revokes Section 4.2 of the Trust. In addition, the Second Amendment revokes Section 11.2(A) of the First Amendment by inserting the following in lieu thereof:

11.2 . Distribution of Remainder Interest Upon Death of Beneficiary. Upon the death of a Beneficiary, any amounts remaining in the Beneficiary's Trust sub-account (the "Remainder") shall be distributed as follows, to the extent that there are funds remaining:

A. First, after the payment of a beneficiary's estate administration expenses (including taxes and attorney's fees) and reimbursement for income taxes (if any), to the extent they are not due from the trust to the State or federal government because of the death of the beneficiary, may not be paid from the trust prior to reimbursing the State, the Trust shall retain the portion of the Remainder that has been authorized by the Grantor in the Joinder Agreement to be added to the sub-account retained by and in the name of the Trust (the "Trust's Remainder Share"), if any, to be used as set forth in Section 12.1; then,

DISCUSSION

The Social Security Act ("Act") provides that an individual is not eligible for SSI if he or she has resources that exceed $2,000.00. 42 U.S.C. §§ 1382(a)(1)(B)(ii), (a)(3)(B). A resource is defined as "[c]ash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20

C.F.R. § 416.1201(a). Trust property may be such a resource for SSI purposes. 42 U.S.C. § 1382b(e); POMS SI 01120.200(A). Trust assets are a resource to an individual if he can revoke the trust and use the assets to meet his needs for food, clothing, and shelter, or if the individual can direct the use of the trust assets to be used for his support and maintenance under the terms of the trust. *See* POMS SI 01120.200(D). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201(A).

As we have previously advised, under the regular resource rules, a sub-account in the Trust would not be considered a resource to individual beneficiaries of the pooled Trust, since the individual cannot direct the trustee to make payments on their behalf for their support and maintenance, cannot sell their beneficial interests in the trusts, and cannot revoke or terminate the trust and obtain the assets. *See* Memorandum from OGC Region V to SSA-MOS, *SSI-Illinois-Review of the Illinois Disability Association's Pooled Trust Drafted by the Office of the Cook County Public Guardian*, (July 13, 1998). We previously reasoned, in particular, that the Trust was not unilaterally revocable because the anti-lapse provision establishes a contingent, but irrevocable beneficial interest in the Trust itself. *Id.* Thus, the Trust is not a resource under the regular resource rules.

However, under the statutory amendments that took effect on January 1, 2000, even an irrevocable trust will be considered a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201(D)(2). Since the Trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary, the sub-account would generally be a resource under this provision if the individual signed a Joinder Agreement after the effective date of the statute, January 1, 2000. *See* POMS SI 01120.201(D)(2).

Certain pooled trusts, however, are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). The Medicaid payback trust exception applies to pooled trusts where the trust:

- contains the assets of an individual who is disabled as defined in the Act;
- is established and managed by a nonprofit association;
- maintains a separate account for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts;
- contains accounts established by the individual, or parent, grandparent, legal guardian, or court solely for the benefit of the disabled individual;
- provides that, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2).

Although the Trust represents that the beneficiary's sub-account is established for the sole benefit of the beneficiary, a reading of the Trust reveals that certain provisions continue to create contingent interests that could benefit third parties during the beneficiary's lifetime. *See* POMS PS 01825.016(D)(2). If these contingent interests were valid, the Trust would not be considered to be established for the sole benefit of the beneficiary. However, the Joinder Agreement has a clause that appears to void this offending language and, thus, we continue to conclude that use of the "null and void" clause is necessary for the Trust to be not be considered a resource under the statutory trust resource rules. *See* Joinder Agreement at 3. Furthermore, there is still some ambiguity, even after the "Second Amendment," as to whether certain taxes could be paid before Medicaid is reimbursed. However, as we previously advised, to the extent that these provisions could be read as inconsistent with the statutory requirements of 42 U.S.C. § 1396p, those provisions would be null and void.

A. Under the Current Language, If Valid, the Sub-Account Could Potentially Benefit Others During the Lifetime of the Beneficiary.

Section 1917(d)(4)(C)(iii) of the Act, 42 U.S.C. § 1396P(d)(4)(C)(iii), states, in relevant part, "[a]ccounts in the trust are established solely for the benefit of individuals who are disabled . . . ." The implementing POMS provide that one should "[c]onsider a trust established ***for the sole benefit of*** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." *See* POMS SI 01120.201(F)(2)

(emphasis in original). However, several provisions of the Trust continue to create contingent interests that could benefit third parties during the lifetime of the beneficiary such that beneficiary's sub-account cannot be considered established for his sole benefit.

Termination Clauses Create Contingent Interests That Could Benefit Third Parties During the Lifetime of the Beneficiary.

a. "Deemed Death" Termination.

Section 11.1(A) of the Trust continues to provide:

11.1 Sub-Account Terminations. Every reasonable attempt will be made to continue the Trust for the purposes for which it is established. However, the Trustee does not and cannot know how future developments in the law including administrative agency and judicial decisions, may affect the Trust of any Trust Sub-Account. If the Trustee has reasonable cause to believe that the assets of a Trust Sub-Account are or will become liable for basic maintenance, support, or care that has been or that would otherwise be provided to such Beneficiary by local, state, or federal government, or an agency or department thereof, the Trustee in its sole discretion, may:

Terminate the Trust Sub-Account as to the affected Beneficiary as though he or she had died, and the Trustee shall then treat the assets in the Trust Sub-Account according to the provisions of Section 11.2....

Trust at 17. This section of the Trust results in a "Deemed Death" termination, in which the trustee terminates the Sub-Account as though the beneficiary has died. Under this fiction, the trustee, upon terminating a Sub-Account, distributes the amounts remaining in the Sub-Account in accordance with Section 11.2 of the Trust. Trust at 17.

The new Section 11.2(A) of the Second Amendment provides that if there are amounts remaining in the sub-account, after reimbursing the State, "…the Trust shall retain the portion of the Remainder that has been authorized by the Grantor in the Joinder Agreement to be added to the sub-account retained by the and in the name of the Trust (the "Trust's Remainder Share"), if any, to be used as set forth in Section 12.1…." Because the Trust may retain funds under this provision, a Sub-Account cannot be considered established for the sole benefit of the beneficiary because a third-party, in this case the Trust and other Trust beneficiaries (under Section 12.1), could benefit from the assets of the sub-account during the beneficiary's lifetime.

Moreover, Section 11.2(C) continues to provides, "the Trustee shall distribute all remaining funds, subject to Section 11.2(A) and (B) of this Trust Agreement, to the Final Remainder Beneficiaries listed under the Joinder Agreement...." Under 11.2(C), individuals named as Final Remainder Beneficiaries have a contingent interest in the assets of the sub-account. Thus, the sub-account would not have been established for the sole benefit of the disabled individual during the beneficiary's lifetime.

b. Termination of Trust During Beneficiary's Lifetime.

Section 11.3 of the Trust continues to provide that the Trustee may, in his or her sole discretion, terminate the sub-account during the beneficiary's life if "it becomes impracticable to fulfill the conditions of the Trust with regard to the respective Beneficiary's sub-account for reasons other than [sic] death of the Beneficiary." Trust at 18. In such an event, the trustee terminates a Sub-Account and may distribute all or any portion of the assets in the Trust sub-account "to such party designated by the Primary Representative...." Thus, if the Primary Representative irrevocably designates a party to receive distributions in the event of an early termination, there exists a contingent interest in the assets of the sub-account that benefits third parties during the claimant's lifetime.

c. Termination of Entire Trust.

Section 11.4 of the Trust continues to permit the Trustee to terminate the entire Trust "[i]f it becomes impossible or impracticable to carry out the Trust's purposes with respect to all or substantially all Beneficiaries...." In such an event, the Trustee terminates the Trust and distributes the assets of the sub-account "to such party designated by the Primary Representative" in accordance with Section 11.3. Trust at 18-19. As discussed above, this clause would also create a beneficial interest in a third party, assuming the Primary Representative has irrevocably designated a party to receive such distributions.

B. Medicaid Must Be Reimbursed First.

To qualify for the pooled trust exception, the Trust also must contain specific language that provides that, to the extent that amounts remaining in the beneficiary's sub-account upon the death of the beneficiary are not retained by the Trust, the Trust

pays to the State from such remaining amounts in the sub-account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan. *See* POMS 01120.203(B)(2)(g). To the extent that the Trust does not retain the funds remaining in the sub-account, the State must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in POMS SI 01120.203(B)(2)(g); SI 01120.203(B)(3)(a). POMS SI 01120.203(B)(2)(a) explains that only the following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State: "[t]axes due from the trust to the State or Federal government because of the death of the beneficiary" and "[r]easonable 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."

Here, Section 11.2(A) of the Second Amendment provides that:

11.2 Distribution of Remainder Interest Upon Death of Beneficiary. Upon the death of a Beneficiary, any amounts remaining in the Beneficiary's Trust sub-account (the "Remainder") shall be distributed as follows, to the extent that there are funds remaining:

A. First, after the payment of a beneficiary's estate administration expenses (including taxes and attorney's fees) and reimbursement for income taxes (if any), to the extent they are not due from the trust to the State or federal government because of the death of the beneficiary, may not be paid from the trust prior to reimbursing the State, the Trust shall retain the portion of the Remainder that has been authorized by the Grantor in the Joinder Agreement to be added to the sub-account retained by and in the name of the Trust (the "Trust's Remainder Share"), if any, to be used as set forth in Section 12.1; then,

It is not clear what the phrase "***may not be paid from the Trust prior to reimbursing the State***" is intended to modify. *See* Second Amendment, Section 11.2(A). It appears that the amended language may be intended to state that the trustee can pay estate expenses and taxes and reimburse taxes owed by others, but that the trustee cannot pay these expenses or taxes before reimbursing the state if the amounts at issue are not "due from the trust…because of the death of the beneficiary." In that case, the language of the trust would be consistent with the statutory requirements. We have previously advised that the trustee can pay estate and other taxes due by virtue of the trust if the trust is included in the state. *See* Memorandum from OGC Region V to *SSA-ARC-MOS, SSI-Ohio-Review of the Trust for Dustin D~, ~ -REPLY,* (December 6, 2006). However, it is far from clear that this is what is intended by the amended language. Nevertheless, due to savings clause, the provisions must be read to be consistent with the statute.

C. The Savings Clause Voids Any Provisions That Are Inconsistent With the Statute.

Even if the foregoing provisions are inconsistent with the statute, the Trust nevertheless qualifies for the Medicaid payback exception for pooled trusts. The Joinder Agreement at Section Q(3) provides "[t]his Trust is a pooled trust, governed by the laws of Illinois, in conformity with the provisions of 42 U.S.C. § 1396p, amended August 10, 1993, by the Omnibus Budget Reconciliation Act of 1993. To the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control." Joinder Agreement at 23. The clause appears to void any offending language, which permits the Trust to meet the exception under 42 U.S.C. § 1396p(d)(4)(C). Section 12.4 of the Trust states that "[s]hould any provision of this Agreement be or become invalid or unenforceable, the remaining provisions of this Trust Agreement shall be and continue to be fully effective." Trust at 20. As such, the offending provisions should be considered void and the remainder of the trust would be valid and would not be a resource under the statutory resource rules. *See* POMS PS 01825.016(D)(2).

CONCLUSION

In sum, we conclude that, while the Second Amendment to the Trust does not bring the Trust in line with the statutory requirements, sub-accounts in the Trust with the null and void clause in the Joinder Agreement still are not resources under the statute.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Alfred C. S~
Assistant Regional Counsel

H. PS 06-165 SSI-IL-Review of the Declaration of Trust for Monica D. L~--REPLY Our Ref: 06-0031 Your Ref: S2D5G6, SI 2-1-3 IL (L~)

DATE: June 7, 2006

1. SYLLABUS

This opinion addresses whether or not the trust in question is a resource for SSI purposes. As outlined in the POMS at SI 01120.201(D)(1)(a), a trust established by an individual after January 1, 2000 is a countable resource if the trust is revocable. In this case, the trust claims to be irrevocable and identifies a as the grantor. However, the actual trust language indicates that the SSI claimant is the true grantor of the trust and the trust can be revoked by the claimant who is the sole beneficiary. Because the trust can be revoked by the claimant, it is a countable resources for SSI purposes.

2. OPINION

You asked whether the Monica D. L~ Supplemental Care Trust (hereinafter "trust") is a resource for purposes of determining eligibility for Supplemental Security Income (SSI). We conclude that the trust is a resource.

BACKGROUND

The trust was created for the benefit of Monica D. L~ (hereinafter "Monica"), who is disabled. According to the trust, Trust and Savings (), as guardian of the estate of Monica, is both the trust grantor or settlor, and trustee. Trust, at 1, paragraph 1. The trust was funded with assets from a personal injury settlement on behalf of Monica. The stated purpose of the trust is to provide for extra and supplemental needs, comforts and luxuries to Monica which are over and above, and will not cause disqualification from the benefits that Monica otherwise receives as a result of her disability from any local, state or federal program, or from private agencies or any combination thereof. Trust, Article Two, paragraphs 1-3. The trust provides that neither Monica nor the guardian of her person or estate shall have any right or power to demand distribution from the trust at any time. Trust, Article Two, paragraph 4. The trustee is to use the trust income and principal to enhance the quality of Monica's life without disqualifying her for any state, federal or local benefits or programs when providing for her needs. Trust, Article Two, paragraph 5. Making any such expenditure is subject to approval by the probate court. Trust, Article Two, paragraph 5.

Unless the trust is terminated sooner by exhaustion of the corpus, the trust terminates upon Monica's election following her restoration of rights or upon her death. Trust, Article Three. Upon termination of the trust, the remaining trust assets shall be paid to the appropriate State agencies, as reimbursement to the State of Illinois for benefits provided to Monica during her lifetime, except that the trustee may with court approval and consistent with existing law first pay any outstanding, reasonable expenses for maintaining the existence of the trust, and final taxes, legal fees, and trustee fees. Trust, Article Three. After these payments, any remaining amounts are to be paid as provided in Monica's will, or in the absence of a will, to Monica's estate. Trust, Article Three.

DISCUSSION

Under federal law, a trust established by an individual after January 2000 will be considered a resource to her if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1)(a). While a trust, like this one, purports to be irrevocable, it can be revoked because the grantor or settlor of the trust is also the sole beneficiary. *See Stewart v. Merchants National of Aurora*, 278 N.E.2d 10, 12 (Ill. App. 1972); Restatement (Second) of Trusts § 339, comment a (1959); Restatement (Third) of Trusts § 65 and comment a and Reporter's Note (2003). Although the trust identifies as the grantor or settlor, Monica is the true settlor of the trust because the trust was formed with her assets. *See In re Estate of* , 635 N.E.2d 853, 855 (Ill. App. 1994); POMS SI 01120.200(L)(3).

Based on our research, we conclude that Monica is also the sole beneficiary of the trust. Monica is the only named beneficiary of the trust during her lifetime, and on termination of the trust, or her death, the remainder of the trust assets, after reimbursement to state agencies for benefits received and other specified administrative costs, are to be distributed as provided in Monica's will, or if there is no will, to her estate. Trust, Article Three. *Scott on Trusts* clarifies that Monica is the sole beneficiary of the trust. Under *Scott*, a settlor is a sole beneficiary when she coveys property in trust to pay the income to her for life, and on her death to covey the property to her estate, or as she should by will or deed appoint. William F. F~, *Scott on Trusts*, § 127.1 (1987).

It follows that, under the Restatement (Second) of Trusts, the inference is that, although there is a provision under the power of appointment as to the disposition of the trust property on Monica's death, Monica intended to be the sole beneficiary of the trust and no residual interest was created. *See* Restatement (Second) of Trusts § 127, comment b; *Bescor, Inc., v. Chicago Title & Trust Co.*, 446 N.E.2d 1209, 1211 (Ill. App. 1983) (the test for determining who is the beneficiary of an express trust is the intent of the parties imposing the trust, and this intention will be ascertained from the express language of the trust). Section 127 also provides that Monica is the sole beneficiary where she transfers the property in the trust to pay the income to herself for life and on her death to pay the principal to her estate. *See* Restatement (Second) of Trusts § 127, comment b. Under Restatement (Second) of Trusts § 127, Monica is the sole beneficiary of the trust. The trust is, therefore, revocable and should be considered a resource.

Sections of the Restatement (Third) of Trusts present apparently conflicting interpretations of the trust's language and whether Monica would be the sole beneficiary. Under § 44 of the Restatement (Third), it is not necessary that the intended beneficiary or beneficiaries be known at the time of the creation of the trust, but a beneficiary must be capable of becoming existent and ascertainable in the future by exercise of a power of appointment. Restatement (Third) of Trusts § 44, comment a. Under this explanation, the power of appointment by will arguably creates a residual interest and Monica is not the sole beneficiary.

However, § 46 of the Restatement (Third) of Trusts states that where "…the owner of property transfers it upon intended trust for the members of an indefinite class of persons, no trust is created." Restatement (Third) of Trusts § 46(1). A class of persons is indefinite if the identity of all individuals comprising its membership cannot be ascertained. Restatement (Third) of Trusts § 44, general comment. We note that, with the paragraph discussing the termination of the trust upon Monica's death with the remainder of the trust assets to be distributed as provided in Monica's will, the trust gives Monica the right to distribute the property to persons to be selected from an indefinite class of beneficiaries. Under this explanation of the Restatement (Third) of Trusts, this power of appointment by will does not create a residual interest, and Monica is, therefore, the sole beneficiary.

Because the Restatement (Third) does not resolve this apparent conflict, and does not purport to reverse the position taken in the Restatement (Second), we believe that application of § 127 of the Restatement (Second) and *Scott* is appropriate. Accordingly, the disposition of the trust property on Monica's death under the power of appointment does not create a residual interest, and the trust is revocable and should be considered a resource.

Finally, we note that the trust provides for termination during Monica's lifetime, "following her restoration of rights." Article III. It appears that remaining assets would then be distributed as if Monica had actually died. Thus, if the trust had named residual beneficiaries, this could result in trust assets being distributed to third parties during Monica's lifetime. This, however, would be inconsistent with 42 U.S.C. § 1396p(d)(4)(a), and would result in the trust being characterized as a resource. *See* POMS PS01825.016(E), PS 05-033 SSI-Illinois-Review of the Brian V~ Irrevocable OBRA Pay Back Trust (termination clause that created contingent interests in third parties rendered the exception under Section 1917(d)(4)(A) of the Act unavailable). Accordingly, the claimant may want to remove the termination clause along with the absence-of-residual-beneficiaries issue.

CONCLUSION

For these reasons, we conclude that the trust is a resource.

I. PS 06-152 SSI-Illinois-Review of Assignment to a Trust of Child Support Payments for Michael L~, ~ -REPLY Our Ref: 06-0040 Your Ref: S2D5G6, SI 2-1-3 IL (L~)

DATE: June 2, 2006

1. SYLLABUS

This opinion addresses whether or not the assignment of child support payments into a supplemental needs trust is irrevocable and whether the payments should be considered countable income for SSI purposes. According to the POMS at SI 01120.200(G)(1)(d), a legally assignable payment that is assigned to a trust is income for SSI purposes unless the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

Under Illinois law, a trust is allowed to receive child support payments. In this case, it has been determined that the child support payments have been irrevocably assigned to a trust that is not a countable resource, thus the child support payments are not countable income for SSI purposes.

2. OPINION

You asked whether the assignment of child support payments into "The Michael P~ L~ Irrevocable Discretionary Supplemental Needs Trust" is irrevocable and whether the payments should be considered income to Michael for purposes of determining eligibility for Supplemental Security Income (SSI). You did not request an opinion on whether the trust is a resource. We conclude that the child support payments do not count as income.

BACKGROUND

Michael L~ was born on July 14, 1983. His parents, Judith L~ and James L~, divorced and entered into an Agreed Order, dated September 23, 2002, that required James L~ to pay Judith L~ $660.00 a month in child support. This order contemplated continued child support payments even though Michael is an adult, apparently because he is mentally disabled. On December 2, 2005, Michael's parents created "The Michael P~ L~ Irrevocable Discretionary Supplemental Needs Trust," which is intended to provide for Michael's needs that are not otherwise received as a result of Michael's disability. Trust at Article 4.02(a). The Trustee is authorized to use Trust income and principal to provide for Michael's supplemental care and funeral expenses, but may not use funds to provide basic support such as food and shelter. Id. On January 4, 2006, an Illinois state court modified the prior Agreed Order so that the child support payments (still in the amount of $660.00 per month) would be paid into the Supplemental Needs Trust.

DISCUSSION

Child Support Payments Paid Directly to the Trust Pursuant to the Court Order Are Not Income to Michael

In Illinois, child support generally terminates when a child reaches the age of 18. *In re Marriage of F~*, 570 N.E.2d 636 (Ill. App. 1991). However, under the Illinois Marriage and Dissolution of Marriage Act,

"The court may award sums of money out of the property and income of either or both parties or the estate of a deceased parent, as equity may require, for the support of the child or children of the parties who have attained majority:

(1) When the child is mentally or physically disabled and not otherwise emancipated**

750 ILCS 5/513(a)(1). The Illinois Marriage and Dissolution Act also contains a statutory provision that allows a trust to receive child support payments. 750 ILCS 5/503(g). Illinois courts have recognized the validity of such trusts. *See In re Marriage of G~*, 576 N.E.2d 946 (Ill. App. 1991).

Here, Michael's parents entered into an Agreed Order pursuant to 750 ILCS 5/513(a)(1), and after creating a Special Needs Trust in December 2005, petitioned the court for modification so that the child support payments would be made to the Trust instead of Michael's mother. The petition was granted on January 4, 2006, and child support payments are presumably being made to the Trust at present. We believe that under Illinois law, it is permissible for the child support payments to be made to "The Michael P~ L~ Irrevocable Discretionary Supplemental Needs Trust" instead of to Michael's mother.

Under Agency policy, child support payments will not be considered income if they are irrevocably assigned to a trust that is not a resource. POMS SI 01120.200(G)(1)(d). In this case, whether the Trust itself is a resource is not at issue. As such, the question at this juncture is whether the court would grant a request by Michael to have the support payments go directly to him, and thus be considered income. POMS SI 01120.200(G)(1)(d). Although the court order states that the payments will be made directly to the Trustee, if Michael could ask the court to modify the order so that the payments would be made directly to him, the child support payments should be considered Michael's income. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, Review of the Crable Special Needs Trust for the Benefit of Taneal Huffman, at 4 (September 27, 2005); Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Review of the Marital Settlement Agreement for Patricia J. H~ and Floyd A. H~ and the Patricia J. H~ Special Needs Trust*, at 3-4 (December 4, 2003).

Our reading of the law in Illinois suggests that Michael could not obtain such an order absent some change in circumstance. The pertinent statutes, 750 ILCS 5/513(a)(1) and 5/510(a), contemplate modification of a court order providing for the support of a child who has attained the age of majority and is disabled when there is a change of circumstances. But, Illinois courts have held that the order awarding child support benefits is res judicata so long as there is no change in circumstances underlying the decree. *See In re Marriage of L~*, 597 N.E.2d 907, 910 (Ill. App. 1992); *In re Marriage of W~*, 512 N.E.2d 1371, 1377 (Ill. App. 1987). At this time, we are not aware of any change of circumstance that would cause the court to modify its order requiring

the child support payments to be made to the Trust. Therefore, the child support payments are, at this time, irrevocably assigned to the trust, and thus are not income under POMS SI 01120.200(G)(1).

We further note that it is unclear whether Michael would even have standing to seek modification of the court order. Several Illinois courts have questioned whether a third-party beneficiary, such as Michael, has standing to seek modification of a support order. *In re Marriage of P~*, 696 N.E.2d 1263, 1266 (Ill. App. 1998); *People ex rel. Collins v. Burton*, 668 N.E.2d 1185, 1187 (Ill.App. 1996); *In re Marriage of G~*, 593 N.E.2d 102, 104 (Ill. App. 1992). In the event there was a case of changed circumstances here or in another case that might warrant modification of a support order under 750 ILCS 5/513(a)(1), it would be appropriate to consult our office further regarding developments in the law on the standing issue.

CONCLUSION

For the reasons discussed above, we conclude that the sub-account assets should not be considered a resource to R~, the individual beneficiary of the pooled trust.

J. PS 06-078 SSI - Illinois - Review of the Sub-Account of Teresa R~ in the Illinois Disability Pooled Trust Joinder Agreement - REPLY Your Reference: S2 D 5G6 SI 2-1-3 IL (R~) Our Ref: 05-0185

DATE: February 28, 2006

1. SYLLABUS

This opinion reviews a sub-account in the Illinois Disability Pooled Trust. The corpus of the sub-account was formed in August, 2005 from funds held in a guardianship account for the SSI beneficiary. The execution of the Joinder Agreement by the Public Guardian created the sub-account with the SSI beneficiary as the sole beneficiary of the Trust and her estate as the Final Remainder Beneficiary. The Agreement states that the State will receive reimbursement for services provided (e.g. Medicaid) upon the death of the beneficiary. Based on the terms of the Master Trust and the sub-account, the Trust qualifies as a Medicaid payback Trust meeting the pooled trust exception and is excluded from resource counting under those provisions. Further, since the beneficiary cannot direct use of the funds and the anti-lapse Trust language creates an irrevocable residual beneficiary, the Trust is not countable under normal resource counting policy.

2. OPINION

You asked whether the Sub-Account of Teresa R~ in the Illinois Disability Pooled Trust, should be treated as a countable resource because the remainder beneficiary is the decedent's estate of Teresa R~. We have reviewed the documents provided to us and, for the reasons discussed below, we conclude that this trust should not be counted as a resource.

FACTS

On August 17, 2005, Robert F. H~, Cook County Public Guardian (Cook County Guardian), on behalf of Teresa R~ (R~), executed a Joinder Agreement (Agreement) creating a sub account in the Illinois Disability Pooled Trust (Trust) for R~. The corpus of the sub account would be comprised of the assets of R~, consisting of $120,000.00 currently held in a guardianship account at Northern Trust. Agreement Part K at p. 9. The Agreement names the Cook County Guardian as the Grantor of the Trust. Agreement Part C at p. 1. It also names the Cook County Guardian as the Primary Representative unless the beneficiary has a legal representative. Agreement Part E at p. 2. R~ is the sole beneficiary of the Trust while she is alive. Agreement Part D at p. 2. Upon her death, the Agreement directs that, if the Trust assets are insufficient to satisfy the State's Reimbursement Claim, then the Grantor/Beneficiary elects to have the assets utilized to reimburse the State's Reimbursement Claim. Agreement Part L at p. 13. If the Trust assets are sufficient to satisfy the State's remainder claim, then the Beneficiary/Grantor also elects to satisfy the State's Remainder Claim and have the remaining amount paid to the final remainder beneficiary. Agreement Part L at p. 14. The Agreement names the Decedent's estate of Teresa R~ as the Final Remainder Beneficiary upon the death of R~. Agreement Part L at p. 15. The Agreement provides that the Cook County Guardian, the named Grantor of the trust, reserves the authority to amend the designation of remainder beneficiaries. Agreement Part L at p. 15. Finally, the Agreement contains an anti-lapse provision which provides that, "[i]f a lapse occurs in distribution, all remaining funds shall be retained as part of the Trust's Remainder Share." Agreement Part L at p. 15.

DISCUSSION

The Social Security Act ("Act") provides that an individual is not eligible for SSI if she has resources that exceed $2,000.00. 42 U.S.C. § 1382(a)(1)(B)(ii). A resource is defined as "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). Trust property may be such a resource for SSI purposes. 42 U.S.C. § 1382b(e); Program Operations Manual System ("POMS") SI 01120.200(A). Trust assets are a resource to an individual if she can revoke the trust and use the assets to meet her needs for food and shelter, or if the individual can direct the use of the trust assets to be used for her support and maintenance under the terms of the trust. *See* POMS SI 01120.200(D). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201(A).

Under the statutory amendments that took effect on January 1, 2000, even an irrevocable trust will be considered a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201(D)(2). Since the Trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary, the sub-account would be a resource under this provision if the individual signed a Joinder Agreement after the effective date of the statute, January 1, 2000. *See* POMS SI 01120.201(C)(1).

Certain pooled trusts, however, are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). The Medicaid payback trust exception applies to pooled trusts where the trust:

contains the assets of an individual who is disabled as defined in the Act;

is established and managed by a nonprofit association;

maintains a separate account for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts;

contains accounts established by the individual, or parent, grandparent, legal guardian, or court solely for the benefit of the disabled individual;

provides that, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2).

Here, the Joinder Agreement appears to qualify for the Medicaid payback trust exception. Part K of the Joinder Agreement indicates that the Sub-Account is to be funded with "$120,000.00 in N. Trust G'ship account". Agreement Part K at 9. The Joinder Agreement indicates that R~ does not receive Social Security Disability Insurance Benefits or Supplemental Security Income. However, the Agreement indicates that R~ is disabled due to schizophrenia, paranoid type. Agreement Part I at p. 8. The Master Illinois Disability Pooled Trust provides that the Illinois Disability Association, which established and manages the Trust, has identified itself as an Illinois not-for-profit corporation. *See* Trust Agreement at page 2, § 1.2. The Joinder Agreement lists R~ as the sole beneficiary of the trust. Agreement Part D at p. 2. Finally, the Joinder Agreement provides that, in accordance with section 11.2 of the Illinois Disability Pooled Trust Agreement, upon the death of the beneficiary, to the extent the beneficiary's sub-account was funded with her own money, claims for reimbursement for services by the State of Illinois that provide Medicaid or other benefits to the beneficiary shall be satisfied, equal to the amount of total assistance paid on behalf of the beneficiary. Agreement Part L at p. 13. Accordingly, we believe that the Joinder Agreement qualifies for the Medicaid Trust exception because all of the conditions are met.

However, even if a trust is not a resource under POMS SI 01120.203(B)(2), the Agency applies regular resource counting rules to determine if it is a resource. POMS SI 01120.203(B). Under the ordinary resource rules, the trust principal will be a resource if (1) the claimant can revoke the trust and use the assets for her support and maintenance, or (2) the claimant can direct the trustee to pay her the funds or use the funds for her support and maintenance. POMS SI 01120.200(D). In addition, the claimant's interest in the Trust is a resource if it can be sold. POMS SI 01120.200(D).

Here, we believe that R~ cannot revoke the Trust. The Master Agreement provides that the Settlor (Grantor) relinquishes all power to amend, alter, or revoke the trust agreement. It further provides that the Trustee, in his sole discretion, may make

payment or distributions under the Trust. However, Illinois follows the general rule that even if a trust purports to be irrevocable, it nevertheless may be revoked if the settlor and all beneficiaries consent. SSA does not consider a trust fund to be a resource if the settlor would be required to obtain the consent of another beneficiary in order to revoke the trust and obtain the funds. Under the Joinder Agreement, R~ would not be the sole beneficiary of the trust.

Though R~ is the sole lifetime beneficiary of the sub-account, the Joinder Agreement provides that, on the death of R~, assets are to be paid subject to section 11.2 of the Master Pooled Trust to the State for reimbursement for Medicaid or other government benefits paid to the Beneficiary, with any remaining amount paid to the Final Remainder Beneficiaries. Joinder Agreement Part L at p. 15. The Joinder Agreement names the "Decedent's estate of Teresa R~" as the Final Remainder Beneficiary. Agreement Part L at p. 13-15. It also reserves a right in the Grantor (Cook County Public Guardian), to amend the designation of remainder beneficiaries. Agreement Part L at p. 15. Finally, the Joinder Agreement contains an anti-lapse provision which provides that, "[i]f a lapse in distribution occurs, all remaining funds shall be retained as a part of the Trust's Remainder Share." Agreement Part L at p. 18. Though the Grantor can amend the designation of the Remainder Beneficiary, pursuant to the Master Agreement, this right to amend is limited and "shall not reduce the amount to be retained by the Trust (if any) upon the death of a Beneficiary as set forth in the original Joinder Agreement." Pooled Agreement, Art. VI, §6.2.

The anti-lapse provision of the Joinder Agreement creates an irrevocable additional residual beneficiary. As noted above, the anti-lapse provision provides that: "[i]f a lapse in distribution occurs, all remaining funds shall be retained as a part of the Trust's Remainder Share." Agreement Part L at p. 18. The Pooled Trust Agreement provides that a beneficiary "shall not reduce the amount to be retained by the Trust (if any) upon the death of a Beneficiary as set forth in the original Joinder Agreement." Pooled Agreement, Art. VI § 6.2. Though the Joinder Agreement designates the "decedent's estate of Teresa R~" the Final Remainder beneficiary, a designation we do not believe could lapse, it also reserves in the Grantor the authority to amend the designation of Remainder Beneficiaries, subject to the limitations imposed by the Pooled Agreement at § 6.2. . While we believe that the current Remainder beneficiary, the decedent's estate of Teresa R~ cannot lapse, there exists the possibility that Grantor may amend the Joinder Agreement and name a different remainder beneficiary whose interest could lapse. This creates a contingent remainder interest in the Trust's Remainder Share. *See* Memorandum from OGC Region V to SSA-MOS, *SSI-Illinois-Review of The Disability Association's Pooled Trust Drafted by the Office of the Cook County Guardian*, (July 13, 1998). It appears, therefore, that a beneficiary could not amend the trust to exclude this anti-lapse provision which creates an irrevocable residual interest in the Trust's Remainder Share. As such, R~ is not the sole Trust beneficiary and R~ would not be able to unilaterally revoke the Trust. Accordingly, the Joinder Agreement should not be counted as a resource for SSI purposes under the regular resource rules either. *Id.* (discussing the other two elements of the regular resource rules as they apply to sub-accounts in their pooled trust).

CONCLUSION

For the reasons discussed above, we conclude that the sub-account assets should not be considered a resource to R~, the individual beneficiary of the pooled trust.

K. PS 05-225 SSI- Review of the Sub-Account of Jesus C~ (~) in the Illinois Disability Pooled Trust - REPLY SSN: ~ Number Holder: Jesus C~ Your Ref: S2D5G6, SI 2-1-3 IL (C~)

DATE August 18, 2005

1. SYLLABUS

A pooled trust was created by the Illinois Disability Association on July,17 1998. The Illinois Disability Pooled Trust and the subaccounts contained therein are irrevocable and the terms of the Trust contain a spendthrift provision preventing transfer or assignment of a beneficiary's interest in the Trust. The trustee has sole discretion regarding all distributions. At the time the Trust was created, the Trust and the subaccounts were determined to be countable resources for SSI purposes because the terms did not meet the requirements for the Medicaid payback trust exception. On April 30, 2002 the Trust was amended and the language that allowed payment of funeral expenses before payment to Medicaid was deleted. For the beneficiary cited in this opinion, an irrevocable subaccount was created in May, 2002 that named the Illinois Disability Association as the residual beneficiary. The Trust and the subaccount should not be considered resources for SSI purposes since they are now excluded under the Medicaid payback trust exception. Due to the revisions that occurred on April 30, 2002, this opinion should only be used for the Illinois Disability Pooled Trust after that date. For Trusts or subaccounts established before April 30, 2002 refer to PS 01825.016(E).

2. OPINION

You asked whether Jesus C~ sub-account in the Illinois Disability Association's Pooled Trust would constitute a resource for Supplemental Security Income purposes. For the reasons discussed below, we conclude that the Sub-Account should not be considered a resource.

FACTS

On July 17, 1998, the Illinois Disability Association, an Illinois not-for-profit corporation, established the Illinois Disability Pooled Trust ("Trust"). *See* Trust § 2.7, page 3. The purpose of the Trust is to provide for each beneficiary's supplemental care, and not to provide for a "disabled" beneficiary's basic support and maintenance. *See* Trust §§ 3.1 and 3.2, pages 3-4. The Trust identifies the beneficiaries as disabled person as defined by Section 1614(a)(3) of the Social Security Act ("Act"), 42 U.S.C. § 1382c(a)(3). *See* Trust § 2.1 at page 2.

Within the pooled Trust, individual trust accounts, called sub-accounts, are created and maintained for each beneficiary, but the funds from each sub-account are pooled for investment and management of funds. *See* Trust § 2.5, page 2; § 7.1, pages 9-10. The Trust is activated for an individual beneficiary when a Joinder Agreement is signed by a grantor (defined under the Trust as a parent, grandparent, guardian, the beneficiary himself, any court, or any person that establishes a sub-account for the benefit of a beneficiary or contributes assets to an existing sub-account) and a trustee. *See* Trust § 2.2, page 2; § 6.1, page 8. Upon acceptance of the Joinder Agreement, the sub-account is established and the trustee has sole discretion to handle all funding matters. *See* Trust § 6.1, page 8. The pooled Trust states that the Trust and each sub-account are irrevocable, and a spendthrift provision provides that, to the extent permitted by law, a beneficiary cannot assign or transfer his or her interest in the Trust. *See* Trust § 4.5, page 7; § 6.3, page 8.

At the time of the original signing, July 1, 1998, the Trust provided that upon the death of a beneficiary, any amounts remaining in the beneficiary's sub-account, would be distributed first to pay the beneficiary's funeral and estate administration expenses; then to the Trust, to the extent the beneficiary authorized in the Joinder Agreement that funds be retained by the Trust to be used for the benefit of other trust beneficiaries who are indigent; then, to the extent that the deceased beneficiary's sub-account was funded with his or her own money, to reimburse the state for any benefits provided under the Medicaid program. *See* Trust § 11.2(B) at page 18. Any funds remaining after this would be paid to remainder beneficiaries as named in the Joinder Agreement. *See* Trust at pages 18-19. The Joinder Agreement further provides that if no remainder beneficiaries are listed 1% of the remaining assets go to the Illinois Disability Association. *See* Joinder Agreement at Section L, subsection (C) at page 15.

On April 30, 2002, the Trust was amended. *See* Trust § 10.2, page 17 (permitting amendments by trustee). The amendment revised the payment of any monies that had been authorized by the Grantor upon the death of the Beneficiary. *See* First Amendment to the Illinois Disability Pooled Trust ("First Amendment"). In particular, the amendment deletes the language that would require or allow payment of funeral expenses before any amounts are retained by the trust or used to reimburse Medicaid.

On May 28, 2002, a Sub-Account was created for Jesus C~ ("Mr. C~"), when his Co-Guardian executed a Joinder Agreement on his behalf.

ANALYSIS

Introduction.

The Social Security Act ("Act") provides that an individual is not eligible for SSI if he or she has resources that exceed $2,000.00. 42 U.S.C. § 1382(a)(1)(B)(ii). A resource is defined as "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). Trust property may be such a resource for SSI purposes. 42 U.S.C. § 1382b(e); Program Operations Manual System ("POMS") SI 01120.200(A). Trust assets are a resource to an individual if he can revoke the trust and use the assets to meet his needs for food or shelter, or if the individual can direct the use of the trust assets to be used for his support and maintenance under the terms of the trust. *See* POMS SI 01120.200(D). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201(A).

Under the statutory amendments that took effect on January 1, 2000, even an irrevocable trust will be considered a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201(D)(2). Since the Trust allows the trustee to use the assets in the sub-

account for the benefit of the individual beneficiary, the sub-account would be a resource under this provision if the individual signed a Joinder Agreement after the effective date of the statute, January 1, 2000. *See* POMS SI 01120.201(C)(1).

Certain pooled trusts, however, are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). The Medicaid payback trust exception applies to pooled trusts where the trust:

contains the assets of an individual who is disabled as defined in the Act;

is established and managed by a nonprofit association;

maintains a separate account for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts;

contains accounts established by the individual, or parent, grandparent, legal guardian, or court solely for the benefit of the disabled individual;

provides that, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2).

Although the Trust purports that Mr. C~ sub-account is established for his sole benefit, a reading of the Trust and Joinder Agreement reveals that certain provisions create contingent interests that could benefit third parties during Mr. C~ lifetime. Due to these contingent interests, the Trust cannot be considered to be established for the sole benefit of the beneficiary. In addition, the Trust provides for payment of certain of the beneficiary's taxes at death, and prior to reimbursing the State or retention by the Trust. However, the Trust and Joinder Agreement have clauses that appear to void the offending language and, thus, we concluded that the Trust is not a resource under the statutory trust resource rules.

The Sub-Account May Benefit Others During the Lifetime of the Beneficiary.

Section 1917(d)(4)(C)(iii) of the Act, 42 U.S.C. § 1396p(d)(4)(C)(iii), states, in relevant part, "[a]ccounts in the trust are established solely for the benefit of individuals who are disabled . . . ." The implementing POMS provide that one should "[c]onsider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." *See* POMS SI 01120.201(F)(2) (emphasis in original).

In a prior opinion, we discussed how certain provisions of the Trust create contingent interests that could benefit third parties during the lifetime of the beneficiary such that the sub-account could not be considered established for his sole benefit. *See* Trust §§ 4.2, 11.1, 11.3, 11.4; First Amendment § 11.2(A). However, we opined that if the offending provisions were removed from the Trust, it would appear that, based on the remaining language of the Trust, the Trust would qualify for the Medicaid payback exception for pooled trusts. *See* Memorandum from OGC Region V to SSA-MOS, *SSI- Review of the Sub-Account of Robert K~ in the Illinois Disability Pooled Trust - REPLY*, (May 4, 2005). Specifically, Section 12.4 of the Trust states that "[s]hould any provision of this Agreement be or become invalid or unenforceable, the remaining provisions of this Trust Agreement shall be and continue to be fully effective." Trust at 20. In addition, the Joinder Agreement at Section Q(3) provides "[t]his Trust is a pooled trust, governed by the laws of Illinois, in conformity with the provisions of 42 U.S.C. § 1396p, amended August 10, 1993, by the Omnibus Budget Reconciliation Act of 1993. To the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control." Joinder Agreement at 23. Thus, these clauses appear to void the offending language, which permits the Trust to meet the exception under 42 U.S.C. § 1396p(d)(4)(C). As such, the Trust would not be a resource under the statutory resource rules.

Turning to the regular resource rules, with respect to the sub-account at hand, Mr. C~ did not name any Final Remainder Beneficiaries under his Joinder Agreement. *See* Joinder Agreement at Section L, subsection (C) at page 15. Accordingly, upon Mr. C~ death, pursuant to Section 11.2(B) of the Trust, the assets of the sub-account are used to pay back the State the total amount of medical assistance paid on behalf of the beneficiary. Should any funds remain after paying back the State, Section 11.2(C) provides, "the Trustee shall distribute all remaining funds, subject to Section 11.2(A) and (B) of this Trust Agreement, to the Final Remainder Beneficiaries listed under the Joinder Agreement...." The Joinder Agreement adds that "[i]f no Remainder

Beneficiary is named or identified, then, by default, the Illinois Disability Association shall receive 1% of the remaining assets in the Sub-Account after Section 11.2(A) and (B) of the Master Pooled Trust Agreement have been satisfied." *See* Joinder Agreement at Section L, subsection (C) at page 15. As noted above, Mr. C~ has not named any Final Remainder Beneficiaries. *See* Joinder Agreement at Section L, subsection (C) at pages 14-17. Consequently, as it stands now, if the Trust were to be terminated while Mr. C~ was alive, the Illinois Disability Association would receive 1% of the remaining assets in the sub-Account during his lifetime. The balance would be held as a resulting trust for Mr. C~ estate. In situations where no Final Remainder Beneficiaries have been named and the express trust fails, the Restatement (Third) of Trust explains that "if the intended trust fails in whole or in part at a later time, or has been or is being fully performed without exhausting or fully utilizing the trust estate, the transferee then holds the trust property, or an appropriate part thereof or interest therein, upon a resulting trust for the transferor or for the successors in interest of the transferor." RESTATEMENT (THIRD) OF TRUSTS § 8 ("When Express Trust Fails In Whole Or In Part"). Thus, upon paying back to the State pay the total amount of medical assistance paid on behalf of the beneficiary, the remaining assets would revert to Mr. C~ estate, with the Illinois Disability Association receiving 1% of the remaining funds. Because the Illinois Disability Association is a residual beneficiary, the Trust is irrevocable. Moreover, we have previously opined that the Trust would not be a resource under the other elements of the regular resource rules since the individual cannot direct the trustees to make payments on their behalf for their support and maintenance and cannot sell their beneficial interests in the trusts. *See* Memorandum from OGC Region V to SSA-MOS, SSI-Illinois-Review of the Illinois Disability Association's Pooled Trust Drafted by the Office of the Cook County Public Guardian, (July 13, 1998). Thus, Mr. C~ sub-account is not a resource under the regular resource rules either.

CONCLUSION

For the reasons discussed above, we conclude that the Sub-Account should not be considered a resource.

L. PS 05-215 SSI-Illinois-Review of the Katelyn J. H~ 2005 Trust, SSN ~ -Reply Your Reference: S2D5G6, SI 2-1-3 IL (H~)Our Reference: 05-139

DATE: August 9, 2005

1. SYLLABUS

An SSI beneficiary's mother established an irrevocable trust funded by a previously countable Coverdell Educational Savings Account. The intent of the trust was to qualify as a Medicaid pay-back trust. The trust allows for allocation of assets within the trust between two sub-trusts: one for the SSI beneficiary's benefit during her lifetime, and the other to be funded only after she attains age 65 and exclusively for post-mortem use by her descendants. The trust language establishes contingent beneficiaries and directs that the SSI beneficiary's mother, as trustee, holds absolute authority to direct use of trust assets. As such, the beneficiary's interest in the trust is a countable resource with zero value. The descendant's share sub-trust does not impact the beneficiary's eligibility at this time since nothing can be transferred until she attains age 65. Since the trust meets the Medicaid pay-back exception, it is not a countable resource, however, any distributions from the trust may be countable income.

2. OPINION

You have asked whether assets held in the Katelyn J. H~ 2005 Trust are a resource to Katelyn J. H~ (Katelyn) for SSI purposes. For the reasons stated below, we concluded that the trust should not be considered a resource.

BACKGROUND

Katelyn is a 13 year old, who is, apparently, an SSI beneficiary. You have told us that Katelyn's aunt previously established a Coverdale Educational Savings Account (ESA), also known as a 530 account, with Katelyn as beneficiary. Based on communications from OISP/OBDS/DIRT and SSA Regional Program Circular No. 2005-006, you determined that the Coverdale ESA was a resource to Katelyn. Therefore, Katelyn's mother, Jacqueline J. S~ (S~), established the Katelyn J. H~ 2005 Trust (the Trust) to hold these assets in a manner that would not result in them being counted as a resource to Katelyn.

The stated intent of the Trust is to qualify under the provisions of 42 U.S.C. § 1396p(d)(4)(A), which excludes from consideration for benefit eligibility trusts that have been established by a parent for a disabled individual, so long as the State will be repaid for medical assistance after the individual's death. The Trust provides that any provisions of the Trust that may prevent it from fully complying with 42 U.S.C. § § 1396p(d)(4)(A) and all related regulations shall be null and void. Trust 1.04. During Katelyn's life, the trustee has sole discretion to pay income or principle to Katelyn, Trust 3.01(a), to provide for Katelyn's "extra and

supplemental needs over and above the benefits, if any, Katelyn may otherwise receive as result of her handicap or disability . . . and which will not cause her to become disqualified from receiving any benefits." Trust 3.01(c).

The Trust allows for allocation of assets within the trust between two separate sub-trusts: The "separate trust named for Katelyn" and the "descendants share." However, any addition to the trust property made before Katelyn reaches age 65 must be allocated to the separate trust named for Katelyn. Trust 2.01. It appears that additions to the trust after Katelyn reaches age 65 will be allocated to the descendant's share and distributed outright to S~'s other descendants at S~'s death. Trust 2.01, 3.02.

The Trust does not specify how it might be funded, or by whom. It was initially funded with a token of $10 from S~. Trust, introductory paragraph and Schedule. The trust permits additions from any source. You have informed us that Ms. S~ intends to fund the trust with assets Katelyn's aunt placed in a Coverdale ESA for Katelyn's benefit.

Upon Katelyn's death, any assets in the separate trust named for Katelyn will first be used to reimburse the Illinois Department of Public Aid for medical assistance paid on behalf of Katelyn during her lifetime. Trust 3.01 (b)(1). Katelyn may, through her will, direct how any remaining assets are distributed. Trust 3.01(b)(2). Any further remaining trust assets will be distributed among Katelyn's then-living descendants or, if she has no descendants, among S~'s then-living descendants or, if none, among the then living descendants of S~'s mother. Trust 3.01(b)(3). S~, as the creator of the trust, waived any right to amend, revoke, or modify the trust. Trust 1.03.

DISCUSSION

As a preliminary matter, the assets which we understand are to fund this trust must be considered to be Katelyn's assets. When Katelyn's aunt funded the Coverdale ESA for Katelyn, she relinquished control of the assets and only Katelyn or, if she is still a minor, a responsible party acting on her behalf may withdraw the funds. SSA Regional Program Circular, No. 2005-006; 26 U.S.C. § 530; IRS Publication 970, http://www.irs.gov/publications/p970/ch07.html. Therefore, if, as we are given to understand, the Trust is funded with assets taken from Katelyn's ESA, the assets must be considered to be Katelyn's, her aunt having relinquished control upon making the initial gift of the Coverdale ESA.

Under federal law, a trust established by an individual after January 2000 generally will be considered a resource to her if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1). If the trust is irrevocable, the trust is still a resource if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. In that case, the value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a).

Certain Medicaid payback trusts are excluded from this rule. 42 U.S.C. § 1382b(e)(1), (5); POMS SI 01120.203(B)(1)(a). If the trust falls within this exception, the Agency applies regular resource rules, and the trust may still be considered a resource if it is revocable. *See* POMS SI 01120.203(B)(1)(a); *see also generally* 20 C.F.R. § 416.1201(a) ("A resource, for the purpose of SSI eligibility, is "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.").

Thus, regardless of whether the statute applies, or whether the trust qualifies for the Medicaid payback trust exception, the trust must be irrevocable or it will be considered a resource. Here, the trust is irrevocable. While a trust, like this one, that purports to be irrevocable can be revoked if the settler (grantor) of the trust is also the sole beneficiary, Katelyn is not the sole beneficiary. *See Stewart v. Merchants National of Aurora*, 278 N.E.2d 10, 12 (Ill. App. 1972); *Restatement (Second) of Trusts* § 339, comment a (1959); *Restatement (Third) of Trusts* § 65 and comment a and Reporter's Note (2003). Although the trust identifies S~ as the creator of the trust, Katelyn is the settlor of the trust because the trust was funded primarily with her assets. *See In re Estate of* , 635 N.E.2d 853, 855 (Ill. App. 1994). However, Katelyn is not the sole beneficiary of the trust. While she is the only named beneficiary of the separate trust named for Katelyn during her lifetime, on her death, the remainder of the trust (after reimbursement of government agencies for benefits received and administrative costs associated with the accounting for such benefits) is to be distributed to whomever she names in her will, or (if there is no will provision) to Katelyn's "descendants," S~'s descendants, or S~'s mother's descendants. Trust 3.01(b)(2)-(3). A contingent gift to "descendants," in the absence of a clearly contrary intent, will create a remainder interest. *See* Memorandum from Office of General Counsel, Chicago, to John W~, Program Specialist, SSI - Review of Regional POMS Transmittal on State Laws Pertaining to Grantor Trusts at 2-3 (March 11, 2003); *see also* Restatement (Second) of Trusts § 127, comment b (". . . if the beneficial interest is limited to the settlor for life and on his death the property is to be conveyed to his children, issue, or descendants, he is not the sole beneficiary of the trust, but an interest in remainder is created in his children, issue, or descendants."); *Restatement (Third) of*

Trusts § 49 and comment a (even future interest in "heirs" may be sufficient to establish additional beneficiaries). Therefore, Katelyn does not have the power to revoke the trust.

Even if the sub-trust named for Katelyn is irrevocable, it will still be a resource under the statute unless the Medicaid payback trust exception applies. The Medicaid payback trust exception applies where the trust is: (1) established with the assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime. *See* 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.201(B)(1). Here, Katelyn is under age 65 and, we presume, disabled. The trust was established for her benefit by her mother using Katelyn's assets. The trust provides that, upon Katelyn's death, any remaining funds would first be used to reimburse the state(s) for Medicaid payments made for his benefit during his lifetime. Therefore, we believe that the sub-trust named for Katelyn satisfies the Medicaid payback exceptions.

Under the ordinary resource rules, a trust will be a resource if: (1) the SSI beneficiary can revoke the trust and use the assets for her support and maintenance; (2) the individual can direct the trustee to pay her the funds or use the funds for her support and maintenance; or (3) if the individual can sell her beneficial interest in the trust. POMS SI 01120.200(D). Here, as we have explained, Katelyn cannot revoke the trust. Moreover, Katelyn cannot direct the use of the trust assets. Whether Katelyn can direct the use of the trust assets depends upon the terms of the trust agreement and applicable state law. *See* POMS SI 01120.200(D)(1), (D)(2). The trust provides that the Trustee shall have sole discretion to pay income or principal to Katelyn, Trust 3.01(a), and should do so to provide for supplemental needs over and above any benefits she receives, which will not cause her to become disqualified for such benefits. Trust 3.01(c). Moreover, the Trust contains no provision allowing Katelyn to act on her own or order actions by the trustee, which, if present, could constitute directing the use of the assets. *See* POMS SI 01120.200(D)(1)(b). Therefore, the trust gives the trustee sole and absolute discretion to distribute trust income or principal and, as such, Katelyn does not have authority to direct the use of the trust assets. Finally, applying normal resource rules, a trust can also be a resource if the individual can sell his beneficial interest in the trust. The trust contains a spendthrift provision which precludes any beneficiary from transferring or encumbering his or her interest in the principal or income of the trust. Trust 6.03. Here, the spendthrift clause would not be effective with respect to Katelyn, since she is the grantor of the trust. But, since disbursements are completely within the trustee's discretion, Katelyn's interest in the trust has no significant market value. The interest, however, is a resource since a resource is defined as an interest that an individual (1) owns (2) has the right, power or authority to convert to cash, and (3) is not legally restricted from using for his support and maintenance, POMS SI 01110.100(B)(1), even if the interest has no current market value, POMS SI 01110.100(B)(2), SI 01140.044. Accordingly, Katelyn's interest in the Trust should be considered a resource with no market value, even though the Trust principal is not a resource.

Although assets retained in the trust are not considered a countable resource, certain distributions may be considered income. For example, any disbursements of cash made directly to Katelyn would be considered unearned income for SSI purposes. 20 C.F.R. §§ 416.1120-416.1121; POMS SI 01120.201(I)(1)(a). In addition, any disbursements made to a third party resulting in Katelyn's receipt of food, clothing or shelter are considered income in the form of in-kind support and maintenance, if and when the distributions are actually made. 20 C.F.R. § 416.1102; POMS SI 01120.201(I)(1)(b). Therefore, disbursements from the trust may be income and should be analyzed under POMS SI 01120.201(I)(1).

Based on the facts available, the existence of provisions for a separate trust called the Descendants Share does not affect Katelyn's eligibility for SSI. It appears that no assets can be allocated to this separate trust until after Katelyn, now aged 13, turns 65. Trust 2.01. At the time of S~'s death, any assets in the Descendant's Share will be distributed to S~'s descendants, not including Katelyn. Trust 3.02. If, however, any of Katelyn's assets (or assets of which Katelyn is a co-owner) were transferred to this subtrust for S~'s descedants, this could constitute a transfer for less than fair market value. POMS SI 01150.110.

CONCLUSION

In sum, because the sub-trust named for Katelyn meets the Medicaid Payback Trust exception and because Katelyn cannot revoke the trust or direct its expenditures, we conclude that the trust should not be considered a resource when determining Katelyn's eligibility for SSI. However, distributions from the trust may be considered income to her. As for the descendant's share, this does not appear to impact Katelyn's SSI eligibility, but further development would be required if any of Katelyn's assets (or assets in which she is a co-owner) are transferred to this sub-trust.

M. PS 05-188 S2D5G6 SSI-Illinois Review of Life's Plan Self-Funded Payback Trust - Reply Your Ref: SI-2-1-3 IL (H~)Our ref: 05 0113

DATE: June 29, 2005

1. SYLLABUS

An SSI beneficiary established a sub-account in a pooled Trust held by a not-for-profit corporation. She funded the irrevocable account with her own money in the form of a check post-1/1/00. The Trust grants the trustee sole discretion regarding distributions and contains a spendthrift provision precluding transfer or anticipation of the funds. Although the Trust contains Medicaid payback provisions, it is determined to be a countable resource as a result of the "deemed death" early termination clause. Language in the Trust provides that the trustee can terminate the Trust at their discretion as if the SSI beneficiary had died. The money in the Trust would then be distributed to: an expense account, the State of Illinois, a Charitable Fund, and the beneficiary's children. The possibility that others could benefit from the Trust while the SSI beneficiary is still alive means that the Trust does not meet the sole benefit requirement to be excluded under the pooled trust exception.

2. OPINION

You have asked for our assistance in determining whether a sub-account created for Susan H~ in Life'sPlan Inc.'s Self-Funded Payback Trust (Trust) would constitute a resource to Ms. H~ for SSI purposes. For the reasons discussed below, it is our opinion that Ms. H~'s participation in the sub-account would be a resource.

BACKGROUND

Life'sPlan Inc., an Illinois not-for-profit corporation, established a pooled trust in January 1997. Life'sPlan amended the trust on July 14, 2004. Life'sPlan has defined the purpose of the trust as to provide for the "care encouragement or treatment of one or more named residents of Illinois who are developmentally disabled and unable to provide for their own care." *See* Trust at Article Two. The trust defines a developmentally disabled person as such person is defined in the Illinois Mental Health and Developmental Disability Code. Article Four, Section 12. The trust is intended to supplement or enhance, but not supplant the benefits and services to which participants in the trust may be eligible. It is also intended to qualify the participant for SSI.

Within the trust, individual accounts are created and maintained for each beneficiary, including Ms. H~. Trust Art. Four (Trust Assets) Section 2. The funds from each sub-account can be commingled (or pooled) with the amounts in other accounts for administrative and investment purposes. The Trust is activated for Ms. H~ when she, as an individual beneficiary, accepts a "Transfer Agreement." Our materials include a Transfer Agreement that identifies Susan Y. H~ as the donor. Ms. H~ signed the agreement. The sub-account for Ms. H~ is funded by a check signed by Ms. H~ in the amount of nine-thousand dollars.

Within the trust, individual accounts are created and maintained for each beneficiary, including Ms. H~. Trust Art. Four (Trust Assets) Section 2. The funds from each sub-account can be commingled (or pooled) with the amounts in other accounts for administrative and investment purposes. The Trust is activated for Ms. H~ when she, as an individual beneficiary, accepts a "Transfer Agreement." Our materials include a Transfer Agreement that identifies Susan Y. H~ as the donor. Ms. H~ signed the agreement. The sub-account for Ms. H~ is funded by a check signed by Ms. H~ in the amount of nine-thousand dollars.

Those funds are to be managed by a Trustee. A trustee is defined a member of Life'sPlan's Board. Article Three (Trustees), Section 1. The trustee has sole and absolute discretion to pay amounts from the principal and earnings in Ms. H~'s account to Ms. H~ in order to provide for her care. Article Four, Section 4(A). The trust states that it is irrevocable and the trust includes a spendthrift provision that provides that Ms. H~, as a participant, who is a beneficiary of her individual account, cannot anticipate, alienate, encumber or hypothecate to receive either the income or the principal in her individual account.

The Trust provides that on termination of an individual's participation in the Trust caused either by Ms. H~'s death, or "any other reason," that 15% of the value of her account shall be distributed to an expense fund within the Trust. Monies in that expense fund are to be used for payment of expenses of the Trust. Article Four, Section 8(a). The balance of the value of the account after the 15% for expenses has been taken out are to be used to pay the state of Illinois for reimbursement of expenditures made by the state for medical assistance (that has not been reimbursed from any other source). After the state of Illinois has been paid, 10% of the remaining value of Ms. H~'s account is to be distributed to a Charitable Fund for the Third Part Supplemental Trust to provide services to unnamed indigent individuals with disabilities.

Similarly, the Termination Clause in Ms. H~'s transfer agreement provides for the 15% distribution of the value of her account to be used for payment of expenses of the Trust. Then, the Transfer Agreement provides for the distribution to the State of Illinois, and for the subsequent transfer of 10% of the remaining value to the Charitable Fund for the purpose of providing supplemental services to individuals with disabilities. Finally, in a provision that applies solely to Ms. H~'s account, the transfer agreement provides that any remaining balance shall be distributed to Ms. H~'s three children.

The Trust at Article Four, Section 4 C, also provides that;

If at any time the Trustees believe that continued payment of principal and net income of any portion thereof on behalf of a Participant would be contrary to the best interests of such Participant, or the account itself lacks the funds necessary to carry out its purposes, or the trust is unable to carry out the purpose as is required by an account, then the Trustees may pay or may apply such principal and/or net income to or for the benefit of the Participant in such manner as the Trustees believe advisable including the termination of participation of the individual in the Trust so as to proceed in Accordance with Section 8 of this Article. Any net income not distributed shall be accumulated in the account for the benefit of the named Participant.

DISCUSSION

Under the Social Security Act, trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary will be considered a resource to the extent that the trust is revocable or to the extent that any payments can be made from the trust for the benefit of individual. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. In Ms. H~'s trust, the trustee has the discretion to use the income and principal in the Trust sub-account for Ms. H~'s benefit. Article Four, Section 4(a). Therefore, the Trust would be a resource to Ms. H~ under these provisions. *See* 42 U.S.C. § 1382b(e)(3)(B).

Certain pooled trusts, however, are exempted from the above cited provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 001120.203(B)(2). In order to qualify for the Medicaid payback trust exemption, the trust must contain assets belonging to the disabled individual and must satisfy the following conditions:

a. It must be established and managed by a nonprofit corporation.

b. A separate account must be maintained for each beneficiary or the trust; but, for purposes of investment and management of funds, the trust may pool or commingle these accounts

c. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.

d. The trust must provide that to the extent that 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 from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

See POMS SI 01120.203(B(2).

Here, Ms. H~'s participation in Life'sPlan Self-Funded Payback Trust does not qualify for the Medicaid Payback exemption because some of its provisions show that the accounts in the trust have not been established solely for Ms. H~'s benefit.

The trust contains a provision that allows the Trustee, in certain circumstances, to terminate Ms. H~'s participation in the Trust. Article 4 Section 4(C). That same provision then states that once Ms. H~'s participation is terminated, distributions of the Trust will proceed in accordance with Section 8 of Article 4. The latter explains how the Trust principal and interest will be distributed on termination which can occur due to Ms. H~'s death, or any other reason. Thus, the language cited from Article Four Section 4(C) allows the Trustee, in his or her discretion, to terminate the trust as if Ms. H~, the beneficiary, had died (i.e., a "deemed death").

This means that while Ms. H~ is still alive, 15% of the value of her account could be distributed to an expense fund within the trust and that this money will be used to pay the expenses of the trust. Since the Trust already includes a provision that entitles Life'sPlan to fair and reasonable compensation for services rendered to the Trust, we believe that the "deemed death" provision establishes Life'sPlan as a contingent beneficiary of the Trust. If Life'sPlan has a contingent beneficial interest in the trust that could vest while Ms. H~ is alive, the Trust does not exist solely for Ms. H~'s benefit.

Similarly, should the Trustee decide to terminate Ms. H~'s participation in the Trust for reasons set forth in Article Four Section 4(C), 10% of the value balance in her account (after the funds deducted for expenses and after paying back the State of Illinois) is directed to be distributed to a Charitable Fund that would provide for supplemental services to indigent persons with disabilities. Thus, this provision (Article Four, Section 8(c)) establishes another person (or class of persons) who could benefit from the Trust while Ms. H~ is alive; specifically an indigent individual with a disability. Because that person can be identified as a beneficiary of the Trust, it is again evident that the Trust has not been established for the sole benefit of Ms. H~ during her lifetime.

There is also a provision in Ms. H~'s Transfer Agreement that provides for distribution after (1) the 15% taken for expenses; (2) the payback to the State of Illinois; and the (3) 10% that goes into the charitable fund for indigent disabled individuals. Ms. H~ has provided that any balance remaining after those distributions have been made, should be distributed to her three children. Because the trust can be terminated during Ms. H~'s lifetime, this interest could pass to her children and her children can be considered beneficiaries of the Trust. Thus, this provision as well demonstrates that the trust has not been established solely for Ms. H~'s benefit.

Thus, terminating the Trust under the fiction of a "deemed death" creates the possibility that other individuals (here the Trust itself, certain indigent disabled individuals, and Ms. H~'s children) could benefit from the Trust during the beneficiary's, Ms. H~'s lifetime. The Trust, therefore, fails to meet the resource exception for Medicaid payback trusts under the Social Security Act.

CONCLUSION

For the foregoing reasons, we conclude that Ms. H~'s sub-account in the Trust would be a resource for her.

N. PS 05-149 SSI-Illinois-Review of the Jonathon L. D~ Special Needs Irrevocable Pay Back Trust, ~ Your Reference: S2D5G6, SI-2-1-3 IL (D~) Our Reference: 05-0087

DATE: April 29, 2005

1. SYLLABUS

This opinion examines whether or not the trust in question is a resource for SSI purposes. As outlined in the POMS at SI 01120.201, the principal of an irrevocable trust established with the benefits of individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse, unless one of the exceptions in SI 01120.203 (Medicaid trust exceptions) applies. As outlined in SI 01120.203B.1., a special needs trust established under Section 1917(d)(4)(A) of the Act is not a countable resource assuming it meets the criteria established in that section. In this case, the trust is a countable resource because it fails to satisfy the requirement that the trust be established for the benefit of the individual by a parent, grandparent, legal guardian, or a court.

2. OPINION

You have asked whether the trust entitled "The Jonathon L. D~ Special Needs Irrevocable Pay Back Trust" established for the benefit of Jonathon L. D~ (Jonathon) is a resource for purposes of determining Jonathon's eligibility for SSI. For the reasons explained below, we conclude that the trust is a resource.

BACKGROUND

On May 4, 2004, Leo D~ III and Bonnie D~ (Jonathon's parents) created "The Jonathon L. D~ Special Needs Irrevocable Pay Back Trust" (Trust) for Jonathon's benefit. This special needs trust was funded by Jonathon's parents transferring Jonathon's assets to the trust, which were assets gifted to him from his parents through the Uniform Gifts to Minors Act (UGMA). Trust Preamble & Trust §§ 1.1, 1.2. These assets amounted to $45,682.91 in investment accounts and stocks owned by Jonathon's parents as custodians for Jonathon. *See* Schedule A of Trust. Jonathon's parents were both named as settlors and trustees of the Trust. Trust Preamble & Trust § 1.1. The Trust provides that it is irrevocable, subject to the right of the trustees to amend any administrative provisions of the Trust, upon court approval, so that it conforms with any regulations that are approved by any governing body or agency relating to 42 U.S.C. 1396p or related statutes. Trust § 1.4.

The Trust declares that its purpose is to supplement, but not to supplant, whatever benefits and services Jonathon may receive as a result of age, disability, or other factors from federal, state, and local governmental and charitable sources. Trust § 2.1(a).

The Trust provides that it will terminate upon Jonathon's death. Trust § 4.1(a). The Trust also provides that it may terminate upon court order when Jonathon is no longer found to be a "disabled person" pursuant to the Social Security Act § 1614(a)(3), 42 U.S.C. § 1382c(a)(3), but further states that, if Jonathon would be found ineligible for benefits solely because of the existence of this clause, then this clause shall be considered null and void. Trust § 4.1(b).

Upon the Trust's termination, the Trust provides that its assets will be distributed in the following order:

a. The assets would be used to repay the State of Illinois (or any other State or Federal agency) for any payments that had been made on behalf of Jonathon during his lifetime.

b. The assets would then be used to pay for Jonathon's funeral expenses; death taxes; court fees for probate administration of his estate; and all legal, trustee, and accounting fees related to his estate.

c. If the trust is terminated during Jonathon's lifetime (i.e., if he is no longer considered disabled for purposes of SSI), the Trust assets would then be distributed to his parents equally or to their survivors. If his parents do not survive, then the Trust assets would be distributed to other certain named family members or, if none, then to Jonathon's heirs at law.

d. If the trust is terminated by Jonathon's death, the remaining Trust assets would then be distributed in accordance with any appointments in Jonathon's will, or, absent such appointments, to certain named family members, and any remaining interests to Jonathon's heirs at law.

Trust § 4.2

The Trust indicates that its terms are to be construed under Illinois law. Trust § 8.2.

DISCUSSION

Under federal law, a trust established by an individual after January 2000 generally will be considered a resource to him if the trust is revocable, unless it meets certain exceptions. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1). If the trust is irrevocable, the trust is still a resource if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. In that case, the value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a).

As noted above, the Trust states that it is irrevocable. Trust § 1.4. Moreover, even though Jonathon should be considered the true settlor of the Trust (since the Trust was established with funds that belonged to him), he is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200. Specifically, the Trust creates contingent remainder interests in certain named family members. POMS SI CHI01120.200(D)(1). Accordingly, the Trust is irrevocable. POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary.").

However, pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since Jonathon is a beneficiary), unless one of the exceptions in POMS SI 01120.203 (which lists the Medicaid trust exceptions) applies. However, it does not appear that any of the exceptions in POMS SI 01120.203 are applicable.

Specifically, the Medicaid trust exception for individual trusts applies where the trust is:

a. established with the assets of an individual under age 65 who is disabled;

b. established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and

c. provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

POMS SI 01120.203(B)(1).

Here, Jonathon is under age 65 and, according to your e-mail indicating a medical allowance has been granted, he is disabled. Also, the Trust provides that, upon Jonathon's death, any remaining funds would be used to reimburse the State(s) for Medicaid payments made for his benefit during his lifetime. Trust § 4.2(a).

The Trust, however, fails to satisfy the second requirement, which requires that it be established for the benefit of Jonathon by a parent, grandparent, legal guardian or a court. Here, the Trust was established when Jonathon's parents transferred his assets into the trust (which were assets gifted to him from his parents through the UGMA). Trust Preamble & Trust §§ 1.1, 1.2. We have been advised, by the Team Leader of the Office of Disability and Income Security Program's Deeming Income and Resources Team, that under Agency policy, where a parent, acting as the agent for a competent adult, creates a trust by merely transferring a competent adult's funds, the parent has not "established" the trust for purposes of 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(e). This policy is based upon the absence of the term "individual" from the list of entities that are permitted to establish a trust under 42 U.S.C. § 1396p(d)(4)(A). *Compare* 42 U.S.C. § 1396p(d)(4)(C) (permitting an "individual" to establish his or her own "account" in a pooled trust). *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm'r-MOS, Chicago, *SSI- Illinois-Review of the Brian V~ Irrevocable OBRA Pay Back Trust* at p. 3 (November 22, 2004). We have been further advised, however, that a parent may establish a trust under 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1) for a competent adult by creating a "seed trust", i.e., contributing some amount of funds not belonging to the individual prior to transferring the individual's funds to the trust.

Accordingly, it does not appear that any of the exceptions in POMS SI 01120.203 apply, and thus the Trust should be considered a resource under POMS SI 01120.201(D)(2).

CONCLUSION

For the reasons discussed above, we conclude that the trust is a resource. This trust was established when Jonathon's parents transferred his assets to the trust and it does not meet any exceptions under POMS SI 01120.203.

O. PS 05-036 SSI - Illinois - Review of the Proposed Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust Your Reference: S2D5G6; SI 2-1-3 IL (Jewish Federation) Our Ref: 04-P-093

DATE: November 29, 2004

1. SYLLABUS

The opinion in this case addresses whether or not the sub-accounts within the master pooled trust are a resource for SSI purposes. The POMS at SI 01120.203B.2. outline the criteria that must be met in order for a pooled trust to qualify for the special needs trust exception. One of the criteria is that the sub-accounts in the trust must be established solely for the benefit of the disabled individual. One the provisions in the trust in question creates a possibility that upon termination of the trust, other individuals could benefit from the trust during the primary beneficiary's lifetime. Because of this provision, a sub-account in the pooled trust is considered a resource for SSI purposes.

2. OPINION

On August 19, 2003, we provided a legal opinion regarding whether an earlier version of the proposed Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust would constitute a resource for SSI purposes. We advised that, if an individual joined the pooled trust, the sub- account within the Master Trust would be a resource. You subsequently received a revised pooled Trust (Trust), and have asked whether this Trust would constitute a resource for SSI purposes. For the reasons discussed below, we believe that, if an individual joined the pooled trust, the sub-account within the Master Trust would be a resource.

BACKGROUND

The Jewish Federation of Metropolitan Chicago, an Illinois not for profit corporation, proposes to establish the Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust. *See* Trust at 1. The purpose of the trust is to hold assets of primary beneficiaries who are disabled and provide for their supplemental needs and supplemental care, and not to provide for their

general support. *See* Trust Art. Two, Section 2.01 at 3. The trust defines primary beneficiary as a person with one or more disabilities as defined by Section l6l4(a)(3) of the Social Security Act, 42 U.S.C. § 1382c(a)(3). *See* Trust Art. One, Section 1.02 at 2.

Within the Trust, individual trust accounts, called Sub-Accounts, are established and maintained for each Primary Beneficiary. *See* Trust Art. One, Section 1.03 at 2; Trust Art. Three at 4. The funds from each sub-account are pooled for investment and management of the funds. *See* Trust Art. Three at 4. A sub-account within the trust is established for a primary beneficiary when an Adoption Agreement is signed by a grantor, who according to the trust may be the primary beneficiary, a parent, grandparent, sibling, or legal guardian. *See* Trust Art. One, Section 1.05 at 2; Trust Art. Five, Section 5.01 at 4. Upon execution of the Adoption Agreement by the grantor, or by court order, subject to the approval of the trustee, the sub-account is established. *See* Trust Art. Five, Section 5.02 at 4. The trustee has sole discretion to reject any Adoption Agreement and to handle all funding matters. *See* Trust Art. Five, Section 5.02 at 4. The Trust states that the sub-account is irrevocable and the contributed property shall not be refundable. *See* Trust Art. Five, Section 5.02 at 5. The Trust also states that property or interests in property can be designated for future transfer by a grantor as a contribution, and that the designation of the property can be revoked by the grantor during the grantor's life and continued competence, upon written notice from the grantor to the trustee. *See* Trust Art. Five, Section 5.03 at 5. Examples of such contributions include a life insurance policy on a grantor's life in which the Master Trust is designated as a beneficiary, or the Master Trust being named as a beneficiary of any future interest of property, such as that which would pass by way of a grantor's will. *See* Trust Art. Five, Section 5.03 at 5.

The Trust provides that upon the death of a primary beneficiary, any amounts remaining in the primary beneficiary's sub-account, may be distributed first to pay any outstanding, reasonable, administrative expenses and fees for administration of the sub-account associated with the termination and wrapping up of the sub-account, such as an accounting to the court and filing of documents, and taxes due from the sub-account to the State or Federal government because of the death of the beneficiary. *See* Trust Art. Nine, Section 9.01 at 10.

After payment of those expenses, the assets of the primary beneficiary's trust account would be distributed to the Trust as specified below, with the termination of the sub-account:

In accordance with 42 U.S.C. § 1396p(d)(4)(C) and Ill. Admin. Code Sect. l20.347(d)(2), as the assets of a Primary Beneficiary's Sub-Account shall be retained at death by the Master Trust, neither the Master Trust nor the Sub-Account shall reimburse the government and/or its agencies at that time for any services provided to the deceased Primary Beneficiary; provided, however, that to the extent any funds remaining in the Primary Beneficiary's Sub-Account after payment of the expenses set forth in Section 9.01 are not for any reason retained by the Master Trust, such amounts (up to the amount expended by the State of Illinois, or any other state, for medical assistance for the Primary Beneficiary) shall be paid to the State of Illinois or such other state as has provided benefits to the Primary Beneficiary as reimbursement to the State of Illinois or such other state for such medical benefits provided to the Primary Beneficiary during his or her lifetime. Assets of a deceased Primary Beneficiary's Sub-Account which are retained by the Master Trust shall be maintained in the General Fund Sub-Account, to be utilized, administered and distributed, from time-to-time, for the benefit of any Primary Beneficiary of this Master Trust. Such General Fund Sub-Account shall be administered and distributed in accordance with the terms and provisions of this Master Trust. However, neither the Trustee nor the Settlor has an obligation to expend funds from the General Fund Sub-Account or the Master Trust or provide services for the benefit of any Primary Beneficiary as a result of the depletion of his or her own individual Sub- Account. The JEWISH FEDERATION OF METROPOLITAN CHICAGO shall be considered the Grantor of this General Fund Sub-Account.

Trust Art. Nine, Section 9.02 at 10-11. The Trust further states:

If the Trustee has reasonable cause to believe that the income or principal in a Sub- Account for a Primary Beneficiary is or will become liable for basic maintenance, support, or care for a Primary Beneficiary which has been or would otherwise be provided by local, state, or federal government, or any agency or department thereof, the Trustee, in its sole discretion, may either: (1) distribute the funds in the Sub-Account to an individual trust or to an account in another pooled or community trust for the sole benefit of the Primary Beneficiary, so long as the purposes of the receiving trust are consistent with the purposes of Article II and, if applicable to the Sub-Account, with 42 U.S.C. § 1396p(d)(4)(A); or (2) continue to administer the Sub-Account under separate arrangement with the affected Primary Beneficiary or his or her guardian for the Primary Beneficiary's sole benefit.

Trust Art. Nine, Section 9.03 at 11. The Trust also states:

If, for reasons outside of the control of the Trustee, it becomes impossible or impracticable to carry out the Master Trust's purposes and the trust is terminated, all remaining trust property in each Primary Beneficiary's Sub-Account and the General Fund will be distributed as follows: such amounts (up to the amount expended by the State of Illinois, or any other state, for medical assistance for the Primary Beneficiary) shall be paid to State of Illinois or such other state as has provided benefits to each Primary Beneficiary as reimbursed to the State of Illinois or such other state for such medical benefits provided to each Primary Beneficiary during his or her lifetime, and any remaining funds in each Sub-Account and the General Fund shall be distributed to either: (1) another pooled or community trust so long as the purposes of the receiving trust are consistent with the purposes of Article II and, if applicable to each Sub-Account, with 42 U.S.C. § 1396p(d)(4)(A); or (2) pursuant to a court order after a final accounting along with a petition seeking direction for final distribution is filed in a court of competent jurisdiction in the State of Illinois.

See Trust Art. Nine, Section 9.04 at 11.

DISCUSSION

Under the Social Security Act, trusts created on or after January 1, 2000, from the assets of a SSI claimant or beneficiary, will be considered a resource to the extent that the trust is revocable, or, in the case of an irrevocable trust, to the extent that any payments can be made from the trust for the benefit of the individual. *See* 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a).

Certain pooled trusts are excepted from this statutory provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). To qualify for the Medicaid payback trust exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

a. It must be established and managed by a nonprofit association;

b. A separate account must be maintained for each beneficiary of the trust, but assets are pooled for investing and management purposes;

c. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, parent, grandparent, legal guardian, or court; and

d. The trust must provide that to the extent that 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 from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan.

See POMS SI 01120.203(B)(2).

The revised pooled Trust does not qualify for the Medicaid Payback exception because the third requirement is not met. Section 1917(d)(4)(C)(iii) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C), requires, in relevant part, that, to qualify for the Medicaid Payback exemption to counting trusts under the statute, "[a]ccounts in the trust [must be] established solely for the benefit of individuals who are disabled ...." The POMS provides that one should "[c]onsider a trust established **for the sole benefit of** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." *See* POMS SI 01120.201(F)(2).

The trust provisions at Trust Art. Nine, Section 9.03 at 11, do not violate this rule because terminating the trust would result in distribution of the funds for the sole benefit of the Primary Beneficiary, and would thus satisfy 42 U.S.C. § 1396p(d)(4)(C). Furthermore, the trust provision at Trust Art. Nine, Section 9.04(1) at 11, also does not violate this rule because terminating the trust would result in distribution of the funds to another pooled or community trust so long as the purposes of the receiving trust were consistent with the purposes of Article II and with 42 U.S.C. § 1396p(d)(4)(A), which we assume would also be in the sole benefit of the Primary Beneficiary.

However, the trust provision at Trust Art. Nine, Section 9.04(2) at 11, appears to violate the rule that sub-accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court. *See* POMS SI 01120.203(B)(2). Terminating the Trust pursuant to a court order after a final accounting along with a petition seeking direction for final distribution creates a possibility that upon termination of the Trust, other individuals could

benefit from the Trust during the primary beneficiary's lifetime. Because of this provision, the Trust should be considered a resource under 42 U.S.C. § 1382b(e).

CONCLUSION

For the foregoing reasons, we conclude that a sub-account in the proposed pooled trust should be considered a resource.

P. PS 05-033 SSI - Illinois. - Review of the Brian V~ Irrevocable OBRA Pay Back Trust Our Reference: 04S044 Your Reference: S2D5G6, S1 2-1-3 IL (V~)

DATE: November 22, 2004

1. SYLLABUS

This opinion determined that an Illinois special needs trust does not meet the requirements for an exception under section 1917(d)(4)(A) of the Social Security Act. This trust contains a Disclaimer provision coupled with a Distribution-Upon-Termination-of-the-Trust provision. The combination of these 2 provisions creates contingent interests which could benefit third parties during the lifetime of the beneficiary. Accordingly, the trust does not meet the requirement in section 1917(d)(4)(A) that the trust must be established for the benefit of the beneficiary. Thus, it should be counted as a resource for SSI purposes.

2. OPINION

You have asked whether a trust purporting to be an Irrevocable OBRA Payback Trust established for Brian A. V~ ("Mr. V~"), a minor, is a resource for the purposes of determining Mr. V~'s eligibility for Supplemental Security Income (SSI). We believe, for the reasons stated below, that the trust is a resource to Mr. V~.

BACKGROUND

Mr. V~ was declared a disabled minor on October 22, 2003. On that date, LaSalle State was appointed guardian of his estate. Mr. V~'s mother brought a medical malpractice claim on behalf of Mr. V~, and a settlement was reached resulting in the sum of $455,992.94 to be paid to Mr. V~. The trust will be funded with the money Mr. V~ received as a result of his medical malpractice settlement. Trust, Exhibit A. His family has retained counsel to create an irrevocable OBRA payback trust. A proposed draft of the trust was submitted for our review.

The name of the trust is "The Brian V~ Irrevocable OBRA Payback Trust." Trust § 1.7. The Trust names LaSalle State as the settlor of the Trust. Trust §§ 1.1, 1.6. The Trust, however, is funded with the assets of Mr. V~, who is named as the Beneficiary of the Trust. Trust §§ 1.2, 1.5. The purpose of the Trust is to supplement but not to supplant, whatever benefits Mr. V~ may be entitled to, and is intended to qualify Mr. V~ for Supplemental Security Income ("SSI"). The trustee is directed to use the principal and income from the trust to provide Mr. V~ with only those benefits and services that, in the trustee's judgment, are necessary for the beneficiary's welfare and are not otherwise available to the beneficiary from other sources. Trust § 2.1. The making and amount of any disbursement from the trust is subject to Court Order. Trust § 3. The Trust grants the trustee alone any "right, power, or authority to liquidate the Trust, . . . or to require payments from the Trust for any purpose. Trust § 3. Finally, the Settlor of the trust "relinquishes all power to alter, amend, or revoke any provisions of the Trust Agreement" and the Trust is expressly made "irrevocable and is intended so pursuant to Section SI-01120.200.D.2 of the Social Security Administration Program Operation Manual System." Trust § 1.4. The trustee may amend any administrative provisions of the Trust with leave of Court, and may alter or reform the Trust so that it conforms with any regulations relating to 42 U.S.C. § 1396p. Trust § 1.4.

The Trust is intended to be an OBRA Pay Back Trust, established under 42 U.S.C. § 1396p(d)(4)(C). The Trust provides that the Trust shall terminate upon the death of the beneficiary. Trust § 4.1(a). Upon the Trust's termination, except upon exhaustion of the corpus, the trustee is directed to execute the following administrative provisions of the Trust in the order listed:

i. pay any amount (up to the amount expended by the State of Illinois or any other state, for medical assistance) to the appropriate state agencies as reimbursement to such state for any benefits provided to Mr. V~ during his lifetime;

ii. may first pay death taxes due from the Trust to the state or federal government and reasonable fees for the administration of the Trust Estate, such as an accounting to a Court, a completion and filing of documents, or other required actions associated with termination and wrapping up the Trust;

Trust § 4.2. Any remaining Trust assets shall be distributed to that person or persons other than Mr. V~ or his estate, on such terms as designated by Mr. V~ in a will admitted to probate. Trust § 4.2. In the absence of such a will, the Trustee is directed to pay the remaining Trust estate to Rosa N~ or her descendants, per stirpes, if Rosa N~ predeceases Mr. V~. Trust § 4.2.

The Trust also contains a clause providing for the termination of the Trust prior to the death of Mr. V~, upon court order, if Mr. V~ is found to be no longer disabled under the Social Security Act, 42 U.S.C. § 1382c, and the Guardian petitions the Court to have the Trust terminated. Trust § 4.1(b). Additionally, the Trust provides for termination prior to the death of the beneficiary, where the beneficiary is restored to capacity under the state Probate Act, is no longer disabled under the Social Security Act, and the beneficiary petitions the court to have the Trust terminated. Trust § 4.1(b). The Trust provides that if applicable federal or state law or regulations are amended or interpreted to render the beneficiary of the trust ineligible for government benefits solely because of this clause, then this clause "shall be null and void." Trust § 4.1(b). The Trust also contains a disclaimer provision that allows Mr. V~, through his guardian, to disclaim his interest in the Trust after having received Court authority. Trust § 7.2. If the Trust is terminated prior to Mr. V~'s death or Mr. V~ disclaims his interest, the Trust provides that the Trust corpus will be paid as designated in Mr. V~'s will, if he has one, and otherwise to Rosa N~ or her descendants. Trust §§ 4.2, 7.2.

DISCUSSION

Under federal law, a trust established by an individual after January 2000 generally will be considered a resource to him if the trust is revocable, unless it meets certain exceptions. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1). If the trust is irrevocable, the trust is still a resource if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. In that case, the value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a).

As explained above, the Trust document states that it is irrevocable. Trust § 1.4. Moreover, even though Mr. V~ should be considered the true settlor of the Trust (since the Trust was established with funds that belonged to him), he is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200. Specifically, the Trust creates contingent remainder interests in persons named in Mr. V~'s will, if he has one, or in Rosa N~ or her descendants in the absence of a will. POMS SI CHI01120.200(D)(1). Accordingly, the Trust is irrevocable. POMS SI CHI01120.200(D) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary.").

However, pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since Mr. V~ is a beneficiary), unless one of the exceptions in POMS SI 01120.203 applies. However, it does not appear that any of the exceptions in POMS SI 01120.203 are applicable.

In particular, the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), which requires that the trust be established for the benefit of an individual by a parent, grandparent, legal guardian or court, would be unavailable. We have recently been advised by the Office of Program Law that this provision should be interpreted to require that the trust be established for the sole benefit of the individual during his or her lifetime. *See* POMS SI 01120.201(F)(2) (defining "established for the sole benefit of the individual"). Here, however, the Disclaimer provision in Article 7.2 coupled with the Distribution-Upon-Termination-of-the-Trust provision in Article 4.2 create contingent interests that could benefit third parties during the lifetime of the claimant. Specifically, should Mr. V~ disclaim his interest in the trust under Article 7.2, the corpus of the trust would pass to individuals named in his will, if he has one, and, if not, would pass Rosa N~, or her descendants.[1] Because of these contingent interests in third parties, the trust would not be for the sole benefit of Mr. V~ during his lifetime, and thus the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), as well as any other exceptions, would be unavailable.[2] Therefore, the trust should be considered a resource to Mr. V~ under POMS SI 01120.201(D)(2).

CONCLUSION

We believe that the provision of the Trust which allows Mr. V~ to revoke his interest in the Trust, creates a contingent interest in third parties. Accordingly, the Trust would not be for the sole benefit of Mr. V~ during his lifetime, and thus the exception

under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), as well as any other exceptions, would be unavailable. Accordingly, we believe that the Trust is a resource to Mr. V~.

[1] The termination clause in Article 4.1(b) also appears to create contingent interests in the same third parties. However, the termination provision also provides that it should be considered null and void if it renders the claimant ineligible for government benefits. Trust § 4.1(b). Thus, we do not believe the termination clause would, standing alone, prevent the Trust from satisfying § 1917(d)(4)(A).

[2] We have previously opined that a "third-party termination clause" in a pooled trust is inconsistent with the requirements in POMS SI 01120.203(B)(2), which explicitly requires that the trust have been established for the sole benefit of the individual during his or her lifetime. Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI-Michigan-Review of Proposed Pooled Amenities Trust Fund for Community Advocates for Persons with Developmental Disabilities, (Feb. 13, 2003). Third-party termination clauses are similar to the third-party disclaimer provision above, except that, unlike the disclaimer provision, they are exercised by the trustee, not the claimant. However, both types of clauses create the possibility that third parties could benefit from the trust during the claimant's lifetime.

Q. PS 05-002 SSI-Illinois-Review of Joyce H~ Special Needs Trust ~ Your Reference: SI-2-1-3 IL (H~) Our Reference: 04P004

DATE: September 27, 2004

1. SYLLABUS

This Illinois opinion concerns a Medicaid payback trust that is funded with maintenance (alimony) payments, has a termination clause, and is established by a court order. The opinion states that Illinois would allow a court to create a trust to receive maintenance payments and that the payments are not income to the beneficiary because the court ordered that the payments must go directly to the trust. The opinion states that the termination clause does not prevent the trust from meeting the requirements for an exception under section 1917(d)(4)(A) because exercise of the termination clause would not benefit anyone other than the beneficiary during the beneficiary's lifetime. The opinion also states that the court ordered the creation of this trust consistent with the requirement for an exception under section 1917(d)(4)(A).

2. OPINION

You asked whether a discretionary special needs trust for the benefit of SSI beneficiary Joyce H~ is a resource to Ms. H~ for SSI purposes and whether the court-ordered maintenance payments made to the trust by Ms. H~'s ex-husband constitute income for SSI purposes. We conclude that the trust is not a resource and the maintenance payments made directly to the trust are not income for SSI purposes.

BACKGROUND

On July 30, 2003, pursuant to the petition of Joyce H~, the Domestic Relations Division of the Circuit Court of Cook County, Illinois entered an order directing that "an irrevocable special needs pay back trust" be created on Ms. H~'s behalf to receive: (1) future discovered assets of Ms. H~; (2) future maintenance payments from Dennis H~; and (3) any funds in excess of the Illinois Department of Public Aid cash asset limit which accumulate in Ms. H~'s account. Order 1-2. The court directed that Ms. H~'s ex-husband, Dennis H~, sign an irrevocable transfer of $300.00 per month to the trust from an account to which his pension deposits were made. Order 4, 6. The $300 monthly payment to the trust represents total payment of Mr. H~'s maintenance obligation. Order 8. The order specified that such payments are taxable to Ms. H~. Order 5. The Court stated that the order "shall remain in effect whether or not the Social Security Administration approves the Trust. . ." Order 9.

The trust declaration names the Circuit Court of Cook County as settlor and states that the trust is irrevocable and intended to comply with POMS SI 01120.200.D.2. Trust Declaration (Decl.) §§ 1.1, 1.4. Ms. H~'s ex-husband consented to the creation of the trust, which was to be funded initially by the monthly maintenance payments. Decl. at p. 11, Schedule A. The trustee is authorized to accept additions to the trust from any source, as long as they are in Ms. H~'s best interests. Decl. § 1.3. The trust terms must be construed under Illinois law. Decl. § 8.2. The trustee has power to amend only with respect to administrative provisions. Decl. § 1.4. The trustee is directed to use the principal and income of the trust to provide the beneficiary, Joyce H~, with "only those benefits and services, that, in the Trustee's judgment, are not otherwise available to the Beneficiary from other sources as or when needed for her welfare," the purpose being to enable Ms. H~ to lead "as normal, comfortable, and

fulfilling a life as possible." Decl. § 2.1. Disbursements from the trust are subject to court order. Decl. § 3. The trustee is instructed to conserve and accumulate the trust estate to the extent feasible, but accumulation or use of the trust is determined solely based on Ms. H~'s needs, without regard for the remaindermen's interests. Decl. § 3. The trust contains a spendthrift provision protecting the beneficiary's interest from assignment, alienation, pledges, attachments, or creditors' claims. Decl. § 7.1. No one except the trustee has the power to require payments from the trust or liquidate the trust. Decl. § 3.

The trust terminates at Ms. H~'s death or upon court order when she no longer meets the Social Security Act definition of "disabled." Decl. § 4. If the trust terminates during Ms. H~'s lifetime, the trust property is to be distributed to Ms. H~ or her guardianship estate. Decl. § 4.2(c). If the trust terminates at Ms. H~'s death, the trust property is to be distributed in the following order: (1) death taxes imposed on Ms. H~'s estate; (2) court fees related to administration of Ms. H~'s estate; (3) other fees related to Ms. H~'s estate; (4) the State of Illinois as reimbursement for assistance paid under public benefit programs; (5) those whom Ms. H~ may appoint in her will. Any property remaining in the trust and not distributed under Ms. H~'s power of appointment is to be distributed to Ms. H~'s children in equal shares. Decl. § 4.2.

DISCUSSION

Do the Maintenance Payments Paid Directly into the Supplemental Needs Trust Constitute Income?

Alimony, sometimes called maintenance, is an allowance ordered by a court to be paid to one spouse from the funds of the other spouse pursuant to a proceeding for divorce or legal separation. 20 C.F.R. § 416.1121. "For SSI purposes, alimony and support payments are cash or in-kind support contributions to meet some or all of a person's needs for food, clothing, or shelter." 20 C.F.R. § 416.1121. Such payments are generally classified as unearned income. 20 C.F.R. § 416.1121.

The domestic relations court has ordered maintenance payments from Ms. H~'s ex-husband to be paid directly into a trust with Ms. H~ as the beneficiary. Initially, the inquiry is whether the creation of the special needs trust and the payment of Ms. H~'s maintenance payments into the trust is permissible under Illinois law. If not, the payment of maintenance into the trust cannot be sheltered from being countable income to Ms. H~.

In Illinois, a court's power to award maintenance in connection with a proceeding for a divorce or legal separation is derived from § 504 of the Marriage and Dissolution of Marriage Act. 750 Illinois Compiled Statutes (ILCS) 5/504. The statute enumerates the factors which a court considers, including each spouse's income, property, and needs, each spouse's present and future earning capacity, the standard of living established during the marriage, the age and physical and emotional condition of each spouse, any valid agreement between the spouses, and any other factors the court finds just and equitable. 705 ILCS 5/504(a). Thus, one of the purposes of maintenance payments is to meet a spouse's needs. *See In re Marriage of S~*, 729 N.E.2d 546, 551 (Ill. App. 2000), citing *In re Marriage of S~*, 656 N.E. 2d 215, 220 (Ill. App. 1995) ("Maintenance may be appropriate where a spouse is not able to earn enough money to meet his needs, even if he is employed"). Placing maintenance payments in a trust that does not allow distributions for basic support would appear to be inconsistent with that purpose. *See, e.g.*, *In re Marriage of B~*, 547 N.E.2d 590, 597 (Ill. App. 1989) (improper to provide for child support payments to trust which did not allow use of the trust corpus for support during the child's minority). *See also Memorandum from Reg. Chief Counsel, Chicago to Asst. Reg. Comm. - MOS, Chicago, Illinois Trust for Krystal L~ S~* (July 10, 1998) (payment of court-ordered child support into supplemental needs trust for benefit of disabled adult child not proper under Illinois law). The statute, however, also provides for court consideration of the standard of living established during the marriage. 750 ILCS 5/504(a)(6). *See In re Marriage of R~*, 539 N.E.2d 1365, 1367 (Ill. App. 1989) (citing *In re Marriage of H~*, 505 N.E.2d 1294, 1301 (Ill. App. 1987)) (goal of maintenance, in certain situations, is "to provide supplementary income where the spouse cannot support herself in her pre-dissolution lifestyle"). Requiring that maintenance payments be made into a trust that allows only for supplemental needs does not appear to be inconsistent with the purpose of assuring that the spouse can maintain the standard of living established during the marriage.

Even though maintenance payments made to a supplemental needs trust may not be contrary to the purposes for awarding maintenance, the question remains whether a court, in connection with a dissolution of marriage, has the authority to create such a trust to receive maintenance payments. A trial court's authority in proceedings for dissolution of marriage is limited to the authority provided for by statute. *See In re Marriage of R~*, 760 N.E.2d 592, 596 (Ill. App. 2001) (trial court was without jurisdiction to enter order relating to termination of parental rights during proceeding brought pursuant to the Marriage Act because court can act only within the limited authority vested in it by the applicable provisions of the Marriage Act). In *In re Marriage of I~*, 788 N.E.2d 794 (Ill. App. 2003), the court noted that a trial court's authority in a dissolution proceeding is conferred only by statute and, therefore, the court may not rely on its general equity powers. 788 N.E. 2d at 799 (citing *In re Marriage of R~*, 760 N.E.2d 592 (Ill. App. 2001)); *In re Marriage of B~*, 643 N.E.2d 268 (Ill. App. 1994).

The Marriage and Dissolution of Marriage Act contains a statutory provision allowing the court to establish a trust to receive child support payments. 750 ILCS 5/503(g). However, we located no such provision authorizing the court to establish a trust to receive maintenance payments. Nor did we locate any Illinois cases in which the domestic relations court formed a trust for the purpose of receiving maintenance payments. In *In re Marriage of G~*, 576 N.E.2d 946 (Ill. App. 1991), the court directed the husband's attorney to establish a trust fund, pursuant to 750 ILCS 503(g), and make disbursements from the trust fund for various purposes, including child support arrearage and unallocated maintenance to the wife at a monthly rate of $1300 per month for 12 months. 576 N.E.2d at 948. The court stated that, although the domestic relations court had properly invoked 750 ILCS § 503(g) in creating a trust for the child's benefit, the unallocated maintenance for the wife was not a proper distribution from the trust. 576 N.E. 2d at 948-49.

We conclude that, because there is no statutory authority to do so, the court may not have had authority, absent consent of the parties, to create a trust to receive the maintenance payments owed to Ms. H~. *See In re Marriage of R~*, 381 N.E.2d 744, 748 (Ill. App. 1978) (creation of trust as part of dissolution decree must conform to statutory requirements); *In re Marriage of B~*, 441 N.E.2d 1283, 1289 (Ill. App. 1982) ("The authority of Illinois courts to set aside separate funds or create trusts for dependents is strictly limited to the purposes set forth in this subsection [now 750 ILCS 5/503(g)]"). It may be, however, that the creation of such a trust would be permissible by agreement of the parties. *See In re Marriage of B~*, 441 N.E.2d 1283, 1291 (Ill. App. 1982); ("The law favors amicable settlement of property rights in cases involving dissolution of marriage and are (sic) reluctant to disturb an agreed order in the absence of fraud, coercion, or settlement terms which are against public policy or morals") (citing *Horwich v. Horwich*, 386 N.E.2d 620). It appears from the statement in the court order that Ms. H~ requested the creation of the trust and from Mr. H~'s consent appended to the trust declaration that the trust was created pursuant to the agreement of the parties. Therefore, we conclude that the court's creation of the trust to receive maintenance payments was likely allowable under Illinois law. Because the payments are made directly into the trust, they would not be considered income to Ms. H~ when paid into the trust.

Is the Trust a Resource?

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash for her support and maintenance. 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. 20 C.F.R. § 416.1201(a). Although the court is nominally the settlor of this particular trust, the assets used to fund the trust at its creation were maintenance payments belonging to Ms. H~. Decl. Schedule A. A trust established on January 1, 2000 or later with the assets of an individual will be considered that individual's resource for SSI purposes unless a Medicaid trust exception applies. *See* POMS SI 01120.203. Because this trust was created after January 1, 2000, with Ms. H~'s assets, the trust is a resource to Ms. H~ unless the Medicaid trust exception applies. *See* POMS SI 01120.203.

Under the Medicaid trust exception, trust assets will not be considered a resource to the individual where (1) the individual is disabled and under age 65, (2) the trust was established for the individual's benefit by a parent, a grandparent, a legal guardian, or a court, and (3) the terms of the trust provide that, upon the death of the individual, the State will be reimbursed for the total medical assistance paid on the individual's behalf under a State Medicaid plan. POMS SI 01120.203B.1.a. Where an individual's assets form only a part of the trust, these rules will apply to that portion of the trust attributable to the individual. Thus, a proration of the trust assets may be necessary where only part of the trust derives from the individual's property.

The materials you sent us indicate that Ms. H~ is disabled and under age 65. *See* SSID dated 09/26/03. We cannot be certain from those materials whether Ms. H~ has been adjudicated incompetent. We have been advised by the Office of Disability and Income Security Programs (ODISP), however, that, consistent with 42 U.S.C. § 1396p, a court may create a Medicaid payback trust for a competent adult, but only if the court establishes the trust by order, as opposed to merely approving a trust that has already been created. The individual, however, may petition the court to enter the order establishing the trust. Here, although Ms. H~ petitioned the court to create the trust, the court entered an order directing creation of the trust. Therefore, even if Ms. H~ is competent, that fact would not preclude creation of a Medicaid payback trust because the court ordered the trust to be created.

The terms of the trust provide that, upon Ms. H~'s death, the trust property will be distributed in the following order: (1) death taxes imposed on Ms. H~'s estate; (2) court fees related to administration of Ms. H~'s estate; (3) other fees related to Ms. H~'s estate; (4) the State of Illinois as reimbursement for assistance paid under public benefit programs; and (5) those persons appointed by Ms. H~'s will. Any remaining trust property not distributed under Ms. H~'s power of appointment is to be distributed to Ms. H~'s children in equal shares. Decl. § 4.2. The payment of death taxes, court fees related to administration of the estate, and other fees related to administration of the estate before payment to the State as reimbursement for Medicaid

assistance is permissible under the Medicaid exception rules. POMS SI 01120.203B.3. Thus, the provision for termination of the trust at Ms. H~'s death complies with the Medicaid trust exception. *See* POMS SI 01120.203B.1.a.

The trust declaration also provides, however, for court ordered termination and distribution of the trust assets prior to Ms. H~'s death if Ms. H~ ceases to meet the Social Security Act definition of "disabled." Decl. § 4. If the trust terminates under this provision, the trust assets must be distributed to Ms. H~ or to her guardianship estate. Decl. § 4.2(c). We have been advised by the Team Leader of the Office of Disability and Income Security Programs (ODISP) Deeming, Income, and Resources Team that such termination clauses are consistent with the statutory Medicaid payback provisions, at least so long as exercise of the termination clause would not benefit anyone other than the individual during the individual's lifetime. Because there is no indication that exercise of the termination clause would benefit anyone other than the individual here, it would not appear to prevent the trust from complying with the Medicaid payback provisions. Should the clause be exercised, however, the Agency would need to consider whether the assets distributed to the claimant should be considered as either a resource or as income. Thus, we conclude that the portion of the trust derived from Ms. H~'s assets meets the Medicaid payback trust exception.

The portion of the trust attributable to Ms. H~'s assets is also not a resource under SSA's regular resource rules. Under the regular resource rules, a trust is a resource if the SSI beneficiary can: (1) revoke the trust and use the assets for her support and maintenance; (2) direct the trustee to pay her the trust assets or use the trust assets to pay for her support and maintenance; or (3) sell her beneficial interest in the trust. POMS SI 01120.200D. Under the terms of the trust declaration, the trust is irrevocable. Decl. § 1.4. Ms. H~, thus, cannot revoke the trust unless she is both the trust settlor and the sole beneficiary. *See Stewart v. Merchants National of Aurora*, 278 N.E. 2d 10, 12 (Ill. App. 1972) (trust settlor who is also sole beneficiary can revoke trust without the trustee's consent, even though no power of revocation was reserved when the trust was created). Although the court is nominally the settlor of this particular trust, the assets used to fund the trust at its creation are maintenance payments belonging to her. Decl. Schedule A. Therefore, Ms. H~ is the true settlor of the trust, at least as to that portion of the trust attributable to the maintenance payments or other property belonging to Ms. H~. *See In re Estate of H~*, 635 N.E.2d 853, 855 (Ill. Ct. App. 1994) (citing *Stewart v. Merchant's Nat'l of Aurora*, 278 N.E.2d 10, 12 (Ill. Ct. App. 1972)("[the person] who furnishes consideration for the creation of a trust is the settlor, even though, in form, the trust is created by another."). Ms. H~, however, is not the sole beneficiary of the trust and, therefore, cannot revoke the trust. Although Ms. H~ is the only named beneficiary during her lifetime, on termination of the trust at her death, the remainder of the trust estate, after payment of estate taxes, estate administration fees, and the Medicaid payback, must be distributed to those whom Ms. H~ appoints by will or, if she does not exercise her testamentary power of appointment, to her children in equal shares. *See* Rest.3d Trusts § 49(b) (an interest may be subject to a power of appointment), comment b (beneficiary has an existing future interest even though it is subject to another's power of appointment). Although no Illinois statutes or cases were located on the subject, we conclude that Illinois courts would likely apply basic trust law to find that a remainder interest is created in Ms. H~'s children. *See* Rest.2d Trusts § 127, comment b ('if the beneficial interest is limited to the settlor for life and on his death the property is to be conveyed to his children, issue, or descendants, he is not the sole beneficiary of the trust, but an interest in remainder is created in his children, issue, or descendants"); Memorandum from Acting Reg. Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *Review of Regional POMS Transmittal on State Laws Pertaining to Grantor Trusts* (Mar. 11, 2003) at 2; Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *Update on the Law Regarding Grantor Trusts* (July 23, 2003) at 2. *See also* Rest.3d Trusts §49(a)(1) (remainder interest created even where "heirs" are designated).

Ms. H~ also cannot direct the trustee to make payments for her basic support and maintenance. The trust declaration gives the trustee sole discretion to use the principal and income of the trust only for Ms. H~'s supplemental needs. Decl. § 2.1. It further states that no one other than the trustee can compel payments from the trust. Decl. § 3. Thus, Ms. H~ cannot direct the trustee to make payments for her basic support and maintenance. Nor can she sell her beneficial interest in the trust. The trust contains a spendthrift provision which precludes her from assigning or otherwise alienating her beneficial interest in the trust. Decl. §7.1. Even if Ms. H~ could sell her beneficial interest in the trust, it would likely have no real fair market value because no reasonable person would purchase the right to have the trustee, in his sole discretion, make disbursements to, or on behalf of, Ms. H~. Because Ms. H~ cannot revoke the trust, direct payments from the trust for her basic support and maintenance, or realistically sell her beneficial interest in the trust, the trust should not be considered Ms. H~'s resource for SSI purposes.

Although the trust was created to hold assets belonging to Ms. H~, including the maintenance payments from her husband, the trust declaration contains a provision allowing the trustee to accept property from other sources, as long as the trust addition is in Ms. H~'s best interest. Decl. § 1.3. If additions are made to the trust from other sources, the regular resource rules apply to determine whether that portion of the trust attributable to the additions from other sources constitute Ms. H~'s resource for SSI purposes. As discussed above, Ms. H~ cannot revoke the trust, direct distributions from the trust for her basic support and

maintenance, or sell her beneficial interest in the trust. Therefore, like the portion of the trust attributable to her own property, any portion attributable to additions from other sources would not be considered Ms. H~'s resource for SSI purposes.

CONCLUSION

We conclude that the Joyce H~ Special Needs Irrevocable Pay Back Trust, created by the Circuit Court of Cook County, should not be considered a resource to Ms. H~ for SSI purposes. We also conclude that the maintenance payments from Dennis H~ are not income to Ms. H~ when paid directly into the trust.

R. PS 04-308 Illinois Disability Pooled Trust for Jerry L. R~, ~; Your Reference: S2D5G6

DATE: December 12, 2001

1. SYLLABUS

This opinion concerns a pooled trust in Illinois. This pooled trust has been determined to be countable as a resource for SSI purposes because it does not meet the requirements for an exception as a Medicaid payback trust. This trust inappropriately provides for payment of the trust beneficiary's funeral expenses before the State is reimbursed for Medicaid benefits.

2. OPINION

You requested an opinion as to whether the Illinois Disability Pooled Trust entered into by Jerry R~, an SSI claimant, constitutes a countable resource for SSI purposes. For the reasons discussed below, it is our opinion that the trust is a countable resource.

BACKGROUND

On May 24, 2000, Mr. R~, by his guardian, executed a Joinder Agreement and adopted the Illinois Disability Pooled Trust ("Trust"). The Trust consists of sub-accounts which are maintained for the benefit of individual beneficiaries, but are pooled and managed collectively for purposes of investment and management of funds. *See* Pooled Trust Agreement at 1; 2, 2.5; 4, 3.2. Mr. R~ is the named beneficiary of the Trust sub-account. *See* Joinder Agreement at 1, D. The trust is funded with the proceeds of a wrongful death claim involving Mr. R~ deceased brother. *See* Joinder Agreement at 8, K(a), 9. The Trustees are the Illinois Disability Association and the LaSalle National , or their respective successors. *See* Pooled Trust Agreement at 3, 2.7.

The Trust provides that the Trustee has discretion to spend the trust funds for Mr. R~ supplemental needs rather than for his basic support and maintenance. *See* Pooled Trust Agreement 3.2 through 4.1(A). The Trust further provides that:

[I]f the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiaries' entitlement to benefits, regardless of whether the Trustee actually exercises that discretion, the preceding paragraph shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's authority to make distributions shall be limited to purchasing supplemental goods and services that will not adversely affect the Beneficiary's government benefits.

Pooled Trust Agreement at 4.1(A). The Pooled Trust Agreement provides that, on the death of the Beneficiary, any trust funds will be used first to pay for the beneficiary's funeral and estate administration and taxes; second to the Pooled Trust Fund (to be used for other beneficiaries) to the extent the grantor has authorized a remainder share for the trust; third to reimburse the State for Medicaid expenditures; and fourth to any remainder beneficiaries designated in the Joinder Agreement. Pooled Trust Agreement at 11.2. Mr. R~ Joinder Agreement does not list any remainder beneficiaries. However, the agreement states that if no such beneficiaries are named, the Pooled Trust will, by default, receive 1% of the remaining assets from Mr. R~ trust account.

DISCUSSION

Amendments to the Social Security Act provide that, an irrevocable trust created by an individual after January 1, 2000, is a resource if the trust allows payment to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3). The Trust provides the Trustee has the sole discretion to make special, supplemental, and non-support distributions that are appropriate to or for the benefit of a beneficiary. *See* Pooled Trust Agreement at 4, 3.2. Since the Trust specifically allows for payment to or for the benefit of the individual, it is a countable resource under the Act. *See* 42 U.S.C. § 1382b(e)(3); POMS SI 01120.201(D)(2)(a).

We note the Trust provides it is the intent of the Trust that the Trustee shall not exercise any discretionary powers granted to it in any manner which would disqualify a beneficiary from qualifying for federal, state, or local government benefits or programs

which a beneficiary may be entitled to receive. *See* Pooled Trust Agreement at 5, 4.1A. It also indicates that, if the Trustee's discretionary authority to make distributions will result in a reduction or loss of the beneficiary's entitlement program benefits, the Trustee's authority to make special, supplemental, and non-support distributions shall terminate. *See* Pooled Trust Agreement at 6, 4.1A. However, the Trust provides that the Trustee will continue to have authority to make distributions, limited to purchasing supplemental goods and services in a manner that will not adversely affect the beneficiary's government benefits. *See* Pooled Trust Agreement at 6, 4.1A. Since the Trustee still has discretion to make distributions for goods and services for the beneficiary, the Trust is a countable resource under 42 U.S.C. § 1382b(e).

We have also considered whether the Trust is excluded under the Medicaid payback trust exception to counting trusts as a resource under 42 U.S.C. § 1382b(e). The Trust is not excluded as a Medicaid payback trust because it gives priority to payment of funeral expenses before the State is reimbursed for Medicaid benefits. *See* Pooled Trust Agreement at 18, 11.2A, B. The POMS instructs that, 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 reimburses the State for medical assistance paid on behalf of the individual under Medicaid. *See* POMS SI 011020.203 B.2.g. To the extent the trust does not retain the funds in the account, the State must be listed as the first payee and have priority over payment of other debts and administrative expenses. *Id.* Further, Agency policy instruction specifically indicates that funeral expense payment is not permitted prior to reimbursement to the State for medical expenses. *See* EM-01085 B.3. The Trust does not meet the exception for counting as a resource under 42 U.S.C. § 1382b(e).

CONCLUSION

In sum, we conclude that Mr. R~ Illinois Disability Pooled Trust is a countable resource for SSI purposes because the Trustee has discretion to expend the trust assets for Mr. R~ benefit, and the Trust does not qualify for the Medicaid payback trust exception because, when Mr. R~ dies, the trust will pay for funeral expenses before reimbursing the State for Medicaid benefits.

Sincerely,
Thomas W. C~
Chief Counsel, Region V

By: _____
Cynthia A. B~
Assistant Regional Counsel

S. PS 04-256 Illinois Oral Trust - Eloise H~, ~

DATE: March 9, 1992

1. SYLLABUS

This 1992 opinion concludes that an oral trust agreement alleged by an SSI recipient did not meet the requirements to be a valid trust under Illinois law. In 1981, the recipient entered into an oral agreement that had some aspects of a trust, but all the legal requirements for a trust were not present. Therefore, the assets in the alleged trust were counted as resources for SSI purposes. It is important to note that this trust was evaluated under SSI rules applicable before the 1999 legislation which changed how trusts are counted in the SSI program. The analysis done on this trust would not be sufficient for a trust established on or after 1/1/2000 that purports to meet the requirements for a Medicaid payback exception.

2. OPINION

You have requested an opinion on whether a trust agreement entered into by Eloise H~, a Supplemental Security Income (SSI) claimant, constituted a valid trust under Illinois law and, if so, whether the funds held pursuant to the terms of the agreement should be treated as a resource of Ms. H~ for purposes of determining eligibility for SSI.

The pertinent SSI regulations provide at 20 C.F.R. § 416.1201(a)(1991) that:

. . . resources means cash or other liquid assets or any real or personal property

that an individual (or spouse, if any) owns and could convert to cash to be used for

his or her support and maintenance. If the individual has the right, authority or

power to liquidate the property or his or her share of the property, it is considered a

resource. . .

Thus, if an individual is able to obtain funds or convert property to cash to be used toward her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility determinations.

The question to be addressed is twofold. First, we must determine whether the claimant entered into a valid oral trust prior to applying for SSI benefits on May 6, 1986, and, if so, whether the funds held pursuant to that agreement should be treated as a resource of Ms. H~ for purposes of determining SSI eligibility for SSI. Second, if the oral trust did not sufficiently limit Ms. H~'s power to liquidate the property, we must determine whether a subsequent written trust agreement signed on May 27, 1988, adequately restricted Ms. H~'s control over the assets. For the reasons outlined below, it is our opinion that Ms. H~ retained the authority to liquidate the assets at all times and that those assets are to be included as resources for purposes of determining her SSI eligibility.

It appears from the materials provided that the pertinent facts are as follows. On December 15, 1980, a check in the amount of $20,912.80 was paid to Eloise H~ by James B~ III as "administrator," which Ms. H~ subsequently endorsed "for deposit only in the account of James E. B~ III as natural guardian for Eloise K. H~." Shortly thereafter, on December 24, 1980, a certificate of deposit in the amount of $20,912.08 was issued to Mr. B~ "as Trustee of Eloise K. H~" with a maturity date of June 24, 1981, and with monthly payments of interest to passbook #~. A letter to Mr. B~ from Patrick O~, an attorney, dated March 17, 1981, which indicated that the attorney had "roughed out a draft of an irrevocable trust agreement which may possibly be used by your aunt." On August 14, 1981, after the maturity date on the original certificate, Ms. H~ spent $960.00 for cemetery lots for herself and her husband. The next activity recorded in the file is a July 9, 1985 certificate of deposit in the amount of $19,639.23 issued to Mr. B~ "as Trustee for Eloise K. H~." This amount is presumably the original amount of $20,912.08, less $960.00 for cemetery lots and $312.85 for an unknown purpose. Once again, the interest was to be paid monthly to passbook #~. On May 6, 1986, Ms. H~ applied for SSI alleging that she had zero income. Ms. H~ signed an additional form on June 1, 1986, alleging no income other than that received from the Department of Public Aid.

In 1988, an interface between IRS records and SSI records revealed the income payments to Ms. H~'s account. It also revealed that on March 14, 1988, Mr. B~ reported that the trust was established on July 9, 1980, with Mr. B~ as trustee and monthly income payments to Ms. H~. Mr. B~ and Ms. H~ were unable to produce a written trust agreement from the date the alleged trust was entered into, but did submit a photocopy of an unsigned document titled "Eloise K. N. H~ Irrevocable Trust." This document begins by stating "THIS TRUST AGREEMENT made this day of May, 1988, and memorializing the Trust Agreement made March 17, 1981, by and between ELOISE K. N. H~ of Chillicothe, Illinois (D~), and JAMES E. B~, III, of Dunlap, Illinois (Trustee) . . ." and proceeds to describe the terms of the trust. A signed copy of the 1988 document, dated May 27, 1988, was submitted on November 1, 1988. This document contains a clause which states "[t]he Donor by execution of this instrument waives the right to revoke, alter or amend this Agreement, in whole or in part, and as such has by her direction and operation of law, created an irrevocable trust, under the terms and conditions herein stated." Four of Ms. H~'s children submitted statements indicating that they were aware of the existence of the trust, and listed 1988, 1987, 1985, and 1974 as the approximate dates that they were informed of the existence of the trust. Three of them indicated that it was their understanding that their mother did not have access to the principal in the trust, and two of them stated that the principal of the trust was set aside for the benefit of the children.

An oral trust for personal property will be recognized in Illinois provided the following requirements are satisfied:

(1) an intention to create a trust, which may be shown by a declaration of trust by the settlor or by circumstances which show that a trust was intended to be created by the settlor; (2) a definite subject matter or trust property; (3) ascertainable beneficiaries; (4) a trustee; (5) a trust purpose; (6) delivery of the trust property to the trustee.

Price v. State, 398 N.E.2d 365, 370, 371 (Ill. App. 1979)(citations omitted); *see also Estate of Wilkening*, 441 N.E.2d 158, 163 (Ill. App. 1982). The party seeking to establish the existence of an oral trust, however, must prove the above requirements with clear and convincing evidence. *Estate of Wilkening*, 441 N.E.2d at 163; *Price v. State*, 398 N.E.2d at 371. Additionally, the evidence used to establish the existence of the trust must be so unequivocal as to eliminate any other reasonable explanation. *Id.*

In our opinion, Ms. H~ has failed to satisfy these stringent requirements. Ms. H~ contends that she and Mr. B~ entered into an irrevocable oral trust on March 17, 1981. A 1988 written trust agreement "memorializing" the oral agreement alleges that the terms of the oral agreement were as follows: (1) she and Mr. B~ intended to create an irrevocable trust in March of 1981; (2) the trust property consisted of a certificate of deposit in the amount of $19,639.23 and a deed for interment rights in consideration of the sum of $960.00; (3) Ms. H~ was to receive the income from the trust during her lifetime, with the principal passing to her children upon her death; (4) Mr. B~ was the trustee; (5) the purpose was to provide for Ms. H~'s children upon her death; and (6) the property was delivered to Mr. B~ as trustee. This written agreement is alleged to be a "memorialization" of the oral agreement of 1981, yet many of the terms in the written agreement are inconsistent with the facts in existence at the time the trust was allegedly created. First, Ms. H~ has failed to prove an intent to create a trust in March of 1981, as the principal was invaded after that point in time. Second, the designation of trust assets in the written agreement is inconsistent with the facts in existence in March of 1981. At that time, the certificate of deposit was in the amount of $20,912.08 rather than $19,639.23, and the deed for interment rights had not yet been purchased. Although Ms. H~ apparently considered entering into a trust agreement, and perhaps even believed she was doing so, at no single time did all of the elements of a valid oral trust exist concurrently. Consequently, Ms. H~ has failed to provide clear and convincing evidence of the existence of a trust.

Most significantly, Ms. H~ has failed to provide sufficient evidence of intent to create a trust. She clearly did not intend to create a trust on March 17, 1981. The only significance of that date is that it happens to be the date of the letter from Mr. O~ to Mr. B~, which indicated that the attorney had completed a rough draft of an irrevocable trust agreement that could possibly be used by Ms. H~. This letter may suggest that Ms. H~ was considering entering into a trust agreement, but no other acts were performed at that time. The requisite intent to create a trust must exist at the same time as the actions conveying property into trust; an intent to convey in trust at some time in the future is insufficient. *G.C. Bogert & G.G. Bogert*, *Law of Trusts* § 11, at 23 (1973). The only time when Ms. H~'s actions were remotely consistent with an intention to create a trust was in December of 1980. At that time, Ms. H~ endorsed a check in the amount of $20,912.08 "for deposit only in the account of James E. B~ III as natural guardian for Eloise K. H~." Approximately a week later, a certificate of deposit in this amount was issued to Mr. B~ "as Trustee of Eloise K. H~" with a maturity date of June 24, 1981. The most substantial factor tending to defeat an assertion that this action established an irrevocable trust, however, is the fact that the principal of the trust is not intact.

Specifically, someone invaded the principal in August of 1981, using $960.00 to purchase burial plots, and again at an unascertained time, using $312.00 for an unknown purpose. Ms. H~ contends, however, that the trust was irrevocable. The invasion of the principal lends itself to two possible interpretations. The first possibility is that Ms. H~ and Mr. B~ intended to, and succeeded in, creating a valid trust in December of 1980. Once a valid trust is created, however, the trust is irrevocable in the absence of an express reservation of the power to revoke by the settlor. *William v. Springfield Marine Bank*, 475 N.E.2d 1122, 1124 (Ill. App. 1985). Similarly, the terms of the trust cannot be modified unless such power is reserved. *Restatement (Second) of Trusts*, §§ 331, 332, 367 (1959). Thus, if Ms. H~ created a valid trust containing the terms she alleges, she could only access the principal by either revoking the trust or modifying its terms. If Ms. H~ had the power to do either of these two things, she also had the power to liquidate the property, rendering it a resource for SSI purposes. This is clearly not the reading of the facts which Ms. H~ asserts.

The only other explanation for the invasion of the principal, however, is that Ms. H~ and Mr. B~ never intended to create a trust in the first place. A "trust" is defined as "a right of property, real or personal, held by one party for the benefit of another." *Black's Law Dictionary* 782 (5th Ed. 1983). In evaluating the intentions of the parties, a court looks for any indication that an interested party believed herself to be in complete control of the assets, which would be inconsistent with an alleged intention to create a trust. *See Estate of Wilkening*, 441 N.E.2d at 164. If Ms. H~ did not expressly reserve the power to revoke the trust, but was able to access the principal several months after the alleged creation of the trust, she did not adequately relinquish control of the assets. Ms. H~'s use of the principal is inconsistent with the separation of legal and equitable interest inherent in a trust agreement.

It is also unclear which items Ms. H~ is alleging to be the actual assets of the trust. The written "memorialization" states that the trust assets consisted of a certificate of deposit in the amount of $19,639.23 and a deed for interment rights in consideration of the sum of $960.00. There were two certificates of deposit held by Mr. B~ "in Trust for Eloise K. H~." The first was issued in 1980 in the amount of $20,912.08, and contained a maturity date of June 24, 1981. The second was not issued until 1985, in the amount of $19,639.23. The $960.00 deed was not purchased until August of 1981, two months after the original certificate matured, apparently having been purchased from the assets of that certificate. If this deed was a part of the agreed upon trust assets, then the attempt to create the trust necessarily must have occurred sometime after August of 1981. Furthermore, there are no records concerning the remaining money between the maturation of the first certificate of deposit

on June 24, 1981 and the issuance of another certificate of deposit on July 9, 1985. There is no evidence that these assets were even being held by Mr. B~ during that time, nor is there any explanation for the expenditure of the additional $312.00.

Given the confusion between the objective facts and the alleged terms of the oral trust embodied in the 1988 written agreement, we cannot conclude that Ms. H~ entered into a valid trust at any time. Twice during the preceding years Ms. H~ transferred money to Mr. B~ "in trust," but there is no evidence that all of the requisite elements of a trust were present concurrently at any time.*/ Furthermore, the act of preparing a written instrument in 1988 did not serve to validate the trust as of that date. The 1988 instrument did not purport to be a current conveyance of property in trust. Rather, its terms indicate that its purpose was to memorialize a prior, oral agreement. Thus, the intention of the parties in 1988 was not to create a trust, but to reduce to written form an agreement they entered into in 1981. The difficulty is that whatever oral agreement they entered into was insufficient to constitute a trust. Consequently, it appears that Ms. H~ retained the power to liquidate the "principal" of the trust at all times, rendering it a resource for purposes of determining SSI eligibility.

Donna M. W~
Chief Counsel, Region V

By:
Kelly R. L~
Assistant Regional Counsel

T. PS 04-243 Illinois Trust for Krystal L. S~ ~

DATE: July 10, 1998

1. SYLLABUS

The issue is whether child support payments deposited in a trust are a countable resource for SSI purposes. Also, whether the assets of a sub-trust intended to hold property previously owned by the SSI recipient or within her control, should be considered a resource.

Child support payments made by the father of the SSI recipient into the trust or sub-trust are illegal under Illinois law because the Declaration prohibits the use of property in either trust for the recipient's support. The Illinois court ordered the child support for "the support of" an adult disabled child. Since the trust declaration specifically states the trust monies cannot be used for the recipient's support, the payment of support into either trust is improper under Illinois State law. Therefore, the support payments continue to be countable income for SSI purposes and any portion of such support payments improperly deposited into and retained in the trust are a resource for SSI purposes.

Assets in a sub-trust intended to hold property previously owned by the SSI recipient or within her control are not the SSI recipient's resources because she cannot revoke the sub-trust. Trust assets properly not within the sub-trust (i.e., assets not derived from the SSI recipient's property and not under her control), are not a resource since she has no power to revoke and she does not have grantor/sole beneficiary status. Any trust assets which are derived from the SSI recipient's property, or property under her control, but not placed in the sub-trust are her resources for SSI purposes only if her mother is also her legal guardian, because her mother can revoke the trust as to those particular assets and use the assets to pay for the SSI recipient's support and maintenance.

2. OPINION

You inquired whether funds placed in a trust established for the benefit of Krystal L. S~ (Krystal) would be considered a countable resource for SSI purposes.

We have concluded that the court ordered child support payments from Krystal's father, James P. S~ (James) cannot properly be paid into the trust under Illinois law. The support payments, therefore, continue to be countable income for SSI purposes, and any portion of such support payments improperly deposited into and retained in the trust should be considered Krystal's resource for SSI purposes.

With regard to assets in the trust which are not derived from the court ordered support payments, we conclude that assets of a Sub-trust, intended to hold property previously owned by Krystal or within her control, should not be considered Krystal's resources for SSI purposes because Krystal cannot revoke the Sub-trust. Trust assets properly not within the Sub-trust, i.e.,

assets not derived from Krystal's property and not under Krystal's control, likewise should not be considered Krystal's resource, since Krystal has no power to revoke and she does not have grantor/sole beneficiary status. Any trust assets which are derived from Krystal's property, or property under Krystal's control, but not placed in the Sub-trust should be considered Krystal's resource for SSI purposes only if Krystal's mother, Susan S~ (Susan) is also her legal guardian, because Susan can revoke the trust as to those particular assets and use the assets to pay for Krystal's support and maintenance.

FACTS

In 1992, Krystal's parents, Susan and James, were divorced and entered into a marital settlement agreement. On January 16, 1997, Susan created "The Krystal L. S~ Discretionary Supplemental Needs Trust," (January Trust) a revocable trust for the benefit of her disabled adult daughter, Krystal. Susan was the trustee.

On May 14, 1997, the Circuit Court of Lake County, Illinois entered an agreed order modifying the 1992 marital settlement agreement. The agreed order required James to pay all child support payments for Krystal to Susan as trustee of "The Krystal L. S~ Discretionary Supplemental Needs Trust."

On July 17, 1997, Susan amended the January Trust and executed a trust certification stating that she established a trust on that date by Declaration of Trust, called "The Krystal L. S~ Irrevocable Discretionary Supplemental Needs Trust." Susan also signed a "Restatement of the Krystal L. S~ Discretionary Supplemental Needs Trust" (Declaration) which amended the January Trust by, in effect, revoking it and replacing it with a new trust (July Trust).

The July Trust, created for the primary benefit of Krystal, is subject to Illinois law. Declaration §§ 1.01, 3.01. As trustee, Susan has sole discretion to expend principal and income for Krystal's supplemental support and maintenance, over and above any funds available from any governmental agencies or other sources. Declaration § 4.02(a). Distributions for Krystal's basic support, including basic food, clothing, or shelter, are prohibited, as is reimbursement to any government or private agency for benefits paid on Krystal's behalf. Declaration at § 4.02. The trustee cannot distribute directly to Krystal, nor can Krystal control any portion of the trust property. Declaration § 1.01.

In addition to disbursements on Krystal's behalf, the trustee has discretion to make some distributions to or for the benefit of any of Susan's other descendants, in their own right. Declaration § 4.02(g). The trustee also has discretion to make disbursements for gifts to others on Krystal's behalf and for various expenses which may be incurred by persons who may live with and care for Krystal after Susan's death. Declaration §§ 4.02(g)-(j).

The July Trust terminates upon Krystal's death, at which time the trust property remaining after payment of Krystal's debts, funeral expenses, and estate and inheritance taxes, is to be distributed to Susan. Declaration, § 4.02(m). If Susan is deceased, the trustee is to distribute 1% of the remaining trust property to the entity operating the residential facility where Krystal lived at the time of her death and the remainder per stirpes to Susan's living descendants other than Krystal or, if none, then to Susan's living heirs-at-law under the Illinois intestacy succession statute. Declaration § 4.02 (m).

Despite the title of the July Trust, § 2.01 of the Declaration reserves to Susan, as settlor, the power to revoke or amend the July Trust, in whole or in part. The Declaration provides, however, for creation of a separate sub-trust for Krystal's benefit, entitled the "Krystal L. S~ Irrevocable Supplemental Care Trust" (Sub-trust) to hold any additions to the trust which come from Krystal's assets or from property under Krystal's control. Declaration § 1.04. The Sub-trust is explicitly irrevocable, with neither Susan nor Krystal having any power to alter, amend, or revoke it. Upon Krystal's death, the Sub-trust terminates and the trust property is to be used to reimburse the State of Illinois for Medicaid and other assistance provided on Krystal's behalf and to pay outstanding debts and funeral expenses. The residue is to be distributed in the same manner as the main portion of the July Trust under § 4.02 of the Declaration, i.e., all to Susan and, if Susan is deceased, 1% to Krystal's residential facility and the remainder per stirpes to Susan's descendants or heirs-at-law.

Two agreed orders were filed in the Circuit Court of Lake County on October 16, 1997. One orders correction of a "scrivener's error" to add the word "Irrevocable" to the trust title. The other agreed order modifies the marital settlement agreement to require James to pay all child support payments for Krystal to Susan as trustee of "The Krystal L. S~ Irrevocable Discretionary Supplemental Needs Trust."

DISCUSSION

Resources, for SSI purposes, include assets that a person owns and can convert to cash to be used for the person's support or maintenance. *See* 20 C.F.R. § 416.1201(a). If the person has the right or power to liquidate property, or her share of the

property, it is a resource. Id. Trust assets are considered to be an SSI recipient's resources if the SSI recipient has the power to revoke the trust and use the trust assets to meet her needs for food, clothing, or shelter, if she can direct use of the trust assets for such purposes, or if she can sell her beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a). Whether the person can revoke the trust or direct use of the trust assets depends on the terms of the trust declaration and on applicable State law. POMS SI 01120.200(d)(2).

As a preliminary matter, it is not entirely clear from the court orders whether the support payments made by James are to go into the Sub-trust or into the main portion of the trust (July trust). We conclude, however, that, despite the court's order, payment of child support by James for Krystal into either trust is improper under Illinois law because the Declaration prohibits use of the property in either trust for Krystal's support. Illinois law provides that a court may award money "for the support of" an adult disabled child. 750 ILCS 5/513. Yet, the Declaration in this instance specifically prohibits the use of the assets of either the July trust or the Sub-trust for such a purpose, stating that distributions cannot be made for Krystal's basic support, including basic food, clothing, or shelter. Declaration § 4.02. We conclude, therefore, that James' payment of "support" into either trust is improper under Illinois law.

Child support payments made for the support of an SSI beneficiary are considered the SSI beneficiary's income for SSI purposes. *See* 20 C.F.R. § 416.1121(b). Because the support payments cannot properly be paid into either the July Trust or the Sub-trust under Illinois law, they cannot be sheltered from being countable income to Krystal. *See In Re Marriage of Raski*, 381 N.E.2d 744, 748 (Ill. App. 1978) (striking down marital settlement provision conveying, in trust to a minor child, marital property that was unrelated to the child's support and maintenance and was to be distributed only after the child reached majority); *see also*, *In re Marriage of Bush*, 547 N.E. 2d 690, 597 (Ill. App. 1989) (improper to provide for support payments to trust which did not allow use of the trust corpus for support during the child's minority). Moreover, any support payments improperly paid to and then retained in either the July Trust or the Sub-trust should be treated as Krystal's resources for SSI purposes, since Krystal could likely compel removal from the trust of that portion of assets derived from her support payments and then use those funds for her support and maintenance. *See In re Marriage of Bush*, 547 N.E. 2d at 599 (reversing trial court's order creating a trust which precluded use for support during child's minority).

Although we conclude that the support payments cannot properly be paid into either trust, the question remains whether other property in either trust, if any, may be considered Krystal's resources for SSI purposes. We deal first with property in the Sub-trust. Under the terms of the Declaration, if any of Krystal's property, or any property under Krystal's control is placed in the trust, it must be placed in the Sub-trust. If, under the terms of the Declaration, Krystal, or Susan as her guardian, can revoke the Sub-trust, or direct distributions from it, for her food, clothing, and shelter, the Sub-trust assets must be considered Krystal's resources for SSI purposes. *See* POMS SI 01120.200(D)(1)(a).

Susan reserved the right, under § 2.01 of the Declaration, to amend or revoke the trust, in whole or in part. Section 1.04 of the Declaration, however, explicitly provides that the Sub-trust is irrevocable. When there is an apparent ambiguity or conflict in the language of a trust document, the primary concern is to ascertain the intent of the donor at the time the instrument was executed. *Estate of Dawson*, 522 N.E. 2d 770 (Ill. App.1988), *Williams v. Springfield Marine bank*, 475 N.E.2d 1122, 1124 (Ill. App. 1985). Intent is to be ascertained from the entire document. *Williams*, 475 N.E.2d at 1124. In determining the donor's intent, sections dealing with a subject matter in detail take precedence over sections containing general provisions on the same subject. 2416 *Corp. v. First National Bank of Chicago*, 415 N.E.2d 420 (Ill. App.1980). Here the portion of the Declaration dealing specifically with the Sub-trust should take precedence over the portion of the Declaration dealing with the trust generally. Also, Restat. 2d Trusts § 330, comment n, states that a settlor may reserve a power to revoke a trust as to a part of the trust property. We located no Illinois cases to the contrary. Here, it seems clear that Susan's intent was to reserve the right of revocation with regard to assets in the trust derived from her own property or property contributed to the trust by others, while making the trust irrevocable as to that portion derived from Krystal's own property.

Even though the Declaration does not specifically provide for revocation of the Sub-trust, Krystal would have the power to revoke the Sub-trust if she were both its settlor and its sole beneficiary. *See Stewart v. Merchants National of Aurora*, 278 N.E. 2d 10, 12 (Ill. App. 1972) (trust settlor who is also sole beneficiary can revoke the trust without the trustee's consent, even though no power of revocation was reserved when the trust was created). Since the property in the Sub-trust, by definition, is Krystal's property or property under her control, Krystal is the true settlor of the Sub-trust, even though Susan holds legal title. *See In re Estate of* , 635 N.E. 2d 853, 855 (Ill. App. 1994), *cert. denied*, 642 N.E.2d 1281 (one who furnishes consideration is the settlor of the trust).

While Krystal is the true settlor of the Sub-trust, she cannot revoke the Sub-trust because she is not the sole beneficiary. Here, the trustee can make disbursements to descendants of Susan other than Krystal. Declaration § 4.02(g). In addition, Susan's descendants are residual beneficiaries upon termination of the trust if Susan does not survive Krystal. Thus, Krystal cannot revoke the Sub-trust because, although she is the true settlor, she is not the sole beneficiary.

Nor can Krystal direct the trustee to make payments from the Sub-trust for her support and maintenance, since the Declaration specifically prohibits distributions to her or at her direction, distributions for her basic support, and distributions to reimburse any governmental agencies for benefits on Krystal's behalf. Declaration at §§ 1.01, 4.02 . Finally, even if Krystal could sell her beneficial interest in the Sub-trust, or the July Trust for that matter, it would likely have no real fair market value because no reasonable person would purchase the right to have the trustee, in her sole discretion, make disbursements in Krystal's behalf. Since Krystal cannot revoke the Sub-trust, direct its use for her basic support, or realistically sell her beneficial interest in the Sub-trust, the Sub-trust property should not be considered Krystal's resource for SSI purposes.

With regard to assets properly deposited in the July Trust rather than the Sub-trust, i.e., assets not derived from Krystal's property or property under Krystal's control, Krystal has no express power of revocation, nor does she have grantor/sole beneficiary status. Those trust assets, therefore, should not be considered Krystal's resource for SSI purposes. If, however, there are any assets in the July Trust rather than the Sub-trust which are derived from Krystal's property or property under Krystal's control (contrary to the terms of the Declaration), whether or not those assets constitute an SSI resource depends on whether Susan is Krystal's guardian. If Susan is not Krystal's guardian, the assets, like those in the Sub-trust, cannot be considered Krystal's resource because Krystal cannot revoke the July trust. If Susan is Krystal's guardian, her express power of revocation means that she could revoke that portion of the July Trust on Krystal's behalf and then use the property for Krystal's support and maintenance. Therefore, any property improperly placed in the July Trust rather than the Sub-trust should be considered Krystal's resource for SSI purposes.

CONCLUSION

The support payments James was ordered to make to Susan as trustee may not properly be paid into either trust under Illinois law. As a result, those support payments continue to be countable income to Krystal. To the extent they are retained, the funds are Krystal's resource. Assets properly in the Sub-trust and the July trust should not be considered Krystal's resource. Assets of the July trust which, contrary to the Declaration, are not contained in the Sub-trust but are derived from Krystal's property or property under Krystal's control should be considered as Krystal's resource only if Susan is Krystal's legal guardian.

Sincerely,
Thomas W. C~
Chief Counsel, Region V

By: _____
Nancy L. B~
Assistant Regional Counsel

U. PS 04-134 Illinois Trust - Countable Resource - Joseph W~, ~

DATE: November 5, 1992

1. SYLLABUS

NOTE: This trust was established before 1/1/00. The issue in this case is whether or not the SSI recipient has access to the trust funds. If an individual has legal authority to revoke the trust and then use the funds to meet his/her food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes. In this situation, the SSI recipient has no access to the trust funds, thus it is not a countable resource for SSI purposes.

2. OPINION

ISSUE

This is with reference to your memorandum inquiring whether the trust created by Austin W~ is a countable resource to Joseph W~, an SSI applicant. We conclude that this trust is not a countable resource under 20 C.F.R. § 416.1201 (1992).

FACTS

The facts may be briefly summarized: On February 4, 1978, Austin W~ as settlor entered into an *inter vivos* revocable trust agreement with Janet H~ and the First National of Vandalia as trustees. This trust was amended one month later on March 4, 1978. The agreement expressly reserved the right of the settlor to revoke the trust. It also provided for the creation of two separate trusts for Austin's sons, Paul and A. W~, upon his death. They were named as beneficiaries of these two trusts. The amended version of the trust agreement stated that "[u]pon the death of the beneficiary for whom such separate Trust A or B was created, the principal and any undistributed income shall be paid over, distributed and conveyed in equal shares to the . . . descendants of said beneficiary." Alan, Joseph's father and beneficiary of Trust B, died in a car accident on February 11, 1989. The trust agreement provided further that "[i]n event any beneficiary who shall be entitled to a distribution under this Trust shall, at the time of such distribution as herein provided, be a minor or under legal disability the portion of such Trust shall be held for the beneficiary and when he shall attain his majority or be restored to competency then the balance of his share shall be paid to him." Joseph was born on May 13, 1982.

DISCUSSION

The primary issue to be resolved here is whether Joseph has any access to the trust funds. If he has access, then the trust is considered as a countable resource. A resource, for the purpose of being eligible for SSI benefits, is defined as property that the beneficiary owns and could convert to cash, or property over which the beneficiary has the right, authority, or power to liquidate. 42 U.S.C. § 1382b; 20 C.F.R. § 416.1201 (1992). In applying this definition to trusts, the Program Operation Manual System ("POMS") states that if the claimant is a beneficiary of a trust but has his access to the trust funds restricted, then the funds are not a resource for the claimant. POMS § 01120.105(A)(2). As we explain below, Joseph currently has no access to the trust funds, and they, as a result, cannot be counted as a countable resource.

Article VIII, No. 2 of the amended trust provides for the distribution of trust funds to the descendants of Paul and Alan. There is no dispute that Joseph is a descendant of Alan and would therefore be eligible for a share of the trust funds. Article VIII, No. 3 states, however, that a minor's share of the trust funds shall be held until such beneficiary attains his majority. There is some question as to whether the term "beneficiary" and its majority requirements actually apply to Joseph and all other descendants or apply instead only to Alan and Paul who were the original beneficiaries of Trusts A and B. The document's language and information provided by Jane W~ (Alan's widow and Joseph's mother) both evidence an intent by Austin (the settlor) to include only Joseph and the other descendants as beneficiaries, at least insofar as that term is used in Article VIII, No 3. of the trust agreement.

An Illinois Appellate court stated that its "primary concern in construing a trust is to discover the intent that the settlors had when they executed the instrument." The court further stated that it "must consider the plain and ordinary meaning of the words used, and the intent must be ascertained from the entire document." *Williams v. Springfield Marine Bank*, 475 N.E.2d 1122, 1124 (Ill.App. 1985). Here, Article VIII, No. 3 states "In event *any* beneficiary who shall be entitled to a distribution . . .shall, at the time of such distribution as herein provided, be a minor. . .the portion of such Trust shall be held for the beneficiary [until he attains majority]" (emphasis added.) The use of the word "any" instead of "either" suggests that this provision refers to more than two beneficiaries. In other words, it implies that Austin intended the term beneficiary to apply to the descendants of Alan and Paul. Furthermore, if the settlor intended for the term beneficiary to apply only to Paul and Alan in this situation, correct grammar and common usage would have required that he use the term "either" instead of the term "any". Moreover, this provision of the trust agreement concerns the minority status of a beneficiary. However, when Austin created this trust in 1978, both Alan and Paul were well beyond their 18th birthday,/ evidencing an unmistakable intent to exclude Alan and Paul and include Joseph and the other descendants in his definition of beneficiary, at least in Article VIII, No. 3.

Because Joseph is a minor, the terms of the trust agreement restrict his access to the trust funds. As a result, the trust is not a countable resource until he attains the age of 18 years./

Respectfully yours,
Donna M~ W~
Chief Counsel, Region V

By: _____
Jeffery C~
Assistant Regional Counsel

V. PS 04-017 SSI - Illinois - Review of Irrevocable Special Needs Pay Back Trusts Devon B~, SSN: ~ - Action Your Reference: S2D5G6 SI 2-1-3 IL (B~) Our Reference: 04P

DATE: October 20, 2003

1. SYLLABUS

This opinion concerns an Ohio trust that was established by a third party for the benefit of an individual who has now applied for SSI payments. Although the beneficiary is neither the grantor nor the sole beneficiary of the trust, and although the beneficiary does not retain the power to revoke or terminate the trust, he does have the power to convert his interest into cash and then use those funds to meet his needs for food, clothing or shelter. This is because the trust does not contain a spendthrift provision, which is intended to protect the beneficiary from spending his money in improvident ways. Because OGC concluded that the beneficiary could sell the right to his future income stream, the value of that interest is a resource for SSI purposes. OGC concluded by saying that, while the value of the beneficiary's interest in the trust is difficult to measure given the complexity of buying someone's interest in a trust that would terminate with his death, the value is at least $2,000. NOTE: Although this involves an Ohio trust, OGC did not rely on specific State law. The principles discussed in this opinion apply Regionwide.

2. OPINION

You asked whether the Devon B~ Irrevocable Special Needs Pay Back Trust would be a resource to Devon for purposes of SSI. We have reviewed the trust documents and, for the following reasons, we conclude that the trust itself should not be considered a resource when determining Devon's eligibility for SSI, but that certain disbursements might be considered income.

BACKGROUND

In late 2001, attorneys for Doris M~, guardian of the estate of Devon B~, submitted a draft of a proposed trust agreement. The Agency reviewed the documents and, in a letter dated January 8, 2002, concluded that this original trust, if filed in court, would be a countable resource. In particular, the Agency concluded that the trust did not qualify for the Medicaid payback trust exception, per SI 01120.203, because, upon Devon's death, the state would not be reimbursed for Medicaid expenditures until after funeral and other expenses were paid. The attorneys subsequently amended the proposed trust agreement so that, on termination of the trust, the state would be reimbursed for medical assistance before any other payments were made. After reviewing the amendments, the Agency advised in a letter dated January 28, 2002, that the amended trust, if filed in court, would not be a resource to Devon for SSI purposes. Due to several delays, the trust agreement was not authorized and executed until April 2, 2002. The final, executed version of the trust contained different provisions than those presented to the Agency in January 2002. Namely, as shown below, the trust provides that certain administrative expenses will be paid before the state is reimbursed for medical assistance.

The "Devon B~ Irrevocable Special Needs Pay Back Trust" ("Trust" or "the trust") was created for the benefit of Devon, who is disabled and receives SSI benefits. The trust was funded by cash from settlement ($69,677.42), cash from Leonard B~ (Devon's father) ($34,495.85), and "Beneficial Interest in Annuity funded with settlement proceeds" (present cash value $300,000.00). Trust § 1.6, Schedule A. Ms. M~ was named as the settlor of the Trust (Trust § 1.2), while the Fifth Third was named as trustee of the Trust (Trust § 1.5).

The stated purpose of the trust is to "supplement, but not to supplant, whatever benefits and services the Beneficiary may from time to time be eligible to receive by reason of age, disability, or other factors, from federal, state, and local governmental and charitable sources including, but not limited to, Supplemental Security Income and Medicaid benefits." Trust § 2.1(a). The trust states that it is irrevocable, Trust § 1.8, and that it is intended that Devon qualify for SSI benefits. Trust § 2.2. The trust gives Devon only the right to amend the designation of residual beneficiaries. Trust § 1.8. The trustee is to use the trust principal and income to provide Devon "with those benefits and services, and only those benefits and services, that, in the Trustee's judgment, are not otherwise available to [Devon] from other sources as or when needed for his welfare." Trust § 2.1(c). The making and the amount of any payment from the trust is subject to court order. Trust, Article Three.

The trust may be amended by the trustee "so that it conforms with any regulations that are approved by any governing body or agency relating to 42 U.S.C. 1396p or related statutes," including "state statutes that are consistent with the provisions and purposes of the Revenue Reconciliation Act of 1993 and amendments to such Act." Trust § 1.8.

The trust terminates upon Devon's death, or at such time as Devon is no longer disabled under the Social Security Act and a court orders the trust terminated. Trust § 4.1. Upon termination of the trust, the trustee is directed to distribute the trust estate in the following order:

a. Court and administrative expenses related to the guardianship, probate, or other estate proceedings of Devon's estate;

b. Repayment of the State of Illinois;

c. Devon's funeral and burial expenses;

d. Income and/or death taxes imposed on Devon's estate;

e. If the trust terminates because Devon is no longer disabled, the remaining trust estate shall be distributed directly to Devon, if he is of legal age and under no disability, or to his guardian, if one is in place;

f. If the trust terminates because Devon is deceased, the remaining trust estate shall be distributed to Devon's decedent's estate, as he appointed in his last will; or

g. If the trust terminates because Devon is deceased and he failed to exercise the aforementioned power of appointment, the remaining trust estate shall be distributed to Devon's descendants, under Illinois rules of intestate succession. Trust § 4.2.

DISCUSSION

In sum, because the trust meets the Medicaid Payback Trust exception to counting it under the trust and because Devon cannot revoke the trust or direct its expenditures, we conclude that the trust should not be considered a resource when determining Devon's eligibility for SSI. However, some distributions from the trust may be considered income to him.

W. PS 03-174 SSI - Illinois - Review of the proposed Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust Your Reference: S2D5G6; SI 2-1-3 ILOur Ref: 02-P-066

DATE: August 19, 2003

1. SYLLABUS

This legal opinion serves as an excellent reminder that a pooled trust must meet four basic requirements in order to be excluded as a resource. They are as follows: the trust must be established and maintained by a non-profit organization; a separate account must be maintained for each trust beneficiary; accounts must be established solely for the benefit of the disabled individual by the individual, parent, grandparent, legal guardian or court; and the trust must provide that to the extent that funds that remain in the sub-account upon the death of the beneficiary are not retained by the trust, the trust will pay to the State an amount equal to the total of medical assistance paid on behalf of the beneficiary. In this case, regional counsel determined that the sub-account would be a countable resource because of specific language contained in the trust document. The trust provided, for example, that the trustee in his or her sole discretion could terminate the sub-account. OGC opined that this violated the third requirement that the trust be established solely for the benefit of the individual since this provision might create the possibility that other individuals could benefit from the trust during the primary beneficiary's lifetime. Further, regional counsel opined that the fourth and final requirement may also not be met because the trust language suggests funeral or other prohibited expenses may be paid prior to State reimbursement.

2. OPINION

You asked whether the proposed Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust (Trust) would constitute a resource for SSI purposes. For the reasons discussed below, it is our opinion that, if an individual joined the pooled trust, the sub-account within the Master Trust would be a resource.

BACKGROUND

The Jewish Federation of Metropolitan Chicago, an Illinois not for profit corporation, proposes to establish the Jewish Federation of Metropolitan Chicago OBRA '93 Pooled Trust. *See* Trust at 1. The purpose of the trust is to hold assets of primary

beneficiaries who are disabled and provide for their supplemental needs and supplemental care, and not to provide for their general support. *See* Trust Art. Two, Section 2.01 at 3. The trust defines primary beneficiary as a person with one or more disabilities as defined by Section 1614(a)(3) of the Social Security Act, 42 U.S.C. § 1382c(a)(3). *See* Trust Art. One, Section 1.02 at 2.

Within the Trust, individual trust accounts, called sub-accounts, are established and maintained for each primary beneficiary. *See* Trust Art. One, Section 1.03 at 2; Trust Art. Three at 4. The funds from each sub-account are pooled for investment and management of the funds. *See* Trust Art. Three at 4. A sub-account within the trust is established for a primary beneficiary when an Adoption Agreement is signed by a grantor, who according to the trust may be the primary beneficiary, a parent, grandparent, sibling, or legal guardian. *See* Trust Art. One, Section 1,03 at 2; Trust Art. Five, Section 5.01 at 4. Upon execution of the Adoption Agreement by the grantor, or by court order, subject to the approval of the trustee, the sub-account is established. *See* Trust Art. Five, Section 5.02 at 4. The trustee has sole discretion to reject any Adoption Agreement and to handle all funding matters. *See* Trust Art. Five, Section 5.02 at 4-5. The Trust states that the sub-account is irrevocable and the contributed property shall not be refundable. *See* Trust Art. Five, Section 5.02 at 5. The Trust also states that property or interests in property can be designated for future transfer by a grantor as a contribution, and that the designation of the property can be revoked by the grantor during the grantor's life and continued competence, upon written notice from the grantor to the trustee. *See* Trust Art. Five, Section 5.03 at 5. Examples of such contributions include a life insurance policy on a grantor's life in which the Master Trust is designated as a beneficiary, or the Master Trust being named as a beneficiary of any future interest of property, such as that which would pass by way of a grantor's will. *See* Trust Art. Five, Section 5.03 at 5.

The Trust provides that upon the death of a primary beneficiary, any amounts remaining in the primary beneficiary's sub-account, may be distributed first to pay any outstanding, reasonable, administrative expenses and fees for maintaining the sub-account, taxes, court costs, and other items and/or services which may be paid pursuant to statute or regulation in existence or subsequently enacted because of the primary beneficiary's death that are not and cannot be paid by governmental sources. *See* Trust Art. Nine, Section 9.01 at 10.

After payment of these expenses, the assets of the primary beneficiary's trust account would be distributed to the Trust as specified below, with the termination of the sub-account.

In accordance with 42 U.S.C. § 1396p(d)(4)(C) and Ill. Admin. Code Sect. 120.347(d)(2), as the assets of a Primary Beneficiary's Sub-Account shall be retained at death by the Master Trust, neither the Master Trust nor the Sub-Account shall reimburse the government and/or its agencies at that time for any services provided to the deceased Primary Beneficiary; provided, however, that to the extent any funds remaining in the Primary Beneficiary's Sub-Account after payment of the expenses set forth in Section 9.01 are not for any reason retained by the Master Trust, such amounts (up to the amount expended by the State of Illinois, or any other state, for medical assistance for the Primary Beneficiary) shall be paid to the State of Illinois or such other state as has provided benefits to the Primary Beneficiary as reimbursement to the State of Illinois or such other state for such medical benefits provided to the Primary Beneficiary during his or her lifetime. Assets of a deceased Primary Beneficiary's Sub-Account which are retained by the Master Trust shall be maintained in the General Fund Sub-Account, to be utilized, administered and distributed, from time-to-time, for the benefit of any Primary Beneficiary of this Master Trust and/or other persons with disabilities who are indigent and receive services from the JEWISH FEDERATION OF METROPOLITAN CHICAGO but who may not be Primary Beneficiaries, either individually or for programs servicing such persons with disabilities, in the Trustee's sole discretion.

Trust Art. Nine, Section 9.02 at 10-11. The Trust further states:

If the Trustee has reasonable cause to believe that the income or principal in a Sub-Account for a Primary Beneficiary is or will become liable for basic maintenance, support, or care for a Primary Beneficiary which has been or would otherwise be provided by local, state, or federal government, or any agency or department thereof, the Trustee, in its sole discretion, may either terminate the Sub-Account as to the affected Primary Beneficiary as though he or she had died, and the Trustee shall then treat the property in the Sub-Account according to Section 9.02, or continue to administer the Sub-Account under separate arrangement with the affected Primary Beneficiary or his or her guardian.

Trust Art. Nine, Section 9.03 at 11.

If the Master Trust is ever terminated, upon termination all remaining Master Trust property shall be distributed to the State of Illinois. *See* Trust Art. Nine, Section 9.04 at 11.

DISCUSSION

Under the Social Security Act, trusts created on or after January 1, 2000, from the assets of a SSI claimant or beneficiary, will be considered a resource to the extent that the trust is revocable, or, in the case of an irrevocable trust, to the extent that any payments can be made from the trust for the benefit of the individual. *See* 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201.[1] In the present Trust, the trustee has discretion to use the entire income and the principal in the Trust sub-account for the benefit of the beneficiary for whom the sub-account was established. *See* Trust Art. Seven, Section 7.01 at 6. Therefore, the Trust would be a resource to the beneficiary under these provisions. *See* 42 U.S.C. § 1382b(e)(3)(B).

1. The Trust Does Not Meet The Requirements For The Pooled Medicaid Payback Trust Exemption to The Statute.

Certain pooled trusts are excepted from this statutory provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). To qualify for the Medicaid payback trust exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

a. It must be established and managed by a nonprofit association.

b. A separate account must be maintained for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts.

c. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.

d. The trust must provide that to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

See POMS SI 01120.203(B)(2).

The Trust does not qualify for the Medicaid Payback exception because the third requirement is not met. We also have concerns about the fourth requirement.

According to the terms of the Trust,

If the Trustee has reasonable cause to believe that the income or principal in a Sub-Account for a Primary Beneficiary is or will become liable for basic maintenance, support, or care for a Primary Beneficiary which has been or would otherwise be provided by local, state, or federal government, or an agency or department thereof, the Trustee, in its sole discretion, may either terminate the Sub-Account as to the affected Primary Beneficiary as though he or she had died, and the Trustee shall then treat the property in the Sub-Account according to Section 9.02, or continue to administer the Sub-Account under separate arrangement with the affected Primary Beneficiary or his or her guardian.

Trust Art. Nine, Section 9.03 at 11. The Trust further provides that:

If, for any reason, the Master Trust is ever terminated, upon termination all remaining Master Trust property shall be distributed to the State of Illinois.

Trust Art. Nine, Section 9.04 at 11. The Master Trust "includes all Sub-Accounts and the General Fund Sub-Account created for the benefit of such disabled individuals." Trust Art. One, Section 1.01 at 2.

Section 1917(d)(4)(C)(iii) of the Social Security Act, 42 U.S.C. § 1396(d)(4)(C), requires, in relevant part, that, to qualify for the Medicaid Payback exemption to counting trusts under the statute, "Accounts in the trust are established solely for the benefit of individuals who are disabled . . . . The implementing POMS provide that one should""[c]onsider a trust established **for the sole benefit** of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." (emphasis in original). *See* POMS SI 01120.201(F)(2). Both of the Trust provisions above appear to violate this rule. Since terminating the trust "as though he or she had died "would create the possibility that other individuals could benefit from the Trust during the primary beneficiary's lifetime, the Trust fails to meet the resource exception for Medicaid payback trusts under the Social Security Act. Therefore, a primary's beneficiary's sub-account in the Trust would be a resource to the primary beneficiary. *See* 42 U.S.C. § 1382b(e)(3)(B). Also, it appears that there is

a possibility that the Trust could be terminated and that the assets turned over to the State of Illinois, if the Master Trust is terminated "for any reason."

We are also concerned that the Trust permits that, on a beneficiary's death, funds in the sub-account may first be used to pay any outstanding, reasonable, administrative expenses and fees for maintaining the existence of the Sub-Account, taxes, court costs, and for such other items and/or services which may be paid pursuant to statute or regulation now in existence or hereafter enacted or issued becoming payable because of the Primary Beneficiary's death that are not or cannot be paid by governmental sources. Trust Art. Nine, Section 9.01 at 10. A Medicaid payback trust can permit payment of taxes due from the trust, and payment of administrative expenses for wrapping up the trust before Medicaid is reimbursed. POMS SI 01120.203(B)(3)(a). However, a trust does not qualify for the true Medicaid payback trust exemption if it allows for payment of other expenses (e.g. funeral expenses or payment of debts owed to third parties) before Medicaid is reimbursed. POMS SI 01120.203(B)(3)(b). Here, it appears that the Trust may allow for these types of expenses if allowed by any state or federal statute now in existence or enacted at any time after the Trust was made.

2. If Offending Provisions Were Removed, The Trust, As Written, Would Otherwise Qualify For The Exemption To Counting The Trust Under The Statute.

If these provisions were removed from the Trust, it seems that the Trust may qualify for the Medicaid payback exception.[2]

The Trust provides that it intends to create a self-funded, irrevocable trust. Trust Art. Five, Sections 5.01, 5.02 at 4-5. The Trust describes the primary beneficiaries of the Trust as persons with one or more disabilities as defined in section 1614(a)(3) of the Social Security Act. *See* Trust Art. One, Section 1.02 at 2. The Jewish Federation of Metropolitan Chicago, which is the organization that proposes to establish the Trust, is identified as a Illinois Not For Profit Corporation. *See* Trust at 1. The Trust maintains a separate sub-account for each primary beneficiary, but pools the sub-accounts for purposes of investing and managing the funds. *See* Trust Art. One, Section 1.03 at 2, Trust Art. 3 at 4. The Trust further states that each sub-account is established by a grantor, which is defined as the primary beneficiary, a parent, grandparent, sibling, or legal guardian of a primary beneficiary, and the trust is established for the benefit of disabled individuals. Trust Art. One, Sections 1.01, 1.05 at 2. And, finally the Trust provides that, on the primary beneficiary's death, after the payment of expenses in Section 9.01, any remaining assets in the primary beneficiary's sub-account shall be retained by the Trust in the General Fund Sub-Account. Trust Art. Nine, Section 9.02 at 10-11. In the event that any assets remaining in the primary beneficiary's sub-account at the primary beneficiary's death are not retained by the Trust, the trustee shall pay to the State of Illinois or any other state from such remaining assets, amounts equal to the amount of medical assistance provided to the primary beneficiary during his or her lifetime. Trust Art. Nine, Section 9.02 at 11. Therefore, it appears that the Medicaid payback exception would apply.

3. If The Trust Were Excepted From The Statute, It Would Not, As Currently Written, Likely Be a Resource Under The *Regular Resource Rules*.

If the Medicaid payback exemption to the statute applied, it appears that the Trust as written would otherwise not be considered a resource under the regular resource rules, except to the extent of any property designated for future transfer as a contribution. *See* POMS SI 01120.200(D). Based on the evidence we have, it does not appear that a beneficiary would have the right to revoke or terminate the Trust Sub-Account. Since the Master Trust will receive any remaining trust assets in a Sub-Account on the beneficiary's death, the Master Trust would be a residual beneficiary of the Trust sub-account, whose consent would be necessary to revoke the Trust.[3] *See Pernod American National & Trust Company of Chicago*, 132 N.E.2d 540, 542 (Ill. 1956). Although the trust itself is not revocable, any property, or interests in property, that have been revocably designated for future transfer would be a resource. *See* POMS SI 01120.200(D)(1). Aside from such revocably assigned future interests, however, the remainder of the trust property would not be a resource. The irrevocable portion of the Trust would not be a resource because the beneficiary cannot compel the trustee to provide for his or her support and maintenance, and because the beneficiary presumably could not sell his or her interest in the Trust, since it is a discretionary trust for the beneficiary's interest. *See* POMS SI 01120.200(D)(1); RESTATEMENT (THIRD) OF TRUSTS § 60 and comment f (2003); Trust Art. Two, Section 2.02 at 3.

CONCLUSION

For the foregoing reasons, we conclude that a sub-account in the proposed pooled trust would be a resource.

KIM L~ B~
Regional Chief Counsel, Region V

By: _____
Henry S. K~
Assistant Regional Counsel

X. PS 03-141 SSI-Illinois-Review of the Illinois Disability Pooled Trust and Amendment Action

DATE: September 20, 2002

1. SYLLABUS

This opinion clarifies that the Illinois disability association's pooled trust was amended effective April 30, 2002 to reimburse the state for Medicaid payments prior to the payment of any funeral expenses. As a result of this amendment, for those who joined the trust before January 1, 2000, the trust sub-account would not be a resource. For those who joined the trust on or after January 1, 2000 but before April 30, 2002, the trust would be a resource until April 30, 2002, but not thereafter. And, for those who joined the trust on or after April 30, 2002, the sub account would not be a resource at any time.

2. OPINION

You asked whether the Illinois Disability Association's Pooled Trust (Trust) would constitute a resource for SSI purposes. For the reasons discussed below, it is our opinion that if an individual joined the pooled trust between January 1, 2000 and April 30, 2002, the trust assets would be a resource until April 30, 2002. However, the trust would not be a resource to those who joined the trust before that time period; nor would it be a resource for any member of the trust on or after April 30, 2002.

BACKGROUND

On July 17, 1998, the Illinois Disability Association, an Illinois not-for-profit corporation, established the Illinois Disability Pooled Trust. *See* Trust at 3, 22. The purpose of the trust is to provide for each beneficiary's supplemental care, and not to provide for a "disabled" beneficiary's basic support and maintenance. *See* Trust at 3-4. The trust identifies the beneficiaries as disabled person as defined by Section 1614(a)(3) of the Social Security Act, 42 U.S.C. § 1382c(a)(3). *See* Trust at 3.

Within the pooled trust, individual trust accounts, called sub-accounts, are created and maintained for each beneficiary, but the funds from each sub-account are pooled for investment and management of funds. *See* Trust at 9. The trust is activated for an individual Beneficiary when a Joinder Agreement is signed by a grantor (defined under the trust as a parent, grandparent, guardian, the beneficiary himself, any court, or any person that establishes a sub-account for the benefit of a beneficiary or contributes assets to an existing sub-account) and a trustee. *See* Trust 2, 8. Upon acceptance of the Joinder Agreement, the sub-account is established and the trustee has sole discretion to handle all funding matters. *See* Trust at 8. The pooled trust states that the trust and each sub-account are irrevocable, and a spendthrift provision provides that, to the extent permitted by law, a beneficiary cannot assign or transfer his or her interest in the trust. *See* Trust at 7-8.

At the time of the original signing, July 1, 1998, the trust provided that upon the death of a beneficiary, any amounts remaining in the beneficiary's trust sub-account, would be distributed first to pay the beneficiary's funeral and estate administration expenses; then to the trust, to the extent the beneficiary authorized in the Joinder Agreement that funds be retained by the trust to be used for the benefit of other trust beneficiaries who are indigent; then, to the extent that the deceased beneficiary's sub-account was funded with his or her own money, to reimburse the state for any benefits provided under the Medicaid program. *See* Trust at 18. Any funds remaining after this would be paid to remainder beneficiaries as named in the Joinder Agreement. *See* Trust at 18-19. The Joinder Agreement further provides, in an anti-lapse clause, that "if a lapse occurs in distribution, all remaining funds shall be retained as part of the Trust's Remainder Share." Joinder Agreement at 19.

On April 30, 2002, the trust was amended. *See* Trust at 17 (permitting amendments by trustee). The amendment revised the payment of any monies that had been authorized by the Grantor upon the death of the Beneficiary. *See* Trust Amendment. In particular, the amendment deletes the language that would require or allow payment of funeral expenses before any amounts are retained by the trust or used to reimburse Medicaid.

DISCUSSION

Assets generally are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his or her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the

property, it is a resource. *See* 20 C.F.R. § 416.1201(a)(1). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201(A).

We previously advised that, under the laws and rules in effect prior to the statutory amendments regarding trusts, a sub-account in this trust should not be considered a resource to individual beneficiaries of the pooled trust, since the individual cannot direct the trustees to make payments on their behalf for their support and maintenance, cannot sell their beneficial interests in the trusts, and cannot revoke or terminate the trust and obtain the assets. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI-Illinois-Review of The Illinois Disability Association's Pooled Trust Drafted by the Office of the Cook County Public Guardian (July 13, 1998). We reasoned, in particular, that the trust was not unilaterally revocable because the anti-lapse provision establishes a contingent, but irrevocable beneficial interest in the trust itself. Id.

Under the statutory amendments that took effect on January 1, 2000, even an irrevocable trust will be considered a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201(D)(2). Since this trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary, the sub-account would be a resource under this provision if the individual signed a joinder agreement after the effective date of the statute, January 1, 2000. *See* POMS SI 01120.201(C)(1).

Certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). To qualify for this exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

a. It must be established and managed by a nonprofit association.

b. A separate account must be maintained for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts.

c. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.

d. The trust must provide that to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

POMS SI 01120.203(B)(2). Prior to the April 30, 2002 amendment, the trust met all of these conditions except for the last. The trust did not meet the last condition because it provided for the payment of funeral expenses before the State would be reimbursed for Medicaid payments. *See* EM-01085(B)(3). As of April 30, 2002, however, the trust was amended to reimburse the state for Medicaid payments prior to paying any funeral expenses.

When a trust qualifies for the Medicaid trust exception to the statute, the trust must be analyzed under the regular resource rules, which were the same rules we applied to trusts prior to the statutory amendments. *See* POMS SI 01120.201(D) (Note). As explained above and in our prior memorandum, the trust would not be a resource under those rules. Therefore, effective April 30, 2002, the sub-accounts in the trusts would no longer be a resource.

CONCLUSION

In sum, we conclude that, for those who joined the trust before January 1, 2000, the trust sub-account would not be a resource. For those who joined the trust on or after January 1, 2000 and before April 30, 2002, the trust would be a resource until April 30, 2002, but not thereafter. And for those who joined the trust on or after April 30, 2002, the sub account would not be a resource at any time.

Thomas W. C~
Regional Chief Counsel, Region V

By: _____
Suzanne D~
Supervisory Attorney

Y. PS 03-011 SSI-Illinois-Review of the Illinois Disability Pooled Trust and Amendment Action Your Ref: S2D5G6; SI 2-1-3 IL

DATE: September 20, 2002

1. SYLLABUS

This opinion concerns the Illinois Disability Pooled Trust which was established by the Illinois Disability Association on July 17, 1998. For a beneficiary who joined the trust before January 1, 2000, a trust sub-account would not be a resource for SSI purposes. For those beneficiaries who joined the trust between January 1, 2000 and April 30, 2002, the trust sub-account would be a resource until April 30, 2002 but not thereafter. For those who joined the trust on or after April 30, 2002, the trust sub-account would not be a resource at any time.

2. OPINION

You asked whether the Illinois Disability Association's Pooled Trust (Trust) would constitute a resource for SSI purposes. For the reasons discussed below, it is our opinion that if an individual joined the pooled trust between January 1, 2000 and April 30, 2002, the trust assets would be a resource until April 30, 2002. However, the trust would not be a resource to those who joined the trust before that time period; nor would it be a resource for any member of the trust on or after April 30, 2002.

BACKGROUND

On July 17, 1998, the Illinois Disability Association, an Illinois not-for-profit corporation, established the Illinois Disability Pooled Trust. *See* Trust at 3, 22. The purpose of the trust is to provide for each beneficiary's supplemental care, and not to provide for a "disabled" beneficiary's basic support and maintenance. *See* Trust at 3-4. The trust identifies the beneficiaries as disabled person as defined by Section 1614(a)(3) of the Social Security Act, 42 U.S.C. § 1382c(a)(3). *See* Trust at 3.

Within the pooled trust, individual trust accounts, called sub-accounts, are created and maintained for each beneficiary, but the funds from each sub-account are pooled for investment and management of funds. *See* Trust at 9. The trust is activated for an individual Beneficiary when a Joinder Agreement is signed by a grantor (defined under the trust as a parent, grandparent, guardian, the beneficiary himself, any court, or any person that establishes a sub-account for the benefit of a beneficiary or contributes assets to an existing sub-account) and a trustee. *See* Trust 2, 8. Upon acceptance of the Joinder Agreement, the sub-account is established and the trustee has sole discretion to handle all funding matters. *See* Trust at 8. The pooled trust states that the trust and each sub-account are irrevocable, and a spendthrift provision provides that, to the extent permitted by law, a beneficiary cannot assign or transfer his or her interest in the trust. *See* Trust at 7-8.

At the time of the original signing, July 1, 1998, the trust provided that upon the death of a beneficiary, any amounts remaining in the beneficiary's trust sub-account, would be distributed first to pay the beneficiary's funeral and estate administration expenses; then to the trust, to the extent the beneficiary authorized in the Joinder Agreement that funds be retained by the trust to be used for the benefit of other trust beneficiaries who are indigent; then, to the extent that the deceased beneficiary's sub-account was funded with his or her own money, to reimburse the state for any benefits provided under the Medicaid program. *See* Trust at 18. Any funds remaining after this would be paid to remainder beneficiaries as named in the Joinder Agreement. *See* Trust at 18-19. The Joinder Agreement further provides, in an anti-lapse clause, that "if a lapse occurs in distribution, all remaining funds shall be retained as part of the Trust's Remainder Share." Joinder Agreement at 19.

On April 30, 2002, the trust was amended. *See* Trust at 17 (permitting amendments by trustee). The amendment revised the payment of any monies that had been authorized by the Grantor upon the death of the Beneficiary. *See* Trust Amendment. In particular, the amendment deletes the language that would require or allow payment of funeral expenses before any amounts are retained by the trust or used to reimburse Medicaid.

DISCUSSION

Assets generally are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his or her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *See* 20 C.F.R. § 416.1201(a)(1). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201A.

We previously advised that, under the laws and rules in effect prior to the statutory amendments regarding trusts, a sub-account in this trust should not be considered a resource to individual beneficiaries of the pooled trust, since the individual cannot direct the trustees to make payments on their behalf for their support and maintenance, cannot sell their beneficial interests in the trusts, and cannot revoke or terminate the trust and obtain the assets. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI-Illinois-Review of The Illinois Disability Association's Pooled Trust Drafted by the Office of the Cook County Public Guardian (July 13, 1998). We reasoned, in particular, that the trust was not unilaterally revocable because the anti-lapse provision establishes a contingent, but irrevocable beneficial interest in the trust itself. *Id.*

Under the statutory amendments that took effect on January 1, 2000, even an irrevocable trust will be considered a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201D.2. Since this trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary, the sub-account would be a resource under this provision if the individual signed a joinder agreement after the effective date of the statute, January 1, 2000. *See* POMS SI 01120.201C.1.

Certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203B.2. To qualify for this exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

- It must be established and managed by a nonprofit association.
- A separate account must be maintained for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts.
- Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.
- The trust must provide that to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

POMS SI 01120.203B.2. Prior to the April 30, 2002 amendment, the trust met all of these conditions except for the last. The trust did not meet the last condition because it provided for the payment of funeral expenses before the State would be reimbursed for Medicaid payments. *See* EM-01085(B)(3). As of April 30, 2002, however, the trust was amended to reimburse the state for Medicaid payments prior to paying any funeral expenses.

When a trust qualifies for the Medicaid trust exception to the statute, the trust must be analyzed under the regular resource rules, which were the same rules we applied to trusts prior to the statutory amendments. *See* POMS SI 01120.201D. (Note). As explained above and in our prior memorandum, the trust would not be a resource under those rules. Therefore, effective April 30, 2002, the sub-accounts in the trusts would no longer be a resource.

CONCLUSION

In sum, we conclude that, for those who joined the trust before January 1, 2000, the trust sub-account would not be a resource. For those who joined the trust on or after January 1, 2000 and before April 30, 2002, the trust would be a resource until April 30, 2002, but not thereafter. And for those who joined the trust on or after April 30, 2002, the sub account would not be a resource at any time.

Thomas W. C~
Regional Chief Counsel, Region V

By:_____
Suzanne D~
Supervisory Attorney

Z. PS 02-133 SSI-Illinois-Review of the Illinois Disability Pooled Trust and Amendment Action, Your Ref: S2D5G6; SI 2-1-3 IL

DATE: September 10, 2002

1. SYLLABUS

Depending on the date of execution of the Joinder Agreement, the Illinois Disability Pooled Trust discussed below may or may not be considered a resource for SSI purposes. Assets generally are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his or her support or maintenance. In this case, for those individuals who signed the Joinder Agreement between January 1, 2000 and April, 29, 2002, the trust assets would be considered a resource until April 30, 2002, because the Trustee had the discretion to expend the trust assets for the benefit of the beneficiary.

2. OPINION

You asked whether the Illinois Disability Association's Pooled Trust (Trust) would constitute a resource for SSI purposes. For the reasons discussed below, it is our opinion that depending of the date of execution of the Joinder Agreement, the Illinois Disability Pooled Trust may or may not be considered a resource for SSI purposes. If the Joinder Agreement is executed between July 17, 1998 and December 31, 1999, or after April 30, 2002, the trust assets would not be a resource for SSI purposes if the individual has irrevocably named a beneficiary to the Trust (including naming the Trust itself as a beneficiary). However, for those individuals signing a Joinder Agreement between January 1, 2000 and April 29, 2002, the trust assets would be a resource for SSI purposes until April 30, 2002, regardless of whether the Trust is irrevocable, because the Trustee has discretion to expend the trust assets for the benefit of a beneficiary, and because the Trust does not qualify for the Medicaid pooled trust exception to the statute.

BACKGROUND

On July 17, 1998, the Illinois Disability Association, an Illinois not-for-profit corporation, established the Illinois Disability Pooled Trust with LaSalle National of Chicago, Illinois as the corporate Co-Trustee. *See* Trust at 3, 22.

The purpose of the Trust is to provide for each Beneficiary's supplemental care, and not to provide for a “disabled” Beneficiary's basic support and maintenance. *See* Trust at 3-4. The Trust identifies the beneficiaries as disabled person as defined by Section 1614(a)(3) of the Social Security Act, 42 U.S.C. § 1382c(a)(3). *See* Trust at 3.

Within the pooled Trust, individual trust accounts, called sub-accounts, are created and maintained for each Beneficiary, but the funds from each sub-account will be pooled for investment and management of funds. *See* Trust at 9. The Trust is activated for an individual Beneficiary when a Joinder Agreement is signed by a Grantor (defined under the Trust as a parent, grandparent, guardian, the beneficiary himself, any court, or any person that establishes a sub-account for the benefit of a Beneficiary or contributes assets to an existing sub-account) and a Trustee. *See* Trust 2, 8. Upon acceptance of the Joinder Agreement, the sub-account is established and the Trustee has sole discretion to handle all funding matters. *See* Trust at 8. The pooled Trust states that the Trust and each sub-account are irrevocable, and a Spendthrift provision provides that, to the extent permitted by law, a Beneficiary cannot assign or transfer his or her interest in the Trust. *See* Trust at 7-8.

The Trust also states that its purpose is not intended to disqualify a Beneficiary from qualifying for federal, state, or local government benefits which he or she may be entitled to receive, unless it is determined by the Trustee to be necessary and advisable. *See* Trust at 5, ¶ 4.1A. The Trust provides that:

[I]f the mere existence of this authority to make distributions will result in a reduction or loss of the Beneficiaries’ entitlement to benefits, regardless of whether the Trustee actually exercises that discretion, the preceding paragraph [4.1 A] shall be null and void and the Trustee's authority to make these distributions shall terminate and the Trustee's authority to make distributions shall be limited to purchasing supplemental goods and services that will not adversely affect the Beneficiary's government benefits.

A sub-account terminates upon either: (1) an unpredicted future development in the law affects the Trust or any sub-account, or (2) the death of the primary Beneficiary. *See* Trust at 17-18.

At the time of the original signing, July 1, 1998, the Trust provided that upon the death of a Beneficiary, any amounts remaining in the Beneficiary's trust sub-account (remainder), would be distributed depending on the original funding into the Trust. First,

after the payment of the Beneficiary's *funeral and estate administration expenses* (including taxes and attorney's fees and reimbursement for income taxes), any amount authorized in the Joinder Agreement to be retained by the Trust would be used for the benefit of other beneficiaries who are indigent. *See* Trust at 18-19. Second, to the extent that the deceased Beneficiary's sub-account was funded with his or her own money, claims for reimbursement for services by the State of Illinois or such other state that provides Medicaid or other government benefits shall be satisfied. *See* Trust at 18. Third, all remaining funds existing after payments are made under the first and second levels shall be paid. *See* Trust at 18. The Trust provides that only the Trustee, in his or her own sole discretion, can terminate the Trust or sub-account during the Beneficiary's lifetime. *See* Trust at 18-19.

On April 29, 2002 (signed April 30, 2002), an amendment was made to the Trust, which was permitted under Article X. *See* Trust at 17. The amendment revised the payment of any monies that had been authorized by the Grantor upon the death of the Beneficiary. *See* Trust Amendment. In particular, the Amendment specifies that any assets remaining in the sub-account, would be used first to satisfy a Beneficiary's *estate administration expenses* (including taxes and attorney's fees) and reimbursement for income taxes (if any). *See* Trust Amendment. The amendment deletes the language that would require or allow payment of funeral expenses before any amounts are retained by the Trust or used to reimburse Medicaid.

DISCUSSION

Assets generally are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his or her support and maintenance. *See* 20 C.F.R. § 41.2101(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *See* 20 C.F.R. § 41.2101(a)(1). For trusts established on or after January 1, 2000, statutory provisions also may affect the status of a trust as a resource. *See* POMS SI 01120.201A. An analysis of whether the Trust would constitute a resource for SSI purposes depends upon when the Trust was activated for an individual Beneficiary by the signing of a Joinder Agreement is signed by a Grantor and a Trustee. *See* Trust 2, 8; *see also* POMS SI 01120.201C.1.

A. **Joinder Agreements executed from inception of the Trust, July 17, 1998, to December 31, 1999**

For those who sighed Joinder Agreements prior to January 1, 2000, the effective date of the new legislation, the trust assets are a resource if (1) the individual can revoke the trust and use the assets to meet his or her needs for food, clothing, and shelter, or (2) if the individual can direct the use of the trust assets to be used for his or her support and maintenance. *See* POMS SI 01120.200D. An individual's beneficial interest in a trust also may be a resource if (3) the individual can sell that interest. *See* Memorandum from Regional Chief Counsel, Chicago, to Assistant Regional Commissioner- MOS, Chicago, Z~ Trust as an SSI Resource-Wisconsin, Bernard W~ (~), (Feb. 23, 1993) at 5. Here, for those who joined the Trust prior to January 1, 2000, the trust assets will be a resource under the first rule if the Beneficiary has not named any other beneficiaries to the Trust sub-account.

1. The Beneficiary cannot revoke the Trust if Residual Beneficiaries are named in the Joinder Agreement.

Illinois follows the general rule that, even if a trust purports to be irrevocable, it nevertheless may be revoked if the settlor and all beneficiaries consent. *Stewart v. Merchants Nat'l* , 3 Ill.App.3d 337, 339, 278 N.E.2d 10, 13 (1972); *Vlahos v. Andrews*, 362 Ill. 593, 599, 1 N.E.2d 59, 61-62 (1936). SSA does not consider a trust fund to be a resource, however, if the settlor would be required to obtain the consent of another beneficiary in order to revoke the trust and obtain the funds. *See* Memorandum from SSD, Chief, SSI Branch (K~), to Director, Division of Program Requirements Policy, Trusts Established as the Result of Z~ Underpayments, (Aug. 28 1991). Therefore, a beneficiary's sub-account would be a resource if he or she were the grantor and sole beneficiary of the sub-account/trust. Here, the Trust allows each person who joins the Trust the option to name residual beneficiaries to the Trust. *See* Trust at 18. If the person does name other individual beneficiaries (including any amounts designated to be retained by the Trust itself), this would be sufficient to render the Trust irrevocable unilaterally. If the SSI Beneficiary names no other beneficiaries to the Trust, however, or retains the right to revoke the beneficiary designations, he could revoke the Trust, and the Trust would be a resource.

In another legal opinion request, SSI-Illinois-Review of the Joinder Agreement for the Illinois Disability Pooled Trust for James C. B~, ~, your reference S2D5G6, SI 2-1-3-IL, we were provided a copy of a Joinder Agreement. Assuming Ms. B~' Joinder Agreement is the standard agreement signed by beneficiaries, Section L addresses distributions of the remaining assets upon a Beneficiary's death.

As discussed above, Section 11.2 of the Trust states that when the pooled trust sub-account is funded with the Grantor/Beneficiary's own money, the Grantor/Beneficiary may elect to have the Trust distribute the sub-accounts remaining

assets. *See* Trust at 18 & Joinder Agreement, Section L(A) at 14. The Grantor/Beneficiary must determine how the remaining assets are to be distributed. *See* Joinder Agreement, Section L(A)(1-2) at 14-15.

Section L(A)(1) states that if the sub-accounts remaining assets are *insufficient* to satisfy the State's Reimbursement Claim, the Grantor/Beneficiary must decide on one of the following options for the distribution of assets which remain in the sub-account at the time of the Beneficiary's death:

a. The Grantor/Beneficiary elects to have the assets utilized to reimburse the State's Reimbursement Claim.

b. The Grantor/Beneficiary elects to have the assets retained by the Trust as the Trust's Remainder Share.

c. The Grantor/Beneficiary elects to have ___ [Beneficiary determines] percentage retained by the Trust as the Trust's Remainder Share and the remaining percentage to be paid to the State's Reimbursement Claim.

Joinder Agreement, Section L(A)(1) at 14-15.

If the Beneficiary irrevocably elects either option L(A)(1)(b) or (c) (with a designation of some percentage greater than zero be retained by the Trust), the Beneficiary designates that remaining amounts shall be retained by the Trust itself. This designation is sufficient to render the Trust itself a beneficiary of the Trust sub-account. Therefore, the Trust would be irrevocable unilaterally, and thus, would not be considered a resource. Although it may not be clear at the time the Trust is created, or when SSA makes its eligibility determination whether the funds will be insufficient to reimburse Medicaid, this nevertheless would be sufficient to create a contingent remainder interest in the Trust.

Section L(A)(2) states that if the sub-accounts remaining assets are *sufficient* to satisfy the State's Reimbursement Claim, the Grantor/Beneficiary must decide on one of the following options for the distribution of assets which remain in the sub-account at the time of the Beneficiary's death:

d. The Grantor/Beneficiary elects to have the assets retained by the Trust as the Trust's Remainder Share.

e. The Grantor/Beneficiary elects to have ___ [Beneficiary determines] percentage retained by the Trust as the Trust's Remainder Share and the remaining percentage to be paid to the State's Reimbursement Claim.

f. The Beneficiary/Grantor elects to satisfy the State's Remainder Claim and have the remaining amount paid to the Final Remainder Beneficiaries.

Joinder Agreement, Section L(A)(2) at 15.

Similarly, if the Beneficiary irrevocably elects either option L(A)(2)(a) or (b)(with a designation of a percentage of greater than zero to be retained by the Trust), the Beneficiary designates that remaining amounts shall be retained by the Trust itself. This designation is sufficient to render the Trust irrevocable unilaterally, and thus, would not be considered a resource, regardless of whether the sub-account actually contains sufficient assets to repay Medicaid.

Section L(C) provides for final remainder beneficiaries. *See* Joinder Agreement at 16. Under this Section, the Grantor/Beneficiary may list persons or entities that he would like to receive the remaining funds. If the Grantor/Beneficiary names remainder beneficiaries and does not to reserve the authority to amend the designation of the remainder beneficiaries, the Trust is irrevocable unilaterally, and thus, would not be considered a resource. *See* Joinder Agreement, Section C, I-II at 16. If, however, the Grantor/Beneficiary either (1) reserves the right to amend the Remainder Beneficiaries of a sub-account or (2) names himself (or his estate or heirs at law or the like) as the sole beneficiary of the sub-account/trust, it would be considered a resource.

2. The Beneficiary cannot direct the Trustee to use the Assets for his or her support and maintenance.

Under the terms of the Trust, the Beneficiary cannot direct the Trustee to use the assets in the sub-account for his or her support and maintenance. Rather, the Trustee has sole discretion to disburse such funds, and disbursements are to be made only for the Beneficiary's supplemental care, not for basic support and maintenance. *See* Trust at 8.

3. The Beneficiary cannot liquidate his or her interest in the Trust.

Although the spend thrift provisions in the Trust would not be effective with respect to any trust assets that originated from the SSI Beneficiary, the Agency generally assumes that the individual would be unable to sell his beneficial interest in this type of discretionary trust. *See* Trust at 7-8. *See Restatement (Third) of Trusts* §60 (Tentative Draft No. 2, Mar. 10, 1999).

B. **Joinder Agreements executed on or after January 1, 2000**

Effective January 1, 2000, amendments to the Social Security Act provide that even an irrevocable trust created by an individual is a resource if the trust allows for payment to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3). According to the Act as amended, most assets held in trust for individual generally are going to be resources if any portion of the trust property could be used for the benefits of the eligible individual or his or her spouse. 42 U.S.C. § 1382b(e)(3). Here, the Trust provides that the Trustee has the sole discretion to make supplemental distributions that are appropriate to or for the Beneficiary. Since the Trust specifically allows for payment to or for the benefit of the individual, it may be a resource under the Act if the individual joined the trust on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e)(3); POMS SI 01120.201D.2.a.

Certain trusts may be excluded from this provision of the Act under the Medicaid payback trust exception of 42 U.S.C. § 1382b(e). This exception under the amended Act provides that property held in trust which meets the requirements described in Section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4), is not subject to the statutory provisions for counting trusts as resources. In order to be excluded from consideration under the Act, the trust must contain assets belonging to a disabled individual, and must satisfy the following conditions:

1. It must be established and managed by a nonprofit association.

2. A separate account must be maintained for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts.

3. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.

4. The trust must provide that to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

Prior to the April 30, 2002 amendment to the Trust, the Trust would not qualify for the Medicaid payback trust exception because it did not meet all of the above-referenced criteria. Specifically, the initial Trust gave priority to payment of funeral expenses before the State was reimbursed for Medicaid benefits. *See* Trust at 18, ¶ 11.2A, B. The POMS instruct that to qualify for the pooled trust exception, the trust must contain specific language which provides that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust reimburses the State for medical assistance paid on behalf of the individual under Medicaid. *See* POMS SI 011020.203B.2.g. To the extent the trust does not retain the funds in the account, the State must be listed as the first payee and have priority over payment of other debts and administrative expenses. *Id.* The Agency interpreted this to mean that to qualify for the Medicaid pooled trust exception, administrative expenses were permitted prior to reimbursement to the state for medical expenses, but not funeral expense payments. *See* EM-01085(B)(3). As such, the Trust did not meet the exception for counting as a resource under 42 U.S.C. § 1382b(e). Thus, any Joinder Agreements executed between January 1, 2000 (the Act Amendment) and the eve of the Trust Amendment (April 29, 2002), the trust assets would constitute a resource for SSI purposes until at least April 30, 2002.

C. **The April 30, 2002 Trust Amendments**

The Trust Amendment was effective April 30, 2002. Under the Amendment, the Trust revised priority payment of estate administration expenses before the State was reimbursed for Medicaid benefits upon the death of a Beneficiary. *See* Trust

Amendment. As discussed above, the POMS instruct that to qualify for the pooled trust exception, a trust must contain specific language which provides that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, and the trust reimburses the State for medical assistance paid on behalf of the individual under Medicaid. *See* POMS SI 011020.203B.2.g. To the extent the trust does not retain the funds in the account, the State must be listed as the first payee and have priority over payment of other debts and administrative expenses. *Id.* Here, the Trust, as amended, complies with EM-01085(B)(3) in specifically stating that priority to payment of estate administration expenses, but not funeral expenses, will be made before the State was reimbursed for Medicaid benefits. Therefore, after April 30, 2002, the Trust qualifies for the Medicaid payback exception to the statute.

The remaining issue is whether the Trust as amended, qualifies as a resource under the agency regulations. With the amendment, the Trust now requires an analysis under POMS SI 01120.201 (Trusts established after January 1, 2000). *See* POMS SI 01120.201D. (Note). In analyzing the Amended Trust under POMS SI 01120.200, the same analysis discussed above in Section A applies, and the Trust will not be a resource if the individual irrevocably names a residual beneficiary to the Trust (including a gift to the Trust itself). If, however, the individual does not irrevocably name another beneficiary to the Trust, the Trust would be revocable, and therefore a resource.

CONCLUSION

In sum, we conclude that depending of the date of execution of the Joinder Agreement, the Illinois Disability Pooled Trust may or may not be considered a resource for SSI purposes. Specifically, if the Joinder Agreement is executed between July 17, 1998 and December 31, 1999, or after April 30, 2002, the trust assets would not count as a resource for SSI purposes if the individual irrevocably names a residual beneficiary to the Trust (including an irrevocable gift to the Trust itself). If the individual has not named an irrevocable residual beneficiary, the Trust is revocable, and therefore a resource. However, for those individuals signing a Joinder Agreement between January 1, 2000 and April 29, 2002, the trust assets would count as a resource for SSI purposes under statutory provisions from the time the individual joined the Trust, until April 30, 2002, even if the Trust was irrevocable. This is because the Trustee has discretion to expend the trust assets for the benefit of a Beneficiary, and the Trust did not qualify under the Medicaid pooled trust exception during that time because it provided for the payment of funeral expenses before reimbursing the state for Medicaid paid for the individual. After April 30, 2002, the Trust would no longer be a resource if the individual has named irrevocable residual beneficiaries to the Trust, since the Trust would qualify for the Medicaid payback exception to the statute after that date

Thomas W. C~
Regional Chief Counsel, Region V

By:_____
Kimberly S. C~
Assistant Regional Counsel

AA. PS 01-189 SSI-Illinois-Review of Proposed Irrevocable Special Needs Trust for Joyce H~; SSN: ~; Your Reference: S2D5G3

DATE: July 30, 2001

1. SYLLABUS

A trust is revocable if the grantor is also the sole beneficiary, even if the trust purports to be irrevocable. A trust that provides for payment of the beneficiary's funeral expenses prior to reimbursement of Medicaid expenditures to the State does not qualify for the Medicaid payback trust exception to counting as a resource under section 1613(e) of the SSAct.

Payments to the trust from the Illinois Fireman's Pension are income to the individual entitled to the payment (the beneficiary) because those payments cannot be irrevocably assigned to the trust under Illinois State law.

2. OPINION

You have asked whether the proposed trust for Joyce H~ is a countable resource for the purposes of determining Ms. H~'s eligibility for Supplemental Security Income (SSI). You have also asked whether the payments being made to the trust from the Arlington Heights, Illinois, Fireman's Pension may be legally assigned to the trust, so that they would not be considered income

to her. For the reasons stated below, we conclude that the trust would be a resource, and the payments from the pension fund would be considered income when determining Ms. H~'s eligibility for SSI.

FACTS

In January 2001, Joyce H~ submitted a proposed trust agreement. The "Joyce H~ Special Needs Irrevocable Pay Back Trust" ("Trust" or "the trust") is being created for the benefit of Joyce H~, who is disabled and who will receive the funds that create the trust apparently as the result of a settlement in a divorce proceeding.

The trust is to be funded by (a) future discovered assets of Joyce H~; (b) future receipts from Dennis H~, being payments from her husband's pension fund Arlington Heights, Illinois, Fireman's Pension per a Qualified Illinois Domestic Relations Order (QILDRO); and (c) funds in excess of the Illinois Department of Public Aid cash asset limit which accumulate in Joyce H~'s account. The Circuit Court of Cook County is named as the settlor of the trust, Trust 1.1, and Antoinette B~ is named as trustee (Trust 6.1).

The stated purpose of the trust is to "supplement, but not to supplant, whatever benefits and services [Ms. H~] may from time to time be eligible to receive by reason of age, disability, or other factors, from federal, state and local governmental and charitable sources." Trust 2.1. The trust states that it is irrevocable, Trust 1.4, and that it is intended that Ms. H~ qualify for SSI. Trust 2.1. The Trustee is to use the trust principal and income to provide Ms. H~ with "those benefits and services, and only those benefits and services, that, in the Trustee's judgment, are not otherwise available to [Ms. H~] from other sources as or when needed for her welfare." Trust 2.1. The making and the amount of any payment from the trust is subject to court order. Trust 3.

The trust may be amended by the trustee "so that it conforms with any regulations that are approved by any governing body or agency relating to 42 U.S.C. 1396p or related statutes, including state statutes that are consistent with the provisions and purposes of the Revenue Reconciliation Act of 1993 and amendments to such Act." Trust 1.4.

The trust terminates upon Ms. H~'s death, or at such time as Ms. H~ is no longer disabled under the Social Security Act, and either a guardian or Ms. H~ petitions a court to have the trust terminated. Trust 4.1 Upon termination of the trust, the trustee is directed to distribute the trust estate in the following order:

a. In the event that the trust terminates upon the death of Ms. H~, the trustee shall "pay directly or indirectly from the Trust Estate (i) Joyce H~'s funeral expenses, (ii) any and all death taxes imposed on Joyce H~'s estate, (iii) court fees of a probate, administration or estate proceeding relating to Joyce H~'s estate, and (iv) any and all legal, guardian, trustee and accounting fees related to Joyce H~'s estate."

b. In the event that the trust terminates upon the death of Ms. H~, or, if required by law, if the trust terminates because Ms. H~ is no longer disabled, funds remaining in the trust are to be used to reimburse governmental agencies for benefits provided to Ms. H~ if such benefits have not been reimbursed from any other source.

c. If the trust terminates because Ms. H~ is no longer disabled, the remaining trust estate is to be distributed to Joyce H~ or her guardianship estate.

d. In the event that the trust terminates upon the death of Ms. H~, the remaining trust estate is to be distributed "in the alternative to Joyce H~'s decedent estate, as she may appoint in her last will," with the remaining trust estate to be paid "pursuant to the relevant portions of the Illinois Probate Code."

Trust 4.2.

DISCUSSION

1. The Trust, as Written, Would Be a Resource

Under federal law, a trust established by an individual after January 2000 generally will be considered a resource to him if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120 TN 35 [hereinafter POMS TN 35] at SI 01120.201(D)(1). If the trust is irrevocable, the trust is still a resource if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. In that case, the value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS TN 35 at SI 01120.201(D)(2)(a).

Certain Medicaid payback trusts are excluded from these statutory provisions. 42 U.S.C. § 1382b(e)(1), (5); POMS TN 35 at SI 01120.203(B)(1)(a). If the trust falls within this exception, the Agency applies regular resource rules, and the trust may still be considered a resource if it is revocable. *See* POMS TN 35 at SI 01120.203(B)(3)(b); *see also* generally 20 C.F.R. § 416.1201(a) (A resource, for the purpose of SSI eligibility, is "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.").

a. The Trust is Revocable

Thus, regardless of whether the statute applies, or whether the trust qualifies for the Medicaid payback trust exception, the trust must be irrevocable or it will be considered a resource. Here, the trust is not irrevocable because even a trust, like this one, that purports to be irrevocable can be revoked if the settlor (grantor) of the trust is also the sole beneficiary. *S~ v. Merchants National of Aurora*, 278 N.E.2d 10, 12 (Ill. App. 1972); Restatement (Second) of Trusts § 339, comment a.

Although the trust identifies the Circuit Court of Cook County as the "settlor," Trust 1.1, Ms. H~ is the true settlor of the trust because the trust was formed with her assets. *See In re Estate of H~*, 635 N.E.2d 853, 855 (Ill. App. 1994); POMS SI 01120.200(L)(3). Ms. H~ is also the sole beneficiary of the trust. She is the only named beneficiary of the trust during her lifetime, and on termination of the trust (if she is no longer disabled or if she dies), the remainder of the trust estate (after reimbursement of government agencies for benefits received) is to be distributed to her (if she is living) or to her whomever she names in her will, or (if there is no will provision) to her heirs (if the trust terminates on her death). Trust 4.2. This does not indicate an intent to create additional beneficiaries in those Ms. H~ may appoint in her will or in her heirs. *See S~*, 278 N.E.2d at 14 (statement that, if trust property does not pass by will, it will pass to heirs does not create additional beneficiaries who must consent to revocation or amendment of trust); Restatement (Second) of Trusts § 127, comment b. Nor is the state a beneficiary of the trust merely because the trust will reimburse the state for Medicaid benefits paid to Ms. H~ during her lifetime. Any money paid to the state is for the benefit of Ms. H~, not the state. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, States Named as Beneficiary to a Trust, at 2 (June 24, 1997); Memorandum from Reg. Chief Counsel, Chicago, to Center Director, Chicago, Illinois OBRA '93 Trust for Dominick J. G~, at 4 (Apr. 17, 1997).

b. Even if the Trust Were Made Irrevocable, It Would Be a Resource.

Even if the trust were irrevocable, however, it still would be a resource. The Medicaid payback exception does not apply, and under federal law the entire trust is a resource because the trustee can make payments from the trust for Ms. H~'s benefit.

(1) The Trust Does Not Qualify for the Medicaid Payback Exception.

The trust would not qualify for the Medicaid payback trust exception because, to be exempt, the trust must provide that, on the death of the individual, any remaining trust assets will be used first to reimburse the state for Medicaid assistance paid on behalf of the individual, even before the trust pays any funeral expenses. *See* POMS SI 01120.203(B)(1)(f); EM-01085 (May 14, 2001). Here, the trust provides for payment of funeral expenses before the state is reimbursed. *See* Trust 4.2. Thus, the federal statute would apply.

(2) The Trust Is A Resource Under Federal Law Because the Trustee Can Make Payments for Ms. H~'s Benefit

Under the federal statute, the entire trust would be a resource to Ms. H~. Even if the trust were irrevocable, "there are circumstances under which payment from the trust could be made to or for the benefit of" Ms. H~. *See* Trust at 2.1. *See* 42 U.S.C. § 1382b(e)(3)(B). Indeed, both the income and the principal of the trust are available for Ms. H~'s benefit.

2. The Pension Payments Would Be Income

It appears that payments from Dennis H~'s Fireman's Pension, which may be added to the trust, should be considered income to Ms. H~. Such payments are considered income to the individual, even where it appears that they are paid to the trust, if: (1) the payments are non-assignable by law; or (2) the payments are legally assignable, but the assignment to the trust is revocable.

See POMS SI 01120.200(G)(1)(c)-(d).

Here, since the assignment is made as part of the trust, *see* Trust at 1.2, and since the trust is revocable, we assume that the assignment would be revocable, as well. But even if the trust were made irrevocable, the payments from the pension fund still should be considered income because state law requires that any assignment of such pension funds to a trust be revocable.

Ms. H~ would be legally entitled to these pension payments pursuant to a QILDRO, 40 ILL. COMP. STAT. 5/1-119, which is issued by a court because such funds are marital property earned during the marriage. Thus, Ms. H~ would have an ownership interest in the pension fund, and would be an alternate payee who would receive a portion of the benefits payable. *See* 40 ILL. COMP. STAT. 5/1-119; 750 ILL. COMP. STAT. 5/503(b); *In re B~*, 722 N.E.2d 287, 295-96 (Ill. App. 1999). State law provides that:

The board of trustees of any retirement fund or system operating under this Code may, at the written direction and request of any annuitant, solely as an accommodation to the annuitant, pay the annuity due the annuitant . . . to a , savings and loan association, or trust company for deposit in a trust established by the annuitant for his or her benefit with that , savings and loan association, or trust company. The annuitant may withdraw the direction at any time.

40 ILL. COMP. STAT. 5/1-106(a) (Supp. 2001). Thus, although state law allows assignment of monthly pension benefits to a trust under certain circumstances, any such assignment must, by law, be revocable, since the annuitant "may withdraw the direction at any time." Since the pension cannot be irrevocably assigned, it would still be considered income under the POMS.

CONCLUSION

In summary, we conclude that the Trust in its current form is a resource to Ms. H~ because it is revocable. Furthermore, even if the trust were made irrevocable, it still would be a resource because the trust does not qualify for the Medicaid payback trust exception to the federal statute, and under the federal statute, the trust would be a resource (even if the trust were irrevocable) because payments from the principal and interest of the trust can be made for Ms. H~'s benefit.

Furthermore, regardless of whether the trust is revocable or irrevocable, and regardless of whether the assets in the trust would be considered a resource, payments into the trust from Dennis H~'s Fireman's Pension would be income to Ms. H~ because, under state law, those payments cannot be irrevocably assigned to trust.

BB. PS 01-107 SSI-Illinois-Review of Options for Living Pooled OBRA Pay Back Trust

DATE: February 5, 2001

1. SYLLABUS

The regional attorney was asked to review the Options for Living Pooled OBRA Pay Back Trust under the newly enacted trust provisions effective January 2000.

It is the opinion of the regional attorney that the trust qualifies for the Medicaid trust exception (SI 01120.203) and would not be considered a resource to an SSI beneficiary.

2. OPINION

We were asked to determine whether the Options for Living Pooled OBRA Pay Back Trust satisfies the newly enacted provisions that provide certain exceptions for the consideration of trusts as resources. We have concluded that this trust qualifies for the exception stated in section 1917(d)(4)(C). Therefore, this trust should not be considered as a resource to its beneficiaries.

BACKGROUND

On November 3, 2000, Surrogate Guardian Services established an Options for Living Pooled OBRA Pay Back Trust with Old Kent of Elmhurst Illinois as the co-trustee. Surrogate Guardian Services stated in the trust agreement that it is an Illinois not-for profit corporation.

The trust states that its purpose is to supplement, but not supplant, whatever benefits and services the beneficiaries of the trust may be eligible to receive from federal, state, and local governmental and charitable sources. It identifies the beneficiaries as disabled persons and it defines a "disabled person" as one so defined by Section 1614(a)(3) of the Social Security Act, 42 U.S.C. § 1382c(a)(3). The trust agreement also states that the individual whose assets were used to establish the trust is disabled according to the Social Security Administration's definition of disability.

The trust is designed to set up sub-accounts for each individual beneficiary. Those sub-accounts are to be maintained by the trustee in trust for the benefit of the beneficiary.

DISCUSSION

On December 4, 1999, the president signed into law the Foster Care Act of 1999 (P.L. 106-169). This law includes an exception for counting, as a resource, certain trusts established on or after January 1, 2000, by an individual, with his or her own funds. The exception applies to any trust described in sections 1917(d)(4)(A) and (C) of the Social Security Act. The significant provision in these trusts provides that upon the individual's death, the state will be repaid from the trust, for Medicaid expenditures made on behalf of the individual.

Such trusts are commonly referred to as "Medicaid pooled trusts" and are usually administered by a non-profit association (organization). Such trusts may contain the assets of a large number of individuals, with separate accounts for each individual beneficiary. To qualify for the exception or exemption, the trust must reimburse the state, upon the individual's death, for Medicaid expenditures made on behalf of the individual from the balance of the trust that is not returned by the trust itself.

Thus, the question raised by the document at issue, is whether or not it qualifies for the exception. The applicable statute, 42 U.S.C. § 1917(d)(4)(C) states that a trust will qualify if it is established and maintained by a not for profit association. Surrogate Guardian Services has identified itself in the trust document as an Illinois not-for-profit corporation. (*See* first paragraph under the heading of title "Trust Agreement Establishing Options For Living Pooled OBRA Pay Back Trust".)

In addition, to qualify for the exception, separate accounts must be maintained for each beneficiary. Section 2, Page 2 of the "Joinder Agreement includes a heading, "Creation of Sub-account." That section states that the Trustee agrees to create a sub-account for the benefit of each beneficiary and to manage the assets for the beneficiary's benefit. Section 1.6 of the Agreement that establishes the trust also contains a heading entitled Sub-account (Section 1.6). This section defines a sub-account as an individual share maintained by the Trustee in trust for the benefit of the beneficiary. This trust, therefore has set up separate accounts that are to be maintained for each beneficiary.

To qualify under the exception, these separate or sub-accounts must be established solely for the benefit of a disabled individual. This agreement or trust appears to qualify under this requirement as well. On page one of the "Joinder Agreement," there is a statement that the donor desires to transfer, assign, and/or transfer such assets to the trust for the benefit of the beneficiary and the beneficiary is defined as "A disabled person according to 1614(a)(3) of the Act."

To qualify for the exception, these (sub) accounts must be established by: the individual; a parent; grandparent; legal guardian; or a court. If the Surrogate Guardian Services is acting as a guardian on behalf of the beneficiaries of the trusts, this requirement would be met. Otherwise, it would generally be acceptable to assume that the individual or someone acting on his or her behalf, as a parent, grandparent, guardian, or court established the trust account.

The trust also has to provide that any remaining amounts after the beneficiary's death are paid to the state to cover any expenditures that the state made to the individual under a State Medicaid plan to the extent that any amounts remaining in the trust are not returned by the trust. Article III of the trust deals with "Distribution" in general. Section 3.5 specifically talks about reimbursing a state agency and refers the reader to Section 4.2 "Reimbursement to State." Although § 4.2 does not specifically mention Medicaid, it discusses repayment to state agencies of — an amount equal to the total amount of assistance paid by such agency on that beneficiary's behalf during his or her lifetime. We feel that this language is sufficient to qualify this trust for the exception.

Finally, this trust qualifies for the exception because the individual whose assets were used to establish the trust was a disabled individual according to SSA's definition of "disability." Page three of the Trust Agreement defines the donor as a disabled person.

CONCLUSION

In sum, we conclude that the trust agreement in question qualifies for the exception set forth in section 1917(d)(4)(C). Thus, Social Security approves of the trust and does not anticipate that any amendments to this trust will be required.

CC. PS 01-105 SSI-Illinois-Review of Stacy A. A~ 1973 Trust, Mother of Alicia A~, SSN: ~

DATE: February 5, 2001

1. SYLLABUS

A third party established an irrevocable trust for the benefit of the SSI recipient in 1973. The trust is not a resource. Although the trust provides that the trustee is required to distribute the income of the trust to the beneficiary "at convenient intervals," a spendthrift clause in the trust prevents the beneficiary from selling or anticipating these distributions. Therefore, any distributions from the trust are subject to regular income counting rules.

2. OPINION

You asked for a legal opinion concerning whether the subject trust is a countable resource to Stacy D~ (formerly A~) ("Stacy"), who is the mother of Alicia A~ ("Alicia"), an SSI claimant. Based on the facts as we understand them, we conclude that the trust assets should not be treated as a countable resource to Stacy. However, payments from the trust would constitute income.

Background

On October 31, 1973, Sam L~ ("Sam") created a trust with property described in a document (referred to in the trust as "Schedule A"), that was not attached to the copy of the trust that we received. The trust is called the "Stacy A. A~ 1973 Trust." The trust is intended for Stacy's benefit during her lifetime. Para. 1. The expressed intent of the trust is that it provide for "the suitable care, maintenance, support, education, or medical attention of the Principal Beneficiary and any of her issue." Section V (b). The trust requires the trustee to distribute the net income of the trust to Stacy at regular intervals and gives the trustee discretion to use the principal for anything consistent with the trust purpose. Section V (b).

The trust continues until Stacy dies; upon her death, the trust terminates. Section VI. Upon termination, the trustee is directed to distribute the trust principal and income to Stacy's "issue per stirpes," and if none, to the issue of Sam's son, William, and if none, to the issue of Sam. Section V (c). The trust further has a spendthrift clause, which prevents the beneficiaries from assigning their interest in the trust. Section I (q).

DISCUSSION

Both income and resources of an ineligible parent can be deemed income or resources to a child who applies for SSI. 20 C.F.R §§ 416.1165, 416.1202. Assets are a resource for SSI purposes if the individual owns them and can convert them to cash that can be used for his or her support and maintenance. *See* C.F.R. 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *See id*. Assets in trust are a resource to the beneficiary of the trust if he or she can terminate or revoke the trust and use the assets to meet his or her needs for food, clothing, and shelter. *See* POMS SI 01120(D)(1)-(3). The trust is also a resource if the individual can direct the funds to be used for her support and maintenance, or if the individual can sell her beneficial interest in the trust.

Here, Sam is the grantor of the trust property. The trust does not give Stacy the power or authority to terminate the trust or obtain the assets. Nor does Stacy have the power or authority to direct the trustee to use the trust assets for her support and maintenance. The trustee "may" in his "sole discretion" use the principal of the trust for Stacy's support and maintenance. Stacy cannot force him to exercise that discretion, but if the trustee makes any discretionary disbursements to her (or Alicia), this would be income to her, and if the trustee uses the funds to furnish Stacy (or Alicia) with food, clothing, or shelter, this would constitute in-kind support and maintenance.

The trustee is required to distribute the income of the trust to Stacy at "convenient intervals." Because of the spendthrift provision, Stacy cannot sell her beneficial interest in the trust. Therefore, the trust is not a resource to her. However, the distributions from the trust are income to her.

CONCLUSION

For these reasons, we believe that the trust is not a resource for Stacy or Alicia. However, distributions from the trust would be income.

DD. PS 00-495 Michael R~ Trust, SSN: ~ - Effect of Nunc Pro Tunc Order, Your Reference: S2D5G3

DATE: June 8, 2000

1. SYLLABUS

This opinion concerns a trust that was amended by an Illinois court under a nunc pro tunc order. The opinion explains that a nunc pro tunc order may be used to make clerical changes to an existing legal document, but not substantive changes. These changes are retroactive to the date of the original document. Prior to the order, this trust was considered a resource for SSI purposes because it was a grantor trust without a named residual beneficiary. However, the Illinois court determined that the original trust sufficiently indicated its intent concerning residual beneficiaries, in this case "heirs at law." The court allowed the trust to be amended by a nunc pro tunc order which added the names of the heirs at law to the trust. The regional counsel determined that this change in the trust was not substantive, so it was appropriate for the court to use a nunc pro tunc order to change the trust. Since the amended trust now identifies residual beneficiaries, it is not a resource for SSI purposes.

2. OPINION

BACKGROUND

The "Michael R~ Supplemental Care Trust" ("the trust") was created for the benefit of Michael R~ ("Michael"), who is disabled and who apparently received the funds that make up the trust as the result of a judgment or settlement in a personal injury action. The First National of Chicago is named as the guardian of Michael's estate and as the grantor of the trust, and Michael's parents, Mary R~ and Robert R~, are named as trustees.

In February 2000, the Agency found that the trust was a resource to Michael for SSI purposes because, although the language of the trust indicated that the trust was irrevocable, Michael could nevertheless revoke it because he was the grantor and sole beneficiary.

On March 31, 2000, the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, entered an order approving an amendment to the trust "nunc pro tunc," effective July 3, 1997. The March 2000 amendment, if valid retroactively, would make the trust irrevocable because, as amended, the trust names residual beneficiaries. The trust would therefore not be a resource.

You asked whether, in light of the amendment, the trust is still a resource and, if not, on what date it ceased being a resource. For the following reasons, we believe that the trust is not a resource and that in this particular case the nunc pro tunc order is valid; therefore, the property in the trust should not be considered a resource at any time.

DISCUSSION

Our review of Illinois case law suggests that the nunc pro tunc order was valid. The change ordered by the Lake County court would apply retroactively. Therefore, the property in trust was not a resource for SSI purposes as of July 3, 1997, when the trust was first funded.

The general rule in Illinois is that a nunc pro tunc order is "an entry now for something previously done, made to make the record speak now what was actually done then." In re *Bird's Estate*, 102 N.E.2d 329, 333 (Ill. 1951) (citing 28 Words and Phrases, 982 et seq.). "It is a device to supply an omission to enter of record an order actually made, but omitted from the record by the clerk." Id. (citing *Sherman v. Green*, 152 Ill. App. 166). The function of a nunc pro tunc order "is not to create something in the record, or supply an omission to make an order, but only an omission in the record of the order." Id. (citing *Briggs v. Briggs* 20 N.E.2d 908). Nunc pro tunc orders may be entered to correct clerical, not judicial errors. *Krilick v. Plencer*, 713 N.E.2d 231, 234 (Ill. App. Ct. 1999). A court cannot, therefore, make a substantive change nunc pro tunc.

Here, the change ordered by the Lake County court was essentially a clarification of the intent manifested in the original trust instrument, and the order was therefore properly entered nunc pro tunc. The original trust provided that upon Michael's death, any trust assets remaining after reimbursements to the appropriate State agencies would be distributed to Michael's "Heirs at Law," with the provision that Patrick R~ and Kathleen R~ were to be considered Michael's only brother and sister; subject to that provision, the heirs and the proportions that they would take were to be determined according to the laws of descent and distribution then in effect in Illinois. Ordinarily, when a grantor uses language leaving the remainder of a trust to his heirs or next of kin, "[i]n the absence of a manifestation of a contrary intention, the inference is that he is the sole beneficiary of the

trust, and that he does not intend to create any interest in the persons who may become his heirs or next of kin." Restatement (Second) of Trusts § 127, cmt. b. (1959).

In this case, a "contrary intention" in the original trust was suggested, even if it was not established, by the stipulation that Patrick R~ and Kathleen R~ were to be considered Michael's only siblings. This provision may have shown an intent to exclude potential beneficiaries-specifically, children born later to Mary R~ and Robert R~, as well as any half brothers or sisters, all of whom would be entitled to shares of the trust property under the rules of descent and distribution in Illinois.

755 ILCS 5 §§ 2-1(d), (h).

The implied "contrary intention" in the original trust is clarified in the amended trust, which provides that that any remainder be paid in equal shares to such of KATHLEEN R~ (sister of MICHAEL R~), PATRICK R~ (brother of MICHAEL R~), MARY R~ (Parent of MICHAEL R~), and ROBERT R~ (Parent of MICHAEL R~) as survive MICHAEL R~, except allowing to the surviving Parent if one is dead a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living.

The amended trust also stipulates, as did the original, that, for purposes of the instrument, Kathleen R~ and Patrick R~ are to be considered the only brother and sister of Michael R~.

Significantly, the amendment to the trust does not create any new beneficiaries, nor does it materially alter the interest of the beneficiaries identified in the initial trust. Under the Illinois statute governing the rules of descent and distribution-i.e., the provision governing the original trust-if an individual dies intestate without a surviving spouse or descendant, the estate is distributed to the parents, brothers and sisters of the decedent in equal parts, allowing to the surviving parent, if one is dead, a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living. 755 ILCS 5 § 2-1(d). Because the amended trust is essentially identical in effect to the original, the addition of named beneficiaries did not constitute a substantive change, and the order amending the trust could therefore properly be entered nunc pro tunc. Moreover, because the trust identifies residual beneficiaries, and because Michael cannot revoke the trust or direct its expenditures, the trust should not be considered a countable resource when determining Michael's eligibility for SSI. *See* Restatement (Second) of Trusts § 127(b) (addition of residual beneficiaries generally makes a trust irrevocable by the grantor).

CONCLUSION

For the foregoing reasons, we believe that the trust as amended would be found by Illinois courts to be amended nunc pro tunc, and the trust should not be considered a resource to Michael R~ as of July 3, 1997.

EE. PS 00-493 SSI-Illinois-Review of The Lambs Care Trust, Inc., OBRA '93 Pooled Trust

DATE: June 6, 2000

1. SYLLABUS

The Lambs Farm, a not-for-profit corporation, proposes to form The Lambs Care Trust, Inc. This is a pooled trust wherein individual trust accounts will be maintained for each disabled beneficiary who chooses to adopt the trust, but the funds from each trust account will be pooled for investment and management.

Funds in the Lambs Care Trust will not count as a resource under the new rules in effect for trusts created after 1/1/00.

2. OPINION

You asked that we review a draft "OBRA '93 Pooled Trust" to be established by "The Lambs Care Trust" to determine whether it would be a resource to disabled residents of the Lambs Farm and other disabled individuals who place funds in it. The pooled trust would likely not have been a resource under our general trust rules. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI Illinois-Review of the Illinois Disability Assn's Pooled Trust Drafted by the Office of the County Public Guardian-Action (July 13, 1998). We believe that the trust will still be excluded from resources under the new rules that went into effect for trusts created after January 1, 2000.

Background

The Lambs Farm, a not-for-profit corporation, proposes to form The Lambs Care Trust, Inc. Within the pooled trust, individual trust accounts, called sub-accounts, will be maintained for each disabled beneficiary who chooses to adopt the trust, but the funds from each sub-account will be pooled for investment and management.

An individual establishes a sub-account and becomes a "Primary Beneficiary" by entering into an "Adoption Agreement," whereby the individual enrolls in and adopts the Pooled Trust Agreement. A disabled individual can use his or her own funds to establish a sub-account for him or herself. Other individuals could also place funds or assets into trust for the disabled beneficiary.

The purpose of the trust is to provide for each beneficiary's supplemental care, and not to provide for a beneficiary's basic support and maintenance. The trustee has sole discretion to make any payments or distributions to or for the benefit of a beneficiary. The trust documents state that the pooled trust and each sub-account are irrevocable, and a spendthrift provision provides that, to the extent permitted by law, a beneficiary cannot assign or transfer his or her interest in the trust. The trust may be terminated by the trustee if it becomes impossible or impracticable to carry out the trust's purposes.

The sub-account will terminate upon the death of the Primary Beneficiary. Any assets remaining in the sub-account after payment of certain expenses shall remain part of the Master Trust to be used for the benefit of the primary beneficiaries of other sub-accounts that are established under the Pooled Trust Agreement. To the extent that any funds remain in the sub-account, they would be available to repay the state for any assistance that had been provided to the Primary Beneficiary.

The Pooled Trust Agreement provides that the grantors or other contributors to the trust cannot revoke any trust established by virtue of the Adoption Agreement. Nor may the Grantor have the right or power to amend, reform, or revoke the Pooled Trust or any sub-account.

DISCUSSION

Until January 1, 2000, the Social Security Act itself did not separately describe the resource treatment for SSI purposes of property held in trust. Therefore, we applied our general resource rules, *see* 20 C.F.R. § 416.1201(a), to determine whether the property counted as a resource. Property is a resource if the individual owns it and can convert it to cash to be used for support and maintenance. *Id.* Property that could not be liquidated was not a resource. 20 C.F.R. § 4116.1201(a)(1). We look to state property law to decide whether the individual owns the property and whether he or she has the "right, authority, or power to liquidate" the property. *See* POMS SI 01110.500, SI 01120.010.

Effective January 1, 2000, the Social Security Act as amended expressly directs how to count property held in trust as a resource for SSI purposes. According to the Act as amended, most assets held in trust for individuals are generally going to be countable resources, even if state property law might otherwise exclude them, if any portion of the trust property could be used for the benefit of the eligible individual or his or her spouse. Pub. L. No. 106-169 § 205, 113 Stat. 1822, 1833 (to be codified at 42 U.S.C. § 1382b(e)). The amended Act, however, further provides that property held in trust does not count as a resource if it is excluded from being a countable resource for Medicaid purposes. Paragraph 1 of amended section 1382(b)(e) provides that "[i]n determining the resources of an individual, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the individual." Paragraph 3 provides that a revocable trust shall be a resource to the individual and an irrevocable trust will be a resource to the extent that a portion of the corpus could be used for the benefit of the individual. Paragraph 5 states that "this subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1917(d)(4)(A) or (C)," that is, to trusts that are excluded from being counted as resources for the Medicaid program. Thus, trusts satisfying the requirements of section 1917(d)(4) (42 U.S.C. § 1396p(d)(4)) are excluded as SSI resources to the individual. These amendments apply "to trusts established on or after" January 1, 2000. This pooled trust is excluded from being a countable resource for the Medicaid program under 1396p(d)(4)(C); therefore, it is excluded from being counted as a resource for SSI.

Section 1917(d)(4)(C) of the Act, 42 U.S.C. § 1396p(d)(4)(C), excludes certain pooled trusts from being counted as a resource to a Medicaid recipient. In order to be excluded, the trust must contain assets belonging to a disabled individual and must satisfy certain conditions. It must be established and managed by a nonprofit association. A separate account must be maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual or a parent, grandparent, legal guardian or court. Finally, the trust must provide that to the extent that amounts remaining in the

beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

The Lambs Care Pooled Trust Agreement satisfies the foregoing criteria. The trust is being established and managed by a nonprofit organization. The trust provides for separate sub-accounts for each disabled beneficiary of the trust, but for purposes of investment and management of funds, the trust pools these accounts. The trust provides that sub-accounts will be established by the primary beneficiary or a parent, grandparent, legal guardian or court. The trust is established solely for the benefit of the disabled individual. Finally, the trust provides that amounts remaining in the beneficiary's account at death will be retained by the trust, and to the extent there is any amount left, it will be used to reimburse the State for expenditures made during the beneficiary's lifetime.

Accordingly, under the new amendments to 42 U.S.C. § 1382b, funds in the Lambs Care Trust will not count as a resource to the disabled beneficiaries who adopt the trust agreement.

CONCLUSION

In summary, we conclude that the sub-account/trust assets should not be considered a resource to individual beneficiaries of the Lambs Care Trust. The trust satisfies the conditions of 42 U.S.C. § 1396p(d)(4)(C), and recent amendments to Title XVI indicate that such trusts are exempt from being counted as resources to SSI recipients.

FF. PS 00-491 SSI-Illinois-Review of a Trust for Jo L. A~

DATE: June 5, 2000

1. SYLLABUS

The trust in this opinion is titled a "revocable living trust" as the settlor intended for the trust to be revocable. All of the funds are available to the SSI recipient for her support and maintenance. Therefore, the trust is a countable resource.

CAUTION: Because of a change in the Social Security Act, this opinion may only apply to trusts established before 1/1/00.

2. OPINION

I. INTRODUCTION

You asked us whether the "Spanky Y~ Revocable Living Trust" established with retroactive SSI payments for Jo L. A~, a disabled child, should be counted as a resource in determining her eligibility for SSI. For the reasons stated below, we believe that the trust should be considered a countable resource.

II. FACTS

Jo L. A~ is a disabled child who has been entitled to SSI since January 1986. In May 1992, she received "*Zebley*" payments totaling $21,445.42. Her mother, LuAnn A~, is her representative payee.

On November 20, 1992, LuAnn A~ created the "Spanky Y~ Revocable Living Trust" for the benefit of Jo L. A~. Our understanding is that the trust was funded with the *Zebley funds.*

The trust lists LuAnn A~ as both the settlor and the trustee. It expressly reserves to the settlor the exclusive right to receive income and manage the trust property. It seems to limit the trustee's duties to "safekeep the trust assets until such time as the SETTLOR shall otherwise direct." Trust, First para. Somewhat inconsistently, the trust further provides that "[d]uring the lifetime of the SETTLOR, the TRUSTEE shall hold manage, invest, and reinvest the property of the estate subject to the provisions" of the trust agreement. Trust, Second para.

The trust, as noted above, is titled a "revocable" trust. The first paragraph expresses the intent of the settlor to create a revocable trust. The eleventh paragraph expressly retains to the settlor the right at any time to "alter, amend, or revoke" the trust.

III. DISCUSSION

It is our understanding that the trust was disclosed to SSA when it was first established and that the claims representative at that time determined that it was not a countable resource to Jo L. A~. Later, on a redetermination, another claims representative determined that it was a countable resource, and found Jo L. A~ ineligible due to excess resources for the period from March 1996 through September 1998. At some point, the claimant's disability was found to have ceased, and in September 1998, the trust was cashed in. The cessation was reversed, and the current question appears to be whether the trust property was a countable resource between March 1996 and September 1998.

As a matter of policy, SSA allows a representative payee to place retroactive SSI payments into trust for the benefit of an SSI eligible individual so long as (1) the trust is in the individual's best interest; (2) the trust is exclusively for the use and benefit of the individual and can be used to meet the individual's current or reasonably foreseeable needs, ad (3) the individual is the sole beneficiary during his or her lifetime. *See* Representative Payment, Use of Benefits and Assignment of Benefits into a Trust, Memo. from Acting Assoc. Gen'l Counsel for Policy and Legis. to Assoc. Comm'r of Program Benefits Policy (May 3, 1995). Therefore, it was not inappropriate for LuAnn A~ to establish this trust for the benefit of Jo L. A~. The question is whether the trust was an available resource.

We believe that the trust in question was an available resource to Jo L. A~. The trust is titled as a "revocable living trust." The first paragraph of the trust makes it clear that LuAnn A~ intended to create a revocable trust. And the eleventh paragraph establishes the requirements for revocation of the trust. As a result, LuAnn A~, at all relevant times, had the legal authority to revoke the trust and access the funds.

The POMS explains the general rules applicable to determine whether a trust is a resource to an SSI recipient. POMS SI 01120.200. According to the POMS, a trust is a resource when the grantor has the authority to revoke the trust and obtain the funds to use for support and maintenance. *See* POMS SI 01120.200(D)(1). Here, LuAnn A~ created the trust using the SSI benefits of Jo L. A~. Jo L. A~ is, therefore, the grantor, because she provided the trust principal. *See* POMS SI 01120.200(B)(2). LuAnn, on behalf of Jo L., could at any time revoke the trust, obtain the trust assets, and use those for Jo L.'s support and maintenance. Therefore, at all relevant times, the trust was a resource to Jo L. A~.

IV. CONCLUSION

The trust was created with retroactive SSI payments issued for the benefit of Jo L. A~. At all times, the trust was revocable, and the funds could be used for the support and maintenance of Jo L. Therefore, at all relevant times, the trust was a countable resource to Jo L.

GG. PS 00-479 SSI-Illinois-Review of a Land Trust for Rita P~ (parent-deemor of Carly P~), ~ (your reference number S2D5G3)

DATE: May 30, 2000

1. SYLLABUS

If an individual can sell his/her interest in a land trust, it is a countable resource for SSI purposes.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked whether the land trust at issue would be a countable resource for Rita P~, parent-deemor of Carly P~, an SSI claimant.

Because Rita P~ can sell her interest in the land trust, as more fully discussed below, we conclude that her share of the trust should be considered a countable resource for the purposes of determining SSI eligibility of Carly P~.

FACTS

In 1967, a land trust was formed comprising a commercial building located at 8110-14 North Lincoln Avenue, Skokie, Illinois. American National and Trust Company of Chicago was named as trustee. In the early 1990s, Sam B~ assigned to Rita P~ a 2.5% interest in this land trust, which also constituted a partnership referred to as the 8110 N. Lincoln Building. Tax returns from 1997 established that Rita P~'s capital share in this land trust was $110,678. In 1997, she received income of $1,287 from the trust from rental and interest income. This income, however, was re-invested in the property, rather than given to her as cash.

The trust directs that the right to receive the proceeds from rentals and from mortgages, sales, or other disposition of the real estate is deemed personal property and may be "assigned and transferred as such." (Trust, paragraph 1). The trust further states that no beneficiary has a legal or equitable right in the representative portion of the actual land; rather, the beneficiary has an interest in the aforementioned proceeds. (Trust, paragraph 1).

DISCUSSION

Resources, for SSI purposes, include assets that a person owns and can convert to cash to be used for the person's support or maintenance. *See* 20 C.F.R. § 416.1201(a). If the person has the right or power to liquidate property, or his share of the property, it is a resource, whether or not he does so. *Id.* Consequently, trust principal is a resource to the individual if (1) he has the legal power to revoke the trust and use the trust assets to meet his needs for food, clothing, shelter; (2) if he can direct use of the trust assets for such purposes; or (3) he can sell his beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a); *Zebley Trust as an SSI Resource-Wisconsin*, Bernard W~; OGC V (M~) to M~, acting ARC-POS (Feb. 23, 1993) at 5.

Under the terms of this land trust, the right to receive the proceeds from rentals and from mortgages, sales or other disposition of the real estate is deemed personal property and may be "assigned and transferred as such." Although the assignment of interest must be lodged with the trustee and the trustee must indicate acceptance, this appears to only be a pro forma provision, and there is no indication that the trustee would not accept any assignment. Indeed, Rita P~ initially gained her interest in the trust through a transfer from Sam B~. Hence, Rita P~ could sell her 2.5% interest in the land trust. Since she can sell her interest in the trust, 2.5% of the trust principal should be considered a countable resource to her for SSI eligibility purposes.

As noted above, 1997 tax returns established that Rita P~'s capital share in the land trust was $110,678. There may be some question whether the equity value of her interest in the trust is actually $110,678, especially since her share of annual income is invested back in the property, she is a limited partner, and she lacks control over decision-making. *See* 20 C.F.R. § 416.1201(c) (resources evaluated according to equity value). Nonetheless, in a property whose total value is over four million dollars, the likely equity value of a right to a 2.5% share in the proceeds would probably exceed $2,000. Because Rita is Carly P~'s parent, Rita's resources might be deemed to Carly. *See* 20 C.F.R. § 416.1202(b).

CONCLUSION

In sum, we conclude that 2.5% of the trust assets at issue could be considered a resource to Rita P~ since she can sell her interest.

HH. PS 00-383 Illinois Trust for Lorraine S~

DATE: July 17, 1997

1. SYLLABUS

Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support without judicial modification of the support decree. Therefore, payments made by one parent to a trust in lieu of court ordered support payments are considered the child's income, available for the child's support and maintenance.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You requested a legal opinion regarding a document creating a discretionary supplemental trust with SSI recipient Lorraine S~ (Lorraine) as beneficiary. You inquired whether Lorraine has unrestricted access to the trust principal for her support and maintenance, i.e., whether the trust principal is a resource for SSI purposes. You also inquired as to the validity of the Statement of Intent by which Lorraine's father agreed that support payments would be paid into the trust.

We conclude that the Statement of Intent, which sought to modify the court order of support, would be held invalid under applicable state law, and that the trust assets should be considered Lorraine's income or resources for SSI purposes, at least to the extent that the assets were derived from payments made pursuant to the Statement of Intent or from other property which had been owned by Lorraine or by her guardian on Lorraine's behalf.

Background

Pertinent Documents Other than the Declaration of Trust

Lorraine, currently twenty-one years old, is the disabled daughter of Deborah S~ (Deborah) and David S~ (David). Deborah and David were divorced in Missouri in 1995. The Judgment/Decree of Dissolution (divorce decree), entered on November 1, 1995, states that there were two children of the marriage: Lorraine, born March 15, 1976, and Lynne, born October 4, 1978. Divorce Decree at 2. The divorce decree awards child support "for the parties' minor children" in the amount of $566 per month per child to be paid by David to Deborah. It further states, "The Court hereby finds that the child LORRAINE is incapacitated and in need of parental support past the age of emancipation." Divorce Decree at 3. It incorporates all terms of a Marital Settlement Agreement (settlement agreement). Divorce Decree at 2. It also permits Deborah to remove the residency of the children to Illinois. Divorce Decree at 4.

The notarized settlement agreement, signed by David on August 15, 1995, in Missouri, and by Deborah on October 25, 1995, in Illinois, requires David to pay to Deborah $566 per month, per child "for the parties' children as and for child support for the care, support and education of the parties' minor children." Settlement agreement at 6. It further states: The parties agree and stipulate that the child LORRAINE S~ is incapacitated and is in need of parental support past the age of emancipation, and said support shall continue until her death, the death of the Respondent, or further Order of the Court. Settlement agreement at 6. Paragraph 15 provides that no modification or waiver of any of the terms will be valid unless it is made in writing and executed with the same formality as the settlement agreement. Settlement Agreement at 10.

On October 24, 1995, one day before the settlement agreement was finally executed, David signed a notarized Statement of Intent agreeing to contribute monthly to a trust to be created for Lorraine's benefit, in lieu of the court ordered child support payments.

On January 26, 1996, the Circuit Court of Kane County, Illinois appointed Deborah as Lorraine's guardian.

Declaration of Trust

On January 30, 1996, Deborah executed, in Illinois, a declaration of trust (declaration), as "Settlor and Trustee," creating the "Lorraine S~ Discretionary Supplemental Trust." The declaration recites that Deborah transferred $10.00 to the trustee which, along with any additional property received from her or any other person and all investments and reinvestments, was to constitute the trust estate. Declaration at 1.

The declaration makes clear that Deborah's intent as settlor is to provide supplemental support beyond any support which can be provided by any governmental, public, or private agency. To this end, it states that no part of the trust is to be considered owned by Lorraine, that Lorraine has no vested right or interest in the income or principal, and that no property, goods or services purchased or owned by the trust for Lorraine's use is to be considered as under Lorraine's control. 1. The declaration prohibits any expenditure for "basic food, clothing and shelter" or making any trust income or principal available to Lorraine for conversion into such items, unless all governmental and private agency benefits for which Lorraine may be eligible because of her disability have been fully exhausted. 3, § 4. The declaration also prohibits any direct payment to Lorraine and prohibits the trustee from making any distribution for Lorraine's support if such support is otherwise available through a governmental agency. 1,3.

Within this framework, the Trustee has sole discretion to distribute principal or income for Lorraine's exclusive benefit to provide for her supplemental support and maintenance, but only to the extent that such items are not otherwise available

through any governmental entity or private agency. 2; 3, §§ 5-9. The declaration also contains spendthrift provisions, protecting the trust estate from the creditors' claims and prohibiting assignment of a beneficiary's interest. 3, § 3; 5, § 2.

Deborah is Trustee. If her acting as Trustee in any way jeopardizes Lorraine's entitlement to government benefits or subjects the trust to claims of reimbursement by any private or governmental body, successor trustees are named. 5.

Deborah, as settlor, has reserved the right to amend the trust "in whole or in part for whatever reason" and has given the Trustee the right to amend or reform the trust provisions the Trustee deems it necessary, due to changes in law, in order to preserve the stated intent of the trust. 3, § 10. In the event of a court determination that reimbursement is required or disqualification from, or reduction, in governmental benefits, the declaration directs the Trustee to amend or reform the trust to effect the Settlor's purpose and, if that cannot be done, to terminate the trust and distribute the trust principal and income to Deborah, "not in any fiduciary capacity, but as [Deborah's] sole and exclusive property without any preconditions or requirements on the use or application of those funds." 3, § 11. If Deborah is deceased at the termination of the trust, distribution is to be made to Lorraine's guardians, also as their sole and exclusive property and not in any fiduciary capacity, or, if no guardian to the Trustees as their sole and exclusive property and not in any fiduciary capacity. Id. If the trust is still in existence at Lorraine's death, the trust estate is to be distributed to Deborah or to her heirs, per stirpes. 4.

DISCUSSION

Resources, for SSI purposes, include assets that a person owns and can convert to cash to be used for the person's support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the person has the right or power to liquidate property, or her share of the property, it is a resource. *Id.* Trust assets are considered an SSI recipient's resource if the SSI recipient has the power to revoke the trust and use the trust assets to meet his needs for food, clothing, or shelter, or if he can direct use of the trust assets for such purposes. *See* POMS SI 01120.200(D)(1)(a). Whether the person can revoke the trust or direct use of the trust assets depends on the terms of the declaration of trust and on applicable State law. POMS SI 01120.200(D)(2).

We deal first with the additions to the trust made pursuant to the Statement of Intent signed by Lorraine's father, David. If the support payments had been made by Lorraine's father to Deborah in compliance with the settlement agreement that the Missouri court incorporated into the divorce decree, the payments would have been considered Lorraine's income for SSI purposes. *See* 20 C.F.R. 416.1121(b). The Statement of Intent seeks to modify the court's support order in two ways. First, instead of making support payments directly to Deborah for Lorraine's benefit, in accordance with divorce decree, the Statement of Intent contemplates payment of the same amount to Deborah as Trustee of the discretionary trust. Second, the divorce decree required that the payments be used for Lorraine's "support." As Lorraine's guardian, Deborah has a duty to use the funds for Lorraine's support. Under the terms of the discretionary trust, however, Deborah could use the funds for supplemental costs, but she would be precluded from making disbursements for basic food, clothing and shelter, and she would have no obligation to make any disbursements at all.

The question is whether Lorraine's parents can enter into an agreement which affects Lorraine's rights and effectively modifies the order of the Missouri court. The duty of support which is applicable is that of the law of the state where the obligor is present, in this case the father's domiciliary state of Missouri. *See* 750 ILCS 20/7. Illinois law also recognizes a child support order issued in another state, if it is the only such order. 750 ILCS 22/207. In addition, a post-majority child support obligation entered into pursuant to a divorce settlement agreement will be recognized by Illinois courts. *See In re Marriage of Leming*, 590 N.E.2d 1027, 1028 (Ill. App. 1992). Thus, the support order encompassed by the Missouri court's divorce decree is controlling and would be recognized by an Illinois court.

Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support. Because child support payments are for the benefit of the child, the parties cannot settle or compromise future payments without judicial modification of the support decree. Only a court has the power to alter future child support payments. *Mora v. Mora*, 861 S.W.2d 226, 227 (Mo. App. 1993); *see also, Boland v. State of Missouri*, Dept. of Social Services, 910 S.W.2d 754, 758 (Mo. App. 1995), *McLaughlin v. Horrocks*, 883 S.W.2d 95, 97 (Mo. App. 1994).

Illinois case law is in accord. *See Blisset v. Blisset*, 526 N.E.2d 125, 127 (Ill. 1988) (parents may modify an agreement for child support only by petitioning the court for modification); *Miller v. Miller*, 516 N.E.2d 837 (Ill. App. 1987)(mother could not consent to modification of settlement, incorporated into divorce decree, which provided that father would pay college expenses for child, even after age 18).

Although David signed the Statement of Intent prior to the date of the divorce decree, in the divorce decree the court refers only to the settlement agreement. There is no indication that the court was aware at that time, or was subsequently informed, of the Statement of Intent or the plans to create a discretionary trust. Since payment of the support into the discretionary trust amounts to a modification of the court's support order, we conclude that such modification would not be valid without court approval. Therefore, the payments made by David to the trust in lieu of the court ordered support payments should be considered Lorraine's income, available for her support and maintenance, the purpose apparently intended by the Missouri court's divorce decree.

Even if the Statement of Intent were found to be valid, we believe that the portion of the trust assets derived from the payments made pursuant to the Statement of Intent should, nevertheless, be treated as Lorraine's income for SSI purposes. We also think it reasonable to conclude, in the absence of any indication that the rest of the trust assets were derived from property belonging to someone other Lorraine, that all of the trust assets should be considered Lorraine's resource. This is especially true since the Declaration of Trust suggests that Deborah, as settlor, contributed only $10.00 to the trust.

Under Illinois law, a discretionary trust for the benefit of a disabled person is not liable to pay or reimburse the State or any public agency for financial aid or services to the disabled person, except to the extent that the trust was created by the disabled person or the trust assets are distributed to, or under the control of, the disabled person. 760 ILCS 5/15.1 (1996 Supp.). Although the exception is not applicable where the trust complies with federal Medicaid reimbursement requirements, id., the declaration in this case, while referring to the applicable Illinois statute, *see* 1, does not provide for Medicaid reimbursement. *See* POMS SI 01730.048.

Under the terms of the declaration of trust, Lorraine does not, herself, have any right to revoke the trust or direct use of the trust assets for her support. Nor is Lorraine named as the person who created the trust (settlor). However, Lorraine's mother and guardian, Deborah, has virtually total control over use of the trust assets. As settlor, Deborah retained the right to amend the trust, in whole or in part, for any reason, which amounts to the power to revoke. *See Bogert*, Trusts 516 (6th ed. 1987)(under a power to amend, an irrevocable trust may be made revocable).

Deborah is also Lorraine's guardian. Where a guardian holds legal title, on behalf of a sole beneficiary of a trust, to assets which are subsequently transferred into a trust, the trust beneficiary is, in effect, the settlor of the trust. , 635 N.E.2d 853, 855 (Ill. App. 1994), cert. denied, 642 N.E.2d 1281 (one who furnishes consideration is the settlor of the trust). Therefore, if Lorraine is the sole beneficiary of the trust, she is the settlor, at least with regard to whatever portion of the trust res was derived from assets which were hers or which her guardian held for her benefit. As we discuss below, contributions of the support payments to the trust should be considered contributions from Lorraine.

In this case, it is not clear from the documents submitted whether Deborah created the trust in her own right or in her capacity as Lorraine's guardian; nor is it clear what portion of the trust assets were derived from property which had been owned by Lorraine or which Deborah held on Lorraine's behalf. The declaration does not indicate whether even the $10.00 that initially funded the trust was Deborah's money or Lorraine's money. Nor is there any information about additions to the trust other than the payments made by David pursuant to the Statement of Intent. If Deborah created the trust as Lorraine's guardian, or if all of the assets of the trust derived from property previously held by Lorraine or by Deborah on Lorraine's behalf as guardian, then Lorraine is the true settlor of the trust and can revoke the entire trust, or amend it to allow access for her support and maintenance. Thus, all of the trust assets would be her resources for SSI purposes.

Under the agreement between Lorraine's parents, Deborah receives the "support" payments as trustee for Lorraine. Nevertheless, those support payments are, in effect, Lorraine's income. Thus, as to the portion of the trust res traceable to those "support" payments, Lorraine is actually the settlor of the trust. Through her guardian, she has the power to revoke the trust by virtue of Deborah's retention of the unconditional power to amend the trust. If she is the sole beneficiary of the trust, Lorraine also has the power to revoke any portion of the trust for which she can be considered the settlor. , 278 N.E.2d 10, 12 (Ill. App. 1972) (trust settlor who is also the sole beneficiary can revoke the trust without the trustee's consent, even though no power of revocation was reserved when the trust was created). Thus, the portion of the trust which is derived from the "support" payments should be considered Lorraine's resource for SSI purposes.

That the declaration calls for disbursement, upon termination of the trust, to Deborah in her own right, rather than on Lorraine's behalf does not change the result. Since Deborah retained the unconditional right to amend the trust, including the right to amend the provisions for disbursement upon termination of the trust, no intent to create a remainder interest in someone other than Lorraine can be implied. Thus, Lorraine is the sole beneficiary of the trust and has the power to revoke the portion of the trust as to which she is the settlor. Furthermore, as Lorraine's guardian, Deborah would have a fiduciary duty to

use that portion of the trust assets which derived from Lorraine's assets not for her own benefit, but for Lorraine's benefit. To receive the assets of the trust in her own right would be a violation of Deborah's fiduciary duty as Lorraine's guardian.

While the declaration recites that Deborah paid $10.00 into the trust at its creation, there is no clear indication whose funds were used to create the trust, nor is there any indication as to whether there were any subsequent additions to the trust res. We think it unlikely that Deborah, who would have to provide an accounting as guardian, would combine Lorraine's property with another person's property in forming the trust res. Deborah is receiving additions to the trust from David in lieu of the court ordered support payments, additions which are actually Lorraine's property. This implies that the trust was created by Deborah as Lorraine's guardian with Lorraine's assets and that Lorraine is, therefore, the true settlor. As settlor, Lorraine would have the power, through her guardian, to revoke the trust or to compel payments from the trust for her support and maintenance. We conclude that, unless Deborah can show that she did not create the trust in her capacity as guardian and that certain trust assets were derived from sources other than Lorraine's property, all of the assets of the trust should be considered Lorraine's resources for SSI purposes.

II. PS 00-379 SSI-Illinois-Review of the Caitlin N. S~ Supplemental Care Trust, SSN ~; (your reference number S2D5G3)

DATE: March 9, 1999

1. SYLLABUS

An otherwise irrevocable trust may be revocable if the actual grantor is also the sole beneficiary. However, naming a residual beneficiary to the trust will result in the trust being considered irrevocable. Providing for reimbursement to the State for payment of medical expenses does not create a residual beneficiary.

2. OPINION

This is in response to your inquiry asking whether the trust agreement for Caitlin N. S~ (Caitlin) would be a countable resource to either Caitlin or her mother, Patricia D~ (Ms. D~), who are both Supplemental Security Income (SSI) recipients. For the reasons stated below, we conclude that the trust should not be considered a countable resource for the purposes of determining SSI eligibility for either Caitlin or Ms. D~.

FACTS

On November 23, 1993, the "Caitlin N. S~ Discretionary Trust," was executed with the proceeds from a personal injury settlement. To comply with changes in Illinois law, the trust was reformed in August 1998. Ms. D~, Caitlin's mother, is named as both Grantor and Trustee. Trust Declaration at 1. The trust states that it shall be governed by Illinois law. *Id.* at 7.

The stated purpose of the Trust is to provide for Caitlin's supplemental needs beyond what is available from government or private programs and to "maximize the benefits and/or funds available to and received by CAITLIN." Trust Declaration at 6. Distributions for Caitlin's benefit can be made only to supplement, and not supplant, benefits available through government or private programs. *Id.* at 4-6. Funds are to be paid at the trustee's discretion, and Caitlin has no right to demand income or principal from the trust. *Id.* at 4-7. The trustee can amend and/or reform the Trust provisions, if necessary due to judicial interpretations or changes in the law; however, the changes must conform with the intentions, purposes, and goals established in the Trust. *Id.* at 6.

The trust purports to be irrevocable and to terminate upon Caitlin's death. Trust Declaration at 8, 18. The trust declaration provides that, upon Caitlin's death, the residue of the trust is to be used first to reimburse any state for medical assistance payments and to pay taxes, burial expenses, and any enforceable debts. *Id.* at 8. Any remaining trust property is to be distributed to Ms. D~.

If Ms. D~ is not living, three percent of the remaining residue is to be distributed to not-for-profit residential facilities where Caitlin lived. *Id.* at 8. If there are no such qualifying organizations, a not-for profit charity should be substituted. *Id.* at 9-10. The remainder of the assets are to go to Ms. D~'s then living heirs at law, as though she had died intestate under the laws of Illinois. *Id.* at 10.

DISCUSSION

Resources, for SSI purposes, include assets that a person owns and can convert to cash to be used for the person's support or maintenance. *See* 20 C.F.R. § 416.1201(a). If the person has the right or power to liquidate property, or her share of the property, it is a resource, whether or not she does so. *Id.* Consequently, trust principal is a resource to the individual if (1) she has the legal power to revoke the trust and use the trust assets to meet her needs for food, clothing, shelter, or (2) if she can direct use of the trust assets for such purposes. *See* POMS SI 01120.200(D)(1)(a).

A. Trust Assets Are Not A Resource to Caitlin.

As discussed above, the trustee has sole discretion over fund direction to supplement benefit programs; Caitlin does not have power to direct the use of trust assets. *See Stein v. Scott*, 625 N.E. 2d 713, 716 (Ill. App. 1993). Therefore, the trust would be a resource to Caitlin only if she has the legal power to revoke the trust.

Whether Caitlin can revoke the trust depends on both the terms of the trust and on Illinois law. The trust declaration in the present case explicitly states that the trust is irrevocable. Nevertheless, under general trust law, an "irrevocable" trust can be revoked if the grantor is also the sole beneficiary of the trust. In such instances, the trust is presumed revocable regardless of the language found in the document. Restatement (Second) of Trusts, § 339. As we have previously advised, Illinois appears to follow the rule that even if a trust purports to be irrevocable, it can nonetheless be revoked if the individual (or subject of the trust - Caitlin) is both the settlor or grantor and the sole beneficiary of the trust. Trust as Resource - Illinois - Theresa M~, SSN: ~, OGC-V (P~) to G~, Acting ARC-POS (Aug. 4, 1993) at 3; Request to Review Illinois Trust for Cynthia L~ M~, ~, OGC-V (M~) to M~, ARC-MOS (Nov. 30, 1998) at 3.

Since the corpus of the trust in this case is the proceeds of a settlement reached as a result of a lawsuit brought on Caitlin's behalf, Caitlin must be considered to be the settlor of the trust. *See* In , 635 N.E.2d 853, 855 (Ill. Ct. App. 1994) (citing , 278 N.E.2d 10, 12 (Ill. Ct. App. 1972) ("'the person who furnishes the consideration for the trust is the settlor, even though, in form the trust is created by another'")).

As discussed above, Caitlin is the only beneficiary of the trust during her lifetime. The only issue, therefore, is whether the trust creates any interest in any residual beneficiaries if the trust terminates at the time of Caitlin's death.

Although the trust provides that, upon Caitlin's death, any amount remaining in the trust shall be paid to the appropriate state agencies as reimbursement to the state for benefits paid during her lifetime, this does not make the State of Illinois, or any other state, a beneficiary of the trust. This provision (which apparently is required by the Medicaid statute, 42 U.S.C. § 1396p(d)) merely requires that the trust reimburse the state for benefits already conferred on Caitlin during her lifetime. Therefore, the money paid is for the benefit of Caitlin, not the state. *See* States Named as Beneficiary to a Trust, OGC-V (D~) to Gloria J. P~, ARC-MOS (June 24, 1997) at 2 (finding that no residual beneficiary is created merely because the OBRA 1993 trust requires that, on the death of the individual, the state be reimbursed for Medicaid assistance paid on behalf of the individual); *see also* Supplemental Security Income - Wisconsin Trust- Michele J. L~, ~, OGC-V (M~) to Gloria J. P~, ARC-MOS (June 9, 1997) at 3; Illinois OBRA '93 Trust for Dominick J. G~, ~, OGC-V (D~) to Gerald K~, Center Director (Apr. 17, 1997) at 4.

Similarly, no additional beneficiaries are established by provisions allowing any payments made for maintaining the existence of the trust, paying any final bills, debts, expenses, taxes, fees, funeral-related items, and/or other items. All of these payments would relate to the running of the trust itself or providing goods or services for Caitlin's benefit (including funeral-related expenses). *See Stewart*, 278 N.E. 2d at 13; *see also* Supplemental Security Income - Wisconsin Trust- Michele J. L~, supra; Illinois OBRA '93 Trust for Dominick J. G~, ~, supra.

Any amounts remaining after these payments are to be distributed to Ms. D~ if she is alive. We have previously advised in Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, Memorandum from OGC-V (K~) to L~, Acting ARC-Programs of 5/24/95, that where a trust names either specific individuals as residual beneficiaries or a class of specific residual beneficiaries, such as descendants, their consent would be required for termination of the trust. Here, the amended trust agreement provides for distribution to Ms. D~, and, if she is not living, to various classes of charities and then Ms. D~'s heirs. At the time of trust execution, Ms. D~ is in existence. As we have previously advised, this provision is sufficient to create a potential residual beneficiary, and the consent of residual contingent beneficiaries would be required to revoke the trust. *See* SSI-Illinois-Review of Trust for Phillip P~, SSN: ~, OGC-V (M~) to Donna Y. M~, ARC-MOS (Apr. 2, 1998) at 3.

We do not assume that residual contingent beneficiaries will consent to revoke the trust. Therefore, Caitlin does not have authority to revoke the trust and gain access to the trust assets. The assets, therefore, are not a resource to Caitlin. 20 C.F.R. § 416.1201; POMS SI 01120.200(d)(1).

B. Trust Assets Are Not A Resource to Ms. D~.

As discussed above, although Ms. D~ is the trustee, she is constrained by the Trust Declaration to administer the trust only to supplement Caitlin's needs. She cannot direct that the funds be used for her own needs. Thus, the trust principal would only be a resource to her if she had the legal power to revoke the trust. However, as discussed in the preceding section, that power would only exist if Ms. D~ were both the grantor and sole beneficiary; she is neither. Therefore, she cannot revoke the trust, and the trust principal is not a resource to her.

CONCLUSION

In sum, we conclude that the trust assets at issue should not be considered a resource to either Caitlin or Ms. D~ for SSI purposes.

JJ. PS 00-364 SSI-Illinois-Review of The Laura P~ Trust

DATE: October 30, 2000

1. SYLLABUS

This opinion involves a discretionary trust established in Illinois. The trust is not a resource for SSI purposes as the SSI recipient is not the grantor or the sole beneficiary. In addition, the terms of the trust indicate that the funds are not available for her support and maintenance.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked for an opinion on whether The Laura P~ Trust (Trust), established for the benefit of Laura P~ (Laura), is a countable resource for Supplemental Security Income (SSI) purposes. We have concluded that the Trust assets should not be considered a resource to Laura because she does not have the legal authority to revoke the Trust and use the funds to meet her food, clothing, or shelter needs, and she cannot direct the use of the Trust principal for her support and maintenance.

FACTS

At issue is a discretionary trust entitled "The Laura P~ Trust" (Trust) created for the benefit of Laura P~, who receives SSI. The Trust states that Schedule "A," attached to the Trust, lists the property which will fund the Trust. However, the copy of Schedule "A" included in OGC's file is blank. Marilyn Z~ contacted the attorney who drafted the Trust for Edward G. P~, Sr. and Nancy J. P~, Laura's parents, to inquire about what property should be listed in Schedule "A." The attorney advised her that the Trust assets will initially consist of a small amount of property or money in Edward, Sr. and/or Nancy P~'s name. Laura's parents intend that upon their deaths, their property will go into the Trust. Ms. Z~ stated that the attorney informed her that the property going into the Trust will not be in Laura's name and specifically, it will not consist of payments from any insurance policies where Laura is the beneficiary. Thus, Edward, Sr. and Nancy P~ are the settlors of the Trust.

Edward P~, Jr., Laura's brother, is designated as the trustee. The trustee, in his sole discretion, is instructed to purchase goods and services on Laura's behalf. The stated purpose of the Trust is to provide for Laura's extra and supplemental needs, over and above those benefits she otherwise receives from public funds or insurance as a result of her disability.

The Trust will dissolve on Laura's death. After paying any and all funeral and burial expenses, as well as any outstanding medical or support expenses, administrative expenses, and taxes, the remaining Trust assets will be paid to Edward, Jr. and Cheryl P~, Laura's sister, if living, and if not, per stirpes to their then living descendants. If Edward, Jr. or Cheryl die having no descendants, then his or her share shall be distributed to the other living at the time. If both Edward, Jr. and Cheryl predecease Laura and leave no descendants, the assets of the Trust shall be distributed under the laws for intestate distribution.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for her support and maintenance. 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property or her share of the property, it is considered a resource. 20 C.F.R. § 416.1201(a)(1); *see also* POMS SI 01110.100(B). Trust property can be a resource for SSI purposes. POMS SI 01120.200(A). The trust principal is a resource to the individual if she (1) has the authority to revoke the trust and then use the funds to meet her food, clothing, or shelter needs or (2) can direct the use of the trust principal for her support and maintenance. *See* POMS SI 01120.200(D)(1)(a). Whether Laura can revoke the Trust and use to funds to meet her food, clothing, or shelter needs or direct the use of Trust assets for her support depends on both the terms of the Trust and on Illinois law. POMS SI 01120.200(D)(2).

A. Laura Has No Authority To Revoke The Trust And Even If She Did, She Would Not Have Access To The Principal.

In this case, although the Trust does not specifically purport to be irrevocable, a beneficiary generally does not have power to revoke a trust. POMS SI 01120.200(D)(1)(b). Pursuant to Illinois law, a trust can be terminated if the purpose of the trust is substantially accomplished and all the interests created by it have vested, there are no unascertainable contingent interests, there are no pending spendthrift provisions, the settlors and beneficiaries are in agreement, and none of the beneficiaries is under a legal disability. , 187 N.E.2d 315, 319 (Ill. Ct. App. 1963).

The trust does not meet the conditions for trust revocation set forth in Illinois law. Revocation would require consent of Laura's parents as well as all the beneficiaries. It is unlikely that the parents would consent to revocation of the trust, because they created the trust for Laura's benefit. Further, in addition to Laura, Edward, Jr. and Cheryl or their respective descendants would have to consent to revocation. It is unclear whether Edward, Jr. and Cheryl have any children at present, and pursuant to Illinois law, any unascertainable contingent interests preclude distribution of the trust. *See* Illinois Trust for Madhu S. M~, SSN: ~, OGC-V (Beverly) to Gloria J. P~, ARC-MOS (December 1, 1997), at 3. Therefore, Laura does not have the sole authority to revoke the trust.

Even if Laura was able to revoke the Trust, the assets are those of her parents. Upon revocation, therefore, she would not be entitled to the trust assets. Thus, she is not able to use the trust assets for her food, clothing, and shelter needs.

B. Laura Cannot Direct The Use Of The Trust Principal For Her Support And Maintenance

Even where a beneficiary does not have the power to revoke a trust and use the trust assets, the trust may still be counted as a resource if the beneficiary has the authority to direct the use of the trust principal for her support and maintenance. POMS SI 01120.200(D)(1)(b). The authority to control the trust principal may be found in specific trust provisions allowing the beneficiary to act on her own or allowing the beneficiary to order actions by the trustee. *Id.*

No such provisions exist in this Trust. The Trust gives the trustee, Edward, Jr., sole and absolute discretion to fulfill the purposes of the Trust. If a trustee has discretion to use the trust principal for the beneficiary's benefit, the trustee is considered a third party rather than the beneficiary's agent, so that "the actions of the trustee are not the actions of the beneficiary, unless the trust specifically so provides." POMS SI 01120.200 (D)(1)(b). Moreover, the Trust has been tailored to preclude the trustee from using the assets to pay for Laura's primary needs. The Trust provides for supplemental goods or services, which the trustee is reasonably satisfied cannot be made available to Laura from public funds. Thus, even if Laura could direct the use of the Trust principal, by the terms of the Trust, the funds would not be available to pay for her support and maintenance. *See* POMS SI 01120.010(B)(3) ("a legal restriction against the property's use for the owner's own support and maintenance means the property is not a resource").

CONCLUSION

For the above-stated reasons, we conclude that the Trust assets should not be considered a resource to Laura P~ for SSI purposes. We are also assuming that there is no "market value" for Laura's interest in this discretionary trust.

KK. PS 00-363 SSI-Illinois-Review of Trust for Phillip P~, SSN: ~; Your Ref. S2D5G3

DATE: April 2, 1998

1. SYLLABUS

The original trust established on September 11, 1996 was revocable and a countable resource since the SSI recipient was both the grantor and the sole beneficiary of the trust.

However, the trust was amended to provide for contingent residual beneficiaries in the event of the SSI recipient's death, and on November 24, 1997 the court entered an order allowing the trust to be amended. Therefore, as of 12/1/97, the trust is irrevocable and not a countable resource since the SSI recipient is no longer the sole beneficiary of the trust.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00.

2. OPINION

You have asked us to review revisions to the trust document created for Phillip P~, an SSI applicant. We have previously advised that a prior version of the trust was legally revocable and, therefore, the trust assets counted as a resource in determining Mr. P~'s entitlement to SSI. (SSI-Illinois-Review of a Special Needs Pay Back Trust for Phillip P~, SSN: ~, Memorandum from OGC-V (M~) to P, ARC-MOS of 7/25/97.) As a result of SSA's decision, Mr. P~'s guardian, the Office of the Cook County Public Guardian, petitioned the Illinois probate court to amend the trust document. On November 24, 1997, the Circuit Court of Cook County, Probate Division, entered an order allowing the trust to be amended. For the following reasons, we believe that the trust as amended is irrevocable and, therefore, not a resource for purposes of determining SSI entitlement.

The original trust document, purportedly irrevocable, provided that it would terminate upon Mr. P~'s death or by order of the court if Mr. P~ is restored to legal capacity and petitions to terminate the trust. Trust 4. Upon Mr. P~'s death, the trustee was directed to pay any otherwise undistributed trust property to Mr. P~'s estate. We advised that this provision established that Mr. P~ was the sole beneficiary of the trust. Therefore, under Illinois and general trust law, we advised that Mr. P~ presumably retained the power to terminate the trust and gain access to the trust assets.

The amended trust provides that on Mr. P~'s death, the remaining trust estate will be distributed either as Mr. P~ appoints in his last will or, in the alternative, as follows:

(d) If Phillip P~ fails to exercise the aforesaid power of appointment, then the Trustee shall pay the remaining trust estate, including undistributed income to his decedent estate and shall be distributed as follows:

(1) If there is a surviving spouse and also a descendant of the decedent, of the entire estate to the surviving spouse and to the decedents descendants per stirpes.

(2) If there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes.

(3) If there is a surviving spouse but no descendant of the decedent,: "the entire estate to the surviving spouse.

(4) If there is no surviving spouse or descendant but a parent, brother, sister or descendant of a brother or sister of the decedent: the entire estate to the parents, brothers and sisters of the decedent in equal parts, The Guardian of the Estate asserts that the only known living family member of Phillip P~'s, at the time of the creation of this provision is Phillip P~'s sister, Jenny P~ of Evanston, Illinois, allowing to the surviving parent if one is dead a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living.

(5) If the above provisions fail to vest, then the remaining trust estate shall pay to the relevant portion of the Illinois Probate Act.

Amended Trust 4 (c), (d) (emphasis in original). We agree that these provisions create contingent residual beneficiaries to the trust, thus rendering it irrevocable.

We have previously advised in Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, Memorandum from OGC-V (K~) to L~, Acting ARC-Programs of 5/24/95, that where a trust names either specific individuals as residual beneficiaries or a

class of specific residual beneficiaries, such as descendants, their consent would be required for termination of the trust. Here, the amended trust agreement provides for distribution to various such classes, including Mr. P~'s siblings. The amended trust agreement further specifies that one member of this class, Mr. P~'s sister, is in existence. This provision is sufficient to create potential residual beneficiaries in addition to Mr. P~. The consent of these residual contingent beneficiaries would be required to revoke the trust. We do not assume that residual contingent beneficiaries will consent. Therefore, Mr. P~ no longer has the sole authority to revoke the trust and gain access to the trust assets. The assets, therefore, are not a resource to Mr. P~. 20 C.F.R. § 416.1201; POMS SI 01120.200(d)(1).

The next question is the effective date that the funds now held in trust ceased being a resource to Mr. P~. Mr. Berk, an attorney with the Office of the Cook County Public Guardian, suggested that "it is anticipated the Phillip P~ will be receiving his SSI benefits starting December 1, 1997." (Letter from Berk to Zavoskey Davis of 12/16/97.) We agree with Mr. Berk's assumption.

Generally, resource determinations are made as of the first moment of the month. 20 C.F.R. § 416.1207(a). Further, the regulations provide that "[if] during a month, a resource decreases in value, . . . the decrease in the value of the resource is counted as of the first moment of the next month. 20 C.F.R. § 416.1207(c). Here, until the probate court approved the amendment on November 24, 1997, the assets now in trust were available resources to Mr. P~. Therefore, the assets were countable as a resource for November 1997, and prior months. Effective with the amendment, the assets were no longer available to him. Therefore, assuming that the funds now in trust for Mr. P~ were the only factor limiting his eligibility for SSI, we agree with the Office of the Public Guardian that Mr. P~ can be eligible as of December 1, 1997.

LL. PS 00-328 Illinois Trust for Madhu S. M~

DATE: December 1, 1997

1. SYLLABUS

Under Illinois law, if an individual has no authority to revoke a trust and cannot direct the use of the trust principal for his/her support and maintenance, the trust assets are not a resource for SSI purposes.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked for an opinion on whether the trust established for the benefit of Madhu S. M~ is a countable resource for Supplemental Security Income (SSI) purposes. Because Mr. M~ does not have the legal authority to revoke the trust, and because he cannot direct the use of the trust principal for his support and maintenance, we have concluded that the assets should not be considered a resource to him.

FACTS

At issue is a discretionary trust entitled "Madhu S. M~ OBRA '93 Trust" [hereafter "Trust Agreement"] created for the benefit of Madhu M~ who is developmentally disabled. His parents, P. Subraya M~ and Nalini S. M~, are named as settlors and co-trustees, and Madhu's brother, Arun S. M~, is designated as successor trustee. The stated purpose of the trust is to provide for Madhu's extra and supplemental needs, over and above those benefits he otherwise receives from the federal, state, and local governments as a result of his disability. Because Madhu is disabled, the trustees are instructed not to distribute cash or securities to him directly, but rather are directed to purchase goods and services on his behalf. At no time can Madhu demand income or principal from the trust.

The trust is said to be created pursuant to 42 U.S.C. § 1396p(d)(4)(A) (1997). This statute exempts certain trusts from the general provision that counts as an available Medicaid resource any corpus or income from the trust which could be made as payment to or for the benefit of the disabled individual. *Id.* at § 1396p(3)(B)(i). The trust agreement further states that it is irrevocable, and that it is intended for Madhu to qualify for Supplemental Security Income.

According to the terms of the agreement, the trust will terminate on Madhu's death. After paying any outstanding expenses for maintaining the existence of the trust, the trustee is directed to reimburse the State for any amounts which were expended on Madhu's behalf. If thereafter any assets remain in the trust, the remaining balance will be paid to Arun S. M~, if then living, and if not, per stirpes to Arun's then living descendants.

DISCUSSION

The Social Security Act provides that an unmarried individual is not eligible for SSI if his countable resources exceed $2000. 42 U.S.C. § 1382(a)(1)(B)(ii) (1997). A resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance. 20 C.F.R. § 416.1201(a) (1997). Thus, if Madhu (1) has the authority to revoke the trust and then use the funds to meet his food, clothing, or shelter needs, or (2) if he can direct the use of the trust principal for his support and maintenance, the trust principal is a resource for SSI purposes. *See* POMS SI 01120.200(D)(1)(a); *see also* memo from OGC-V (M~) to Kaiser, Director, POS-RSI/SSIB, SSA-V, Joseph A~, ~, at 1 (restricted access to the trust principal means it cannot be used for support and maintenance); memo from OGC-V (M~) to P~, ARC-MOS, SSA-V, Rita F~, ~, at 5 (same). Whether Madhu can revoke the trust or direct the use of trust assets depends on both the terms of the trust and on Illinois law.

A. Madhu Has No Authority To Revoke The Trust

In this case, the trust agreement purports to be irrevocable, and states that it may only be altered to conform with changes in the law or regulations concerning 42 U.S.C. § 1396p. But even when a trust expressly declares that it is irrevocable, it may still be terminated if the parties are not under any legal disability, and if the settlor and all beneficiaries agree. , 187 N.E.2d 315, 319 (Ill. Ct. App. 1963) ("'Where all parties interested in the trust fund are sui juris they may consent to a termination of the trust and distribution of the fund...'" (quoting , 104 N.E. 659, 661 (Ill. 1914)). This rule does not apply where there are unascertainable contingent beneficiaries, or where the purpose of the trust has not been substantially accomplished. *See id*; *Fenske v. Equitable Life Assurance Society*, 91 N.E.2d 465, 467 (Ill. Ct. App. 1950) (stating that a trust may only be set aside where the parties in interest are ascertained, under no legal incapacity, and consent to the revocation, and where the object of the trust has been practically accomplished) (citations omitted); *Pernod v. American Nat'l Bank & Trust Co.*, 132 N.E.2d 540, 542 (Ill. 1956); k, 12 N.E.2d 203, 205 (Ill. 1937).

As discussed above, a trust can typically be revoked with the consent of the settlors and all beneficiaries. Here, Madhu's parents are the settlors of the trust, and they would not likely consent to revocation. Revocation would also require consent of his brother, or of his brother's descendants. It is not clear whether Arun M~ has any children at present, but as we discussed above, under Illinois law, any unascertainable contingent interests will preclude distribution of the trust. SSA policy would therefore prohibit the trust principal from being counted as a resource to Madhu as he does not have the legal authority to revoke the trust.

B. Madhu Cannot Direct The Use Of The Trust Principal For His Support And Maintenance

Even where a beneficiary does not have the power to revoke a trust, it may still be counted as a resource if he has the authority to direct the use of the trust principal. *See* POMS SI 01120.200(D)(1)(b). This may be accomplished through either specific trust provisions allowing the beneficiary to act on his own, or by ordering actions through his trustee. *See id*.

No such conditions exist in this agreement. Madhu is specifically prohibited from demanding income or principal from the trust, and the trustees may not distribute cash or securities to him directly. *See* "Trust Agreement", Article I, Subsection 1.03(b), (c). The trust has also been tailored to preclude the trustee from using the assets to pay for Madhu's primary needs. *Id.* at Subsection 1.03(a) (..."this trust is to provide for Madhu's extra and supplemental needs, over and above the benefits he otherwise receives as a result of his disability..."). So even if Madhu could direct the use of the trust principal, by the terms of the agreement, these funds would not be available to pay for his support and maintenance. *See* POMS SI 01120.010(B)(3) ("... a legal restriction against the property's use for the owner's own support and maintenance means the property is not a resource.").

CONCLUSION

For the above-stated reasons, we conclude that the trust assets should not be considered a resource to Madhu S. M~ for SSI purposes.

MM. PS 00-275 Trust Document - Terry K~

DATE: July 22, 1991

1. SYLLABUS

When the trustee has total discretion as to if and when any distributions from the trust corpus or income will be made, and the sole discretion to withhold any distributions, the beneficiary has no access to the trust. The trust is not a resource and earnings are not income. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 01/01/00.

2. OPINION

This is with reference to your memorandum inquiring whether a trust established for the benefit of Terry K~ constitutes a resource for SSI purposes and whether the trust principal counts as income.

The facts are as follows. In September 1990, Terry K~ received workers' compensation benefits totaling $47,500. With the proceeds from this settlement, a trust was created for the benefit of Mr. K~. The trust contained, inter alia, the following provision:

Under no circumstance shall Terry L. K~ have the power or authority to demand any distribution from the Trustee who is under no obligation, implied or otherwise, to make any distributions to him. ...The Trustee shall use his best efforts to avoid distributions which may cause disqualification for any public or private benefits which Terry K~ is or may be eligible to receive during the term of this Trust (emphasis added).

(K~ Trust Agreement, Paragraph 4, p. 5).

A. The K~ Trust Does Not Constitute A Resource.

The first issue raised by your memorandum is whether the trust counts as a resource for SSI purposes. The Program Operations Manual System (POMS) states that if the claimant's access to the trust principal is restricted, the principal is not considered a resource. SI 01120.105A.2. This principle maintains even where the trust arrangement can be revoked by someone other than the beneficiary. Id. Moreover, it remains true where the trust provides a regular and specified payment from the principal to the beneficiary for the beneficiary's use. Id. Lastly, the trust principal is not a resource even where the trust designates a representative payee or legal guardian as trustee for treatment of accounts which use the form of "in trust for." Id.

The foregoing leads us to conclude that the K~ trust does not constitute a resource for SSI purposes. As quoted in part above, the Trustee is "under no obligation, implied or otherwise, to make distributions to [Mr. K~]. Further, the Trustee may withhold distributions to him if, in the Trustee's sole discretion, such amounts would not be consistent with the intentions expressed in this agreement." (K~ Trust Agreement, Paragraph 4, p. 5). This passage suggests rather strongly that Mr. K~'s access to the trust principal is restricted. Under this Trust Agreement, Mr. K~ has no power to invade the trust principal, and as a result, the trust should not be considered a resource.

B. The Trust Principal Does Not Count As Income.

The second issue raised by your memorandum is whether the trust principal counts as income. The discussion in this section of the memorandum is quite similar to the foregoing. The POMS provisions states that "[i]f the claimant/beneficiary has a right to the income from the principal of the trust as it becomes available..., it is income to him as it becomes available." SI 01120.105B.1. This provision states further, "If the claimant/beneficiary has no right to the income from the trust principal and the income is added to the principal, then the earnings from the trust principal are not income to the claimant for SSI purposes." SI 01120.105B.2. Here, the Trust Agreement does not give Mr. K~ a right to receive income from the trust principal. "Under no circumstance shall [Mr.] K~ have the power or authority to demand any distribution from the Trustee." (K~ Trust Agreement, Paragraph 4, p. 5). This language is clear and unambiguous. Because Mr. K~ has no right to the income from the principal of the trust principal, the trust principal does not count as income for SSI purposes.

Accordingly, we are of the opinion that Mr. K~ does not have unrestricted access to the principal, and that he has no right to receive income from the trust principal.

NN. PS 00-273 Illinois Trust - Countable Resource - Christine K~, ~

DATE: February 3, 1993

1. SYLLABUS

A account trust is a valid trust in Illinois. If the beneficiary cannot revoke the trust or has no access to it or cannot direct the use of trust funds, it is not a resource. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00.

2. OPINION

ISSUE

This is with reference to your memorandum inquiring whether the account trust is a countable resource to Christine K~. We conclude that this trust is not a countable resource to Christine under 20 C.F.R. § 416.1201 (1992).

FACTS

The facts may be briefly summarized: Christine has been severely mentally disabled since birth and unable to care for herself. On January 15, 1992, Christine's mother died, entitling her to $2,000 from a life insurance policy. On June 12, 1992, Leila K~ and Minnie B~ S~, Christine's aunts, assumed legal guardianship of Christine. One month later on July 6, 1992, Leila and Minnie with the money from the insurance policy opened a savings account trust in their names and designated Christine as beneficiary of this trust. As a result of an earlier court order, this money was to be withdrawn only upon order of the Circuit Court of Cook County.

DISCUSSION

A "resource," for the purpose of being eligible for SSI benefits, is defined as property that the beneficiary owns and could convert to cash, or property over which the beneficiary has the right, authority, or power to liquidate. Section 1613 of the Social Security Act, 42 U.S.C. § 1382b; 20 C.F.R. § 416.1201 (1992). In applying this definition to trusts, the Programs Operation Manual System ("POMS") states that if the claimant is a beneficiary of a trust and the beneficiary's access to the trust principal is restricted, then the principal is not a resource for the claimant. POMS § 01120.105(A)(2).

Illinois law recognizes the validity of an account trust created by deposits made in trust for a named beneficiary. The statute states in part:

If one or more persons opening or holding an account sign an agreement with the institution providing that the account shall be held in the name of a person or persons designated as trustee or trustees for one or more persons designated as a beneficiary or beneficiaries, the account and any balance therein which exists from time to time shall be held as a trust account. . .

(c) Any trustee may make additional deposits to and withdraw any part or all of the account at any time without the knowledge or consent of the other trustees, or the beneficiaries. . .

Ill. Ann. Stat. ch. 17 2133 (S~-H~ 1992). Here, Leila and Minnie signed an agreement with Cosmopolitan and opened an account as trustees for Christine. As a result, according to Illinois law, each has a right individually to deposit or withdraw funds from this account. Christine possesses no right, authority, or power to access the funds of this account. Accordingly, the account trust is not a countable resource to Christine.*/

OO. PS 00-272 Supplemental Security Income - Wisconsin Trust - Lauren M. J~, SSN ~; Your Reference: S2D5G3

DATE: July 10, 1998

1. SYLLABUS

Under Illinois law, because the purpose of the trust is for the individual's support, the discretionary authority given to the trustee on how to apply the trust funds does not permit him/her to avoid contributing to the individual's support and maintenance. Thus, the individual can direct the use of the funds for his/her support and maintenance. Therefore, the funds in

the trust are a resource to the individual. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

This is with reference to your request that we review the "Lauren M. J~ Trust" to determine whether it is a countable resource for Lauren M. J~ (Lauren), a Supplemental Security Income (SSI) applicant. Although the Trustee has discretion on how to apply the funds, the express terms of the trust direct its use for Lauren's support and maintenance. The funds in the trust, therefore, should be considered a resource to her.

FACTS

This trust appears to have been funded with $10.00 in cash that was provided by Lauren. We do not know whether other property has been added to the trust. The trust names Lauren as Grantor, and Charles P. J~ and Marion A. J~, Lauren's parents, and American National and Trust Company of Chicago as the Trustees. Under this trust, the Trustee may in its discretion distribute so much or all of the trust income and principal as the Trustee determines to be required or desirable for the support, medical needs, education, welfare, and best interests of Lauren. In addition, during Lauren's lifetime, the Trustee may distribute to any child of Lauren who under age twenty-five so much or all of the trust income and principal as the Trustee determines to be required. The trust provides that it is irrevocable and not amendable.

The trust also provides that on Lauren's death, the Trustee shall pay her funeral expenses, reasonable expenses of administration of her estate, and any death taxes. The Trustee shall distribute the balance of the trust as appointed and directed by Lauren by will. If Lauren does not exercise this power of appointment, the Trustee shall distribute the trust property to her living descendants, per stirpes, or if there are none, equally to Charles P. J~, her father, Marion A. J~, her mother, and Charles P. J~, Jr., her brother.

DISCUSSION

To qualify for SSI benefits, a claimant must show that his or her resources are below a statutory maximum. 20 C.F.R. §§ 416.202, 416.1205; 42 U.S.C. § 1382(a). Under the applicable regulation, "resources" are defined as:

cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

20 C.F.R. § 416.1201(a).

If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource.

20 C.F.R. § 416.1201(a)(1).

A trust can be a resource. The Program Operations Manual System (POMS) specifies that if an individual has the authority to direct the use of the trust principal for her support and maintenance, the trust principal is a resource to the individual for SSI purposes. POMS SI 01120.200(D)(1). In this case, the trust is a countable resource for determining Lauren's SSI eligibility because she can direct the use of the trust income and principle for her support and maintenance under the terms of the trust. POMS SI 01120.200(D)(1)(a).

The grantor of a trust is the person who provides the consideration for the trust. 76 Am. Jur. 2d § 55; POMS SI 01120.200(B)(2). In this case, Lauren is the grantor of the trust because she provided funds to establish the trust and is named as "Grantor" in the trust instrument. Furthermore, Lauren is a beneficiary of the trust because the trust property is held for her benefit. 76 Am. Jur. 2d § 59; POMS SI 01120.200(B)(4).

The terms of the trust instrument provide that the primary purpose of the trust is for Lauren's support. The trust contains explicit instructions that the trustee may in its discretion pay to Lauren, or use for her benefit, so much or all of the income and principal of the trust as the trustee determines to be required or desirable for her support, medical needs, education, welfare, and best interests.

Because the primary purpose of the trust is for Lauren's support, the discretionary authority given to the trustee does not insulate the trust from being a resource. Illinois case law provides that such discretion does not permit the trustee to provide

no support for the beneficiary. *See Estate of McInerny*, 682 N.E.2d 284, 291 (1997)(citing , 432 N.E.2d. 1086, 1088 (1982)). The trustee may not avoid paying for or contributing to Lauren's support and maintenance simply because the terms of the trust give the trustee discretion in distributing the income and principal of the trust. Because the trustee would, therefore, be abusing its discretion if it did not use the trust for Lauren's support, she can direct the use of the funds.

Thus, we conclude that the trust income and principal at issue should be considered a resource to Lauren for SSI purposes because the terms of the trust direct the use of the trust income and principal for her support and maintenance.

PP. PS 00-269 Illinois Trust For Joseph A. A~, SSN: ~

DATE: June 3, 1997

1. SYLLABUS

At issue is whether the beneficiary has unrestricted access to the trust principal and can therefore use it for his support and maintenance. Even though there is general language in this trust and others similarly set up by the grantor that allows the beneficiary access to the trust principal, this trust contains specific language that it be a discretionary trust for a disabled beneficiary with the trustee having sole and absolute discretion as to the control of the assets in the trust. Therefore, the trust is not a resource for SSI purposes.

2. OPINION

This is in response to your inquiry concerning a trust fund established for Joseph A. A~. You asked us whether Joseph had unrestricted access to the trust principal, and if he could use the principal for his support and maintenance. For the following reasons, it would appear that Joseph does not have unrestricted access to the trust principal and therefore, it cannot be used for his support and maintenance.

FACTS

Jack K~, Joseph A~'s grandfather, established an irrevocable and unamendable trust for the benefit of his grandson, Joseph A~, and Helene A~ was named trustee. The trust was entitled Helene A~ Irrevocable Trust Number 2. The trust included apparently conflicting provisions. Section 2.2 stated generally that "a beneficiary for whom a trust is named shall have the right to withdraw from any contribution to the trust estate . . . .".

However, section III specifically provided that:

3.1. The following shall apply to the trust for the benefit of Joseph:

(a) During the lifetime of Joseph, the trustee shall distribute any part or all of the income and principal of the trust estate to Joseph as the trustee deems desirable in the trustee's sole and absolute discretion for his best interests. Any excess income shall be added to principal. It is the grantor's desire that the trust established hereunder for the benefit of Joseph qualify as a trust for a disabled beneficiary pursuant to the provisions of Section 15.1 of the Illinois Trust and Trustees Act.

DISCUSSION

A resource, for SSI purposes, includes assets that the individual owns and could convert to cash to be used for his own support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can revoke the trust and use the assets to meet his needs for food, clothing, and shelter. POMS SI 01120.105.A.1, 01120.200(D)(1)-(3). Consistent with SSI's trust policy, if an individual neither owns nor has the legal right to direct the use of trust assets to meet his or her support and maintenance needs, then the trust assets are not considered a resource.

In the instant case, the claimant's grandfather, Jack K~, appears to have created a number of grantor trusts and used the same general language in all the trusts including the trust established on behalf of Joseph. This is evidenced by the title of Joseph's trust agreement, "Trust Number 2", and the repeated general references in the agreement to "each trust", "each separate trust hereunder," "a beneficiary for whom a trust is named" and "Each trust named for a beneficiary . . . shall be distributed to the beneficiary for whom the trust is named."

As pointed out in your memorandum, Section 2.2 of the trust does provide "a beneficiary for whom a trust is named . . . the right to withdraw from any contribution to the trust estate." Since this section is a part of Joseph's trust agreement it would appear to allow Joseph the right to direct the use of the trust assets. However, this language is consistent with the general language used throughout the trust and was presumably applied generally to all beneficiaries, particularly since Joseph was not specifically named.

On the other hand, Section III specifically names Joseph, indicates that Joseph's trust assets are under the sole and absolute discretion of his trustee, and notes that the grantor desired that the trust qualify as a trust for a disabled beneficiary pursuant to the provisions of Section 15.1 of the Illinois Trust and Trustees Act. That section states:

§ 15.1. Trust for disabled beneficiary. A discretionary trust for the benefit of an individual who has a disability that substantially impairs the individual's ability to provide for his or her own care or custody and constitutes a substantial handicap shall not be liable to pay or reimburse the State or any public agency for financial aid or services to the individual except to the extent the trust was created by the individual or trust property has been distributed directly to or is otherwise under the control of the individual. Property, goods, and services purchased or owned by a trust for and used or consumed by a disabled beneficiary shall not be considered trust property distributed to or under the control of the beneficiary. A discretionary trust is one in which the trustee has discretionary power to determine distributions to be made under the trust.

In Illinois, when an apparent ambiguity or conflict exists in a trust, the primary concern is ascertaining the intent of the donor. *Estate of Dawson*, 522 N.E. 2d 770 (1988). In determining the donor's intent, consideration of the entire instrument, and not a single portion, should be the procedure. , 658 F.2d 487 (7th Cir. 1981). Furthermore, in considering all of the provisions of the trust, the sections dealing with subject matter in detail take precedence over sections which contain general provision on the same subject. 2416 , 415 N.E. 2d 420 (1980).

The specific intent of section III with regard to distribution of Joseph's assets, which complies with the requirements of Section 15.1 of the Illinois Trust and Trustees Act, would therefore appear to override the general provisions of the agreement as to distribution of assets as it pertains to the other trusts and beneficiaries. It appears that it is the intent of the grantor, due to his express language in regards to Joseph, to establish a discretionary trust rather than allow Joseph the right to withdraw from the trust estate as the other beneficiaries are capable of doing.

For these reasons, we believe that in all likelihood, a number of trust estates were created and all used the same general language which permitted the beneficiaries to withdraw assets from the trust estate. Joseph's trust agreement, however, exempted him from this provision due to the grantor's explicit provision that Joseph have a discretionary trust for a disabled beneficiary with sole and absolute discretion as to the control of the assets vested with the trustee.

QQ. PS 00-268 Illinois OBRA '93 Trust for J~, SSN: ~, Your Reference: S2D5G3

DATE: February 18, 1999

1. SYLLABUS

The opinion concerns a trust created for the benefit of the SSI recipient with funds awarded the SSI recipient as a result of a settlement in a malpractice action.

The trust is not a resource for SSI purposes because the grantor (the SSI recipient) does not have the legal authority to revoke the trust or direct the use of its assets for her own support and maintenance. A trust can be revoked if the grantor of the trust is the sole beneficiary. However, under the terms of this trust the grantor cannot revoke the trust as she is not the sole beneficiary since the trust provides for residual beneficiaries in the event of her death.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked whether the trust established for J~ is a countable resource for the purposes of determining Ms. J~' eligibility for Supplemental Security Income (SSI) and whether any of its disbursements would be countable income. We believe, for the reasons stated below, that the trust itself should not be considered a countable resource when determining Ms. J~' eligibility for SSI but that certain disbursements might be considered income.

FACTS

The " D. J~ OBRA '93 Trust" ("the J~ Trust" or "the trust") was created for the benefit of J~, who is disabled and who apparently received the funds that make up the trust as the result of a judgment or settlement in a medical malpractice action. Ms. J~' mother, Loretta J~, is named as the settlor of the trust, and both of her parents, Loretta J~ and Dennis J~, are named as trustees.

The stated purpose of the trust is to provide for J~' "extra and supplemental needs, over and above the benefits she otherwise receives as a result of her handicap or disability from any local, state or federal governmental source or from private agencies any of which provide services or benefits to disabled persons." The trust states that it is irrevocable and that it is intended that Ms. J~ qualify for SSI. No funds from the trust are to be expended for the benefit of Ms. J~ "so long as there are sufficient services, funds and benefits available to her for her care, comfort, and welfare from governmental sources." Although the trustees are to be "liberal in utilizing the trust income and principal to augment that which is provided for by governmental sources," they are to "use trust assets to supplement but never to substitute for governmental funds and benefits." The trustees are directed to purchase supplemental goods and services-and, in doing so, to "avoid duplication of benefits provided . . . by or from governmental sources"-for Ms. J~, but they may not distribute cash or securities to her.

The trust may be amended by the trustees, and then only when the trustees determine that amendment is necessary to ensure that the purposes and intentions of the trust are furthered by conforming to "changes in any laws or rules" that affect the trust.

Upon Ms. J~' death (or when the corpus is exhausted), the trust terminates, and, after administrative costs are paid, funds remaining in the trust are to be used to reimburse governmental agencies for benefits provided to Ms. J~, pursuant to 42 U.S.C. § 1396p, and any funds that then remain are to be distributed to Loretta and Dennis J~, or to whichever of them survives; or, if neither survives, to their then living descendents.

DISCUSSION

A resource, for the purpose of SSI eligibility, is "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). The J~ Trust is thus not a resource, for SSI purposes, unless Ms. J~ has legal authority to revoke the trust and then use the funds to meet her needs for food, clothing, or shelter; or unless she can direct the use of the trust principal for her support and maintenance under the terms of the trust. POMS SI 01120.200(D)(1)(a).

The trust in this case explicitly states that it is irrevocable. Even when a trust includes such language, however, it is deemed revocable if the settlor is also the sole beneficiary. Under those circumstances, the settlor/beneficiary can compel termination of the trust despite explicit language to the contrary. , 278 N.E. 2d 10, 12 (Ill. App. 1972); Restatement (Second) of Trusts § 339, comment a. Trusts that have been established from personal injury judgments are considered to be established by the person who received the award. POMS SI 01120.200(J)(3). Thus, although the trust identifies Ms. J~' mother, Loretta J~, as the "settlor," Ms. J~ herself is to be regarded as the settlor, as she was the one who provided the consideration. , 635 N.E.2d 853, 855 (Ill. App. 1994).

The central question regarding the revocability of the J~ Trust is therefore whether Ms. J~ is the sole beneficiary. The language of the trust makes it clear that while Ms. J~ is intended to be the sole primary beneficiary, the amount left in the trust upon Ms. J~' death is to be distributed first to state agencies, as reimbursement for benefits given to Ms. J~ during her lifetime, and then to "Loretta and Dennis J~, or all to the survivor of them; otherwise, to their then living descendants" (J~ Trust, Article 1.03(d)). While no state is considered a beneficiary under these terms, it is clear that Loretta and Dennis J~, and their descendants, are residual beneficiaries. The addition of residual beneficiaries generally makes a trust irrevocable. *See* Restatement (Second) of Trusts, § 127, comment b. Illinois follows this rule. Clarification of Regional SSA Program Circular 95-05 Concerning Trust, OGC-V (K~) to L~, Acting ARC (5/24/95).

The fact that the J~ Trust provides for "liberal" expenditures by the trustees on behalf of the beneficiary should not affect the analysis of whether the beneficiary can revoke the trust. The central question, again, is whether Ms. J~ can either revoke the trust or direct, under the terms of the trust, that the trustees provide for her support and maintenance. As explained above, the existence of residual beneficiaries precludes Ms. J~ from revoking the trust.

Similarly, the language of the trust does not appear to reserve any power to Ms. J~ to direct how the principal or income are to be expended. Rather, the trustees appear to have unfettered discretion to decide which goods and services are to be purchased

for Ms. J~: "By way of illustration, the Trustees may purchase those goods or services which shall enhance and maximize 's development and happiness . . ." (J~ Trust, Article 1.03(a)) (emphasis added); the trustees are to be liberal in their expenditures on Ms. J~ when they determine, "in their sole discretion, that such additional expenditures are in 's best interest" (id.) (emphasis added); the trustees shall expend the income and principal of the trust "as the Trustees determine from time to time to be necessary" (J~ Trust, Article 1.03(c)) (emphasis added). Furthermore, the trust explicitly provides that "[a]t no time and under no circumstance shall have the right to demand income or principal from this trust" (id.).

Our analysis of whether the trust is revocable by the beneficiary is not affected by the provision in the trust that allows the trustees to modify its provisions as a result of "judicial decisions or interpretations or other changes in any laws or rules, to conform the Trust provisions to operate and to fully comply with the expressly stated intentions, purposes and goals in establishing this Trust" (J~ Trust, Article 1.02). This power to modify is restricted to the trustees and to situations in which changes in the law operate to defeat the intentions of the settlor in creating the trust. Generally, whether the power to modify includes the power to revoke "is a question of interpretation to be determined in view of the language used and all the circumstances whether and to what extent the power is subject to restrictions." Restatement (Second) of Trusts § 331, comment h. In the J~ Trust, the power to modify does not appear to encompass the power to revoke the trust. Furthermore, even if the power to modify could include termination, that power, in this case, resides in the trustees, not in the settlor/beneficiary. It does not confer on Ms. J~ herself any power to revoke the trust or direct expenditures of its principal or income.

Finally, it is a question of fact whether certain disbursements distributed from the trust for the benefit of Ms. J~ are countable income. Under Illinois law, "[p]roperty, goods and services purchased or owned by a trust for and used or consumed by a disabled beneficiary shall not be considered trust property distributed to or under the control of the beneficiary." 760 ILCS 5/15.1. Thus, if the trust distributes to Ms. J~ property that she can then convert into cash to be used for her own support and maintenance, then that property is countable income; if the trust retains title to the property, or if the distribution is of a sort that cannot be converted to cash, then the property is not income. Of the illustrations of goods or services listed in Article 1.03(a) of the J~ Trust, "entertainment items (such as a television, VCR, or the like)" might be considered income if they can be converted to cash, unless the trust specifically retains ownership of those items; on the other hand, "evaluations or training and educational programs" and "transportation and related costs to visit relatives and friends" would not be resources under Illinois law.

CONCLUSION

Because the J~ Trust identifies residual beneficiaries, and because Ms. J~ cannot revoke the trust or direct its expenditures, we believe that the trust should not be considered a countable resource when determining Ms. J~' eligibility for SSI. Further, we believe that only those distributions from the trust which confer a benefit on Ms. J~ that she can convert to use for her support and maintenance should be considered income to her.

RR. PS 00-262 SSI-Illinois - Review of the John E. H~ OBRA '93 Trust, SSN: ~

DATE: May 19, 1999

1. SYLLABUS

This trust, created in 1995, is not a countable resource as the SSI recipient cannot direct payment of the trust principal for his support and maintenance or revoke or terminate the trust to obtain the assets.

Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/01/00.

2. OPINION

You have asked us to review the trust established for John H~, a disabled adult. You have asked us to determine whether the trust constitutes a countable resource to John H~ for the purpose of determining his eligibility for SSI.

We conclude that the trust assets would not be a resource because Mr. H~ cannot direct that the Trustee use the trust assets for his support and maintenance; sell, or otherwise transfer his interest in the trust; or revoke or terminate the trust to obtain the assets.

FACTS

Mr. H~ is an adult who is a "disabled person" as defined in the Social Security Act § 1614(a)(3) (42 U.S.C. § 1382(a)(3)). The trust was created on October 24, 1995, by Mr. H~'s mother, Bennie H~. The trust was initially funded with $20.00 (*see* "Ex. A, Schedule of Assets"), and this amount was increased by $360,000, deposited by Chubb Insurance Company in a guardianship account at First Chicago NBD. These funds were proceeds from a medical malpractice settlement. We have not been advised whether other assets have since been added to the trust.

The trust states that its express purpose is to "provide for John's extra and supplemental needs, over and above the benefits he otherwise receives as a result of his handicap or disability from any local, state or federal governmental source or from private agencies any of which provide services or benefits to disabled persons." Trust 1.03(a). The trust further provides that: "Because of [Mr. H~'s] disabilities, the Trustee is directed to purchase goods and services on [Mr. H~'s] behalf, and not to distribute cash or securities to [Mr. H~.]" Trust 1.03(b). In addition, it states that: "at no time and under no circumstances shall [Mr. H~] have the right to demand income or principal from this trust." Trust 1.03(c). It has a "spendthrift" provision, precluding the beneficiary from assigning his rights. Trust 2.02.

The trust provides that Mr. H~'s mother, Bennie H~, is the guardian of his estate, and the "settlor." It specifically states that it is irrevocable, and provides that the settlor "does not reserve any right to later amend, revoke or terminate this Trust in whole or in part at any time." Trust 1.02. However, that same provision also authorizes the Trustee to "amend and/or reform" the trust to conform with "judicial decisions or interpretations or other changes in any laws or rules," and to conform with "any regulations that are approved by any governing body or agency relating to 42 U.S.C. 1396p or related statutes, including state statutes that are consistent with the provisions and purposes of the Revenue Reconciliation Act of 1994 and amendments to such act." Trust 1.02.

The trust also provides that "unless sooner terminated by exhaustion of corpus, this trust shall terminate upon [Mr. H~'s] death." Trust 1.03(d). After Mr. H~'s death, the trustee will first pay "any outstanding, reasonable expenses for maintaining the trust; any final bills, debts, expenses, taxes, fees, funeral-related items, and/or such other items which may be paid." Id. Any amount remaining in the trust after the above-mentioned expenses have been paid will be paid to the appropriate state agencies as reimbursement for benefits provided to Mr. H~ during his lifetime. Id. In the event that any trust assets remain after these payments have been made, the balance is to be distributed per stirpes to Mr. H~'s descendents. If there are no descendents, the balance will be distributed to Mr. H~'s mother, Bennie H~ or, if she does not survive, to Mr. H~'s father, John T. H~. If Mr. H~'s father does not survive, the balance will be allocated and distributed equally to Mr. H~'s sisters, Shaun R. H~ and Antonia M. H~, or, if either is then deceased, to her descendents, per stirpes. Id.

DISCUSSION

A "resource" is cash, other liquid assets, or any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. 20 C.F.R. § 416.1201(a) (1998). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can direct the use of the assets to meet his need for food, clothing, and shelter, or if he can terminate or revoke the trust and obtain unrestricted access to the trust assets. *See* Program Operations Manual System (POMS) SI 01120.105 (A)(1), 01120,200(D)(1)-(3). Whether the claimant can terminate the trust or direct use of the trust assets depends on the terms of the trust declaration and applicable state law. POMS SI 01120.200(D)(2). An individual's beneficial interest in a trust also may be a resource if the individual can sell that interest. *See Zebley Trust as an SSI Resource-Wisconsin*, Bernard W~ (~), RA V (M~) to M~, Acting ARC-POS (Feb. 23, 1993) at 5.

For the following reasons, the trust assets would not be a countable resource for SSI purposes:

1. Mr. H~ Cannot Direct the Trustee to Use the Assets for His Support and Maintenance.

Under the terms of the trust, the Trustee has sole discretion to disburse assets in the trust, and the disbursements are to be made only for Mr. H~'s supplemental care. In addition, the Trustee is directed to purchase goods and services on Mr. H~'s behalf, and is not to distribute funds directly to Mr. H~. Trust 1.03(b). Furthermore, under no circumstances will Mr. H~ have the right to demand income or principal from the Trust. Trust 1.03(c). Accordingly, Mr. H~ cannot direct the Trustee to use the assets in the Trust for his support and maintenance.

2. The Trust Interest Would Have Little Or No Fair Market Value.

As stated above, the trust authorizes the Trustee to make disbursements in his or her sole discretion for Mr. H~'s benefit, and prohibits the Trustee from making any disbursements directly to Mr. H~. Trust 1.03(b). Additionally, the trust includes a "spendthrift" provision precluding Mr. H~ from assigning his rights. Trust 2.02. For these reasons, Mr. H~'s interest in the Trust would have little or no fair market value. *See* 20 C.F.R. § 416.1201(a)(1) (resources evaluated according to market value).

3. Mr. H~ Cannot Revoke Or Terminate the Trust.

The first issue in determining whether the trust is revocable is whether Mr. H~ or his mother, Bennie H~, is the settlor or grantor of the trust. The general rule, and the rule in Illinois, is that the grantor of the trust is the individual who actually furnishes the consideration that establishes the trust, even if another person or entity nominally creates the trust. 76 Am. Jur. 2d § 55; In re Estate of H~, 635 N.E.2d 853, 855 (Ill. App. 1994), appeal denied, 642 N.E.2d 1281, cert. denied, 115 S. Ct. 1101. The primary contribution to the trust was funded with proceeds from a medical malpractice settlement in an action brought on Mr. H~'s behalf. Therefore, the funds belonged to the beneficiary, Mr. H~, and this indicates that he is the settlor or grantor of the trust.

Even though the trust document indicates that Mr. H~'s mother, Bennie H~, is the settlor/grantor of the trust, she was acting on Mr. H~'s behalf. The Program Operations Manual System explains that an individual can be the grantor when the trust is established by an "other individual legally empowered to act on [his] behalf (e.g., a legal guardian, representative payee ...), [who] establishes the trust with funds or property that belong to the individual." POMS SI 01120.200(B)(2). The trust provides that Mr. H~'s mother is the guardian of his estate. Trust 1.01. As Mr. H~'s guardian, Bennie H~ was legally empowered to act on his behalf. She established the trust with funds that belonged to Mr. H~. Mr. H~ is, therefore, the actual grantor of the trust because he furnished the consideration and his mother acted on his behalf.

As a general rule, where the settlor and the sole beneficiary are the same, the trust can be revoked even if it purports to be irrevocable. *See* Restatement (Second) of Trusts § 339 (1959). As stated above, Mr. H~ is the settlor or grantor of the trust. We must determine whether he is also the sole beneficiary in order to determine whether the trust can be revoked.

The trust lists Mr. H~ as the only beneficiary during his lifetime. Trust 1.03. It also provides that, upon termination by Mr. H~'s death, the residue will be used to pay his final bills and then to reimburse Illinois or any other state for benefits provided to Mr. H~ during his lifetime. Trust 1.03(d). This provision does not create additional beneficiaries. *See* States Named as Beneficiary to a Trust, OGC-V (D~) to P~, ARC-MOS (June 24, 1997). However, the trust further provides that any balance shall be distributed to Mr. H~'s descendents and, if there are none, to his mother, and if she does not survive, to his father, and if he does not survive, to his sisters, and if one of the sisters does not survive, to her descendents. Trust 1.03(d). This provision, which designates persons to receive the trust property in the event of Mr. H~'s death, creates "residual" or "contingent" beneficiaries whose consent must be obtained in order for the trust to be revoked. *See* Clarification of Regional SSA Program Circular 94-05, OGC-V (K~) to L~, Acting ARC-POS (May 24, 1995), at 1. We do not assume that they will consent to terminate the trust. Therefore, Mr. H~ cannot revoke or terminate the trust at will, and the trust is irrevocable. Finally, Mr. H~ also cannot terminate the trust and obtain the assets. It specifically states that "unless sooner terminated by exhaustion of corpus, this trust shall terminate upon [Mr. H~'s] death." Trust 1.03(d).

CONCLUSION

In summary, the assets of the John H~ trust are not countable resources because Mr. H~ cannot direct that the Trustee use the trust assets for his support and maintenance; sell or otherwise transfer his interest in the trust; or revoke or terminate the trust to obtain the assets.

SS. PS 00-259 Supplemental Security Income - Illinois Trust - Anna M~ H~ a/k/a Alice C~, SSN ~, Your Reference: S2D5G3

DATE: August 13, 1998

1. SYLLABUS

At issue is whether or not the trust is a resource for SSI purposes. The beneficiary does not have the authority to direct the payment of the trust principal for his/her support and maintenance or revoke the trust and use the trust principal for his/her support and maintenance. The trust also provides for contingent beneficiaries. Therefore, the trust is not a resource for SSI purposes.

2. OPINION

You inquired whether the funds held pursuant to the terms of a trust agreement should be considered a countable resource for purposes of SSI eligibility for Anna M~ H~, the beneficiary of the trust.

The pertinent SSI regulation provides that:

[R]esources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

20 C.F.R. § 416.1201(a). Thus, if an individual is able to obtain funds or convert property to cash to be used toward his or her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility. Trust assets are a resource to the individual if he or she "has legal authority to revoke the trust and then use the funds to meet his or her food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his or her support and maintenance under the terms of the trust." POMS SI 01120.200(D)(1)(a). We have reviewed the documents presented to us and, for the reasons discussed below, we conclude that this trust should not be a countable resource under 20 C.F.R. § 416.1201(a)(1).

FACTS

Ms. Anne M~ H~ is an SSI recipient. The trust in question purports to be written pursuant to 42 U.S.C. § 1396p, as amended, and is entitled: "TRUST AGREEMENT ANNE M~ H~ OBRA '93 TRUST." ("H~ Trust" or "Trust"). The court-approved Trust is funded by a $20,000 inheritance, bequeathed by Anthony Angarole by testamentary trust to Anne M~ H~. Dathene Angarole, who had been a trustee of the testamentary trust and was personal representative of the estate, signed as grantor, and Lynda K. Given, an attorney, is named as trustee. Anne M~ H~ is the primary beneficiary of the Trust.

The H~ Trust states that the funds are to be used for Ms. H~'s "extra and supplemental needs, over and above the benefits she otherwise receives as a result of her handicap or disability from any local, state or federal governmental source." H~ Trust, article one, section 1.03(a). Funds are to be paid at the trustee's discretion, and Ms. H~ has no right to demand income or principal from, or to serve as trustee of, the Trust. *Id.* at section 1.03(a) & (c). The Trust purports to be irrevocable and terminates upon Ms. H~'s death. *Id.* at section 103(d). The Trust provides:

Specifically in accordance with 42 U.S.C. 1396p(d)(4)(A), any amount remaining in the Trust at Anne M~ [H~]'s death (up to the amount expended by the State of Illinois, or any other state, for medical assistance) shall be paid to the appropriate State agencies, as reimbursement to the State of Illinois or such other state as has provided benefits to Anne M~ [H~] during her lifetime, except that the Trustee may first pay any outstanding, reasonable expenses for maintaining the existence of the Trust, any of Anne M~ [H~]'s final bills, debts, expenses, taxes, fees, funeral related items, and/or such other items which may be paid, prior to reimbursement to the State, pursuant to statute or regulation now in existence or hereafter enacted or issued. ... In the event that any Trust assets are remaining after payment of the reasonable expenses and the reimbursement to the State of Illinois or other state(s) as set forth above, the remaining balance shall be distributed equally to MICHELE C~, NICOLE C~ and NICHOLAS C~, if then living, with the share of any of them, if then deceased, to be distributed, per stirpes, to such beneficiary's then living descendants.

H~ Trust, article one, section 1.03(d).

DISCUSSION

A trust consistent with the provisions of the Omnibus Reconciliation Act of 1993, as amended, may still be a countable resource for SSI purposes. *See* Revocability of Wisconsin Trust for Clayton D. B~, ~, OGC-V (D~) to Gloria J. P~, ARC-POS (10/28/94) at 4, n.7. A trust may be a countable resource if the beneficiary can either: (1) direct the trustee to pay over trust principal for her support and maintenance; or, (2) revoke the trust and then use the funds for her support or maintenance.

First, a trust may be a resource "in the rare instance, where [the beneficiary] has the authority under the trust to direct the use of the trust principal." POMS SI 01120.200(D)(1)(b). The H~ Trust is not one of these "rare instances." The trustee has "sole discretion" to distribute trust income or principal, and may "purchase goods and services on [Ms. H~'s] behalf" but may not "distribute cash or securities" to her. H~ Trust, article one, section 1.03(a),(b). The Trust also provides that the beneficiary does not have "the right to demand income or principal from this trust." H~ Trust, article one, section 1.03(c); article two, section

2.03. Therefore, Ms. H~ does not have the authority to direct the payment of trust principal for her support and maintenance, because the trustee has exclusive authority over distribution of trust income and principal.

Furthermore, the trustee's power to distribute the Trust is limited. The Trust requires the trustee to consider the effect of any distribution on the beneficiary's entitlement to government resources. Article one, section 1.03(a),(c). Therefore, Ms. H~'s access to the trust principal is restricted, and the trust principal should not be considered a countable resource for this reason.

Second, a trust may be a countable resource if the beneficiary may revoke it and use trust proceeds for her support and maintenance. POMS SI 01120.200(D)(1)(a). A trust may be revocable either through the language of the trust itself or by operation of state trust law.

The Trust expressly states that the Trust is irrevocable. H~ Trust, article one, section 1.01. Therefore, the terms of the Trust do not allow it to be revoked. Additionally, upon Ms. H~'s death, the trustee is directed to pay all amounts remaining in the Trust up to the total amount of medical assistance paid to the beneficiary by any state plan. H~ Trust, article one, section 1.03(d). After payment to any state agency providing medical assistance, any remainder of the trust principal is to be paid to Michele C~, Nicole C~, and Nicholas C~, if then living, or, if deceased, to their then living descendants, per stirpes. Article one, section 1.03(d). Thus, no provision empowers Ms. H~ to revoke the Trust and use the trust principal for her support and maintenance.

The next question, then, is whether Ms. H~ can revoke the Trust pursuant to state trust law. As a general rule, funds in irrevocable trusts are not countable assets. POMS SI 01120.200(D)(2)(b). The general law of trusts recognizes an exception to this rule — when the grantor is the sole beneficiary of the trust arrangement, then the trust is revocable regardless of the language in the trust document to the contrary.

See Restatement (Second) of Trusts, § 339 (1959); 76 Am. Jur. 2d Trusts 91 (1975); *see also* POMS SI 01120.200(B)(8),(D)(3). We previously advised that Illinois appears to follow this rule. Trust as Resource - Illinois -Theresa M~, SSN: ~, OGC-V (P~) to Armando A. G~, Acting ARC-POS (8/4/93), at 3.

To determine whether the trust is revocable under this provision, the relevant inquiry is who is the grantor and who are the beneficiaries. The grantor of the H~ Trust cannot be ascertained from the information available to us. The H~ Trust is funded from Ms. H~'s inheritance bequeathed to testamentary trust. Ms. Dathene Angarole signed the H~ Trust as grantor; however, a grantor of a trust is the individual who actually furnishes the consideration that establishes the trust. *See*, *e.g.*, in *re Estate of John* , 635 N.E.2d 853, 855 (Ill. Ct. App. 1994) (citing , 278 N.E.2d 10. 12 (Ill. Ct. App. 1972) ("the person who furnishes the consideration for the trust is the settlor, even though, in form the trust is created by another"). If Ms. H~'s inheritance vested, even if she never actually received her inheritance, she may be the true grantor. If it was a valid testamentary trust, she may or may not be the true grantor. This issue, however, does not affect our ultimate opinion, for reasons explained below.

If Ms. H~ was the sole grantor and also the sole beneficiary, she could revoke the trust. A beneficiary is any person with a beneficial, or equitable ownership, interest in the trust. POMS SI 01120.200(B)(4). The addition of residual contingent beneficiaries generally makes a trust irrevocable. *See* Restatement (Second) of Trusts, § 127, comment b (1959). Illinois follows this rule. Clarification of Regional SSA Program Circular 95-05 Concerning Trust, OGC-V (K~) to L~, Acting ARC (5/24/95).

The H~ Trust states that, upon Ms. H~'s death all funds remaining in the trust at the beneficiary's death will be distributed first to reimburse the State of Illinois up to an amount equal to the total medical assistance paid by the State of Illinois on Ms. H~'s behalf. H~ Trust, article one section 1.03(d). We have recently advised that no residual beneficiary is created merely because the trust requires that any sums remaining in the trust at the death of the individual be paid first to the state to reimburse it for benefits paid on that person's behalf. *See* States Named as Beneficiary to a Trust, OGC-V (D~) to P~, ARC, SSA-V (6/24/97), at 2. The State of Illinois, therefore, is not a residual beneficiary of the Trust.

The H~ Trust also specifies that, if any balance remains after the State of Illinois has been reimbursed, that balance is to be distributed equally to Michele C~, Nicole C~ and Nicholas C~, or their living issue, per stirpes. H~ Trust, article one, section 1.03(d). Thus, the H~ Trust provides contingent beneficiaries, and therefore, cannot be revoked by Ms. H~. *See* Restatement (Second) of Trusts, § 127, comment b (1959).

CONCLUSION

For the above reasons, we believe the trust principal should not be considered a countable resource when determining Ms. H~'s eligibility for SSI.

TT. PS 00-250 SSI-Illinois-Petition to Amend Trust for Joyce G~, SSN: ~

DATE: December 17, 1999

1. SYLLABUS

The opinion involves a grantor trust which names contingent identifiable beneficiaries. The presence of these beneficiaries shows that the grantor is not the sole beneficiary of the trust. Thus, the trust is not a resource.

2. OPINION

You asked that we review the petition to amend the "Special Needs Irrevocable Pay Back Trust" established by the Office of the Public Guardian for Joyce G~, a disabled person. The original trust had been a "grantor trust" that Ms. G~ (or her guardian on her behalf) could revoke. The trust as amended is intended to create additional contingent beneficiaries, and thus avoid implied revocability. Based on our review of the documents, we conclude that the amended trust is not a resource.

Background

On July 25, 1997, the Office of the Public Guardian executed a trust called the "Joyce G~ Special Needs Irrevocable Pay Back Trust" and funded it with $239,000 of Ms. G~'s assets. In April 1999, we concluded that the trust was a revocable "grantor" trust because Ms. G~ was the grantor (source of the funds) and the sole beneficiary.

We concluded that Ms. G~ was the sole beneficiary because the trust provided that she was the sole beneficiary during her lifetime and would terminate if either Ms. G~ died or if she was no longer a "disabled person" as defined under the Social Security Act. Trust 4.1. If Ms. G~ was found to be no longer a disabled person, the funds would be paid to Ms. G~ or her guardianship estate. Trust 4.2(c). If she died, the trustee was directed to pay any remaining trust property to Ms. G~'s decedents' estate. Trust 4.2(d).

In April 1999, the Public Guardian petitioned the Illinois probate court for leave to amend the trust insofar as it described distributions on the death of Ms. G~. The probate court granted the petition on April 13, 1999. The trustee consented to the amendment on May 11, 1999.

As amended, the trust provides for the payment of remaining trust property to:

(1) If there is a surviving spouse and also a descendent of the decedent: 1/2 of the entire estate to the surviving spouse and 1/2 to the decedent's descendants per stirpes (2) If there is no surviving spouse but a descendent of the decedent: the entire estate to the decedent's descendents per stirpes. (3) If there is a surviving spouse but no descendent of the decedent: the entire estate to the surviving spouse. (4) If there is no surviving spouse or descendent but a parent, brother, sister or descendent of a brother or sister of the decedent: the entire estate to the parents, brothers and sisters of the decedent in equal parts, The Guardian of the Estate Asserts that the only known living family members of Joyce G~'s, at the time of the creation of this provision, are Joyce G~'s first cousins, Thea H~ of Evanston, Illinois, Joseph S~ of North Muskegan, Michigan, Mae C~ of Lemont, Illinois and Joseph H~ of Wilmette, Illinois, allowing to the surviving parent if one is dead a double portion and to the descendents of a deceased brother or sister per stirpes the portion which the deceased brother or sister would take if living. (5) If the above provisions fail to vest, then the remaining trust estate shall pay to the relevant portion of the Illinois Probate Act.

Amended Trust 4.2.

DISCUSSION

We have previously advised that a grantor trust is presumed revocable. *See* POMS SI 01120.200(D)(3); Memo. from OGC-V to ARC-POS, Six State Synopsis of Trust Laws (Feb. 26, 1992). We have also advised that a trust is not a grantor trust to the extent that it has named a class of contingent identifiable beneficiaries. *See* Memo. from OGC-V to ARC-Programs, Clarification of Regional SSA Program Circular 94-05 Concerning Trusts (May 24, 1995). In light of these authorities, we believe that the amended trust is not a resource.

The general rule is that when a trust names no residual beneficiary, the grantor intends that he or she is the sole beneficiary. Restatement (Second) of Trusts § 127 cmt. b (1957).

Where, however, the grantor expresses his or her intent that the remainder of the trust property be paid to a specific identifiable class, such as descendents, then the members of that class are considered contingent remainder beneficiaries. *Id.*

Here, as amended, the trust makes clear that Ms. G~ intended specific individuals-her spouse (if any), parents, siblings, or descendents-would obtain the remainder interest in her trust property. This is sufficient to show Ms. G~'s intent that she is not the sole beneficiary of the trust. Therefore, the trust, as amended is not a resource.

We note that the probate court approved the amendment in April 1999, and the trustee accepted the amended trust in May 1999. Therefore, the property would cease to be a resource effective June 1999. *See* 20 C.F.R. § 416.1207(a) (first moment of month rule).

CONCLUSION

For the foregoing reasons, we believe that the trust as amended is no longer a resource to Ms. G~ as of the time the amendment was accepted by the trustee. Therefore, the trust would not be a resource effective June 1999.

UU. PS 00-241 Illinois OBRA 93 Trust for Dominick J. G~, SSN: ~ Your Reference: SI-2-1-3

DATE: April 17, 1997

1. SYLLABUS

The funds in the trust are a countable resource as the SSI recipient is the grantor and sole beneficiary of the trust and can revoke the trust and use the funds for his support and maintenance.

2. OPINION

This is in response to your inquiry asking whether the trust agreement for Dominick J. G~ would be a countable resource to Mr. G~, a Supplemental Security Income (SSI) claimant. We conclude that Mr. G~, as the settlor and sole beneficiary of the trust, could revoke the trust and use the trust funds for his support and maintenance. The assets in the trust, therefore, should be considered a resource to him.

Background

Mr. G~ is an adult claimant for SSI benefits. He apparently had some assets, which the guardian of his estate placed in a court-approved trust. The trust purports to be written pursuant to 42 U.S.C. § 1396p, as amended, and is entitled: "TRUST AGREEMENT: DOMINICK G~ OBRA 93." That statute governs eligibility for Medicaid. You submitted letters in which officials from the state Medicaid agency apparently conclude that the trust complies with the statutory Medicaid trust provisions and with state rules implementing that law.

The settlor (grantor) of the trust is named as Trust and Savings , as guardian of Mr. G~ s estate. The trust states that the trust funds are to be used solely for the benefit of Mr. G~ for his "extra and supplemental needs, over and above the benefits he otherwise receives as a result of his handicap or disability" from governmental benefits. Funds are to be paid at the trustee s discretion, and Mr. G~ has no right to demand income or principal from the trust. All expenditures are to be approved in advance by the Probate Court.

The trust purports to be irrevocable and is to terminate on Mr. G~ s death. The trust provides that:

Specifically in accordance with 42 U.S.C. 1396p(d)(4)(A), any amount remaining in the Trust at [Mr. G~ s] death (up to the amount expended by the State of Illinois, or any other state, for medical assistance) shall be paid to the appropriate State agencies, as reimbursement to the State of Illinois or such other state as has provided benefits to [Mr. G~] during his lifetime, except that the Trustee may first pay any outstanding, reasonable expenses for maintaining the existence of the Trust, any final bills, debts, expenses, taxes, fees, funeral-related items, and/or such other items which may be paid, prior to reimbursement to the State, pursuant to statute or regulation now in existence or hereafter enacted or issued. In the event that any Trust assets are remaining after payment of the reasonable expenses and the reimbursement to the State of Illinois or other state(s) as set forth above, then the balance shall be allocated and distributed to the decedent s estate, if any, otherwise pursuant to a small estate s affidavit.

Article 1.03(d).

The trust also provides that it will terminate in the event that Mr. G~ is no longer a disabled person under the Social Security Act. In that event, the trust estate will be distributed outright to Mr. G~, after reimbursement to the State of Illinois or any other state that has provided him benefits. The trust also provides that the trust may be subject to further court order.

DISCUSSION

As we previously advised, the rules governing when trust assets affect eligibility for Medicaid are quite different from the SSI rules for determining when assets are a countable resource. Even if a trust is consistent with the provisions of the Omnibus Reconciliation Act of 1993, as amended, it still may be a countable resource for SSI purposes. *See* Revocability of Wisconsin Trust for Clayton D. B~, ~, OGC-V (D~) to Gloria J. P~, ARC-POS (Oct. 28, 1994) at 4, n.7.

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his or her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *See id.* Trust assets are a resource to the individual if he or she can revoke the trust and use the assets to meet his or her needs for food, clothing, and shelter. *See* POMS SI 01120.200(D)(1)-(3). We previously advised that Illinois appears to follow the general rule that, even if a trust purports to be irrevocable, it nevertheless may be revoked if the individual is both the settlor and sole beneficiary of the trust. Trust as Resource - Illinois - Theresa M~, SSN: ~, OGC-V (P~) to Armando A. G~, Acting ARC-POS (Aug. 4, 1993), at 3.

Here, Mr. G~, acting through his guardian, is the settlor (grantor) of the trust at issue. *See* POMS SI 01120.020(B)(1), (C)(1). For reasons explained more fully below, he also is the only beneficiary of the trust. Therefore, he can revoke the trust at any time and use the assets for his support and maintenance, although his guardian may have to obtain court approval to revoke the trust on his behalf.

Clearly, Mr. G~ is the only beneficiary of the trust during his lifetime. The trust assets also would revert back to him if the trust is terminated because he is restored to competency. The only issue, therefore, is whether the trust creates any interest in any residual beneficiaries if the trust terminates at the time of Mr. G~ s death.

Although the trust provides that, upon Mr. G~ s death, any amount remaining in the trust shall be paid to the appropriate state agencies as reimbursement to the state for benefits paid to Mr. G~ during his lifetime, this does not make the State of Illinois, or any other state entitled to such reimbursement, a beneficiary of the trust. This provision (which apparently is required by the Medicaid provisions cited above) merely requires that the trust reimburse the state for benefits already conferred on Mr. G~ during his lifetime. Therefore, the money paid is for the benefit of Mr. G~, not the state.

Similarly, no additional beneficiaries are established by provisions allowing any payments made for maintaining the existence of the trust, paying any final bills, debts, expenses, taxes, fees, funeral-related items, and/or other items which may be paid by law prior to reimbursement to the state. All of these payments would relate to running the trust itself or providing goods or services for Mr. G~ s benefit (including his funeral-related expenses). These provisions also do not create any additional beneficiaries. *See Stewart*, 3 Ill. App. 3d at 339, 278 N.E.2d at 12.

Any amounts remaining after these payments are to be distributed to Mr. G~ s estate, if any, and otherwise pursuant to a small estate s affidavit. As we have previously advised, a remainder interest in the settlor s estate does not establish any additional beneficiaries. *See* Theresa M~, supra, memorandum at 4; *see also* Restatement (Second) of Trusts § 127, comment b; cf. *Botzum*, 367 Ill. at 542-43, 12 N.E.2d at 204-05 (trust provision that life beneficiary shall by her last will and testament appoint residual beneficiary did not create any title or interest in the possible appointees such that their permission would be required to terminate the trust); *Stewart*, 3 Ill. App. 3d at 337, 339, 278 N.E.2d at 12 (no additional beneficiaries created by provision that, on beneficiary s death, trustee shall pay remainder as the will of the beneficiary may provide, or if there is no will to beneficiary s heirs at law).

Because Mr. G~ is the settlor and sole beneficiary of the trust, he should have the power to revoke the trust, even if the trust purports to be irrevocable. Because he is under a legal disability, however, his guardian would revoke the trust on his behalf.

Illinois case law provides that the settlor and beneficiaries can agree to revoke the trust where they are not under a legal disability. *See Botzum*, 367 Ill. at 542-43, 12 N.E.2d at 205; *Vlahos*, 362 Ill. at 599, 1 N.E.2d at 61-62; *see also* Restatement (Second) of Trusts § 339. The cases, however, do not address the situation in which the trust was established by a guardian on behalf of one under a legal disability. Presumably, if an individual under a disability can create a trust through his guardian, he should be able to revoke the same trust through his guardian.

Illinois statutory law provides that:

Adjudication of disability shall not revoke or otherwise terminate a trust which is revocable by the ward. A guardian of the estate shall have no authority to revoke or amend a trust that is revocable or amendable by the ward, except that a court may authorize a guardian to revoke a Totten trust or similar deposit or withdrawable capital account in trust to the extent necessary to provide funds for the purposes specified in paragraph (a) of this Section [i.e., for suitable support and education of the ward].

755 Ill. Comp. Stat. Ann. § 5/11a-18(d). This provision is designed to prevent a guardian from undoing a trust that the ward established prior to his disability. Here, however, the guardian (not the ward) created the trust while the ward was under a disability. Therefore, there is no danger of thwarting the ward s pre-disability intentions. However, since the ward is under a disability, and especially since the trust was authorized by a court and is subject to further court order, the guardian may be required to obtain court approval prior to revoking the trust on Mr. G~ s behalf. Even if this is the case, however, we see no reason to assume that a court might deny such a request, especially since Illinois law requires guardians to use the ward s assets to provide for the suitable support and education of the ward. *See* 755 Ill. Comp. Stat. Ann. § 5/11a-18(a).

CONCLUSION

In sum, we conclude that the trust assets at issue should be considered a resource to Mr. G~ for SSI purposes since, as settlor and sole beneficiary of the trust, he can revoke the trust and use the trust assets for his support and maintenance.

VV. PS 00-236 SSI Illinois Review of Trust for William N. G~

DATE: December 14, 1998

1. SYLLABUS

A general rule of trust law asserts that a trust is not a countable resource for SSI purposes if the recipient cannot revoke or direct use of the trust for his/her support and maintenance. The Trust principal therefore is not a countable resource. However, although the Trust principal is not a countable resource, disbursements from the Trust under certain circumstances would be countable income for determining SSI eligibility.

2. OPINION

This is in response to your request for an opinion regarding whether, for Supplemental Security Income ("SSI") purposes, (1) the trust established for the benefit of William N. G~ is a countable resource and (2) distributions from the trust are countable income. Because William N. G~ ("William") does not have legal authority to revoke the trust or to direct the use of the trust assets for his own support and maintenance, we have concluded that the trust principal is not a countable resource. However, distributions from the trust that are used for William s support and maintenance and cash distributions paid directly to William are countable income for SSI purposes.

FACTS

In July 1998, Barbara A. F~ ("Grantor") established the William N. G~ Trust Agreement ("Trust Agreement" or "Trust") for the benefit of her physically disabled son, William. The Trust Agreement names Janet A. F~ as Trustee and states that it consists of the property listed on "Schedule A." Although "Schedule A" is currently blank, the file also contains a receipt for $61,000 from the Grantor to fund the Trust. We assume that the $61,000 was actually the Grantor s.

The purpose of the Trust is to maximize all available resources and apply them so that William has the best possible chance of becoming self-sufficient. Accordingly, the Trust is for "extras" to enhance William s quality of life and provide special medical care and treatment that may not otherwise be available. The Trust funds are only to be used to supplement, but never to supplant public funds, so that William can obtain the greatest amount of funds and services available to him from all federal, state, and local governmental sources.

Under the terms of the Trust Agreement the Trustee can use Trust assets for anything consistent with the Trust s purpose that cannot be provided from public funds at a given time, including special education and therapy; job training; medical care; entertainment; travel; pocket money; clothing; and any other type of supplemental needs, goods or services, including special housing or custodial or medical care. The Trust Agreement provides that the Trustee has "sole and absolute discretion" in determining whether to use part or all of the net income and principal of the Trust to benefit William, but forbids the Trustee

from paying Trust income or principal "in such a way as to make [William] or any other beneficiary ineligible for public funds that would otherwise be available . . . ."

In addition to William, the Trust Agreement also establishes other potential beneficiaries. If the Trustee determines that the income from the Trust is ever in excess of that required for William, the Trustee may distribute all or a part of the excess to one of more of the Grantor s living descendants (currently, only William s sister, Andrea). Furthermore, at the time of William s death, or "if the principal or income become counted as a resource for SSI purposes or other public benefit purposes, or if the income is counted to reduce or eliminate any public benefits for William, so that the Trust purpose fails," the Trust principal and income are to be distributed to the Grantor, or if she is deceased, to her descendants, or to other identified beneficiaries depending upon the circumstances.

DISCUSSION

A resource, for determining whether an individual is entitled to SSI, includes cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance 20 C.F.R. § 416.1201(a) (1998). Trust property may be such a resource for SSI purposes. Program Operations Manual Systems ("POMS") SI 01120.200(A). Specifically, trust principal constitutes a resource if an individual (1) has legal authority to revoke the trust and then use the funds to meet his food, clothing, or shelter needs, or (2) can direct the use of the trust principal for his support and maintenance under the terms of the trust. POMS SI 01120.200(D)(1)(a).

Whether the Trust is revocable depends on the terms of the Trust and/or Illinois law. POMS SI 01120.200(D)(2). Article XIII of the Trust Agreement specifically states that it is irrevocable and may not be amended. Nevertheless, under Illinois law, a trust may be terminated if: the purpose of the trust is substantially accomplished and all of the interests created by the trust are vested; there are no unascertainable contingent interests; there are no pending spendthrift provisions; the beneficiaries are in agreement; and none of the beneficiaries is under a legal disability. , 187 N.E.2d 315, 319 (Ill. App. Ct. 1963). *See also Altemeier v.* , 86 N.E.2d 229, 234 (Ill. 1949); , 12 N.E.2d 203, 205 (Ill. 1937). In light of these factors the Trust Agreement remains irrevocable. At Article III, the Trust Agreement states that if at any time the Trustee determines that the Trust resources are in excess of what is needed for William, the Trustee may distribute the excess income to the Grantor s living descendants (presently, William s sister, Andrea). Furthermore, under Article IV the Trust principal and net income are to be distributed to the Grantor or other identified beneficiaries depending upon the circumstances, at the time of William s death or if the Trust purpose fails. Thus, because the Trust Agreement creates contingent beneficiaries, William lacks legal authority to revoke the Trust and use the Trust property for his food, clothing, and shelter. *See Altemeier*, 86 N.E.2d at 234 ("where the trust makes provision for distribution to contingent beneficiaries, or upon uncertain contingencies, the trust may not be terminated even by the unanimous consent of all of the beneficiaries, or the prospective beneficiaries, before the time fixed by the terms of the trust.").

Although William does not have the legal authority to revoke the Trust Agreement, the Trust may still be counted as a resource in determining SSI eligibility if William has the ability to direct the use of the Trust principal. POMS SI 01120.200(D)(1)(a). Such authority may be included specifically in a trust provision allowing the beneficiary to act on his own or in a provision allowing him to order actions by the trustee. POMS SI 01120.200(D)(1)(b). The Trust Agreement includes no such provision. Rather, Article III of the Trust Agreement provides that the Trustee has "sole and absolute discretion" to determine whether to disburse part or all of the Trust income and principal to fulfill the Trust purposes. *See also* Article VII ("The Trustee, in making distributions of income or principal in the Trustee s absolute and sole discretion . . ."). Thus, William does not have the ability to direct the use of Trust assets for his support and maintenance under the terms of the Trust Agreement. *See Stein v. Scott*, 625 N.E.2d 713, 716 (Ill. App. Ct. 1993) (under trust provision that disbursements were to be paid at "trustee s discretion," trustee had unfettered discretion to determine if and when beneficiary should receive trust funds).

Finally, although the Trust principal is not a countable resource, disbursements from the Trust under certain circumstances would be countable income for determining William s SSI eligibility. If the Trustee were to authorize disbursements from the Trust consisting of cash paid directly to William, or payments to a third party for food, clothing, or shelter received by William, such disbursements would constitute income for SSI purposes. POMS SI 01120.200(E)(1)(a) & (b). If, however, such disbursements resulted in William s receipt of goods or services other than food, clothing, or shelter such as medical care the Trust disbursements would not constitute countable income for SSI purposes. POMS SI 01120.200(E)(1)(c).

CONCLUSION

For the foregoing reasons, we conclude that the Trust principle is not a countable resource, but that Trust disbursements under some circumstances would constitute countable income.

WW. PS 00-235 Illinois Trust for Theodore F~ SSN: ~

DATE: July 6, 1998

1. SYLLABUS

As a general rule, funds in a trust that is irrevocable by its terms and under State law are not countable resources. However, when the grantor of the trust is also the sole beneficiary of the trust arrangement, the trust is revocable regardless of language in the trust document to the contrary. Since the individual is the sole beneficiary of the trust, he/she can revoke the trust at any time and use the assets for his/her support and maintenance, even though his/her guardian may have to obtain court approval to revoke the trust on his/her behalf. Thus, the trust is a countable resource for SSI purposes.

2. OPINION

You have asked for an opinion on whether the trust established for the benefit of Theodore F~ is a countable resource for Supplemental Security Income (SSI) purposes. We have reviewed the trust documents and have concluded that Theodore has the legal authority to revoke the trust and then use the assets for his support and maintenance. Therefore, the assets in the trust should be considered a resource to him.

FACTS

At issue is a discretionary trust entitled "Theodore F~ OBRA '93 Trust" ("Trust Agreement") created for the benefit of Theodore F~, who is disabled. His mother, Angela G. P~, is named as the grantor and the trustee. Theodore s step-father and brother, Thomas J. P~ and George F~, respectively, are named as successor trustees. The stated purpose of the Trust is to provide for Theodore's extra and supplemental needs, over and above those benefits he otherwise receives from the federal, state, and local governments as a result of his disability. Because Theodore is disabled, the trustees are instructed not to distribute cash or securities to him directly, but rather are directed to purchase goods and services on his behalf. Theodore has no right to demand income or principal from the Trust.

The Trust Agreement states that it is irrevocable and that it is intended that Theodore still qualify for government assistance. The Trust Agreement may be amended to comply with judicial decisions or other interpretations or changes in the laws and rules, including regulations under 42 U.S.C. 1396p or related state statutes that are consistent with the Revenue Reconciliation Act of 1993 as amended, to conform the Trust provisions to operate and comply with the stated goals of the Trust.

According to the terms of the Trust Agreement, the Trust will terminate on Theodore's death. After paying any outstanding expenses for maintaining the existence of the trust and all reasonable expenses such as debts and funeral costs, the trustee is directed to reimburse the State for any amounts which were expended on Theodore's behalf. If thereafter any assets remain in the Trust, the remaining balance will distributed to Theodore s decedent s estate, if any, otherwise pursuant to a small estate s affidavit.

The Trust Agreement also provides that it will terminate in the event that Theodore is no longer a disabled person under the Social Security Act. In that event, the trust estate will be distributed to Theodore outright, after reimbursement to the State of Illinois or any other state that has provided him benefits.

DISCUSSION

The Social Security Act provides that an unmarried individual is not eligible for SSI if his countable resources exceed $2000. 42 U.S.C. § 1382(a)(1)(B)(ii). A resource is defined as cash or other liquid assets or any real or personal property that an individual owns and can convert to cash to use for his support and maintenance. 20 C.F.R. § 416.1201(a). Thus, if Theodore (1) has the authority to revoke the Trust and then use the funds to meet his food, clothing, or shelter needs, or (2) if he can direct the use of the trust principal for his support and maintenance, the trust principal is considered a resource for SSI purposes. *See* POMS SI 01120.200(D)(1)(a). Consistent with SSI s trust policy, if an individual neither owns nor has the legal right to direct the use of trust assets to meet his or her support and maintenance needs, then the trust assets are not considered a resource. *See* Memo

from OGC-V (Beverly) to P~, ARC-MOS (Dec. 1, 1997) , at 3-4 (inability to revoke the trust or direct the trust principal for support and maintenance render the trust not a resource); *see also* Memo from OGC-V (M~) to Kaiser, Director, POS-RSI/SSIB, SSA-V (June 3, 1997), at 2. Whether Theodore can revoke the Trust or direct the use of Trust assets depends on both the terms of the Trust Agreement and on Illinois law.

As a general rule, funds in a trust that is irrevocable by its terms and under state law are not countable resources. POMS SI 01120.200(D)(2)(b). But even a trust that expressly declares itself irrevocable, may still be terminated if the parties are not under any legal disability, and if the settlor and all beneficiaries agree. *See v.* , 187 N.E.2d 315, 319 (Ill. App. Ct. 1963) ("'Where all parties interested in the trust fund are sui juris they may consent to a termination of the trust and distribution of the fund. '" (quoting *Anderson v.* , 104 N.E. 659, 661 (Ill. 1914) (footnote added)). As a consequence of this rule, when the grantor is the sole beneficiary of the trust arrangement, the trust is revocable regardless of language in the trust document to the contrary. *See* POMS SI 01120.200; , 187 N.E.2d at 319. We have previously advised that Illinois appears to follow this general rule. *See* Memo from OGC-V (M~) to P~, ARC-MOS, SSA-V (July 28, 1997), *In re Rita M. F~*, ~, at 2-3 . Even if he did not reserve the power of revocation, if the grantor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished. *Vlahos v. Andrews*, 1 N.E.2d 59, 61-62 (Ill. 1936).

A grantor or settlor of a trust is the individual who actually furnishes the consideration that establishes the trust, even if another entity nominally creates the trust. , 635 N.E.2d 853, 855 (Ill. App. Ct. 1994). When the sole beneficiary, acting through his guardian, conservator, legal representative, or other individual legally empowered to act on his behalf establishes the trust with funds that actually belong to the sole beneficiary, the sole beneficiary can legally be considered the grantor of the trust. POMS SI 01120.200(B)(2).

Here, Theodore is the grantor of the Trust because he furnished the consideration for its creation, acting through his legal guardian, Angela P~. The property that was used to start the Trust (stock in 3M, cash, and a savings bond) came from Theodore s estate. (*See* Inventory.) Therefore, it was his property. Thus, even though the Trust was set up by Angela P~, she was acting as Theodore s agent; he supplied the consideration and is considered to be the grantor. , 635 N.E.2d at 855. For reasons explained more fully below, he also is the only beneficiary of the trust. Therefore, he can revoke the Trust at any time and use the assets for his support and maintenance, although his guardian may have to obtain court approval to revoke the trust on his behalf.

Clearly, while Theodore is alive, he is the only beneficiary of the Trust, as the trust can only be used for his benefit. Other than the exhaustion of corpus, the only way the Trust would be distributed before Theodore s death is if he were restored to competency, in which case any amount remaining in the Trust would go to Theodore, after reimbursement to the State of Illinois or any other state that provided benefits to Theodore prior to that time (Trust Agreement at 4).

Although the Trust Agreement provides that, upon Theodore s death, any amount remaining in the Trust shall be paid to the appropriate state agencies as reimbursement to the state for benefits paid to Theodore during his lifetime, this does not make the State of Illinois, or any other state entitled to such reimbursement, a beneficiary of the Trust. *See* Memo from OGC-V (M~) to P~, ARC-MOS, SSA-V (June 27, 1997) , ~, at 4. This provision merely requires that the Trust reimburse the state for benefits already conferred on Theodore during his lifetime. Therefore, the money is for the benefit of Theodore, not the state.

Similarly, no additional beneficiaries are established by provisions allowing any payments made for maintaining the existence of the Trust, paying any final bills, debts, expenses, taxes, fees, funeral-related items, and/or other items which may be paid by law prior to reimbursement to the state. All of these payments would relate to running the Trust itself or providing goods or services for Theodore s benefit (including his funeral-related expenses). These provisions also do not create any additional beneficiaries. *See* Memo from OGC-V (D~) to K~, Center Director, SSA-V (April 17, 1997) *In re Dominick J. G~*, ~, at 4.

Any amounts remaining after these payments are to be distributed to Theodore s estate, if any, and otherwise pursuant to a small estate s affidavit. As we have previously advised, a remainder interest in the grantor s estate does not establish any additional beneficiaries. *See* Dominick G~, supra, memo at 4; *see also* Restatement (Second) of Trusts § 127, comment b; , 278 N.E.2d 10, 12 (Ill. App. Ct. 1972) (no additional beneficiaries created by provision that, on beneficiary s death, trustee shall pay remainder as the will of the beneficiary may provide, or if there is no will to beneficiary s heirs-at-law); , supra, memo at 4 ("upon Rita's death, the residual estate is to be distributed to those individuals who are entitled to receive Rita's property as determined in accordance with the laws of the State of Illinois. The use of such terms, however, does not create residual beneficiaries of the Trust, because there are no identifiable residual beneficiaries, either by name or by class"). If the Trust included no information about what to do upon the death of the beneficiary, the money would be put into the beneficiary s estate. *See* Memo from OGC-V (K~) to L~, Acting ARC, SSA-V, (May 24, 1995) Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, at 3. Accordingly, a trust agreement containing language specifying that the trust will pass to the grantor-

beneficiary's estate upon his or her death is legally equivalent to a trust instrument where there is no further provision regarding the disposition of the trust. *Id.* Since the latter creates a revocable trust, the former does as well and language referring to the trust passing to the beneficiary's estate upon the beneficiary's death does not create a residual or contingent beneficiary that would make the trust irrevocable. *See id.*; Restatement (Second) of Trusts, § 127, comment b, p. 273 (1959).

Because Theodore is the grantor and sole beneficiary of the Trust, he has the power to revoke the Trust, even though the Trust purports to be irrevocable. Because he is under a legal disability, however, his guardian would have to revoke the Trust on his behalf. Presumably, if an individual under a disability can create a trust through his guardian, he should be able to revoke the same trust through his guardian. *See* Dominick G~, supra, memo at 5.

CONCLUSION

For these reasons, the Trust in this case is a revocable grantor's trust, as the grantor and sole beneficiary are the same. Because the Trust is a revocable grantor s trust, it can be counted as a resource for SSI purposes. Theodore can, through a guardian, revoke the Trust under Illinois law and obtain either the principal or the interest of the trust to use for his own maintenance and support. POMS SI 01120.200(D)(2); 20 C.F.R. § 416.1201(a).

XX. PS 00-227 Illinois Trust for Rita M. F~, SSN: ~

DATE: July 28, 1997

1. SYLLABUS

The trust in this case is a countable resource as the SSI recipient is the grantor and the sole beneficiary of the trust and can revoke the trust and use the principal for her own support and maintenance.

2. OPINION

You have requested an opinion as to whether the "Rita M. F~ Supplemental Needs Trust Agreement" (the Trust) is a revocable grantor's trust, whether Rita F~ (Rita), a supplemental security income recipient, would have unrestricted access to the trust principal which she could use for her support and maintenance. For the following reasons, we believe that, despite the language in the Trust to the contrary, the actual grantor of the Trust is Rita, the sole beneficiary, and that therefore, the Trust is a revocable grantor's trust and a countable resource under 20 C.F.R. § 416.1201.

FACTS

Heinrich F~, the guardian of the estate and person of Rita F~, a disabled person, filed a counterclaim on her behalf against two health insurance companies. A settlement was reached and submitted for approval by an Illinois circuit court judge in December 1996. It provided that $498,388.94 be distributed to Heinrich F~, as Trustee of the Trust that was established for the benefit of Rita F~ for her lifetime. Rita is the sole beneficiary.

DISCUSSION

A resource, for SSI purposes, includes cash or other liquid assets or any real or personal property that the individual owns and could convert to cash to be used for her own support and maintenance. 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property or her share of the property, it is considered a resource. 20 C.F.R. § 416.1201(a)(1); *see also* POMS SI 01110.100(B). Based on the regulations, trust property may be a resource. If an individual has the ability to revoke the trust and then use the funds to meet food, clothing or shelter needs, or if the individual can direct the use of the trust principal for her support and maintenance under the terms of the trust, then that property will be counted as a resource. POMS SI 01120.200(D)(1)(a). Conversely, if the individual has no power to access the principal or direct the use of the trust principal, then it will not be considered a resource. POMS SI 01120.200(D)(2)(b). Even if the trust property is not a resource, however, the funds paid from the trust may be income to the SSI recipient.

Here, the Trust states that it is irrevocable and may only be altered, amended, restated revoked or terminated by order of the Circuit Court of Peoria County. Article II § 1.1. It is a discretionary trust because the trustee has full discretion as to the time, purpose and amount, if any, of all distributions paid to or for the benefit of Rita's special needs. Article II § 2. *see also* POMS SI 01120.200(B)(10) (defining discretionary trust). The stated purpose of the Trust is to supplement Rita's needs, and it further provides that no income or principal will be distributed if the distribution would result in the denial, discontinuance or

reduction of any governmental funds. Article I(E); Article II § 2. Upon Rita's death, the Trustee is to distribute all amounts remaining in the Trust to the State of Illinois up to an amount equal to the total medical assistance paid by the State of Illinois on Rita's behalf and to distribute any remaining amounts to those individuals who are entitled to receive Rita's property as determined in accordance with the laws of the State of Illinois. Article II § 3.

As a general rule, funds in irrevocable trusts are not countable assets. POMS SI 01120.200(D)(2)(b). The general law of trusts, however, recognizes an exception to this rule — when the grantor is the sole beneficiary of the trust arrangement, the trust is revocable regardless of the language in the trust document to the contrary. Restatement (Second) of Trusts, § 339 (1959); 76 Am. Jur. 2d Trusts 91 (1975); *see also* POMS SI 01120.200(B)(8),(D)(3). We have previously advised that Illinois appears to follow this general rule. Trust as Resource - Illinois -Theresa M~, SSN: ~, OGC-V (P~) to Armando A. G~, Acting ARC-POS (Aug. 4, 1993)(citing , 3 Ill. App. 3d 337, 339, 278 N.E.2d 10, 13 (1972) (expressly "irrevocable" trust could be revoked by agreement of settlors who also were sole beneficiaries of trust)); *see also Six-State Synopsis of Trust Laws*, OGC-V (P~) to P~, ARC, SSA-V (2/26/92) (advising that, in the absence of statutory or case law to the contrary, all six states in our region can be presumed to apply this principle). Thus, under the law in Illinois, a person may not set up an irrevocable trust for himself or herself as sole beneficiary.

A grantor or settlor of a trust is the individual who actually furnishes the consideration that establishes the trust, even if another entity nominally creates the trust. 76 Am. Jur.2d §55; , 635 N.E.2d 853, 855 (Ill. App. 1994) (holding that the language in the trust identifying defendant's insurer as settlor "was nothing more than an attempt to disguise the actual settlor" who was the beneficiary because he furnished the consideration for the creation of the trust when he exchanged his claim against the doctor for the settlement funds deposited in the trust).

Here, Rita furnished the consideration for the creation of the Trust when she, acting through her legal guardian, exchanged her claim against the health insurance companies for the settlement funds deposited in the Trust. Therefore, Rita was the grantor of the Trust as she provided the consideration for the Trust, even though her guardian nominally created it. When the sole beneficiary, acting through her guardian, conservator, legal representative, or other individual legally empowered to act on her behalf establishes the trust with funds that actually belong to the sole beneficiary, the sole beneficiary can legally be considered the grantor of the trust. POMS SI 01120.200(B).

The next question, then, is whether Rita, as grantor of the trust, is also its sole beneficiary. The addition of residual or contingent beneficiaries generally make the trust irrevocable. Restatement (Second) of Trusts, § 127, comment b (1959). Here, the Trust provides that upon Rita's death, the residual estate is to be distributed to those individuals who are entitled to receive Rita's property as determined in accordance with the laws of the State of Illinois. Article II, 3. The use of such terms, however, does not create residual beneficiaries of the Trust, because there are no identifiable residual beneficiaries, either by name or by class. *See* Restatement (Second) of Trusts, § 127, comment b (1959); *see also* Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, OGC-V (K~) to L~, Acting ARC, SSA-V, at 2 (5/24/95) (hereinafter Clarification).

Where a trust specifies only that the trust will pass to grantor-beneficiary's estate (or to whom he or she may appoint by will), the trust is legally equivalent to a trust instrument where there is no further provision regarding the disposition of the trust. *Id.* at 4. Since the latter creates a revocable trust, the former does as well, and such language does not create a residual or contingent beneficiary that would make the trust irrevocable. Id. (citing Restatement (Second) of Trusts, § 127, comment b (1959); Theresa L. D~ G~, OGC-V (S~) to L~, Acting ARC, SSA-V, at 2-3 (3/29/95).

Where a trust purports to create an interest in favor of the grantor-beneficiary's "heirs at law", or to her next of kin or persons entitled to inherit on her death intestate (such as the Trust in this case), the general rule is that in the absence of a manifestation of a contrary intention, the inference is that [the grantor-beneficiary] is the sole beneficiary of the trust. Restatement (Second) of Trusts, § 127, comment b (1959); *see also* Clarification, at 4-6.

Here, because the term used by the Trust for distribution upon Rita's death refers solely to those entitled to inherit on her death under the laws of Illinois, we believe such language fails to create additional beneficiaries. Consequently, Rita is the sole beneficiary of the Trust.

For these reasons, we believe that the Trust in this case is a grantor's trust as the grantor and sole beneficiary are the same. Because the Trust is a revocable grantor trust, it can be counted as a resource for SSI purposes. Rita, through her legal guardian, can revoke the trust under Illinois law and obtain unrestricted access to its principal or interest to use for her own maintenance and support. 20 C.F.R. § 416.1201(a); POMS SI 01120.200(D)(2).

YY. PS 00-180 Blocked Account in Illinois as SSI Resource: Duane P. C~, Jr., ~ (Your Ref: S2D5B2, SI-2-1)

DATE: December 7, 1990

1. SYLLABUS

This opinion concerns whether funds held in a blocked account for a minor SSI recipient are countable resources.

An account is considered "blocked" where a State permits a guardian or payee to access funds held on behalf of another only with the permission of the court. Such funds are generally presumed to be available under Illinois law unless there is a legal restriction on the use of the funds that nullifies the presumption of availability. Not every court order denying a request for expenditures constitutes a legal restriction that nullifies the presumption that the funds are available for the beneficiary's support and maintenance. Under Illinois law, a guardian of a minor's estate is required to expend the minor's funds for his/her support and maintenance. Thus, as long as the funds are available for the minor's support and maintenance, they are considered a resource.

2. OPINION

By memorandum dated July 27, 1990, you asked us for an opinion on whether funds held in an account for a minor SSI beneficiary, Duane P. C~, Jr., ~, are countable resources for SSI purposes. Such funds are generally presumed to be available under Illinois law unless there is a legal restriction on the use of the funds that nullifies the presumption of availability. Here, there is a court order that finds that the funds "are not excess countable resources for SSI payment purposes" and denies the request for withdrawal of funds.

In our opinion, however, there is insufficient basis to conclude that the court order is a legal restriction on the use of the funds that nullifies the presumption that the funds are available for the beneficiary's support and maintenance. We therefore conclude that the funds are available for the beneficiary's support and maintenance and should be counted as resources for SSI purposes.

BACKGROUND FACTS

Here, in early 1985 an account of some $11,000.00 was established at the Northern Trust Company in the name of the minor, Duane C~, Jr. The funds apparently resulted from the settlement of a lawsuit. According to the January 1985 "Order to Settle Cause of Action - Minor's Estate" entered by the Circuit Court of Cook County, Illinois, the funds were to be held:

in an account in the name of the minor to be held subject to further order of court or to be released to the minor without further order upon the attainment of majority on December 5, 1992.

The Northern Trust account is held in the name of "Duane P. C~, Jr., a Minor." Neither the account itself, nor the account statements, indicate that the account is held in trust or under any other restriction(s). The beneficiary's mother, Mrs. Shirley C~, appears to have been the guardian of the minor's estate. She stated in the September 1989 Request for Reconsideration that "the funds withdrawn from the account [were] used to support Duane and other needs regarding to shelter, food, clothing, etc." It does not appear that she sought permission from the court before withdrawing funds. In the May 24, 1990 Request for Reconsideration, Mrs. C~ stated that "I was not aware that I should have not been removing funds out of Duane Jr.'s account." In September 1989 the account had a balance of some $4756.54. Following occasional withdrawals, by the end of 1989 the account had a balance of some $4292.49.

By early 1990, Mrs. C~ appears to have been represented by counsel. It is not clear if she remains the guardian of her minor son's estate. In May 1990, the Circuit Court of Cook County, Illinois, appointed a guardian ad litem "to seek SSI benefits and any assets of minor" and continued all pending matters to June 22, 1990. On June 22, 1990, Judge W~ of the Circuit Court of Cook County, Illinois, issued an Order that stated:

This matter coming in for withdrawal of funds. The court being advised in the premises,

It is hereby ordered that:

a. the funds in the minor's account at Northern Trust Company are not excess countable resources for Supplemental Security Income payment purposes of the Social Security Administration;

b. the request for withdrawal of funds is denied.

DISCUSSION

Citing POMS SI 01120.110, we have previously advised you that where a fiduciary manages and controls funds owned by an SSI recipient, those funds are still considered available to the recipient for his support and maintenance absent a legal restriction on the use of or access to the funds by the payee or guardian. OGC-V (L~) to SSA-V, ARC-POS (W~), "Blocked Accounts as SSI Resources — Action," August 3, 1989; OGC-V (M~) to SSA-V, ARC-POS (P~-W~), "Blocked Account in Michigan as SSI Resource: Richard B~, ~," December 4, 1990. An account is considered "blocked" where a state permits a guardian or payee to access funds held on behalf of another only with the permission of the court. Since under Illinois law a minor's funds are to be used for his support and maintenance, the funds in a "blocked" account are presumed to be accessible by petition and are resources. OGC-V (L~), supra; POMS 01120.210D.1 (Feb. 1989); and the regional POMS supplement at SI R01120.210.

However, we have also previously advised you that the presumption of availability can be nullified in several circumstances. For example, we have advised that there may be a court order disapproving all or part of the expenditures made by the guardian on behalf of the ward, thereby constituting a legal restriction on the use of the funds expended that would nullify the presumption of availability. We further advised that the order establishing a guardianship may have to be reviewed to determine whether the court has imposed any restrictions on the guardian or minor's access to funds in a "blocked" account. OGC-V (L~), supra; OGC-V (M~), supra; and the regional POMS supplement at SI R01120.210. Accord, POMS 01120.210D.2 (Feb. 1989), which states that "The assumption of an owner's access to funds is nullified by evidence of a legal restriction against such access." /

As the following discussion makes clear, in our opinion not every court order disapproving expenditures made by the guardian constitutes a legal restriction that nullifies the presumption that the funds are available for the beneficiary's support and maintenance. Our previous opinions are limited to the extent they may have suggested otherwise.

We previously suggested that the order establishing the guardianship may be relevant to the question of availability of funds. For example, as in the December 4, 1990 OGC-V opinion involving a Michigan beneficiary, the order establishing the guardianship may itself preclude the use of the funds for the support or maintenance of the minor. OGC-V (M~), supra. Similar examples are contained in the previously-cited POMS sections whereby by operation of a court order, State law, or the terms of the account involved, the particular funds are in fact not available for the beneficiary's support and maintenance.

In addition, there may be other relevant considerations affecting whether SSA will conclude that a court order that disapproves expenditures made by the guardian constitutes a legal restriction that nullifies the presumption that the funds are available for the beneficiary's support and maintenance. These considerations may include, but are not necessarily limited to, such factors as whether the court's order actually addresses the availability of the funds for the beneficiary's support and maintenance; the jurisdiction of the court to enter the order restricting availability; whether there is an adequate factual basis for the court's order; the consistency of the court order with State law requirements; or the consistency of the court's order with previous actions by the involved parties or by the court itself. Social Security Ruling 83-37c, which adopts the decision in *Gray v.* , 474 F.2d 1370 at 1373 (6th Cir. 1973). There, the court described the following four prerequisites to the Secretary's acceptance of a State court determination as conclusive:

1) An issue in a claim for social security benefits previously has been determined by a State court of competent jurisdiction; 2) this issue was genuinely contested before the State court by parties with opposing interests; 3) the issue falls within the general category of domestic relations law; and 4) the resolution by the State trial court is consistent with the law enunciated by the highest court in the State.

One of the four factors described in the *Gray* case and Social Security Ruling 83-37c requires that the issue resolved by the State court fall within the general category of domestic relations law. / Although the court order herein does not clearly arise within the general category of domestic relations law, in our opinion the remaining three principles may well provide guidance in other types of cases as well. While not having the force and effect of the law or regulations, Social Security Rulings are binding on all components of the Social Security Administration as precedents in determining other related cases. Therefore, we recommend consideration of the remaining three factors herein, along with all other relevant factors, to the extent they are applicable. /

In short, a court order that disapproves all expenditures for support or maintenance generally constitutes a legal restriction that nullifies the presumption of availability, especially where that court order is not prohibited by State law and reflects a restriction on the face of the order establishing the guardianship or reflects a restriction on the face of the account in question.

In certain circumstances, however, where there is a legitimate question as to whether or not the court has actually disapproved expenditures for support or maintenance, it may be appropriate for SSA to continue to develop the matter. This is such a case.

Here, in June 1990 the Circuit Court of Cook County, Illinois ordered that the funds "are not excess countable resources for SSI payment purposes" and denied the request for withdrawal of funds. In our opinion, however, there is insufficient basis to conclude that the court order is a legal restriction on the use of the funds that nullifies the presumption that the funds are available for the beneficiary's support and maintenance.

The record you have provided us does not show who sought the withdrawal of funds in 1990 or for what purpose they were sought. Based on the evidence we have, it appears likely that either the beneficiary's mother, or an attorney acting on behalf of the beneficiary, his mother or his estate, was seeking to withdraw the funds in response to an SSA determination of overpayment or ineligibility, rather than for the minor beneficiary's support and maintenance. Had the funds instead been sought for the support or maintenance of the beneficiary, we do not know what the court would have ruled. Under Illinois law, a guardian of a minor's estate is required to expend the minor's funds for his or her support or maintenance. Ill. Ann. Stat. ch. 110 1/2, paras. 11-13(b) and 11a-18(a) (S~-H~ Supp. 1989); , 520 N.E.2d 690 (1st Dist. Ill. 1987), appeal denied *Goodman v. Berger*, 530 N.E.2d 244 (1988). Although in 1985 the State court herein ordered that funds should not be withdrawn from the minor SSI beneficiary's account without "further order or court," the account established pursuant to that court order showed no restrictions. In fact the claimant's mother withdrew over $6000.00 during 1985 through 1989 for the minor's support and maintenance without seeking permission from the court and the court does not appear to have questioned any of the mother's withdrawals.

Under 20 CFR 416.1201(a), resources are defined as "cash or other liquid assets ... that an individual ... owns and could convert to cash to be used for his or her support and maintenance." Thus, the answer to the legal conclusion of whether or not the funds are SSI resources turns on the factual question of whether, as a matter of State law or the documents establishing the account or some other consistently-applied restriction, the funds are available for the claimant's support and maintenance. The Secretary would likely defer to a State court's resolution of the factual question, especially if the issue had been genuinely contested by parties with opposing interests, was consistent with prior actions by the parties or with prior court order, or reflected a restriction that appeared on the face of the account. E.g., Social Security Ruling 83-37c and , supra. Here, however, there is no evidence that the State court ever asked or answered the factual question of whether the funds are available for the claimant's support and maintenance, that the parties contested the issue, that the order was consistent with prior actions by the parties or the court, or reflected a restriction on the account. The evidence we have suggests instead that some $6000.00 from the account in question was in fact spent for the beneficiary's support and maintenance over an extended period of years and that the account contained no restrictions on its face. This is therefore a basis for SSA not to defer to the State court's order.

Moreover, the State court's ruling appears to be improper under State law, since under Illinois law such funds are required to be used for the claimant's support and maintenance. Ill. Ann. Stat. ch. 110 1/2, paras. 11-13(b) and 11a-18(a). This is an additional basis for SSA not to defer to the State court's order. E.g., Social Security Ruling 83-37c and , supra.

Finally, SSA generally defers to a State court's order interpreting State law, especially in those areas where a domestic relations or similar question arises under State law and/or the Social Security Act specifically incorporates State law requirements. , supra. The legal conclusion here, however, regarding whether or not the funds constitute resources for SSI purposes, arises under Federal law (i.e., Title XVI of the Social Security Act and 20 CFR 416.1201(a)). Again, this provides an additional basis for SSA, whose position was not represented in the State court proceedings, not to defer to, much less be bound by, the State court's order. At most, there appears to be an unfounded attempt to circumvent the Federal requirements that should not be countenanced by SSA.

In summary, the State court's legal conclusion herein is not factually supported and the necessary factual predicates do not appear to have been considered much less genuinely contested; the State court's order is inconsistent with prior actions (or inactions) by the parties and/or the court; the State court's order is not required by the terms establishing the account in question or reflected on the account's face; and the State court's order appears to be incorrect as a matter of State and Federal law. Moreover, while the State court's order concludes that the funds are "not excess countable resources for Supplemental Security Income payment purposes," the order does not conclude that the funds may not be used for the beneficiary's support and maintenance. There is thus insufficient basis to conclude that the court order is a legal restriction on the use of the funds that nullifies the presumption that the funds are available for the minor's support and maintenance under Illinois law. For the foregoing reasons, in our opinion the Secretary need not defer to the State court's order determining that the funds are not SSI

resources. We therefore conclude that the funds are available for the beneficiary's support and maintenance and should be counted as resources for SSI purposes.

Should you have additional evidence available regarding the court proceedings that led to the court's June 22, 1990 Order that undermines our analysis or conclusions, we will be happy to review this matter further.

Footnotes:

[1] If the grantor of the Trust corpus is a third party, then the Trust would be subject to evaluation only under the general resources rules, described below.

[2] Importantly, if any other changes are made to the Trust, we cannot comment on how it may impact this analysis.

[3] We note that the Adoption Agreement indicates that it may be amended so long as the grantor and trustee agree and so long as the amendment is consistent with the Master Trust. The grantor/beneficiary could not, however, unilaterally amend even the Adoption Agreement under this provision.

A. PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~

DATE: September 16, 2002

1. SYLLABUS

This opinion addresses whether a personal effect (in this case, a piano) owned by an SSI recipient, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required by her physical condition under the household goods and personal effects exclusion. This is essentially an evidentiary issue; i.e., the key is whether the fact finder in the FO has sufficient evidence to determine that the piano is required by the individual's physical condition. Under 20 CFR 416.1216(c), certain household goods and personal effects are excluded from SSI resource counting if they are "required because of a person's physical condition." As long as there is sufficient evidence for the fact finder to determine that the piano (or similar item) is required as treatment or therapy for the individual's physical condition, then the item could be excluded as a resource. If the fact finder cannot determine that the piano (or similar item) is required, then the current market value of the piano (or similar item) is subject to the $2,000 maximum exclusion for household goods and personal effects [20 CFR 416.1216(a)-(b)]. It should be noted that the exclusions discussed above do not appear in the Social Security Act.

2. OPINION

You asked whether a piano, owned by SSI claimant Alicia W~, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required because of her physical condition. We conclude that, although there is no caselaw or other legal authority interpreting the applicable regulation, 20 C.F.R. § 416.1216(c), the Agency may consider the piano as an excludable resource, under 20 C.F.R. § 416.1216(c), provided Ms. W~ can show that playing the piano is required as treatment or therapy for her physical condition. If the Agency finds that the piano is not so required, further development and consideration may be warranted to determine the actual current market value of the piano.

FACTS

Alicia W~ owns a baby grand piano that the Wausau Field Office reported is worth $7000. It is not clear how the valuation of $7000 was reached. For purposes of this memorandum, we assume that $7000 is likely the amount Ms. W~ paid for the piano. Ruth J~, a benefit specialist with the Aging and Disability Resource Center of Marathon County, has advised SSA that Ms. W~ tried to sell her piano by advertising it in a local newspaper and with the Wausau Conservatory of Music and by contacting several local churches. Two individuals expressed interest, but Ms. W~ received no offers to buy the piano. We do not know what price Ms. W~ asked or whether anyone would be willing to purchase the piano for less than her asking price. Ms. J~ stated, in April 2002, that a local music store sold only one comparable piano in the preceding year. The price that the music store charged was not reported. Although Ms. J~ indicated that she was providing the field office with a statement from the music store, no such statement was included in the materials forwarded to us. Ms. J~ also reported that Ms. W~ uses the piano daily and that she is the only member of her household.

Ms. W~ has a congestive heart condition and hypertension. On December 12, 2001, her physician, Arthur W~, M.D., wrote a letter stating that playing piano provided Ms. W~ with positive health benefits in terms of stress relief, which resulted in positive benefits for her hypertension. Dr. W~ further stated that being forced to sell her piano in order to receive SSI "would have a deleterious effect on her overall health."

DISCUSSION

The Social Security Act (the Act) provides that certain resources are excludable resources for SSI purposes. 42 U.S.C. § 1382b. Among the resources that may be excluded are household goods and personal effects, but only to the extent that their total value does not exceed the $2000 limit set by the Commissioner. 42 U.S.C. § 1382b(2)(A); 20 C.F.R. § 416.1216(b). The regulations define "personal effects" to include musical instruments. Thus, a portion of the value of Ms. W~'s piano could be excluded as a personal effect, provided the total value of her other personal effects and household goods is less than $2000. However, it appears that Ms. W~'s piano may be worth considerably more than that. We must determine, therefore, whether her piano may be excludable for some other reason, or whether the value of her piano can be considered less than previously assumed.

Exclusion for Items Required for Person's Physical Condition

The exclusion for household goods and personal effects that are required because of a person's physical condition does not appear in the Act. *See* 42 U.S.C. §1382b. The exclusion became a part of SSI regulations effective October 20, 1975. 40 Fed. Reg. 48911, 48916 (October 20, 1975). Neither the preamble to the final regulation published on that date nor the preamble to the proposed regulation states the rationale for the exclusion or gives any further clarification as to its application. *See* 39 Fed. Reg. 2487 (January 22, 1974); 40 Fed. Reg. at 48911. Thus, we cannot ascertain from those publications whether the Agency intended for the exclusion to apply to items such as a piano that provide "positive health benefits" in terms of an individual's physical condition. The POMS, likewise, provides no guidance in this situation. *See* POMS SI 01130.430. We were unable to find any caselaw interpreting the regulatory provision or any OGC precedential opinion on the subject. Similarly, we found no caselaw regarding other needs-based federal entitlement programs that might be helpful in interpreting 20 C.F.R. § 416.1216(c).

The Internal Revenue Code (IRC), however, includes a personal income tax deduction for medical care expenses. 26 U.S.C. § 213(a). The definition of "medical care" includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . .." 26 U.S.C. § 213(d)(1)(A). The Internal Revenue Service (IRS) addressed the issue of whether the cost of a piano could be deducted under the IRC medical care provision in two private letter opinions. In the first, parents bought a piano so that their child, who had polio, could strengthen her finger muscles and improve her posture. Priv. Ltr. Rul. 59-03205410A (March 20, 1959), 1959 WL 59702. The IRS determined that, if the use of the piano was prescribed by a physician to mitigate the effects of the child's illness, and if the child was the only one to use the piano, a portion of the cost could be deducted as a medical care expense. *Id.* The portion of the piano's cost that could be deducted was "the minimum cost of a piano of a quality sufficient for the therapeutic purposes" subject to the ceiling of 7.5% of adjusted gross income, as provided in 26 U.S.C. § 213(a). Priv. Ltr. Rul. 59-03205410A. Another private letter ruling states that, after suffering a nervous breakdown, a taxpayer's daughter "was induced by her doctors to resume piano lessons, in view of her particular aptitude in this area, as it was hoped that this would be good therapeutic treatment and would create a motivation toward recovery." Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. The taxpayer could not find a suitable used piano, so he bought a new piano for $800. The IRS held that the taxpayer could take a medical care deduction for "an amount which does not exceed the minimum cost of a piano of a quality sufficient to effect the prescribed therapy," subject to the limitations in 26 U.S.C. § 213. Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. To the extent, however, that the expenditure was "elaborate," i.e., beyond the need for the prescribed medical therapy, it was not deductible because it was not directly related to medical care. *Id.*

The IRC provision relied upon in these two private letter rulings is not identical to the resource exclusion provision in the Social Security Regulations. The IRC section would apply to expenditures for treatment of a mental condition as well as a physical condition, but the Social Security regulation would allow exclusion of an item only if it is required because of the SSI claimant's physical condition. Compare 26 U.S.C. § 213(d)(1)(A), 20 C.F.R. § 416.1216(c). While the Social Security regulation allows for exclusion of a resource "required because of a person's physical condition," 20 C.F.R. § 416.1216(c) (emphasis added), the IRC provision, 26 U.S.C. § 213(d)(1), allows a tax deduction for "amounts paid" for treatment (emphasis added). Although the IRC section does not address whether an expenditure is medically required, the private letter rulings provide some support for the conclusion that, in some cases, piano playing may be prescribed as part of an individual's medical treatment.

There is nothing in the Social Security Act or Social Security Regulations to direct a conclusion on this issue. We think it reasonable, however, to conclude, based on the private letter rulings, that there are situations in which a doctor may reasonably require a patient to play a piano as a necessary part of treatment or therapy for the patient's physical condition. Unlike the medical care deduction provision in the IRC, the SSI exclusion for items required for a person's physical condition does not place any limitation on the value of items which can be excluded, even though some of the items listed, such as an engagement ring or a dialysis machine, could have considerable monetary value. 20 C.F.R. § 416.1216(c); *see also* POMS SI 01130.430 ("Items Excluded Regardless of Value") (emphasis added).

The letter from Ms. W~'s physician states that it is important that she enjoy the benefits of her piano because it relieves her stress and, consequently, has a positive effect on her hypertension. The doctor further states that selling the piano to receive SSI benefits would be "deleterious" to her health. In the absence of evidence casting doubt on the doctor's credibility, we think this statement may be sufficient for a fact-finder to conclude that the piano is required for Ms. W~'s physical condition. You may want to obtain clarification from the doctor, however, that he considers playing the piano a required part of Ms. W~'s treatment or therapy for her hypertension or her congestive heart condition. You may also want to verify that the "deleterious" effect of selling the piano refers to her inability to receive the therapeutic benefit of playing the piano, rather than to other factors, such as a contemplated elevation of her blood pressure because selling the piano would upset her.

If you find that playing a piano is required for Ms. W~'s physical condition and she is the only person who will use the piano, the entire value of the piano should be considered an excludable resource. If, however, you find that playing piano is not required for Ms. W~'s physical condition, it will be necessary to determine the piano's value.

Determining the Current Market Value

If you determine that the piano is not an excludable resource under 20 C.F.R. § 416.1216(c), the current market value of the piano will be subject to the $2000 maximum exclusion for household goods and personal effects. 20 C.F.R. § 416.1216(a)-(b). Contrary to Ms. J~'s contention, the fact that Ms. W~ was unable to sell her piano does not necessarily mean that the value of the piano is zero. The piano likely has some value, even if it is not the $7000 purchase price. It is possible that the value of the piano is zero, however, if, for example, a buyer's expense to move the piano from Ms.W~'s home to a new location exceeds the price that a buyer would ordinarily pay for the piano.

The information provided to us did not indicate what price Ms. W~ was asking for the piano when she advertised it. It may be that she was simply asking a higher price than the current market value and, therefore, did not get an offer. We suggest further development to ascertain the current market value of the piano. For example, did Ms. W~ get any offers to buy the piano and, if so, what amount was offered? Ms. J~ indicated that the local music store sold one comparable piano over the past year. What was the sale price? Are there other music stores in the area that carry comparable pianos? If so, what price do they charge? Has Ms. W~'s piano been appraised? How much would a pawn shop pay for the piano, given that it could be difficult to sell quickly?

We note that POMS SI 01150.200 contains a provision that, under certain circumstances, allows for conditional SSI benefits for a limited period while an individual attempts to sell a non-liquid resource. The individual must agree to sell the resource at the current market value within a specified period and use the proceeds to refund the overpayment of conditional benefits. POMS SI 01150.200B.1. The period of conditional benefits where personal property is concerned would generally end after three months, except that there could be one three-month extension granted for good cause. SI 01150.201A. The individual must make reasonable efforts to sell the resource, taking all necessary steps to sell the resource through the local media. SI 01150.201B.1. The information provided to us does not indicate whether Ms. W~ was eligible for, or received, conditional benefits under these POMS provisions.

We also note that, even if Ms. W~ purchased the piano for $7000, and if the Agency determines that the current market value of her piano is less than $7000, it does not necessarily mean that her purchase was a transfer for less than fair market value. *See* POMS SI 01150.005A. (transfers of resources for less than fair market value after December 14, 1999 may result in a period of SSI ineligibility). Nor does the fact that Ms. W~ may not be able to sell her piano for the same price she paid mean that she paid more than the fair market value. Fair market value is the current market value of a resource at the time the resource is transferred, i.e., the going price for which it could reasonably be expected to sell at the time, on the open market in the geographic area involved. POMS SI 01150.005. If Ms. W~ bought her piano on the open market, e.g., from a merchant, the $7000 purchase price is assumed to be the fair market value at the time of the transfer. POMS SI 01140.005C.4.a. It may be that the value of the piano has depreciated since its purchase, or simply that the going price for a comparable piano was $7000 at the time of the purchase but is less now due to economic conditions. A prospective buyer might be willing to pay more for a piano bought from a merchant whose reputation is known than he would pay in a private sale by a stranger. A merchant might

also be in a position to charge more because he could offer a factory guarantee or a store guarantee that a private seller like Ms. W~ cannot offer. Finally, a merchant might be in a position to wait until a buyer came along who was willing to pay a higher price. Thus, the current market value of the piano, in Ms. W~'s hands, may be less than the amount she paid for the piano, even though the original purchase was not a transfer for less than fair market value.

CONCLUSION

In summary, we conclude that, if the Agency fact-finder concludes that Ms. W~ has shown that playing piano is required as part of her treatment or therapy for her physical condition, the piano's entire value may be excluded under 20 C.F.R. § 416.1216(c). If the fact-finder concludes that playing piano is not required for Ms. W~'s physical condition, the current market value of the piano should be considered a household good or personal effect subject to the $2000 maximum exclusion for all household goods and personal effects. However, the Agency may want to give further consideration to the current market value of the piano in Ms. W~'s hands.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By:_____
Nancy L. B~
Assistant Regional Counsel

B. PS 00-327 Illinois—Forethought Prepaid Burial Agreement for Edward M~, ~; Your Ref. S2D5G3

DATE: April 6, 1998

1. SYLLABUS

Funding a pre-paid funeral contract by irrevocably transferring ownership of a life insurance policy to an irrevocable trust that is not the funeral provider or the seller is valid under Illinois law.

2. OPINION

This is in reply to your November 18, 1997, inquiry concerning whether the life insurance funded burial trust agreement for Edward M~, an aged SSI recipient, is valid under Illinois law. For the following reasons, we conclude that the burial trust agreement is valid, and the cash surrender value of the life insurance policy is not a countable resource.

FACTS

On October 28, 1997, Mr. M~ purchased pre-paid funeral services of $4544.57 from the Modell Funeral Home. The services were funded by a concurrently purchased life insurance policy, issued by the Forethought Life Insurance Company. Mr. M~ also transferred that Policy to the Modell Funeral Home, in an Agreement called "Change of Policy/Certificate/Annuity Ownership To The Forethought Trust." In the agreement, the Modell Funeral Home promised to immediately transfer ownership to the Forethought Trust on Mr. M~'s behalf. The agreement specified that the proceeds of the policy were to be used to fund burial expenses and that Mr. M~ retained the right to change the designated funeral firm and the name of the beneficiary. The agreement with the funeral firm included the full range of funeral services and products, such as embalming, a funeral ceremony, a graveside ceremony, a casket and outer burial container, as well as such miscellaneous items as the services of a clergyman, and obituary notices. Mr. M~ already owns a burial site.

The "Transfer Of Ownership To Funeral Firm" section of the document states specifically that the transfer of ownership was "permanent," except as provided for in that document, and that Mr. M~ gave up his right to control the policy, surrender it for cash, or obtain a loan against it. The document indicates, however, that Mr. M~ retained the option to designate a different funeral home and that he could change the name of the beneficiary. You noted that the "Funeral Planning Agreement" accompanying the pre-need contract indicated that the funeral plan could be canceled in accordance with the terms of the Forethought documents, and that, under certain conditions, the purchaser could receive the cash value of his policy. You asked whether, under these facts, the life insurance funded trust agreement was valid and irrevocable.

DISCUSSION

A life insurance funded burial contract involves an individual purchasing a life insurance policy in his name and then assigning, revocably or irrevocably, either the proceeds or ownership of the policy to a third party, generally a funeral provider. The purpose of the assignment is to fund a pre-arranged burial contract. *See* Program Operating Manual System (POMS) § SI 01130.425(A)(2). Here, ownership of Mr. M~'s life insurance policy was transferred to the funeral provider, and then to an irrevocable trust. Since the policy was placed in trust, the resource value of the trust must be evaluated according to the rules governing trust funds in order to determine whether it is a countable resource for SSI purposes. POMS §§ SI 01130.425(A)(2), SI 01120.200(E).

The "Change of Policy/Certificate/Annuity Ownership to the Forethought Trust" agreement in this case provided that Mr. M~'s transfer of ownership was "permanent" and that Mr. M~ waived all rights under the insurance policy to surrender it for cash or to obtain a loan against it. Because this transfer was permissible under state law, as described below, the trust was irrevocable.

The agreement also provided that Mr. M~ "retain[ed] the right to change the designated funeral firm" as well as the "beneficiary." So the question becomes whether, in light of these provisions, a life insurance policy placed in an irrevocable trust is a countable resource.

A resource, for SSI purposes, is defined as property that the SSI beneficiary owns and can convert to cash, or property or over which the beneficiary has the right, authority, or power to liquidate. 20 C.F.R. § 416.1201. In applying this definition to trusts, the POMS states that if the claimant neither owns nor has the legal right to direct the use of trust assets to meet his support or maintenance needs, and state law allows a revocably assigned life insurance policy that funds a funeral contact to be placed irrevocably in trust, the policy's cash surrender value is not a resource for SSI purposes. SI 01130.425(E)(1). The trust at issue meets these standards.

The above-mentioned provision of the "Funeral Planning Agreement," indicating that, under certain circumstances, when the funeral plan is canceled, the "certificate holder" may receive the cash value of the life insurance policy, is not applicable to this case. Here, the life insurance policy had been irrevocably transferred to the Forethought Trust, as plaintiff has given up all rights control, including the right to surrender the policy for cash.

Further, the irrevocable assignment of the pre-needs contract is in accordance with Illinois law. Effective January 1, 1994, the state of Illinois revised the Illinois Funeral or Burial Funds Act, which regulates pre-needs burial contracts. *See* 225 ILCS 45. The Act states specifically that "[n]othing shall prohibit the purchaser [of a life insurance or annuity funded pre-need contract] from irrevocably assigning ownership of the policy or annuity used to fund a guaranteed price pre-need contract to a person or trust for the purpose of obtaining favorable consideration for Medicaid, Supplemental Security Income, or another public assistance program, except that neither the seller nor the contract provider shall be named the owner of the policy or annuity." 222 ILCS 45/2a(c). That is precisely what was done here. While another section of this statute specifies that pre-need contracts are generally revocable, *see* 222 ILCS 45/4(a), (c), that section reiterates the provision that the purchaser of the pre-need contract may make the contract irrevocable for purposes of obtaining SSI or another government benefit. 222 ILCS 45/4(a).

Here, the trust agreement makes clear that the trust itself is irrevocable and that Mr. M~ simply retained the right to change funeral providers, not that he was able to surrender the policy for cash or to obtain a loan against it. The Forethought Trust is not a funeral provider, and thus could receive irrevocable assignment of the policy under 225 ILCS 45-2a(c). Consequently, pursuant to Illinois law, the life insurance trust in this case is valid. The insurance policy has been transferred to a valid irrevocable trust, and Mr. M~ no longer owns the policy or has the power to use it for his support and maintenance. Consequently, the cash surrender value of Mr. M~'s life insurance is not a countable resource for SSI purposes. *See* 20 C.F.R. § 416.1201(a); POMS SI 01130.425(E).

CONCLUSION

We conclude that Mr. M~'s irrevocable life insurance- funded burial trust agreement is valid under Illinois law, despite his retained ability to change funeral providers. Additionally, the cash surrender value of the life insurance policy is not a countable resource for SSI purposes.

A. PS 07-034 SSI-IL.-Review of Annuity Payments to the Virginia L~ Irrevocable Special Needs Trust, ~ ACTION/Your Ref: S2D5G6 SI 2-1-3 IL Our Ref: 06-0090

DATE: December 12, 2006

1. SYLLABUS

This opinion establishes the precedent that in the state of Illinois where a structured settlement agreement contains a non-assignment provision for periodic payments from an annuity, even a court cannot modify the agreement to permit assignment. Therefore, the payments are income because they cannot be assigned directly to a trust or anyone else.

2. OPINION

You asked us whether payments from an annuity issued by the Metropolitan Insurance & Annuity Company (hereinafter "Annuity") to the Virginia L~ Irrevocable Special Needs Trust (hereinafter "Trust") constitute income to Hector L~, a disabled adult. For the reasons discussed below, we conclude that the annuity payments are income.

BACKGROUND

In September 1988, Hector L~ was born with cerebral palsy. His parents subsequently filed a lawsuit on his behalf against the physician who provided pre-natal care. In August 1999, the guardian ad litem, the guardian of the estate, and his parents agreed to a settlement with the defendant and her insurer. On August 30, 1999, the court entered the Order Approving Settlement of Minor's Claim ("Order"), which approved the settlement agreement.

Section 2.2 of the settlement agreement provides for monthly payments for the life of Hector, with such "Periodic payments payable to the designated guardian of Hector L~, a minor (payee)." Section 5 of the settlement permitted the defendant to make a qualified assignment of the obligation to make periodic payments to the Metropolitan Insurance and Annuity Company. Paragraph 12 of the Court's Order approving settlement mentions the Annuity. Section 3 of the settlement provides that the payee does not have the power to sell or assign the periodic payments.

At the time of the settlement, Hector's mother, Virginia, established the Trust with $10 of her own money, and the trustee was Hector's father, Manuel L~. The Annuity agreement indicates that it was effective as of September 20, 1999. Section 3 of the Annuity provides that the periodic payments may not be assigned. Addendum A to the Annuity provides for periodic payments to the trustee of the Trust. The last sentence of the Court's Order instructs Manual L~ to provide an accounting of a special needs trust in February 2001.

DISCUSSION

The periodic payments from the settlement are income because the payments to Hector are either non-assignable to the trust, or are assignable, but not irrevocably so. Pursuant to POMS SI 01120.200(G)(1)(c), certain payments are non-assignable by law and may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. *See also Reames v. Oklahoma ex rel. OK Health Care Authority*, 411 F.3d 1164, 1171 (10th Cir. 2005) (holding that Social Security disability income could not be assigned into a special needs trust). Pursuant to POMS SI 01120.200(G)(1)(d), a legally assignable payment that is assigned to a trust is income for SSI purposes unless the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual.

There is no indication that an assignment took place, much less an irrevocable one. Pursuant to 215 ILCS 153/25(a), "No annuity issuer or structured settlement obligor may make payments on a structured settlement to anyone other than the payee or beneficiary of the payee without prior approval of the circuit court. . . No payee . . . of a structured settlement may assign in any manner the structured settlement payment rights without prior approval of the circuit court." The settlement agreement indicates that settlement payments were to be made to the guardian of Hector L~, not to a trust. The Court's Order acknowledged the existence of the trust, but did not indicate that the periodic settlement payments were assigned to the trust, much less that the payments were assigned irrevocably. Significantly, elsewhere in the Order, the Court indicated that its oversight of Hector's funds would end when Hector turned 18. The fact that the Court apparently allowed the settlement proceeds to be place in the Trust, for the benefit of a minor Hector, is insufficient to indicate that the Court permitted an irrevocable assignment of future payments to the trust.

Furthermore, even if the parties attempted to seek such an order, the court would not have authority to approve such an assignment. Both the settlement agreement and the Annuity contain non-assignment provisions. The courts in Illinois have found that such non-assignment clauses in structured settlements are not only enforceable, but that courts are powerless to allow assignments after approving such settlements. *See In re Foreman*, 302 Ill. Dec. 950 (Ill. App. Ct. 2006). Thus, the settlement agreement did not allow either Hector's guardian or Hector to assign the rights to Hector's income and Hector was prohibited by law from making such an assignment. Even though Hector has been transferring his money to the trust (through his guardian), the settlement forced him to retain the rights to the periodic payments and these payments remain his income.

CONCLUSION

For the reasons discussed above, we conclude that the Annuity periodic payments to the Trust are income.

B. PS 00-383 Illinois Trust for Lorraine S~

DATE: July 17, 1997

1. SYLLABUS

Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support without judicial modification of the support decree. Therefore, payments made by one parent to a trust in lieu of court ordered support payments are considered the child's income, available for the child's support and maintenance.

Caution: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You requested a legal opinion regarding a document creating a discretionary supplemental trust with SSI recipient Lorraine S~ (Lorraine) as beneficiary. You inquired whether Lorraine has unrestricted access to the trust principal for her support and maintenance, i.e., whether the trust principal is a resource for SSI purposes. You also inquired as to the validity of the Statement of Intent by which Lorraine's father agreed that support payments would be paid into the trust.

We conclude that the Statement of Intent, which sought to modify the court order of support, would be held invalid under applicable state law, and that the trust assets should be considered Lorraine's income or resources for SSI purposes, at least to the extent that the assets were derived from payments made pursuant to the Statement of Intent or from other property which had been owned by Lorraine or by her guardian on Lorraine's behalf.

Background

Pertinent Documents Other than the Declaration of Trust

Lorraine, currently twenty-one years old, is the disabled daughter of Deborah S~ (Deborah) and David S~ (David). Deborah and David were divorced in Missouri in 1995. The Judgment/Decree of Dissolution (divorce decree), entered on November 1, 1995, states that there were two children of the marriage: Lorraine, born March 15, 1976, and Lynne, born October 4, 1978. Divorce Decree at 2. The divorce decree awards child support "for the parties' minor children" in the amount of $566 per month per child to be paid by David to Deborah. It further states, "The Court hereby finds that the child LORRAINE is incapacitated and in need of parental support past the age of emancipation." Divorce Decree at 3. It incorporates all terms of a Marital Settlement Agreement (settlement agreement). Divorce Decree at 2. It also permits Deborah to remove the residency of the children to Illinois. Divorce Decree at 4.

The notarized settlement agreement, signed by David on August 15, 1995, in Missouri, and by Deborah on October 25, 1995, in Illinois, requires David to pay to Deborah $566 per month, per child "for the parties' children as and for child support for the care, support and education of the parties' minor children." Settlement agreement at 6. It further states: The parties agree and stipulate that the child LORRAINE S~ is incapacitated and is in need of parental support past the age of emancipation, and said support shall continue until her death, the death of the Respondent, or further Order of the Court. Settlement agreement at 6. Paragraph 15 provides that no modification or waiver of any of the terms will be valid unless it is made in writing and executed with the same formality as the settlement agreement. Settlement Agreement at 10.

On October 24, 1995, one day before the settlement agreement was finally executed, David signed a notarized Statement of Intent agreeing to contribute monthly to a trust to be created for Lorraine's benefit, in lieu of the court ordered child support payments.

On January 26, 1996, the Circuit Court of Kane County, Illinois appointed Deborah as Lorraine's guardian.

Declaration of Trust

On January 30, 1996, Deborah executed, in Illinois, a declaration of trust (declaration), as "Settlor and Trustee," creating the "Lorraine S~ Discretionary Supplemental Trust." The declaration recites that Deborah transferred $10.00 to the trustee which, along with any additional property received from her or any other person and all investments and reinvestments, was to constitute the trust estate. Declaration at 1.

The declaration makes clear that Deborah's intent as settlor is to provide supplemental support beyond any support which can be provided by any governmental, public, or private agency. To this end, it states that no part of the trust is to be considered owned by Lorraine, that Lorraine has no vested right or interest in the income or principal, and that no property, goods or services purchased or owned by the trust for Lorraine's use is to be considered as under Lorraine's control. 1. The declaration prohibits any expenditure for "basic food, clothing and shelter" or making any trust income or principal available to Lorraine for conversion into such items, unless all governmental and private agency benefits for which Lorraine may be eligible because of her disability have been fully exhausted. 3, § 4. The declaration also prohibits any direct payment to Lorraine and prohibits the trustee from making any distribution for Lorraine's support if such support is otherwise available through a governmental agency. 1,3.

Within this framework, the Trustee has sole discretion to distribute principal or income for Lorraine's exclusive benefit to provide for her supplemental support and maintenance, but only to the extent that such items are not otherwise available through any governmental entity or private agency. 2; 3, §§ 5-9. The declaration also contains spendthrift provisions, protecting the trust estate from the creditors' claims and prohibiting assignment of a beneficiary's interest. 3, § 3; 5, § 2.

Deborah is Trustee. If her acting as Trustee in any way jeopardizes Lorraine's entitlement to government benefits or subjects the trust to claims of reimbursement by any private or governmental body, successor trustees are named. 5.

Deborah, as settlor, has reserved the right to amend the trust "in whole or in part for whatever reason" and has given the Trustee the right to amend or reform the trust provisions the Trustee deems it necessary, due to changes in law, in order to preserve the stated intent of the trust. 3, § 10. In the event of a court determination that reimbursement is required or disqualification from, or reduction, in governmental benefits, the declaration directs the Trustee to amend or reform the trust to effect the Settlor's purpose and, if that cannot be done, to terminate the trust and distribute the trust principal and income to Deborah, "not in any fiduciary capacity, but as [Deborah's] sole and exclusive property without any preconditions or requirements on the use or application of those funds." 3, § 11. If Deborah is deceased at the termination of the trust, distribution is to be made to Lorraine's guardians, also as their sole and exclusive property and not in any fiduciary capacity, or, if no guardian to the Trustees as their sole and exclusive property and not in any fiduciary capacity. Id. If the trust is still in existence at Lorraine's death, the trust estate is to be distributed to Deborah or to her heirs, per stirpes. 4.

DISCUSSION

Resources, for SSI purposes, include assets that a person owns and can convert to cash to be used for the person's support and maintenance. See 20 C.F.R. § 416.1201(a). If the person has the right or power to liquidate property, or her share of the property, it is a resource. Id. Trust assets are considered an SSI recipient's resource if the SSI recipient has the power to revoke the trust and use the trust assets to meet his needs for food, clothing, or shelter, or if he can direct use of the trust assets for such purposes. See POMS SI 01120.200(D)(1)(a). Whether the person can revoke the trust or direct use of the trust assets depends on the terms of the declaration of trust and on applicable State law. POMS SI 01120.200(D)(2).

We deal first with the additions to the trust made pursuant to the Statement of Intent signed by Lorraine's father, David. If the support payments had been made by Lorraine's father to Deborah in compliance with the settlement agreement that the Missouri court incorporated into the divorce decree, the payments would have been considered Lorraine's income for SSI purposes. See 20 C.F.R. 416.1121(b). The Statement of Intent seeks to modify the court's support order in two ways. First, instead of making support payments directly to Deborah for Lorraine's benefit, in accordance with divorce decree, the Statement of Intent contemplates payment of the same amount to Deborah as Trustee of the discretionary trust. Second, the

divorce decree required that the payments be used for Lorraine's "support." As Lorraine's guardian, Deborah has a duty to use the funds for Lorraine's support. Under the terms of the discretionary trust, however, Deborah could use the funds for supplemental costs, but she would be precluded from making disbursements for basic food, clothing and shelter, and she would have no obligation to make any disbursements at all.

The question is whether Lorraine's parents can enter into an agreement which affects Lorraine's rights and effectively modifies the order of the Missouri court. The duty of support which is applicable is that of the law of the state where the obligor is present, in this case the father's domiciliary state of Missouri. See 750 ILCS 20/7. Illinois law also recognizes a child support order issued in another state, if it is the only such order. 750 ILCS 22/207. In addition, a post-majority child support obligation entered into pursuant to a divorce settlement agreement will be recognized by Illinois courts. See In re Marriage of Leming, 590 N.E.2d 1027, 1028 (Ill. App. 1992). Thus, the support order encompassed by the Missouri court's divorce decree is controlling and would be recognized by an Illinois court.

Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support. Because child support payments are for the benefit of the child, the parties cannot settle or compromise future payments without judicial modification of the support decree. Only a court has the power to alter future child support payments. Mora v. Mora, 861 S.W.2d 226, 227 (Mo. App. 1993); see also, Boland v. State of Missouri, Dept. of Social Services, 910 S.W.2d 754, 758 (Mo. App. 1995), McLaughlin v. Horrocks, 883 S.W.2d 95, 97 (Mo. App. 1994).

Illinois case law is in accord. See Blisset v. Blisset, 526 N.E.2d 125, 127 (Ill. 1988) (parents may modify an agreement for child support only by petitioning the court for modification); Miller v. Miller, 516 N.E.2d 837 (Ill. App. 1987)(mother could not consent to modification of settlement, incorporated into divorce decree, which provided that father would pay college expenses for child, even after age 18).

Although David signed the Statement of Intent prior to the date of the divorce decree, in the divorce decree the court refers only to the settlement agreement. There is no indication that the court was aware at that time, or was subsequently informed, of the Statement of Intent or the plans to create a discretionary trust. Since payment of the support into the discretionary trust amounts to a modification of the court's support order, we conclude that such modification would not be valid without court approval. Therefore, the payments made by David to the trust in lieu of the court ordered support payments should be considered Lorraine's income, available for her support and maintenance, the purpose apparently intended by the Missouri court's divorce decree.

Even if the Statement of Intent were found to be valid, we believe that the portion of the trust assets derived from the payments made pursuant to the Statement of Intent should, nevertheless, be treated as Lorraine's income for SSI purposes. We also think it reasonable to conclude, in the absence of any indication that the rest of the trust assets were derived from property belonging to someone other Lorraine, that all of the trust assets should be considered Lorraine's resource. This is especially true since the Declaration of Trust suggests that Deborah, as settlor, contributed only $10.00 to the trust.

Under Illinois law, a discretionary trust for the benefit of a disabled person is not liable to pay or reimburse the State or any public agency for financial aid or services to the disabled person, except to the extent that the trust was created by the disabled person or the trust assets are distributed to, or under the control of, the disabled person. 760 ILCS 5/15.1 (1996 Supp.). Although the exception is not applicable where the trust complies with federal Medicaid reimbursement requirements, id., the declaration in this case, while referring to the applicable Illinois statute, see 1, does not provide for Medicaid reimbursement. See POMS SI 01730.048.

Under the terms of the declaration of trust, Lorraine does not, herself, have any right to revoke the trust or direct use of the trust assets for her support. Nor is Lorraine named as the person who created the trust (settlor). However, Lorraine's mother and guardian, Deborah, has virtually total control over use of the trust assets. As settlor, Deborah retained the right to amend the trust, in whole or in part, for any reason, which amounts to the power to revoke. See Bogert, Trusts 516 (6th ed. 1987)(under a power to amend, an irrevocable trust may be made revocable).

Deborah is also Lorraine's guardian. Where a guardian holds legal title, on behalf of a sole beneficiary of a trust, to assets which are subsequently transferred into a trust, the trust beneficiary is, in effect, the settlor of the trust. See In re Estate of Hickey, 635 N.E.2d 853, 855 (Ill. App. 1994), cert. denied, 642 N.E.2d 1281 (one who furnishes consideration is the settlor of the trust). Therefore, if Lorraine is the sole beneficiary of the trust, she is the settlor, at least with regard to whatever portion of the trust res was derived from assets which were hers or which her guardian held for her benefit. As we discuss below, contributions of the support payments to the trust should be considered contributions from Lorraine.

In this case, it is not clear from the documents submitted whether Deborah created the trust in her own right or in her capacity as Lorraine's guardian; nor is it clear what portion of the trust assets were derived from property which had been owned by Lorraine or which Deborah held on Lorraine's behalf. The declaration does not indicate whether even the $10.00 that initially funded the trust was Deborah's money or Lorraine's money. Nor is there any information about additions to the trust other than the payments made by David pursuant to the Statement of Intent. If Deborah created the trust as Lorraine's guardian, or if all of the assets of the trust derived from property previously held by Lorraine or by Deborah on Lorraine's behalf as guardian, then Lorraine is the true settlor of the trust and can revoke the entire trust, or amend it to allow access for her support and maintenance. Thus, all of the trust assets would be her resources for SSI purposes.

Under the agreement between Lorraine's parents, Deborah receives the "support" payments as trustee for Lorraine. Nevertheless, those support payments are, in effect, Lorraine's income. Thus, as to the portion of the trust res traceable to those "support" payments, Lorraine is actually the settlor of the trust. Through her guardian, she has the power to revoke the trust by virtue of Deborah's retention of the unconditional power to amend the trust. If she is the sole beneficiary of the trust, Lorraine also has the power to revoke any portion of the trust for which she can be considered the settlor. See Stewart v. Merchants National Bank of Aurora, 278 N.E.2d 10, 12 (Ill. App. 1972) (trust settlor who is also the sole beneficiary can revoke the trust without the trustee's consent, even though no power of revocation was reserved when the trust was created). Thus, the portion of the trust which is derived from the "support" payments should be considered Lorraine's resource for SSI purposes.

That the declaration calls for disbursement, upon termination of the trust, to Deborah in her own right, rather than on Lorraine's behalf does not change the result. Since Deborah retained the unconditional right to amend the trust, including the right to amend the provisions for disbursement upon termination of the trust, no intent to create a remainder interest in someone other than Lorraine can be implied. Thus, Lorraine is the sole beneficiary of the trust and has the power to revoke the portion of the trust as to which she is the settlor. Furthermore, as Lorraine's guardian, Deborah would have a fiduciary duty to use that portion of the trust assets which derived from Lorraine's assets not for her own benefit, but for Lorraine's benefit. To receive the assets of the trust in her own right would be a violation of Deborah's fiduciary duty as Lorraine's guardian.

While the declaration recites that Deborah paid $10.00 into the trust at its creation, there is no clear indication whose funds were used to create the trust, nor is there any indication as to whether there were any subsequent additions to the trust res. We think it unlikely that Deborah, who would have to provide an accounting as guardian, would combine Lorraine's property with another person's property in forming the trust res. Deborah is receiving additions to the trust from David in lieu of the court ordered support payments, additions which are actually Lorraine's property. This implies that the trust was created by Deborah as Lorraine's guardian with Lorraine's assets and that Lorraine is, therefore, the true settlor. As settlor, Lorraine would have the power, through her guardian, to revoke the trust or to compel payments from the trust for her support and maintenance. We conclude that, unless Deborah can show that she did not create the trust in her capacity as guardian and that certain trust assets were derived from sources other than Lorraine's property, all of the assets of the trust should be considered Lorraine's resources for SSI purposes.

4.11 INDIANA

A. PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~ Your Ref: S2D5G6 SI 2-1-3 IN

DATE: November 3, 2008

1. SYLLABUS

This opinion examines whether or not the trust and annuity in question are a resource for SSI purposes. In this case, the trust meets all of the criteria required to meet the special needs trust exception. Likewise, the annuity is not currently a resource because the claimant does not have the ability to sell her right to receive future payments. The claimant is eligible to receive payments from the annuity beginning in August 2022. The annuity payments may be income to the claimant beginning in 2022 and should be evaluated at that time

2. OPINION

You asked us whether the Trust and Annuity constitutes a resource or income for SSI purposes. For the reasons stated below, we believe that the Trust is not a resource and that the Annuity also is not a resource and does not currently result in any income to Savanna. The Annuity, though, may be income beginning in August 2022.

BACKGROUND

The Trust for the Sole Benefit of Savanna R. W~ was established in 2007, pursuant to court order. The Trust indicates that Savanna suffers from a severe and permanent brain injury, as well as from permanent physical injuries, arising from substandard care during her birth. The Trust was established around the time of settlement of two related lawsuits.

One lawsuit was a medical malpractice lawsuit against Dr. Z~-B~ brought by Ronnie and Mollie W~, individually and as parents and natural guardians on behalf of Savanna W~. The June 2007 Settlement Agreement and Release provided that the W~s were to receive $150,000, and that the guardians of the estate of Savanna W~ were to receive periodic payments of $1,000 per month for 100 months beginning August 10, 2022.

According to a subsequent court order, the $150,000 lump sum was distributed with: a) a total of $96,700 paid to the attorneys; and b) $53,300 held in escrow pending resolution of an unidentified ERISA subrogation claim (which was ultimately waived).

The Settlement Agreement gave the defendant or its insurer the right to purchase an annuity policy, of which the defendant/insurer would be the sole owner, for the purpose of funding the periodic payments. The Agreement also states that the W~s have no power to sell, mortgage, encumber or anticipate the periodic payments, by assignment or otherwise.

In or around May 2007, Prudential Assigned Settlement Services Corporation (PASSCorp) assumed the annuity payment obligations to the W~s, and purchased an annuity contract from the Prudential Insurance Company. The Annuity Certificate indicates that the certificate holder (i.e., PASSCorp) had sole and exclusive ownership rights in the Certificate, and that no other person had any right to anticipate, sell or absolutely assign payments under the Certificate. The Certificate indicated that Prudential Insurance would make $1,000 payments each month for 100 months, beginning on August 10, 2022, to Ronnie and Mollie W~ as guardians of Savanna R. W~, for her benefit.

On June 13, 2007, the Lawrence County Circuit Court issued an order directing Mollie W~ to establish the Trust for the Sole Benefit of Savanna R. W~ with Fifth Third Bank as the Trustee, and to pay the portion of the settlement that would otherwise be payable to Savanna to the Trust. The Trust was established that same day.

On June 29, 2007, Ronnie W~ and Mollie W~, individually and as parents and natural guardians on behalf of Savanna W~, settled a suit they had filed against the Indiana Patient Compensation Fund for $1,000,000. Of this amount, the W~'s proceeds were $726,430.33.

According to a court order dated December 3, 2007, the net settlement proceeds from both the Z~-B~ suit (including the $53,300 previously held in escrow) and the IPCF suit were $779,730.33, after payment of fees and costs. From that amount, $51,806.36 was paid to Ronnie and Mollie W~ for their own claims, and the remaining $727,923.97 was ordered to be paid to the Trustee. The Trustee received that amount on December 12, 2007.

Trust Terms

Article I of the Trust indicates that its purpose is to "protect Savanna's long-term interests, to generally provide supplemental care . . . and to increase the quality of her life, after utilizing available assistance from governmental and private agencies and when such assistance or benefits are incomplete or insufficient, and not to replace assistance or benefits or to render Savanna ineligible for any assistance or benefits to which she would otherwise be entitled . . ."

Article II indicates that the Trust estate is to consist of funds ordered by a court to be paid to the Trust, including a lump sum amount as well as a periodic annuity payment for a term certain, and any funds or property ordered by the court to be paid to the Trust.

Article III states that the Trust is irrevocable, other than by order of the court. The Trustee has the discretion and authority to distribute the principal and income of the Trust, but is not to "supplant services, assistance, and medical care available to Savanna from any such source [as Medicaid or SSI benefits]" and the Trustee is authorized to deny requests to release income

or principal to pay for expenses otherwise covered by public assistance programs. Trust, Art. IV, C. The Trustee is also authorized to take those steps necessary to ensure that Savanna remains eligible for public assistance, unless it determines that such is contrary to Savanna's best interests. Trust, Art. IV, C. The Trustee may make disbursements directly to Savanna. Trust, Art. IV, C-D.

Article V of the Trust provides that upon Savanna's death, the Trustee shall repay the State of Indiana, or any other state that may provide Savanna with Medicaid assistance, that amount required to satisfy 42 U.S.C. § 1396p(d)(4)(A). Trust, Art. V. The Trustee then to pay Mollie W~ $10 and to pay the remainder of the Trust estate to the personal representative of Savanna's estate. The Trust contains a spendthrift clause which prohibits attachment by creditors, or transfer or assignment by any beneficiary. Trust, Art. V.

DISCUSSION

Under regular resource rules, assets are resources for SSI purposes if the individual owns them and can convert them to cash for her support and maintenance. 20 C.F.R. § 416.1201(a). Under special statutory trust resource rules, trusts established with the assets of an individual after January 1, 2000 will also generally be considered resources. 42 U.S.C. § 1382b(e).

Certain trusts - known as Medicaid payback trusts or special needs trusts - are excluded from the statutory trust resource rules. *See* 42 U.S.C. §§ 1382b(e), 1396p(d)(4); POMS SI 01120.203. These trusts, however, must still be evaluated under regular resource rules to determine whether they are resources. POMS SI 01120.203(B)(1)(a).

A Medicaid payback trust will be exempt from the statutory rules if it: (a) contains the assets of a disabled individual under the age of 65; (b) is established for the benefit of that individual by a parent, grandparent, guardian or court order; and (c) provides that the state will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance pain on behalf of the individual under a state Medicaid plan. POMS SI 01120.203(B)(1)(a); 42 U.S.C. § 1396p(d)(4)(A).

A Medicaid payback trust, though exempt from statutory trust resource rules, will nonetheless be a resource under regular resource rules if: (a) it is revocable; (b) the claimant can compel the trustee to use the funds for her support and maintenance; or (c) the claimant can sell her beneficial interest in the Trust. POMS SI 01120.200(D)(1)(a); 01120.200(D)(2).

This Trust meets the special needs trust exception. Based on the information we have, Savanna is under 65, and she is disabled. The Trust was funded solely with Savanna's assets. Under the terms of the June court order, the Trust had the right to Savanna's settlement funds at that time, despite not receiving the actual monies until December. Ind. Code § 30-4-2-1(c) ("it is not necessary to the validity of a trust that the trust be funded with or have a corpus that includes property other than the present or future, vested or contingent right of the trustee to receive proceeds or property").

The Trust was established for Savanna's benefit by her mother upon court order. Finally, the Trust provides that the state of Indiana, as well as any other state that provides Savanna medical assistance, will receive that amount required to satisfy 42 U.S.C. § 1396p(d)(4)(A). POMS SI 01120.203(B)(1)(f); Trust, Art. V.

While the Trust is therefore exempt from the statutory trust resource rules, it still must be analyzed under regular resource rules. Here, the Trust is not a resource under the regular resource rules.

The Trust is irrevocable. As a general rule, under Indiana law, a trust is presumed to be irrevocable absent an explicit reservation of power to revoke by the grantor at the time of creation of the trust. Ind. Code Ann. § 30-4-3-1.5(a); *Hinds v. McNair*, 413 N.E.2d 586, 594 (Ind. App. 1980). Here, the Trust explicitly states that it is irrevocable, except by court order. However, a trust that purports to be irrevocable can nonetheless be revoked where the settlor/grantor and all the beneficiaries agree. *See Colbo v. Buyer*, 134 N.E.2d 45 (Ind. 1956); Restatement (Second) of Trusts § 339 comment a (settlor who is sole beneficiary can revoke irrevocable trust). Here, Savanna is the true settlor/grantor of the Trust, POMS SI 01120.200(L)(3), but she is not the sole beneficiary, because the Trust provides that, upon her death, her mother is to receive $10. *Breeze v. Breeze*, 428 N.E.2d 286, 287-88 (Ind. App. 1981). Thus, Savanna does not have the power to revoke the Trust unilaterally.

Further, Savanna has no power to direct the use of Trust principal; the Trustee has sole discretion to make disbursements. Finally, the Trust has a spendthrift provision, which purports to prohibit attachment by creditors or transfer or assignment by any beneficiary. Trust, Art. V. Indiana law provides that if the settlor is also the beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of her interest will not prevent her creditors from satisfying claims from the trust. Ind. Code § 30-4-3-2. This statute does not state, though, that a transferee could reach the settlor's interest in such a case.

Therefore, any attempt by Savanna to sell her beneficial interest in the Trust would likely fail. And even if she could sell it, it would have no significant value, for the trust is discretionary. Thus, under regular resource rules, the Trust is not a resource.

Also relevant is the annuity, under which payments do not begin until 2022. The Settlement Agreement and the Annuity Certificate specify that the annuity cannot be assigned. Therefore, the annuity is not currently a resource because Savanna cannot sell her right to receive the future payments. The question, then, is whether the annuity payments will be income to Savanna beginning in 2022, or whether the future payments have been irrevocably assigned to the Trust. See POMS SI 01120.200(G)(1)(d). While the court order of June 2007 requires that Mollie W~ "pay and distribute the remaining balance of the settlement that would otherwise be payable to Savanna to the Trustee of the Trust for the Sole Benefit of Savanna R. W~," and the Trust Agreement also explicitly references "a periodic annuity payment . . . to be made to the Trust for a term certain," it is not clear that the annuity has been assigned irrevocably to the Trust, particularly since the Settlement Agreement and the Annuity both state that the payments cannot be assigned. When the payments begin in 2022: (a) Savanna may be emancipated, and she may be able to receive the annuity payments directly; or (b) Savanna's guardians could petition the court to use the payments for Savanna's support instead of placing the payments in the Trust. Thus, the payments may be income when they begin in 2022, and this issue should be reevaluated at that time.

CONCLUSION

The terms of the Proposed Trust II and the Proposed Joinder Agreement eliminate the possibility that other individuals could benefit from the disabled beneficiary's sub-account during her lifetime. However, the amendments outlined in the Proposed Trust II and Proposed Joinder Agreement are "modifications." As such, they would become effective on the date of execution of the new Trust II and new Joinder Agreement. Consequently, any sub-account created under the Joinder Agreement or Proposed Joinder Agreement would be considered a resource for SSI purposes. However, the Joinder Agreement and Proposed Joinder Agreement should be further modified to provide that, when an individual has received Medicaid benefits from more than one State, the funds remaining in the trust will be distributed to each State from which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. If such modification occurs, the Joinder Agreement and Proposed Joinder Agreement would satisfy the statutory requirements for the Medicaid trust exception. However, we also recommend that the trust be clarified to state that, if and when a new trust is established in or after 2078, that trust will include all amendments made to the current trust as of that date.

CONCLUSION

The Trust is not a resource to Savanna for SSI purposes. The anticipated annuity payments are not a resource to Savanna now. They may be income to her beginning in 2022 and should be evaluated at that time.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Allen D~
Assistant Regional Counsel

B. PS 07-170 SSI-Indiana-Review of Proposed Restatement of the ARC of Indiana Master Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3 IN (ARC) Our Ref: 07-0277

DATE: July 2, 2007

1. SYLLABUS

The Chicago Regional Counsel previously determined that a sub-account created under the ARC of Indiana Master Trust (Trust II) and Joinder Agreement was a resource for SSI purposes. This opinion addresses proposed amendments to the trust which are intended to make it a non-countable resource for SSI purposes. Upon review, the proposed changes would be considered modifications, not revisions, and would only be effective on the date they were executed. Even with the modifications, the trust amendments still are not sufficient to change the previous determination. Two areas remain which make this trust a countable resource. One is that no provision is made for a change of residence so that more than one state would be eligible for the Medicaid assistance payback on the death of the claimant. Another is that the potential exists for distribution to others on the "deemed death" of the claimant. Therefore, the distribution resulting from this early termination would not be for the sole use

of the claimant. The precedent here is that revisions or modifications to trusts that do not address and solve the central issues for exclusion remain a countable resource for SSI purposes.

2. OPINION

We previously reviewed the ARC of Indiana Master Trust II (Trust II) and Joinder Agreement and concluded that a sub-account created under Trust II and the Joinder Agreement was a resource for purposes of determining eligibility for Supplemental Security Income (SSI). The ARC recently submitted proposed revisions to the Trust II (Proposed Trust II) and the Joinder Agreement (Proposed Joinder Agreement). You asked whether sub-accounts in the Proposed Trust II would be a resource for SSI purposes. For the reasons discussed below, we conclude that sub-accounts in the Proposed Trust II still would be considered a resource for SSI purposes.

BACKGROUND

We previously identified three problems with Trust II and the Joinder Agreement. First, we advised that a sub-account created under Trust II did not qualify for the Medicaid payback exception because it was not established for the sole benefit the disabled individual. See 42 U.S.C. §§ 1382b(e)(3)(B), 1396d(4)(C); Program Operations Manual Systems (POMS) SI 01120.203(B)(2); Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Indiana-Review of the Sub-Account of Deborah Cobb in the ARC of Indiana Master Trust II (March 21, 2007). Under certain circumstances, the trustee could terminate Trust II as though the beneficiary had died. Upon the beneficiary's "deemed death," the Trustee would distribute property held in the beneficiary's name in accordance with the Joinder Agreement. Trust II, Articles Nine and Ten. Pursuant to the Joinder Agreement, the Arc of Indiana would retain 50% of the disabled beneficiary's assets, and the remaining 50% would be distributed to the State of Indiana, up to an amount equal to the total medical assistance paid on the disabled beneficiary's behalf. Joinder Agreement, section F. This created the possibility that individuals other than the beneficiary could benefit from the beneficiary's sub-account during her lifetime. Thus, the sub-account was not established solely for the benefit of the beneficiary.

Second, we previously advised that, even if the "deemed death" clause were removed, the Trust would still fail to qualify for the Medicaid payback exception. Pursuant to the Joinder Agreement, the Trustee could terminate the beneficiary's sub-account if she changed residence from Indiana to another state and the Trustee was unable to make appropriate arrangements for distributions. If that occurred, the Trustee could distribute the beneficiary's remaining sub-account property in the same manner as if the beneficiary had died. Joinder Agreement, Sections D and F, n..1. Thus, the potential distribution on change of residency provision was inconsistent with the requirements that pooled trust accounts be created for the beneficiary's sole benefit during her lifetime.

Third, we noted that Trust II was scheduled to terminate in the year 2078, theoretically within the beneficiary's lifetime. Upon such termination, a New Trust II would be created into which all ARC trust property would be contributed. Except for a new termination date, the New Trust II would contain identical terms as Trust II. Trust, Article Nine, Section IV. We noted that, unless the New Trust II was amended to remove the "deemed death" clause and amend the "change of residence" provisions, the 2078 termination would effectively resurrect the provisions from Trust II that caused a sub-account to constitute a resource for SSI purposes.

DISCUSSION

The proposed amendments to the trust address most of our concerns. Namely, the proposed language would eliminate our concerns that the trust was not for the sole benefit of the disabled individual during his or her lifetime. However, the attempt to make these changes effective "*ab initio*" is ineffective. The changes will only be effective prospectively. Furthermore, although the revised provisions for moving out of the State of Indiana no longer would raise concern that the trust could benefit individuals other than the disabled beneficiary during the disabled beneficiary's lifetime, we are concerned that the trust does not provide for re-payment of Medicaid expenditures made by any other State. We also recommend further clarification of the provisions relating to the new trust that may be established in 2078.

The proposed Trust II eliminates the "deemed death" clause. We note, however, that the proposed Trust II attempts to delete the "deemed death" clause "*ab initio*," i.e., as of January 9, 1995, the date Trust II was originally created. Proposed Trust II, Article Nine, Section II. This appears inappropriate. The Restatement (Third) of Trusts distinguishes between two types of alteration of a trust document. A "'reformation' involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain - and properly restate - the true, legally effective intent of a settlor with respect to the original terms of trusts they

have created." Restatement (Third) of Trusts § 62, Reporter's Notes. A reformation alters the text of a donative document so that it expresses the intention it was intended to express." *See* Restatement (Third) of Property, § 12.1. It relates back to alter the text as of the date of the original declaration of trust. *See Id.* In contrast, a "modification involves a change in - a departure from - the true, original terms of the trust, whether the modification is done by a court [cites omitted] or by the beneficiaries." Restatement (Third) of Trusts § 62, Reporter's Notes. Because a modification is a "departure from the true, original terms of the trust," a modification becomes effective upon its execution. *Id.*

It appears that the original intent of the Trust was to allow for distributions upon a beneficiary's deemed death and that the proposed alteration changes the original intent of the parties. Thus, the proposed alteration is a modification, rather than a reformation. *Id. See* Restatement (Third) of Trusts, § 62, Reporter's Notes. By stating that the deletion is effective "ab initio," the proposed Trust II attempts to apply modified trust terms retroactively to January 9, 1995, the original date of the Trust II Declaration. Such retroactive application is inconsistent with modification. Because the proposed deletion of the deemed death clause is a "departure from the true, original terms of the trust," the proposed deletion would become effective upon its execution and would not relate back ab initio to January 9, 1995. *See* Restatement (Third) of Trusts § 62, Reporter's Notes.

The proposed Joinder Agreement also deletes the provision that previously allowed the Trustee to distribute the beneficiary's remaining sub-account property in Trust II if she changed residence from Indiana to another state. Proposed Joinder Agreement, Section F, n.1. We note, however, that the Proposed Joinder Agreement similarly attempts to apply the deletion "*ab initio.*" Proposed Joinder Agreement, Section F., n.1. For the same reasons explained above, we believe that a retroactive application of this clause to January 9, 1995, would be inconsistent with the Restatement (Third) of Trusts. Such modification would, instead, become effective upon its execution.

The Proposed Trust II also contains slightly altered language concerning termination in the year 2078. The new provision states that, upon such termination, a New Trust II will be created that, except for a new termination date, will contain identical terms as Trust II, "*as amended.*" Proposed Trust II, Section IV. Because Trust II has previously been amended several times, we believe it would be prudent to clarify that "*as amended*" refers to the proposed 2007 amendments or all amendments made to the trust as of 2078 or the creation of the new trust.

Finally, we note that Section F of the Joinder Agreement allows the ARC to retain 50% of the Trust assets at the time of the beneficiary's death, and requires that the remaining 50% be distributed to the State of Indiana up to an amount equal to the total medical assistance paid on the beneficiary's behalf under the State Medicaid plan, appeared consistent with this POMS provision. *See* Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Indiana-Review of the Sub-Account of Deborah C~ in the ARC of Indiana Master Trust II (March 21, 2007). The trust does not provide for reimbursing any other State for Medicaid payments. The Office of Income and Security Programs (OISP) recently clarified that language such as this is problematic because it frustrates any State Agency's (other than Indiana's) ability to recoup medical assistance paid on behalf of the individual. *See* Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Illinois-Review of the David C~ f/k/a Karr Supplemental Care and Need Trust (June 11, 2007). OISP informed us that the trust must provide that the funds remaining in the trust are distributed to each State from which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. This is in keeping with the Act's requirement that the trust must provide for reimbursement of "the total medical assistance paid on behalf of the individual under a State plan under this subchapter." 42 U.S.C. § 1396p(d)(4)(a). Because the Joinder Agreement and Proposed Joinder Agreement permit reimbursement for payments made under only the Indiana Medicaid plan, they do not meet the statutory standard. Thus, any sub-account created under the Joinder Agreement or Proposed Joinder Agreement would not satisfy all of the elements of the Medicaid trust exception and would be considered a resource for SSI purposes.

CONCLUSION

The terms of the Proposed Trust II and the Proposed Joinder Agreement eliminate the possibility that other individuals could benefit from the disabled beneficiary's sub-account during her lifetime. However, the amendments outlined in the Proposed Trust II and Proposed Joinder Agreement are "modifications." As such, they would become effective on the date of execution of the new Trust II and new Joinder Agreement. Consequently, any sub-account created under the Joinder Agreement or Proposed Joinder Agreement would be considered a resource for SSI purposes. However, the Joinder Agreement and Proposed Joinder Agreement should be further modified to provide that, when an individual has received Medicaid benefits from more than one State, the funds remaining in the trust will be distributed to each State from which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. If

such modification occurs, the Joinder Agreement and Proposed Joinder Agreement would satisfy the statutory requirements for the Medicaid trust exception. However, we also recommend that the trust be clarified to state that, if and when a new trust is established in or after 2078, that trust will include all amendments made to the current trust as of that date.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Anne K. K~
Assistant Regional Counsel

C. PS 05-224 SSI-Indiana-Review of the Brooke G~ Irrevocable Trust Number One and the Sub-Account of Brooke G~, ~, in the ARC of Indiana Master Trust I-REPLY Our Ref: 05-140 Your Ref: S2D5G6, SI 2-1-3 IN (G~)

DATE: August 17, 2005

1. SYLLABUS

An irrevocable trust was established by an SSI beneficiary's grandparents in 1993. The trust contained a spendthrift provision and the grandparents served as trustees and had absolute authority over distributions. In 2002, the Superior Court ordered that the trust be reformed and the assets were subsequently placed in a sub account of the Association for Retarded Citizens (ARC) of Indiana Master Trust I. Barring an explicit statement to the contrary, reformation of a trust relates back and serves to alter the text of the trust as of the original date of execution. Additionally, a trustee to trustee transfer does not constitute the establishment of a new trust for SSI purposes unless there is an indication that the beneficiary is using the transfer as an estate planning tool. Thus, the beneficiary's sub account in the ARC Trust is considered a continuation of the original Trust. Since the original trust was not a resource for SSI purposes, the second trust created by the reformation is also not a resource for SSI purposes. Due to a change in the Social Security Act, this precedent may only be applicable to a trust established before 1/1/00.

2. OPINION

You asked whether the former Brooke G~ Irrevocable Trust Number One ("G~ Trust") and the current subaccount of Brooke G~ in the Association for Retarded Citizens ("ARC") of Indiana Master Trust I ("ARC Trust") were/are resources for purposes of SSI eligibility.

BACKGROUND

On December 28, 1993, Gilbert and Helen S~, Brooke G~'s grandparents, established the G~ Trust, in which they named themselves as the trustees and Brooke as the beneficiary. Mr. and Mrs. S~ irrevocably transferred into the Trust an initial gift of $15,000.00. The trust indicated that this initial gift, as well as an additional anticipated gift of $15,000.00, was to be used to purchase an interest in a hog farm.

The Trust provided that the trustees had sole discretion to make distributions of income and principal to or for the benefit of Brooke in order to provide for her support, maintenance, health, and other benefit. The Trust added that the trustees had complete and absolute authority to take any action with respect to the trust as long as it was in the best interest of the beneficiaries.

Under the terms of the Trust, the beneficiary could not alienate, encumber, or hypothecate her interest in the principal or income of the trust, and her interest in the Trust was protected from the claims of any creditors. Upon Brooke's death, the remaining assets, after payments of all proper expenses, were to be distributed equally to the lineal descendants of Deborah G~.

Upon the petition of Deborah S~, the Jasper Superior Court issued an "Order Reforming Trust" on August 21, 2002. The Court order showed that Brooke, considered an incapacitated person, was a ward of the Court. The Court found that the assets of the G~ Trust included an interest in Penbrook Oak Farm, LLC, with an approximate value of $22,893.00. The Court also found that it was in Brooke's best interests that the G~ Trust be reformed, as it did not allow her to qualify for Medicaid. The Court therefore ordered that the interest in Penbrook Oak Farm be liquidated and the proceeds be paid to the ARC of Indiana Master Trust under a joinder agreement for Brooke's benefit.

Shortly thereafter, Mr. S~ purchased the shares of Penbrook Oak Farm contained in the G~ Trust for $22,500.00. On September 10, 2002, Mr. and Mrs. S~ executed a joinder agreement, enrolling in the ARC Trust. Brooke's sub account in the ARC Trust was funded immediately with the proceeds of $22,500.00 from the sale of the shares of Penbrook Oak Farm.

DISCUSSION

I. G~ Trust

Because Brooke's grandparents funded this Trust, it met the definition of a third party trust and only the regular resource rules apply. Under the regular resource rules, trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet her needs for food or shelter, or (2) direct the use of the trust assets for her support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the current value of the individual's future interest in mandatory disbursements, if any, may be a resource if it can be sold. *See id.* Applying these rules, the Trust was not a resource to Brooke.

The Trust stated that it was irrevocable, and no provision allowed Brooke to terminate the Trust. Additionally, the trustees had sole discretion to make distributions from the trust. Thus, Brooke had no power to direct the use of the Trust assets for her support or maintenance. Moreover, the Trust did not provide for mandatory disbursements to Brooke. With respect to Brook's power to otherwise sell her beneficial interest in the Trust, the Trust contained a "spendthrift" provision, which prohibited her from alienating, encumbering, or hypothecating her interest in the Trust. Consequently, the Trust was not a resource to Brooke.

II. Brooke's Subaccount in the ARC Trust

Brooke's sub account in the ARC Trust was created by an order of the Jasper Superior Court reforming the G~ Trust. Following Restatement (Third) of Trusts § 62, Ind. Code § 30-4-3-25 provides that "[u]nder petition by an interested party, the court may rescind or reform a trust according to the same general rules applying to the rescission or reformation of non-trust transfers of property." According to the Restatement, reformation "involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain-and properly restate-the true, legally effective intent of settlors with respect to the original terms of trusts they have created." Restatement (Third) of Trusts § 62 reporter's notes (2003). From the materials provided to us, it appears that Mr. and Mrs. S~ intended that the G~ Trust would provide for Brooke's support and maintenance, without preventing her from qualifying for Medicaid or SSI. It further appears that Deborah S~, with the approval of Mr. and Mrs. S~, sought judicial reformation of the G~ Trust due to their mistaken belief that the Trust did indeed disqualify Brooke from receiving such assistance. In response, the Jasper Superior Court reformed the G~ Trust by essentially terminating the Trust and transferring its assets to a sub account in the ARC Trust.

The Restatement indicates that when reformation occurs, the changes relate back to the creation of the instrument. *See* Restatement (Third) of Property § 12.1 cmt. f (2003) ("An order of reformation alters the text of a donative document so that it expresses the intention it was intended to express. Thus, unless otherwise stated, a judicial order of reformation relates back and operates to alter the text as of the date of execution rather than as of the date of the order or any other post-execution date."). Moreover, we have recently opined that a trustee-to-trustee transfer, such as occurred here, does not constitute the "establishment" of a new trust for purposes of applying the statutory trust resource rules, so long as there is no indication that the claimant is using the transfer as an estate planning tool. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI-Review of the WisPACT I Trust* (July 29, 2005). There is no indication here that the claimant is using the transfer to circumvent our counting rules. Thus, under both rationales, Brooke's subaccount in the ARC Trust is considered a continuation of the G~ Trust. Accordingly, the proper inquiry is whether the G~ Trust was a resource under the rules applicable when the Trust was first created, not whether the subaccount in the ARC Trust would be a resource under the rules applicable at the time of the transfer. And, as indicated above, the G~ Trust was not a resource under the regular resource rules that were applicable when it was created. Therefore, Brooke's subaccount in the ARC Trust should not be considered a resource.

CONCLUSION

For the reasons discussed above, we conclude that neither the G~ Trust nor Brooke's subaccount in the ARC Trust should be considered a resource.

D. PS 05-125 SSI-Indiana-Review of the Sub-Account of Michael D~ in the Association of Retarded Citizens Pooled Trust, ~ Your Ref: S2D5G6 SI 2-1-3 IN (D~)Our Ref: 05-0075

DATE: April 2, 2005

1. SYLLABUS

The issue is whether a subaccount established for an individual in the Association for Retarded Citizens of Indiana Master Trust is a resource. Also, would court-ordered support payments into the Trust be considered income to the individual for SSI purposes.

The purpose of the Trust is to provide the comfort and happiness of disabled beneficiaries and provide for their supplemental needs, over and above their basic maintenance, support, medical, dental and therapeutic care. Within the Trust, individual Trust accounts (subaccounts) are created and maintained for each beneficiary, but pooled for investment and management of the funds. The trustee has full power, authority, and absolute discretion to perform all acts necessary to accomplish the purpose of the Trust.

The Trust was established in 1989 by joinder agreement. However, the parents did not deposit any funds into the subaccount at that time,. Instead, they noted their intention to fund the account upon the death of the last surviving parent. The parents are complying with a December 17, 2004 court order to deposit support funds into this account monthly. Thus, the account is currently funded with support money from the father beginning 2004.

The Trust is a third party Trust established after January 1, 2000. The individual has no authority over the Trust account and cannot direct its use or sell his interest in the Trust. Therefore, the subaccount would not constitute a resource and the support payments to the Trust would not be considered income for SSI purposes. However, any cash disbursements made directly to the individual would be income, and any disbursements to third parties that result in the individual's receipt of food, clothing, or shelter would be considered income in the form of in-kind support and maintenance.

2. OPINION

You asked whether the sub-account established for Michael D~ (Michael) in the Association for Retarded Citizens of Indiana Master Trust I (ARC Master Trust) is a resource to Michael for purposes of determining his eligibility for Supplemental Security Income (SSI). You also asked whether court-ordered support payments into the Trust would be considered income to Michael for SSI purposes. For the reasons discussed below, we conclude that the sub-account would not constitute a resource, and the support payments would not be considered income, for purposes of Michael's SSI eligibility. However, any cash disbursements made directly to Michael would be considered income, and any disbursements to third parties that resulted in Michael's receipt of food, clothing or shelter would be considered income in the form of in-kind support and maintenance.

BACKGROUND

The Association for Retarded Citizens of Indiana (ARC), an Indiana not-for-profit corporation, established the ARC Master Trust on October 24, 1988. ARC Master Trust, Article 1. The purpose of the Trust is to promote the comfort and happiness of disabled beneficiaries, and provide for their supplemental needs, over and above their basic maintenance, support, medical, dental and therapeutic care. ARC Master Trust, Article 2. Within the Trust, individual trust accounts, called "sub-accounts," are created and maintained for each disabled beneficiary, but apparently pooled for investment and management of the funds. ARC Master Trust, Article 6. Enrollment becomes effective for a donor and disabled individual upon execution of a Joinder Agreement and receipt of an enrollment fee. ARC Master Trust, Article 3; Joinder Agreement, Article I. Once trust property from the donor has been accepted, neither the donor nor the disabled beneficiary may revoke the Trust. ARC Master Trust, Article 3. If a property interest is designated for future transfer, that designation is revocable. ARC Master Trust, Article 3.

The Trustee has full power and authority, and absolute discretion, to perform all acts necessary to accomplish the purposes of the Trust. ARC Master Trust, Article 6. The Trustee has sole and unqualified discretion to make disbursements for the benefit of the disabled beneficiary or refrain from making such disbursements. ARC Master Trust, Article 2. The Trustee may, in his sole discretion, disburse Trust income or principal in order to purchase services or property for the benefit of the disabled beneficiary, consistent with the purposes of the Trust. ARC Master Trust, Article 4. "The Trustee is prohibited from using or applying trust property in any way that would reduce the Government Assistance otherwise available to the disabled beneficiary, except that the Trustee may, in the Trustee's sole discretion, make disbursements or distributions that result in a reduction of the disabled beneficiaries' Government Assistance if such reduction is less than the amount of the disbursement or

distribution." ARC Master Trust, Article 2. In addition, the Trustee has absolute and discretionary power to receive, hold, manage and control all income arising from such Trust and the corpus thereof. ARC Master Trust, Article 6. The Trustee s maintain records for each sub-account, and provide an annual accounting to each donor documenting the activity in the sub-account. ARC Master Trust, Article 6. No money or property of the Trust (either income or principal) s be pledged, assigned, transferred, sold or encumbered in any manner by the disabled beneficiary. ARC Master Trust, Article 6.

Upon the death of the disabled beneficiary, the Trust property held in Michael's name s be distributed in accordance with the Joinder Agreement. ARC Master Trust, Article 8. The Joinder Agreement contains the following proportionate distribution: 50% to the ARC, 20% to John R~ (Michael's grandfather); 20% to Robert and Virginia D~ (Michael's grandparents); and 10% to Dawn D~ (Michael's aunt). Joinder Agreement, Article G. The Trustee may, in his sole discretion, terminate the Trust sooner as to Michael if the Trustee has reasonable cause to believe that the Trust income or principal is, or may become, liable for basic maintenance, support and care which was, or would otherwise be, provided by a government agency or department. ARC Master Trust, Article 8. The Trustee may also terminate the Trust with regard to all disabled beneficiaries if it becomes impracticable to carry out the purpose of the Trust. ARC Master Trust, Article 8. In such events, the Trustee s distribute the Trust property held in the disabled beneficiary's name in the same proportionate shares noted above. ARC Master Trust, Article 8. If, however, the ARC has ceased to exist, any property remaining in the Trust s be transferred to another organization which, in the sole discretion of the Trustee, would serve the interests and needs of people with disabilities in a manner consistent with the purposes of the Trust. ARC Master Trust, Article 8. Lastly, if not terminated earlier, the Trust s terminate on July 1, 2078. At that time, the Trustee s distribute all trust property to the ARC and create a new Master Trust. ARC Master Trust, Article 8.

On October 25, 1989, Robert D~, Jr. and Patricia D~ (Michael's parents) executed a Joinder Agreement, enrolling in the ARC Master Trust. According to the Joinder Agreement, Michael's parents intend to fund Michael's sub-account by way of life insurance, or another means, upon the death of Michael's last surviving parent. Joinder Agreement, Article E. In the meantime, following Michael's eighteenth birthday, and pursuant to a court order, Michael's father must make weekly payments to the Marion County Clerk's Office, and Michael's mother must deposit these funds into the ARC Master Trust at least monthly. Order Approving Agreed Entry for Modification of Child Support (Order), Paragraphs 1-2. The Order modified Michael's parents' December 13, 1993 agreement concerning custody, visitation, support and property. Under the terms of the December 13, 1993 agreement, Michael's father was required to provide "supplemental assistance" through monthly deposits into the ARC Master Trust after Michael attained the age of eighteen. Agreed Entry, Paragraph 3. "The intent of these payments is to supplement, not supplant, means-tested benefits for which Michael might be eligible now or in the future." Agreed Entry, Paragraph 7. The December 13, 1993 agreement indicated that the exact amount to be deposited by Michael's father following Michael's eighteenth birthday would be agreed upon at a later date; otherwise it would be not less than twenty percent of Michael's father's gross income for the year 2004 and every year thereafter. On December 17, 2004, Michael's parents agreed that Michael's father should make weekly payments of $107.00. Agreed Entry, Paragraph 4. The same day, the Marion County Superior Court approved the Agreed Entry. Order. The court noted that the payments made by Michael's father "s be considered to be supplemental assistance in addition to means-tested benefits for which Michael N. D~ might be eligible now or in the future." Order, Paragraph 3.

DISCUSSION

"Resources" are "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and can convert to cash to be used for his support and maintenance." 20 C.F.R. § 416.1201(a). If an individual has the right, authority or power to liquidate the property, it is considered a resource. 20 C.F.R. § 416.1201(a)(1). A trust established on or after January 1, 2000 that contains assets of only third parties constitutes a resource to the beneficiary if the beneficiary (1) has authority to revoke or terminate the trust and use the funds to meet his food, clothing or shelter needs, (2) can direct the use of the trust principal for his support and maintenance under the terms of the trust, or (3) can sell his beneficial interest in the trust. 20 C.F.R. § 416.1201(a); POMS SI 01120.200(D)(1)-(3). Applying these rules, the ARC Master Trust, the trust would not be a resource to Michael.

A. The Trust is a Third-Party Trust Established After January 1, 2000.

A trust established by a person other than the beneficiary is a third-party trust if the person who established the trust is also the grantor - i.e., the individual who supplied the consideration for the trust. POMS SI 01120.200(A)(2)(b), (B). In the present case, Michael's parents executed the Joinder Agreement in October 1989. Joinder Agreement, Paragraph J. However, Michael's parents did not deposit any funds into the sub-account at the time they executed the Joinder Agreement. Joinder Agreement, Paragraph E. Instead, they noted their intent to fund Michael's sub-account upon the death of his last surviving parent. Joinder

Agreement, Article E. We assume that Michael's parents are complying with the court's December 17, 2004 Order, which requires Michael's father to make weekly payments to the Marion County Clerk's Office, and Michael's mother to deposit the funds into the ARC Master Trust at least monthly. Order, Paragraphs 1-2. Thus, Michael's sub-account is currently funded by money from Michael's father. Also, pursuant to the Order, these funds constitute "supplemental assistance" rather than child support. Order, Paragraph 3. Thus, the funds are not income to Michael under POMS SI 00830.420B or any other POMS section of which we are aware. Accordingly, because the trust is funded with assets that belong to a third party (Michael's father) and are not income to Michael, Michael's sub-account meets the definition of a third party trust, and the regular resource rules apply.

B. Under the Regular Resource Rules, the Trust Principal is not a Resource to Michael As previously noted, a trust established on or after January 1, 2000, that contains assets of only third parties constitutes a resource to the beneficiary if the beneficiary (1) has authority to revoke or terminate the trust and use the funds to meet his food, clothing or shelter needs, (2) can direct the use of the trust principal for his support and maintenance under the terms of the trust, or (3) can sell his beneficial interest in the trust. 20 C.F.R. § 416.1201(a); POMS SI 01120.200(D)(1)-(3). Here, Article 3 of the ARC Master Trust provides that the Trust is not revocable by Michael. In addition, Michael does not have the ability to direct the use of Trust assets. ARC Master Trust, Articles 2 and 4. Instead, the Trust agreement gives the Trustee the authority to make such distributions and payments as the Trustee, in his sole discretion, deems appropriate. ARC Master Trust, Articles 2, 4 and 6. Thus, according to the terms of the Trust, Michael has no right to direct the use of the Trust assets to meet his food, clothing and shelter needs. The Trust also contains a "spendthrift" provision, which is valid in the state of Indiana. *See* In. Code Ann. § 30-4-3-2 ("The settlor may provide in the terms of the trust that the interest of a beneficiary may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee"); *see also* Restatement (Second) of Trusts § 152(2). Under this clause, Michael cannot pledge, assign, transfer, sell or encumber any money or property of the Trust (either income or principal). ARC Master Trust, Article 6. Consequently, the Trust is not a resource to Michael.

C. Certain Disbursements or In-Kind Payments Would Constitute Unearned Income

Although the Trust principal is not considered a resource, certain distributions may be considered income. The Trust provides that "[t]he Trustee is prohibited from using or applying trust property in any way that would reduce the Government Assistance otherwise available to the disabled beneficiary, except that the Trustee may, in the Trustee's sole discretion, make disbursements or distributions that result in a reduction of the disabled beneficiaries' Government Assistance if such reduction is less than the amount of the disbursement or distribution." ARC Master Trust, Article 2. Thus, under the Trust agreement, the Trustee could make cash disbursements to Michael. Such disbursements would be considered unearned income for SSI purposes. 20 C.F.R. §§ 416.1120-416.1121; POMS SI 01120.200(E)(1)(a). In addition, this Trust provision would allow for disbursements made to a third party that result in Michael's receipt of food, clothing or shelter. ARC Master Trust, Article 2. These could be considered income in the form of in-kind support and maintenance. 20 C.F.R. § 416.1102; POMS SI 01120.200(E)(1)(b).

CONCLUSION

For the reasons discussed above, we conclude that the Trust is not a resource to Michael for SSI eligibility purposes and the supplemental support payments from Michael's father are not income to Michael. However, cash distributions from the Trust directly to Michael or to third parties for Michael's receipt of food, clothing or shelter may be considered unearned income and/or in-kind support and maintenance.

E. PS 05- 091 SSI-Indiana - Trust for Sole Benefit of Nicole C. R~~ Your Reference: SI-2-1-3 IN (R~) Our Reference: 04P064

DATE: February 18, 2005

1. SYLLABUS

A discretionary special needs trust was created for a competent, adult SSI beneficiary on July 6, 2002. Although the trust names a third party as the grantor and trustee, it was entirely funded with the SSI beneficiary's own insurance settlement proceeds. The trust is determined irrevocable because it contains a spendthrift clause and establishes residual beneficiaries in the event the SSI beneficiary dies. While Medicaid reimbursement language is included, it is determined that the trust does not meet any of the Medicaid trust exceptions presented in section 1917(d)(4)(A) of the SSACT. The requirement that the trust be established

by a parent, grandparent, legal guardian or court is not satisfied in this case since the corpus was comprised entirely of the beneficiary's own funds. The CD renewed on April 4, 2004 is determined to represent the remaining proceeds of the trust and an asset of the trust. Since no exceptions are met, the trust is determined to be a countable resource to the SSI beneficiary since its inception in 2002.

2. OPINION

You asked whether a discretionary special needs trust for the benefit of SSI beneficiary Nicole C. R~ (Nicole) is a resource to Nicole for SSI purposes. You also asked whether a certificate of deposit (CD) in the amount of $10,000, renewed on April 1, 2004, and re-titled on May 5, 2004, is a resource to Nicole for SSI purposes. We conclude that, because the trust was created with Nicole's funds after January 1, 2000, and none of the Medicaid exceptions in POMS SI 01120.203 apply, the trust should be considered as Nicole's resource for SSI purposes. We further conclude that, since it appears that the $10,000 CD represents the remaining proceeds of the personal injury property settlement, it is an asset held by the trust from its date of issue.

BACKGROUND

On July 6, 2002, Donna M. R~ established the "Trust for the Sole Benefit of Nicole C. R~" (hereinafter referred to as "Nicole's Trust"), naming herself as the grantor and trustee and Nicole C. R~ as the beneficiary. The declaration of trust (Trust Agreement) recites that Nicole was injured in an automobile accident and, as a result, has "ongoing motor disabilities." Trust Agreement Preamble at 2. At its creation, Nicole's Trust was funded with a certificate of deposit (CD) for $34,003.03, which represents part of a settlement from an insurance company on June 2, 2002. *See* Time Deposit Inquiry of March 16, 2004; Report of Contact dated March 10, 2004; Schedule A; Trust Agreement Preamble at 3. The Trust Agreement allows additions to be made to Nicole's Trust. Trust Agreement, Art. II.

The purpose of Nicole's Trust is to provide for Nicole when assistance available from government and private agencies is "incomplete or insufficient" and not to replace assistance or benefits from such sources. Declaration, Art. 1. All disbursements are at the discretion of the Trustee, who is instructed not to supplant services, assistance, and medical care available to Nicole from government agencies, including SSI benefits, unless the benefits of such assistance are outweighed by the burdens of the program requirements. Trust Agreement, Art. IV, § B. The Trustee is specifically authorized to deny any request for a disbursement if it will pay for expenses otherwise paid for by a public assistance program. Trust Agreement, Art. IV, § B. The Trust Agreement also contains a "spendthrift clause," which prohibits attachment by creditors or transfer or assignment by Nicole. Trust Agreement, Art. VI. The terms of the Trust Agreement are to be construed under the laws of Indiana. Trust Agreement, Art. VIII, § A.

The Trust Agreement states that Nicole's Trust is irrevocable, except that it may be amended or revoked if a change in the law or other circumstance will frustrate the purpose. Trust Agreement, Art. III. When Nicole dies, the trust terminates and the trust estate is to be distributed first to the State in the amount legally required as reimbursement for Medicaid assistance to Nicole. Trust Agreement, Art. V, § A. After Medicaid reimbursement, the remainder is to be distributed in equal shares to Donna R~ (the Trustee), Daniel T. R~ II, and Allison R. R~. Trust Agreement, Art. V, § B. The Trust Agreement also contains provisions for distribution of the share of any beneficiary who predeceases Nicole. Trust Agreement, Art. V, § B.

Although Article III of the Trust Agreement specifically states that the trust is irrevocable, Article VII allows the Trustee to terminate Nicole's Trust if she determines that continued administration of Nicole's Trust is not economical. Upon termination for this reason, the Trustee is to distribute the entire trust estate into The ARC of Indiana Master Trust, dated October 24, 1988, for Nicole's benefit. Trust Agreement, Art. VII, § A. The Trustee also has discretion to make distributions from Nicole's Trust into the ARC of Indiana Master Trust, without terminating Nicole's Trust, if she determines that receiving services from the ARC through the ARC trust is in Nicole's best interests. Trust Agreement, Art. VII, § B. The Trustee is authorized to "enroll Nicole in The Arc (sic) of Indiana Master Trust, notwithstanding the fact that the terms of that Trust may vary from the terms of this Trust, and to conform the terms of such enrollment to the terms of 42 U.S.C. § 1396p(d)(4)" (the Medicaid payback provisions). Trust Agreement, Art. VII, § B.

Schedule A, titled "Trust for the Sole Benefit of Nicole C. R~," contains a July 1, 2002 entry that the balance of the insurance settlement was $34,003.03, placed in CD #21208. Schedule A lists various items, some of which appear to be expenditures from Nicole's Trust, e.g., hotel, plane tickets, and rental van charges for two trips. Schedule A also contains a notation "Renewal of CD #21769 - value $10,000" for April 4, 2004.

A Time Deposit Inquiry, dated March 16, 2004, bearing the name Nicole C. R~ and account number 21208, shows an initial deposit of $34,003.03 on July 1, 2002, and a balance of $15,349.33 remaining as of March 1, 2004. You also provided us with a copy of a CD in the amount of $10,000, issued to "Trust for the Sole Benefit of Nicole C. R~" with May 5, 2004, shown as a revision date and "To Retitle" shown as the reason for the revision. The fax transmittal from Jackie P~ of the Indianapolis Field Office indicates that the revision was made because that office determined, by the title of the CD, that it was not a part of Nicole's Trust. In a letter dated March 31, 2004, a bank official referred to a "CD" and stated that it had been set up as a trust with Nicole as the sole beneficiary, but the official did not know whether the funds for the CD were from a trust or represented the remaining balance of the trust.

On February 3, 2005, you verified by telephone that Nicole does not have a guardian and, although she is physically disabled, there is no indication that she is mentally incompetent. You indicated that Nicole may have executed a power of attorney, under which Donna R~ created Nicole's Trust.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash for her support and maintenance. 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. 20 C.F.R. § 416.1201(a). The Trust document states that it is irrevocable. Trust Agreement, Art. III. Even if there were no such explicit statement, Nicole's Trust would be irrevocable because, under Indiana law, a trust is presumed to be irrevocable unless there is an express reservation of the power to revoke by the grantor when the trust is created. *Hinds v. McNair*, 413 N.E.2d 586, 594 (Ind. App. 1980). Here, Nicole is the true grantor of Nicole's Trust because the trust was established with settlement funds that belonged to her. If Nicole were the sole beneficiary of the trust, she could unilaterally revoke the trust notwithstanding the language to the contrary in the Trust Agreement. POMS SI CHI01120.200C. Nicole is not the sole beneficiary of the trust, however. The Trust Agreement provides that, at Nicole's death, the remainder is to be distributed to three named individuals. Trust Agreement, Art. V § B. Accordingly, Nicole's Trust is irrevocable.

Pursuant to POMS SI 01120.201(D)(2), an irrevocable trust established with an individual's assets on or after January 1, 2000 is a resource if payments from the trust could be made to or for the benefit of the individual or the individual's spouse, unless one of the exceptions in POMS SI 01120.203 applies. Because Nicole's Trust was created with Nicole's assets (the insurance settlement money) after January 1, 2000, it is a resource to Nicole unless a Medicaid trust exception in SI 01120.203 applies. *See* POMS SI 01120.203. We conclude, however, that none of the exceptions are applicable.

In particular, the exception under § 1917(d)(4)(A) of the Social Security Act, 42 U.S.C. § 1396p, does not apply. *See* POMS SI 01120.203(B)(1). Under that exception, trust assets are not a resource to the individual if: (1) the individual is disabled and under age 65; (2) the trust was established for the individual's benefit by a parent, grandparent, legal guardian, or court; and (3) the terms of the trust provide that, upon the individual's death, the State will be reimbursed for the total medical assistance paid on the individual's behalf under a State Medicaid plan. POMS SI 01120.203B.1.a. Where an individual's assets form only a part of the trust, these rules apply to that portion of the trust attributable to the individual.

Although Nicole is disabled and under age 65, and the Trust Agreement contains a provision to reimburse Medicaid when Nicole dies and the trust terminates, the second requirement for the Medicaid trust exception is not met, i.e., the requirement that the trust be established for Nicole's benefit by a parent, grandparent, legal guardian, or court. The Trust Agreement recites that Nicole's Trust was initially funded with the proceeds of a settlement paid by an insurance company in connection with a motor vehicle accident that caused Nicole's disability. Trust Agreement, Preamble 2-3. The Trust Agreement specifically recites that there was no lawsuit involved. Trust Agreement, Preamble 3. Thus, it appears that Nicole's Trust was not established by a court. Nor was Nicole's Trust established by a guardian, since you have informed us that Nicole does not have a guardian.

Although we presume that Donna R~ is Nicole's mother, or perhaps her grandmother, and we know that she created Nicole's Trust with Nicole's funds and for Nicole's benefit, the trust nevertheless fails to meet the Medicaid trust exception. We have been advised by the Team Leader of the Office of Disability and Income Security Programs' Deeming, Income, and Resources Team that, where a parent (or grandparent) acting as the agent for a competent adult creates a trust by merely transferring a competent adult's funds (as was done here), the parent (or grandparent) has not "established" the trust for purposes of 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(e). The term "individual" is absent from the list of entities that are permitted to establish a trust under 42 U.S.C., § 1396p(d)(4)(A). *Compare* 42 U.S.C. § 1396p(d)(4)(C) (permitting an "individual" to establish his or her own "account" in a pooled trust). We have been further advised that a parent (or grandparent) may establish a trust under 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1) for a competent adult (1) by creating a "seed trust," i.e., contributing some amounts of funds not belonging to the individual prior to transferring the individual's funds to the trust,

or (2) where the State recognizes the existence of a "dry" or "empty" trust, i.e., a trust without any trust assets which is created by the parent or grandparent, and into which the competent disabled adult's funds can then be placed. However, there is no indication that Donna R~ created a seed trust. Moreover, Indiana does not recognize dry or empty trusts. *See Leazenby v. Clinton County Bank and Trust Company*, 355 N.E.2d 861, 864 (Ind. 1976); *Pavy v. Peoples Bank and Trust Company*, 195 N.E.2d 862, 866-67 (Ind. 1964); *Restatement (Third) of Trusts*, § 2(i)(2003) ("A trust cannot be created unless there is trust property in existence and ascertainable at the time of the creation of the trust"). Thus, to satisfy 42 U.S.C. § 1396p(d)(4)(A), Donna R~ would have had to initially fund Nicole's Trust with some assets not belonging to Nicole before transferring Nicole's assets into the trust. Because Nicole's Trust was established with Nicole's assets after January 1, 2000, and because none of the exceptions in POMS SI 01120.203 apply, the trust is a resource to Nicole. In addition, we note that items on Schedule A appear to mirror larger deductions on the Time Deposit Inquiry of March 16, 2004, such that they would constitute either assets of the trust or disbursements from the trust, but, in either case, they would represent conversion of a resource, which may or may not be excludable. For example, the electronic wheelchair would appear to be an excludable resource. *See* 20 C.F.R. § 416.1216(c).

We turn to the issue of whether CD 21769 should be considered part of Nicole's Trust. You provided us with a copy of CD 21769, with a revision date of May 5, 2004, and a reason for revision as "To Retitle." Schedule A shows an entry for April 4, 2004, indicating renewal of CD 21769 in the amount of $10,000. The number of the $10,000 CD (21769) is different from the number of the CD used to fund Nicole's Trust when it was created (21208). However, it appears that CD 21769 represents the remaining proceeds of CD 21208. As such, it should be considered an asset of the Trust and a resource. If, however, there is any indication that CD 21769 came from some source other than the personal injury settlement proceeds, then further development should be undertaken to determine whether CD 21769 represents the assets of a third-party trust. See POMS 01120.200.

CONCLUSION

We conclude that Nicole's Trust is a resource to Nicole because no exception in POMS SI 01120.203 applies. We further conclude, since it appears that CD 21769 represents the remaining proceeds of CD 21208, i.e., the remainder of the personal injury settlement proceeds, it is a trust asset back to the date the CD was first issued.

F. PS 04-312 Indiana Trust for Angela R. M~ SSN: ~ --ACTION Your Reference: S2D5G3

DATE: December 28, 1999

1. SYLLABUS

On 11/30/93, an irrevocable trust was created for an SSI recipient. The trust has a spendthrift provision and names her mother as the settler (grantor) of the trust; however, it is unclear whose money was used to fund the trust. Per the terms of the trust, the trustee "may" use the income or principal of the trust for the recipient's health, education and support. The trust is not determined to be a countable resource for the following three reasons: 1) The NH is not the sole beneficiary of the trust and, therefore, cannot revoke or terminate the trust and obtain the assets contained therein. 2) The trustee retains the power to determine when, and if, to make any payments from the trust (i.e. the beneficiary cannot direct use of the trust to meet her basic needs). 3) According to the terms of the trust, the recipient cannot sell or transfer her beneficial interest in the trust. While it is noted that the trust contains language allowing amendments to the trust, it is determined that since the trustee has discretion to deny consent, the trust remains a non-countable resource. Any disbursements from the trust, whether cash or in-kind, may constitute income for SSI purposes and, therefore, must be reported when received.

2. OPINION

You have asked whether the trust established for Angela M~ (Angela) is a countable resource for the purposes of determining Angela's eligibility for Supplemental Security Income (SSI). We believe, for the reasons stated below, that the trust is not a resource to Angela, although any distribution made to Angela could be considered income for SSI purposes at the time of the distribution.

FACTS

The Angela R. M~ Trust (the trust) was created on November 30, 1993 with the funds held in a particular bank account. The trust names Paula A. M~ (presumably Angela's mother) as the settlor of the trust, but it is not clear whose money was in the bank account that funded the trust.

The purpose of the trust is "the benefit of Angela R. M~." Sec. 2. Under the terms of the trust, the trustee "may" distribute the income or principal of the trust for Angela's health, education, and support and maintenance only to the extent that her needs are not met by any and all available governmental benefits. The trust has authority only to make payments to supplement, not to replace, government benefits. Sec. 6 The trust further states that the trustee's discretion in expending income and principal is limited to the purchase of items or services not provided by government programs or benefits. Sec. 7.

The trust states that it is "irrevocable." Sec. 4. The trust may be amended with the consent of the settlor and the trustee, but the trust cannot be made revocable. Sec. 5.

The trust has a spendthrift provision with respect to Angela's interest in the trust. Sec. 9 The trust will terminate when Angela dies or if the trust is found subject to the claims of any government or private agency. On termination, the remaining trust property will be distributed to the settlor's surviving children. Secs. 10-11.

DISCUSSION

A resource, for SSI purposes, includes cash or other liquid assets or any real or personal property that the individual owns and could convert to cash to be used for her own support and maintenance. 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property or her share of the property, it is considered a resource. 20 C.F.R. § 416.1201(a)(1); *see also* POMS SI 01110.100(B). Trust property can be a resource for SSI purposes. POMS SI 01120.200(A). The trust is a resource to Angela if she can (1) revoke or terminate the trust and use the funds to meet her needs for food, clothing or shelter; (2) direct the use of the trust principal for her support and maintenance; or (3) sell her beneficial interest in the trust. POMS SI 01120.200(D)(1)(a); *Zebley Trust as an SSI Resource-Wisconsin, Bernard Walton* (~), RA V (M~) to M~, Acting ARC-POS (Feb. 23, 1993). Our analysis of this case is somewhat complicated because, from the information we were provided, we cannot determine whether this trust was established with Angela's funds or her mother's. However, we conclude that the trust at issue here is not a resource to Angela under any of these three theories, regardless of the source of the funds.

1. Angela Cannot Revoke or Terminate the Trust and Obtain the Assets.

If the trust was established with the mother's funds (or anyone's funds other than Angela's own funds), Angela would not have the power to terminate the trust and obtain the trust assets. By its terms, the trust will terminate only if Angela dies or if the trust is found subject to the claims of any governmental or public agency.

If Angela's funds were used to fund the trust, she could not revoke the trust on her own because she is not the sole beneficiary of the trust. Under general trust law, a trust that purports to be irrevocable may be revoked if the settlor (also called a "grantor") and all beneficiaries agree. *See* Restatement (Second) of Trusts § 338(1), 339 (1959). Here, if the funds used to create the trust belonged to Angela, she is the true settlor of the trust, even if the trusts names another person as the settlor. *See* 76 Am. Jur. 2d Trusts § 55 (1992). But even if Angela is the settlor of the trust, she is not the sole beneficiary of the trust. There are additional, residual beneficiaries to the trust because, on termination of the trust, any remaining assets will be distributed to the settlor's children._11 Angela could not revoke the trust without the consent of other beneficiaries, some of which may not even exist yet. *See* Restatement (Second) of Trusts § 338(1), 339 (1959). As a matter of policy, we presume that the additional beneficiaries would not consent to revocation of the trust. *See Trusts Established as the Result of Zebley Underpayments*, SSD, Chief, SSI Branch (K~) to B~, Director, Division of Program Requirements Policy (8/28/91); *Walton* Memo, *supra*, at 3.

2. Angela Cannot Direct the Trustee to Use the Funds for Her Support and Maintenance.

Angela also does not have power to direct use of the trust property to meet her needs for food, clothing, or shelter. According to the terms of the trust, the trustee has discretion as to whether and when to make any payments from the trust. The trust states that the trustee "may" distribute funds for Angela's supplemental needs, although "[t]he trustee's discretion" is limited to expenditures to purchase items or services not provided by government programs or benefits. Secs. 6-7. Therefore, under the terms of the trust, Angela cannot compel the trustee to make payments for her basic support and maintenance.

We note that the trust allows an amendment to the trust with the consent of the settlor and the trustee, although the trust cannot be modified to be made revocable. Sec. 5. Under this provision, if Angela is the settlor, she could modify the trust, with the trustee's consent, so that the trustee would be required to use the trust assets for her support and maintenance. However, Angela would have to obtain the trustee's consent to make such an amendment to the trust, and the trustee would have discretion to deny the amendment. *See* Restatement (Second) of Trusts § 330 comment l, 331(1) and comment (1959). Because the trustee could withhold consent, the trust should not be considered a resource to Angela. _22

3. Angela Cannot Sell Her Beneficial Interest in the Trust.

If Angela's mother (or anyone but Angela) is the settlor of the trust, Angela would be unable to sell her beneficial interest in the trust because of the spendthrift provision in Section 9 of the trust. If Angela is the settlor of the trust, the spendthrift provision presumably would be invalid. However, we would assume that the beneficial interest has no significant value because of the discretionary nature of the trust. *See Zebley Trust as an SSI Resource-Wisconsin, Bernard Walton* (~), RA V (M~) to M~, Acting ARC-POS (Feb. 23, 1993) at 5; *Tentative Draft No. 2*: *Restatement (Third) of Trusts* § 60 and comment f (March 10, 1999). As explained above, Angela could amend the trust, such that the trustee was required to make certain payments to her from the trust. In that case, Angela could, in theory, have a beneficial interest of value that she could sell. But since Angela cannot amend the trust without the trustee's consent, and since the trustee has discretion to deny consent, we will not consider the trust to be a resource.

4. Disbursements From the Trust May Be Income to Angela.

As noted above, the trustee is not required to make disbursements from the trust. However, if the trustee makes any disbursements, those disbursements may be income for SSI purposes. POMS 01120.200(E)(1). Therefore, Angela should be required to report any expenditures made to her or on her behalf.

CONCLUSION

In sum, this trust is not a resource to Angela because she cannot revoke or terminate the trust, direct the trustee to provide for her support and maintenance, or sell her beneficial interest in the trust. However, Angela should be required to report any disbursements from the trust made to her or for her benefit, since those disbursements could represent income for SSI purposes.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By: _____
Carole J. K~
Assistant Regional Counsel

_11 We need not determine whether (if Angela's funds were used to fund the trust) the "settlor's children" refers to Angela's children, as the true settlor of the trust, or Paula M~'s children, as the named settlor of the trust. In either case, there would be residual beneficiaries who would have to consent to any revocation of the trust.

_22 We discussed this issue with attorneys in our central office in Baltimore. They agreed that the agency should not require Angela to show that the trustee will not consent to an amendment to the trust.

G. PS 04-198 Indiana Trust for David S~, ~

DATE: November 16, 1999

1. SYLLABUS

The individual has a trust sub-account in the ARC of Indiana Master Trust, funded by the individual's insurance settlement. The trust monies provide for the comfort and happiness of disabled beneficiaries by using the trust property to serve their interests over and above their basic maintenance, support, medical, dental, and therapeutic care or any other appropriate care or service which may be paid for or provided by other sources. The trustee has discretion to make disbursements. The trustee, however, cannot make any disbursements which would jeopardize a disabled beneficiary's eligibility for Government assistance. The trustee is also prohibited from using trust property to reimburse any local, State, or Federal Government agency for such assistance.

The individual does not have the power to direct use of the trust property to meet his needs for food, clothing, or shelter. Nor can the individual sell his beneficial interest in the trust, or revoke the trust and obtain the trust assets. Since the individual is the trust settler, but is not the sole beneficiary of the trust (after his death, the money goes to his heirs and the ARC), the individual cannot revoke the trust without consent of the other beneficiaries.

Since the trust is irrevocable, and the individual cannot direct any disbursements from the account or convert trust property to cash to be used for his support, the property in the sub-account is not a resource for SSI purposes.

2. OPINION

The individual has a trust sub-account in the ARC of Indiana Master Trust, funded by the individual's insurance settlement. The trust monies provide for the comfort and happiness of disabled beneficiaries by using the trust property to serve their interests over and above their basic maintenance, support, medical, dental, and therapeutic care or any other appropriate care or service which may be paid for or provided by other sources. The trustee has discretion to make disbursements. The trustee, however, cannot make any disbursements which would jeopardize a disabled beneficiary's eligibility for Government assistance. The trustee is also prohibited from using trust property to reimburse any local, State, or Federal Government agency for such assistance.

The individual does not have the power to direct use of the trust property to meet his needs for food, clothing, or shelter. Nor can the individual sell his beneficial interest in the trust, or revoke the trust and obtain the trust assets. Since the individual is the trust settler, but is not the sole beneficiary of the trust (after his death, the money goes to his heirs and the ARC), the individual cannot revoke the trust without consent of the other beneficiaries.

Since the trust is irrevocable, and the individual cannot direct any disbursements from the account or convert trust property to cash to be used for his support, the property in the sub-account is not a resource for SSI purposes.

This is in reference to your request for assistance in determining whether, for SSI entitlement purposes, the property comprising a trust sub-account formed by joinder agreement between the Association for Retarded Citizens (ARC) of Indiana and David S~ can be considered a resource. The trust was created under Indiana law. We conclude that any property in a sub-account of the ARC of Indiana Master Trust I (Trust I) for which David S~ is beneficiary is not a resource to David for SSI purposes, although any distribution made to David would be considered income for SSI purposes at the time of the distribution.

FACTS

The materials you provided indicate that a trust sub-account was established for David S~ in 1990 in the Association for Retarded Citizens (ARC) of Indiana Master Trust. The ARC of Indiana Master Trust I was created on October 24, 1988. See declaration entitled, "The ARC of Indiana Master Trust I" at 1. In 1990, a joinder agreement was executed enrolling David S~, the disabled beneficiary, in the ARC Master Trust, and provides that the donor of the trust assets is "Defendant's Insurer," Colonial Penn Insurance Company. David's sub-account authorized distributions to be made.

The declarations of Trust I provide that its purpose is to promote the comfort and happiness of disabled beneficiaries by using the trust property to serve their interests "over and above their basic maintenance, support, medical, dental, and therapeutic care, or any other appropriate care or service which may be paid for or provided by other sources." Trust I at Article 2. The trustee has unqualified discretion to make disbursements, taking into account the services and financial resources available to the beneficiary from other sources. The trustee, however, cannot make any distribution or use of the trust property which would jeopardize a disabled beneficiary's eligibility for Government Assistance or for any services or financial assistance for basic maintenance, support, medical, dental and therapeutic care, or other "appropriate" care or service from any local, state, or federal government agency or department. The trustee is also prohibited from using trust property to reimburse any local, state or federal governmental agency or department for such assistance. Trust I at Articles 2, 4. The trustee is authorized to terminate the trust as to a particular disabled beneficiary if the trustee reasonably believes that it will be required to reimburse any local, state, or federal governmental agency or department from the trust income or principal. Trust I at Article 8, Section II. Distribution of the trust property upon termination must be made in accordance with the provisions of the Joinder Agreement. *Id.*

The trust is irrevocable as to any particular beneficiary upon execution of a Joinder Agreement and delivery to, and acceptance by, ARC of the assets to be deposited in the applicable sub-account. *See* Trust I at Article 3.

The trust declaration contains a "spendthrift clause" which prohibits any beneficiary from transferring, assigning, or otherwise encumbering any trust property in satisfaction of creditors' claims. Trust I at Article 6(d). Trust property is not available to a beneficiary until actually delivered to him or delivered for his benefit. *Id.*

There is a limited power to amend the trust and the Joinder Agreement, but amendments cannot alter the purpose of the trust or provide for the revocability of gifts otherwise irrevocable under ARC I or the joinder agreement. Trust I at Article 8, Section I.

The trust terminates either upon the death of the disabled beneficiary or on July 1, 2009 if there has been no written notice by ARC that the trust term is extended. Upon termination, all trust property must be distributed in accordance with the Joinder Agreement, except that, if termination occurs because ARC has not extended the term of the trust, no part of the trust property can be distributed to ARC. Trust I at Article 8.

DISCUSSION

Resources, for SSI purposes, include assets that a person owns and can convert to cash to be used for the person's support or maintenance. *See* 20 C.F.R. § 416.1201(a). If the person has the right or power to liquidate property, or his share of the property, it is a resource. Id. Trust assets are an SSI recipient's resources: (1) if the SSI recipient has the power to revoke the trust and use the trust assets to meet his needs for food, clothing, or shelter; (2) if he can direct use of the trust assets for such purposes; or (3) if he can sell his beneficial interest in the trust. *See* POMS SI 01120.200D.1.a. Whether the person can revoke the trust or direct use of the trust assets depends on the terms of the trust declaration and on applicable State law. POMS SI 01120.200D.2.

David does not have power to direct use of the trust property to meet his needs for food, clothing, or shelter. According to the terms of the trust, the trustee has complete discretion over whether or not to make disbursements. Trust I at Articles 2, 4, 6(b). Moreover, any disbursements which the trustee chooses to make must be consistent with the purpose of trust, which is to promote David's comfort and happiness by using the trust property to serve his interests *over and above* his basic maintenance, support, medical, dental and therapeutic care, and other care provided by other sources. Trust I at Article 2. The trustee is expressly prohibited from making disbursements that would jeopardize David's receipt of assistance from governmental bodies. *Id.*

Nor can David sell his beneficial interest in the trust. As explained below, it appears that David is the settlor of the trust. Because he is the settlor of the trust, the spendthrift provision is invalid and would not prevent David from selling his interest in the trust. *See Restatement (Second) of Trusts* § 156(1) (1957); cf. Ind. Code Ann. § 30-4-3-2(b). However, since disbursements are completely within the trustee's discretion, David's interest in the trust has no significant market value. Since his interest in the trust property would be of no real value to a potential transferee, any attempts by David to convert his interest in the trust into cash would likely fail. *See Bernard Walton*, ~, RA V (M~) to RC SSA V (M~), 2-23-93; *see also Tentative Draft No. 2: Restatement (Third) of Trusts* § 60 & comment f (March 10, 1999).

Finally, David cannot revoke the trust and obtain the trust assets. Under Indiana law, a trust is presumed to be irrevocable unless there is an express reservation of the power to revoke by the settlor when the trust is created. *Hinds v. McNair*, 413 N.E. 2d 586, 594 (Ind. App. 1980). An unrestricted power to modify the trust includes the power to revoke. Ind. Code Ann. § 30-4-3-1. This is in accord with general trust law. *See Restatement (Second) of Trusts* §§ 330-31 (1957). Here, the master trust declaration specifically states that the trust is irrevocable as to any particular sub-account upon execution of the joinder agreement and funding of the sub-account. This provision cannot be amended even with the consent of the ARC.

Even if a trust purports to be irrevocable, however, it can be revoked if the settlor and all beneficiaries agree. *See Restatement (Second) of Trusts* § 338 & comment a (1957). Therefore, if David is the settlor and sole beneficiary of the trust, he can revoke the trust on his own and obtain the assets. The ARC is nominally the settlor of the trusts, and the insurance company is listed as the donor of the trust assets. However, David's sub-account was apparently funded with the proceeds of an insurance award or settlement that presumably belongs to David. Thus, David appears to be the actual trust settlor. A settlor is the sole beneficiary of a trust where he transfers property in trust designating himself as beneficiary with the remainder to his estate or his heirs. Restatement (Second) of Trusts § 127 & comment b (1957). Where a settlor manifests an intention to create a vested or contingent interest in others, however, he is not the sole beneficiary. *Id.* at § 339, comment b.

In *Breeze v. Breeze*, 428 N.E.2d 286, 287-88 (Ind. App. 1981), the court found that a trust settlor was not the sole beneficiary of a trust where the settlor was the only beneficiary during his lifetime, but the trust declaration provided for the remainder to be distributed to others upon the settlor/beneficiary's death. Since at least part of the remainder after David's death is to be paid to someone other than David's heirs (i.e., the ARC of Indiana), David would not be considered the sole beneficiary of the trust and he cannot revoke the trust without the consent of the remaindermen who are also considered beneficiaries. *See Restatement (Second) of Trusts* § 127 comment b (1957) (where settlor is not the sole beneficiary, he cannot revoke the trust without the consent of the other beneficiaries).

CONCLUSION

Since David cannot revoke the trust, cannot direct any disbursements for his support, and cannot convert trust property into cash to be used for his support, the property in his trust sub-account is not a resource for SSI purposes.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By: _____
Mary T~
Assistant Regional Counsel

H. PS 04-084 SSI-Indiana-Review of the Trust for the Benefit of Zachary S~, ~-ACTION Your Ref: S2D5G6, SI 2-1-3 IN (S~) Our Ref: 04P021

DATE: February 27, 2004

1. SYLLABUS

This case involves a testamentary trust that was established by the individual's grandmother. The trust was to distribute any remaining trust principal to the individual upon attainment of age 30. Prior to his attainment of age 30, the individual's parents petitioned the Court to modify the distribution clause of the trust to "make the trust a special needs trust." Indiana law allows judicial modification of a trust when the modification would be necessary to prevent the failure of the purposes of the original trust. In this case, the grandmother had created the original trust to provide for her grandson's needs because he had a "learning disability." However, the grandson was more severely disabled due to autism and mental retardation. For this reason, OGC concluded that the judicial modification of the trust was allowed under Indiana law.

The pre-01/01/00 rules for trusts still apply because the trust remains a third party trust. Since the individual cannot terminate the trust, direct distributions from the trust for his support and maintenance, or sell his beneficial interest in the trust, the trust is not a resource for SSI purposes. However, disbursements from the trust may be income.

2. OPINION

You have asked us whether the Trust for the Benefit of Zachary S~ is a countable resource to Zachary for purposes of SSI. For the reasons discussed below, we conclude that the trust, as amended, is not a countable resource. However, any distributions from the trust paid directly to Zachary and any distributions used for his support and maintenance would be considered income for SSI purposes.

FACTS

On October 28, 1986, Martha H~, Zachary's grandmother, a resident of Indiana, executed her Last Will and Testament. On June 17, 1991, Ms. H~ executed the Seventh Codicil to her Last Will and Testament. The codicil contained the following provision:

I make the following gifts:

1. To Bank One, Bloomington, N.A., as Trustee for the benefit of my grandson, ZACHARY W. S~, of Carmel, Indiana, the sum of Five Hundred Thousand and no/100 Dollars ($500,000.00), in Trust nevertheless for the purpose of providing for his medical and educational needs resulting from his learning disability. Upon his attaining age Thirty (30), the Trustees H~ distribute to Zachary, if living, and if not then living to his estate, the then remaining balance.

Ms. H~ subsequently died, _11 and the trust became effective.

Thereafter, Timothy and Nancy S~, Zachary's parents, filed a petition to modify the trust in the Marion County Superior Court, Probate Division. On December 26, 2002, the court granted their petition and authorized their proposed modification. The "Amendment to Trust for the Benefit of Zachary W. S~," executed on December 27, 2002, stated that "it will be most advantageous to Zachary if the trust is amended to be administered as a 'special needs trust,' so that Zachary can have funds

available to pay for his supplemental needs over his lifetime, without jeopardizing his eligibility for SSI and or Medicaid." Amd. at 1.

According to the amended trust, the trustee has "sole and absolute discretion" to distribute principal or income from the trust, after considering "the advisability of making such distribution in light of the amount to which Zachary may be entitled from any governmental agency." Amd. Art. 2, 1(A). The trustee's discretion is only limited to the extent that "no assets sH~ be paid or expended when the Trustee determines that appropriate and reasonable care, comfort, support and habilitation are available and can be provided or funded by private, local, state or federal government agencies." *Id*.

Upon Zachary's death, the trust will terminate and the trustee sH~ pay any necessary funeral and burial expenses in its discretion. Amd. Art. 2, 1(B). The remaining trust property and accumulated income sH~ be distributed to his siblings in equal shares, with certain exceptions. *Id*.

DISCUSSION

1. The December 2002 Amendment to the Trust Constituted A Valid Judicial Modification of the Testamentary Trust

Ms. H~ created the testamentary trust for Zachary in June 1991 in the seventh codicil to her will. Subsequently, Zachary's parents petitioned the Marion County Probate Court to modify the testamentary trust to become a "special needs" trust. In December 2002, the court granted Zachary's parents' petition and issued an order modifying the trust. Thus, we must determine whether the court's action complied with Indiana law.

In Indiana, judicial modification of a trust is allowed under certain circumstances. Ind. Code § 30-4-3-26 provides:

Upon petition by the trustee or a beneficiary, the courts direct or permit the trustee to deviate from a term of the trust if, owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purposes of the trust. In that case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust, or may prohibit the trustee from performing acts required by the terms of the trust.

This provision follows Restatement (Second) of Trusts § 167(1), and is known as the "doctrine of equitable deviation." *See also In re Will of Scheele*, 517 N.E.2d 418, 426 (Ind. Ct. App. 1987). This doctrine does not apply where the modification would merely be more advantageous to the beneficiaries; rather, it must be necessary to prevent the failure or substantial impairment of the purposes of the trust. *See* Restatement (Second) of Trusts § 167 cmt. b (1959).

Here, Zachary's parents related that he was diagnosed with autism and mild mental retardation, and that subsequent to Ms. H~'s death, he applied for SSI because he had difficulty maintaining steady employment as a result of these disorders. Amd. at 1. There is no indication in the materials provided to us that Ms. H~ was aware of or anticipated these circumstances, especially since she stated that Zachary had a learning disability. *See also* Restatement (Third) of Trusts § 66 cmt. b (2003) ("Failure to provide in the terms of trust for subsequent developments involved in a case reinforces an inference that the circumstances were not anticipated by the settlor.").

The purpose of the trust was to provide for Zachary's medical and educational needs resulting from his learning disability. It is questionable whether the December 2002 modification was necessary to prevent the failure or substantial impairment of the purpose of the trust, or whether the modification was merely advantageous to Zachary. However, in the absence of evidence that casts doubt on the validity of the court's action, we defer to the court's action and conclude that the court's order complied with Ind. Code § 30-4-3-26.

2. The Amended Trust is not A Countable Resource

Since the court's action was a valid modification of the testamentary trust created by Ms. H~ in 1991, the amended trust still remained a trust established solely with the assets of a third party. Therefore, the regular resource rules in POMS SI 01120.200 apply to determine whether the assets in the amended trust are a resource. Under this provision, trust assets are a resource if an individual can (1) revoke or terminate the trust and use the assets to meet his needs for food, clothing, or shelter; (2) direct the use of the trust assets for his support and maintenance under the terms of the trust; or (3) sell his beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a).

Whether a trust can be revoked or terminated depends on the terms of the trust and the applicable state law. *See* POMS SI 01120.200(D)(2). Here, the terms of the amended trust do not give Zachary the right to terminate the trust. Moreover, no provision in the Indiana Code allows a beneficiary to otherwise terminate a trust. This is consistent with the general trust principle that beneficiaries may terminate a trust only if that power is granted in the terms of the trust. *See* Restatement (Third) of Trusts § 64 (2003). Therefore, Zachary cannot terminate the trust.

Next, we determine whether Zachary has the power to direct the use of the trust assets for his support and maintenance. The trust contains no provision allowing Zachary to direct any actions by the trustee or to act on his own behalf. *See* POMS SI 01120.200(D)(1)(b). Instead, the trust gives the trustee discretion to make such distributions and payments as it determines appropriate. _22 Amd. Art. 2, 1(A). Thus, Zachary does not have authority to direct the use of the trust assets to meet his support and maintenance needs.

Lastly, we determine whether Zachary has the power to sell his beneficial interest in the amended trust. Since this is a discretionary trust and the trustee cannot be compelled to make any distributions, Zachary's interest in the trust would have little or no value to a potential transferee. As such, any attempts by Zachary to convert his interest in the trust to cash would likely fail. Therefore, Zachary's beneficial interest in the trust would have no significant market value. *See* Restatement (Third) of Trusts § 60 and cmt. e (2003).

Because Zachary does not meet any of the above three criteria, we conclude that the assets in his trust are not a countable resource. However, certain distributions from the trust may be considered income. For example, any disbursements of cash made directly to Zachary would be considered unearned income for SSI purposes. *See* 20 C.F.R. § 416.1102; POMS SI 01120.200(E)(1)(a). In addition, any disbursements made to a third party resulting in Zachary's receipt of food, clothing, or shelter would be considered income in the form of in-kind support and maintenance. *See* 20 C.F.R. § 416.1102; POMS SI 01120.200(E)(1)(b).

CONCLUSION

The judicial modification of the testamentary trust for Zachary created by Ms. H~ was valid under Indiana law. As modified, Zachary's trust is not considered a resource to him for SSI purposes because he cannot terminate the trust, direct distributions from the trust for his support and maintenance, or sell his beneficial interest in the trust. Certain distributions from the trust, however, may be considered income to him.

Sincerely,
Kim L. B~
Regional Chief Counsel

By: _____
Cristine H. K~
Assistant Regional Counsel

_11We do not know the date of Ms. H~'s death.

_22The only limitation on the trustee's discretion is in the form of a prohibition from making distributions.

I. PS 02-039 Indiana Irrevocable Funeral Trust Agreement for Franklin T. T~, ~; Your Reference: S2D5G3

DATE: March 11, 2002

1. SYLLABUS

The issue in this case concerns whether or not an Irrevocable Funeral Trust Agreement (IFT Agreement) is valid under Indiana law and constitutes a countable resource for SSI purposes. This IFT Agreement provided that it is irrevocable after the first 30 days, that the deposit to the trust of the life insurance policy is irrevocable, and that the assignment of the policy proceeds to the funeral home and of ownership to the Trustee is irrevocable. While the IFT Agreement meets the requirements to be valid under Indiana law, the cash surrender value is considered a resource for SSI purposes during the first 30 days because it could be revoked by the recipient. After 30 days, the policy would not be a countable resource because the policy was irrevocably assigned to the trust.

2. OPINION

You requested an opinion whether the Indiana Irrevocable Funeral Trust Agreement entered into by Franklin T~, an elderly SSI claimant, is valid under Indiana law and constitutes a countable resource. Provided nothing in the life insurance policy itself precluded this arrangement, the irrevocable funeral trust agreement would be valid, and the cash surrender value of the life insurance policy would be a resource for the first thirty days after the agreement was made, but not thereafter.

FACTS

On November 21, 1997, Mr. T~ (Purchaser) purchased prepaid funeral services and/or merchandise from the Dickerson Funeral Home (Seller) by entering into an Irrevocable Funeral Trust Agreement ("IFT Agreement"). The services were funded by a life insurance policy issued by Western & Southern with a death benefit of $7000, which named Tom D~ d/b/a Dickerson Funeral Home as the designated beneficiary. The IFT Agreement provided for irrevocable deposit to trust of the life insurance policy and irrevocable assignment of the death benefit to the Dickerson Funeral Home and ownership to the trustee, NBD Bank, N.A.

The IFT Agreement acknowledged that, on November 3, 1994, the Indiana Funeral Trust Fund was established under a Second Amended Master Trust Agreement ("Master Trust Agreement") entered into between Hightower Services, Inc. and NBD Bank, N.A., as Trustee. The IFT Agreement also contained an adoption clause whereby the provisions of the Master Trust Agreement became binding on the parties to the IFT Agreement. The IFT Agreement and the Master Trust Agreement became irrevocable thirty days after the date it was signed by Mr. T~ and Mr. D~.

The Master Trust Agreement requires that a separate sub-trust account be established by the Seller for each IFT Agreement between a Purchaser and a Seller; that the accounts of all Purchasers establishing IFT Agreements be commingled and invested and that all income drawn from investments be added periodically on a pro rata basis and with a separate accounting for each sub-trust account; that the money on deposit and the interest earned be paid to the Seller when it provides evidence satisfactory to the Trustee that it has performed its obligations under the IFT Agreement and provided all funeral services and/or merchandise required of it; and that the Trustee may receive from interest earned on the commingled funds its reasonable compensation for services. Pursuant to the Master Trust Agreement, each Seller is required to sign an Adoption Agreement which acknowledges that the Purchaser received a summary of the Master Trust Agreement and acknowledges that Seller is to be a party and individual Settlor to the Master Trust Agreement.

The IFT Agreement also provides that Mr. T~ may change the funeral home who is to provide funeral services and merchandise at any time. However, under the agreement, Mr. T~ does not have any right to withdraw income from or reduce the account balance of the sub-trust account for any reason.

Other documents forwarded to us include a June 3, 2000, Notice of Change of Ownership and an undated "Data Page." The June 3, 2000, Notice of Change of Ownership indicates a change in ownership was "recently" requested, and the Dickerson Funeral Home is the new owner of Mr. T~' life insurance policy, as well as the Class 1 beneficiary. The undated Data Page, which has a fax date of January 25, 2001, reflects that Franklin T. T~ is the owner of the life insurance policy and Mary E. T~, Wife, is the Class 1 beneficiary.

DISCUSSION

A life insurance funded burial contract involves an individual purchasing a life insurance policy in his name and then assigning, revocably or irrevocably, either the proceeds or ownership of the policy to a third party, generally a funeral provider. The purpose of the assignment is to fund a prearranged burial contract. POMS § SI 01130.425(A)(1). Assuming the policy allowed Mr. T~ to assign ownership, ownership of Mr. T~' life insurance policy was assigned to NBD Bank, N.A. and the policy was deposited to trust. Since the policy was placed in trust, the rules governing trust funds determine whether it is a resource for SSI purposes. POMS §§ SI 01130.425(E); SI 01120.200 (B)(1) (for trusts created before 1/1/00).

A resource, for SSI purposes, is defined as property that the SSI claimant owns and can convert to cash or property, or over which he has the right, authority, or power to liquidate. 20 C.F.R. § 416.1201(a)(1). Applying this definition to trusts, the POMS provides that if: (1) the individual neither owns nor has the legal right to direct the use of trust assets to meet his or her support and maintenance needs, and (2) state law allows a life insurance policy that funds a funeral contract to be placed irrevocably in trust, then the policy's cash surrender value is not a resource for SSI purposes. POMS § SI 01130.425(E)(1).

The IFT Agreement in this case provides that Mr. T~' transfer of ownership was irrevocable after the first thirty days, as was the deposit of the life insurance policy in trust, and Mr. T~ does not have any right to withdraw income from or reduce the account

balance of the sub-trust account for any reason after that time. Because this transfer was permissible under Indiana law, as described below, the trust was irrevocable and the life insurance policy is not a countable resource for SSI purposes.

Indiana law specifically regulates pre-need funeral and burial contracts. See Ind. Code Ann. § 30-2-13 et. seq. Contracts for prepaid funeral services and/or merchandise entered into after December 31, 1995, and before July 1, 1999, (as the one in this case) may be funded with an insurance policy and may be revoked within thirty days after it is signed. *See* Ind. Code Ann. § 30-2-13-12.1(b). Thirty days after the contract is signed all property paid or delivered to the seller s be irrevocably deposited to trust as authorized by statute. *Id.* When the contract is funded with an insurance policy, the ownership of the insurance policy must be irrevocably assigned to a trustee. *See* Ind. Code Ann. § 30-2-13-12.1(c).

A trust account authorized and established under Indiana's statute must:

(1) be irrevocable and require the seller to deposit to trust all sums or property received from the purchaser; (2) designate the seller as settlor and the seller as beneficiary; (3) designate a trustee qualified under this chapter and authorize the trustee to charge a reasonable fee for services; (4) require that a separate account be maintained in the name of each purchaser; (5) require that the interest earned on the account be added to the principal and reinvested; (6) permit assets of the separate accounts of several purchasers to be commingled for investment; and (7) require that on delivery of services or merchandise the trustee s remit to the seller the amount on deposit in the purchaser's trust.

Ind. Code Ann. § 30-2-13-12.1(h)(1)-(7). The chapter further provides that a trust account:

(1) must include the provisions set forth in subsection (h) above; (2) may be included as an integral part of a seller's contract through the execution of an adoption agreement that references the trust account; and (3) is not required to be represented by a separate trust document for each contract.

Ind. Code Ann. § 30-2-13-12.1(j). Finally, a contract for prepaid funeral services and/or merchandise entered into after June 30, 1997, must contain a statement that:

(1) the purchaser may revoke the contract within thirty days after the contract is signed; and (2) after thirty days the contract is irrevocable.

Ind. Code Ann. § 30-2-13-12.1(j). However, this chapter does not prohibit a purchaser from immediately making the trust irrevocable and assigning ownership of an insurance policy used to fund a contract to obtain favorable consideration for Medicaid, SSI, or another public assistance program under federal or state law. Ind. Code Ann. § 30-2-13-12.1(m).

As discussed in our "Facts" section above, it appears that the IFT Agreement and Master Trust Agreement complies with these requirements. The IFT Agreement expressly provides that it is irrevocable after the first thirty days, that the deposit to trust of a life insurance policy is irrevocable, and that the assignment of the policy proceeds to Dickerson Funeral Home and of ownership to the Trustee is irrevocable. Since Mr. T~ could have revoked the IFT Agreement within thirty days after signing it, the cash surrender value was a resource during this time period. Although it appears Mr. T~ did not notify the insurance company of the agreement until recently, Mr. T~ signed the IFT Agreement on November 21, 1997; thus, the cash surrender value was a resource until December 21, 1997. After that time, however, the policy was not a resource. Mr. T~ simply retained the right to change funeral providers; he does not have any right to withdraw income from or reduce the account balance of the sub-trust account established for him for any reason. Therefore, it appears that he is not able to surrender the policy for cash. Further, pursuant to Indiana law, the IFT Agreement is valid. The insurance policy has been transferred to a valid irrevocable trust, and Mr. T~ no longer owns the policy or has the power to use it for his support and maintenance. Consequently, the cash surrender value of Mr. T~' life insurance is not a resource for SSI purposes.

CONCLUSION

For the above reasons, we conclude that, assuming nothing in the insurance policy itself precluded this arrangement, Mr. T~' irrevocable life insurance-funded funeral trust agreement is valid under Indiana law. The cash surrender value of the life insurance policy was a resource for the first thirty days after the assignment, since Mr. T~ could revoke the agreement and obtain the cash surrender value of the policy. After the first thirty days, the policy would not be a resource because the policy was irrevocably assigned to trust.

J. PS 00-339 Indiana Trust for Angela R. M~, SSN: ~; Your Reference: S2D5G3

DATE: December 28, 1999

1. SYLLABUS

This irrevocable trust is not a resource for SSI because the beneficiary cannot revoke the trust, direct the use of the funds for her support and maintenance or sell her beneficial interest. However, disbursements from the trust may be income to the beneficiary. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00.

2. OPINION

You have asked whether the trust established for Angela M~ (Angela) is a countable resource for the purposes of determining Angela's eligibility for Supplemental Security Income (SSI). We believe, for the reasons stated below, that the trust is not a resource to Angela, although any distribution made to Angela could be considered income for SSI purposes at the time of the distribution.

FACTS

The Angela R. M~ Trust (the trust) was created on November 30, 1993 with the funds held in a particular bank account. The trust names Paula A. M~ (presumably Angela's mother) as the settlor of the trust, but it is not clear whose money was in the bank account that funded the trust.

The purpose of the trust is "the benefit of Angela R. M~." Sec. 2. Under the terms of the trust, the trustee "may" distribute the income or principal of the trust for Angela's health, education, and support and maintenance only to the extent that her needs are not met by any and all available governmental benefits. The trust has authority only to make payments to supplement, not to replace, government benefits. Sec. 6 The trust further states that the trustee's discretion in expending income and principal is limited to the purchase of items or services not provided by government programs or benefits. Sec. 7.

The trust states that it is "irrevocable." Sec. 4. The trust may be amended with the consent of the settlor and the trustee, but the trust cannot be made revocable. Sec. 5.

The trust has a spendthrift provision with respect to Angela's interest in the trust. Sec. 9 The trust will terminate when Angela dies or if the trust is found subject to the claims of any government or private agency. On termination, the remaining trust property will be distributed to the settlor's surviving children. Secs. 10-11.

DISCUSSION

A resource, for SSI purposes, includes cash or other liquid assets or any real or personal property that the individual owns and could convert to cash to be used for her own support and maintenance. 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property or her share of the property, it is considered a resource. 20 C.F.R. § 416.1201(a)(1); see also POMS SI 01110.100(B). Trust property can be a resource for SSI purposes. POMS SI 01120.200(A). The trust is a resource to Angela if she can (1) revoke or terminate the trust and use the funds to meet her needs for food, clothing or shelter; (2) direct the use of the trust principal for her support and maintenance; or (3) sell her beneficial interest in the trust. POMS SI 01120.200(D)(1)(a); Zebley Trust as an SSI Resource-Wisconsin, Bernard W~ (~), RA V (M~) to M~, Acting ARC-POS (Feb. 23, 1993). Our analysis of this case is somewhat complicated because, from the information we were provided, we cannot determine whether this trust was established with Angela's funds or her mother's. However, we conclude that the trust at issue here is not a resource to Angela under any of these three theories, regardless of the source of the funds.

1. Angela Cannot Revoke or Terminate the Trust and Obtain the Assets.

If the trust was established with the mother's funds (or anyone's funds other than Angela's own funds), Angela would not have the power to terminate the trust and obtain the trust assets. By its terms, the trust will terminate only if Angela dies or if the trust is found subject to the claims of any governmental or public agency.

If Angela's funds were used to fund the trust, she could not revoke the trust on her own because she is not the sole beneficiary of the trust. Under general trust law, a trust that purports to be irrevocable may be revoked if the settlor (also called a "grantor") and all beneficiaries agree. See Restatement (Second) of Trusts § 338(1), 339 (1959). Here, if the funds used to create

the trust belonged to Angela, she is the true settlor of the trust, even if the trusts names another person as the settlor. *See* 76 Am. Jur. 2d Trusts § 55 (1992). But even if Angela is the settlor of the trust, she is not the sole beneficiary of the trust. There are additional, residual beneficiaries to the trust because, on termination of the trust, any remaining assets will be distributed to the settlor's children. Angela could not revoke the trust without the consent of other beneficiaries, some of which may not even exist yet. See

Restatement (Second) of Trusts § 338(1), 339 (1959). As a matter of policy, we presume that the additional beneficiaries would not consent to revocation of the trust. *See* Trusts Established as the Result of Zebley Underpayments, SSD, Chief, SSI Branch (K~) to B~, Director, Division of Program Requirements Policy (8/28/91); W~ Memo, supra, at 3.

2. Angela Cannot Direct the Trustee to Use the Funds for Her Support and Maintenance.

Angela also does not have power to direct use of the trust property to meet her needs for food, clothing, or shelter. According to the terms of the trust, the trustee has discretion as to whether and when to make any payments from the trust. The trust states that the trustee "may" distribute funds for Angela's supplemental needs, although "[t]he trustee's discretion" is limited to expenditures to purchase items or services not provided by government programs or benefits. Secs. 6-7. Therefore, under the terms of the trust, Angela cannot compel the trustee to make payments for her basic support and maintenance.

We note that the trust allows an amendment to the trust with the consent of the settlor and the trustee, although the trust cannot be modified to be made revocable. Sec. 5. Under this provision, if Angela is the settlor, she could modify the trust, with the trustee's consent, so that the trustee would be required to use the trust assets for her support and maintenance. However, Angela would have to obtain the trustee's consent to make such an amendment to the trust, and the trustee would have discretion to deny the amendment. See Restatement (Second) of Trusts § 330 comment l, 331(1) and comment e (1959). Because the trustee could withhold consent, the trust should not be considered a resource to Angela.

3. Angela Cannot Sell Her Beneficial Interest in the Trust.

If Angela's mother (or anyone but Angela) is the settlor of the trust, Angela would be unable to sell her beneficial interest in the trust because of the spendthrift provision in Section 9 of the trust. If Angela is the settlor of the trust, the spendthrift provision presumably would be invalid. However, we would assume that the beneficial interest has no significant value because of the discretionary nature of the trust. *See* Zebley Trust as an SSI Resource-Wisconsin, Bernard W~ (~), RA V (M~) to M~, Acting ARC-POS (Feb. 23, 1993) at 5; Tentative Draft No. 2: Restatement (Third) of Trusts § 60 and comment f (March 10, 1999). As explained above, Angela could amend the trust, such that the trustee was required to make certain payments to her from the trust. In that case, Angela could, in theory, have a beneficial interest of value that she could sell. But since Angela cannot amend the trust without the trustee's consent, and since the trustee has discretion to deny consent, we will not consider the trust to be a resource.

4. Disbursements From the Trust May Be Income to Angela.

As noted above, the trustee is not required to make disbursements from the trust. However, if the trustee makes any disbursements, those disbursements may be income for SSI purposes. POMS 01120.200(E)(1). Therefore, Angela should be required to report

any expenditures made to her or on her behalf.

CONCLUSION

In sum, this trust is not a resource to Angela because she cannot revoke or terminate the trust, direct the trustee to provide for her support and maintenance, or sell her beneficial interest in the trust. However, Angela should be required to report any disbursements from the trust made to her or for her benefit, since those disbursements could represent income for SSI purposes.

A. PS 07-119 SSI - Indiana - Review of the Inheritance of Gail J~, Parent Deemor for Jacque J~, ~ Your Reference: S2D5G6 SI-2-1-IN (J~)

DATE: April 25, 2007

1. SYLLABUS

The issue is whether a parent's inheritance in an estate should be treated as a resource or income for the purpose of determining a child's SSI eligibility in the state of Indiana. All states in Region V consider an inheritance as income as of the date of death and a resource in subsequent months.

The mother of an SSI child was one of the heirs to the Decedent's estate, and had an inheritance interest in the property (condo) of the estate and title in Decedent's property. The mother's share of the interest in the condo is income up to the presumed maximum value in the month of Decedent's death, and an excludable resource in the following months, since it served as the principal residence for herself and SSI child prior to the decedent's death.

2. OPINION

You asked when Gail J~'s interest in an inheritance in an estate should be treated as a resource or income for the purpose of determining SSI eligibility for her son, Jacque G. J~. We have reviewed the account documents and, for the following reasons, we conclude that Ms. J~'s inheritance interest should be treated as income on the date of Shirley W~' death and a resource beginning the following month.

BACKGROUND

Gail J~ became one of four heirs to the estate of Shirley W~ ("Decedent") after her death, on August 31, 2006. On September 14, 2006, the Decedent's Last Will and Testament was probated and an estate was established. On that same date, Ms. J~, along with the three other heirs, created a "Family Settlement Agreement" ("Agreement"). Ms. J~ was appointed as a co-executor of the estate. The Agreement set forth terms on the distribution of some of the estate assets. The relevant terms of the Agreement stated that the following assets would be contributed to the proceeds of the Decedent's estate: a Certificate of Deposit in the amount of $35,480.62, minus $16,500.00, and a checking account in the amount of $35,877.68. Other assets in the Decedent's estate are a condominium; two transfers from checking accounts in the amount of $413.00 and $554.42; a life insurance policy in the amount of $4,000; an automobile; and furniture. Prior to the Decedent's death, Ms. J~ and Jacque moved into the condominium, and it is currently being used as their principal residence. The estate is currently in probate and has not yet been settled or closed.

DISCUSSION

Under SSA's Program Operations Manual System (POMS), inheritance is an interest in a decedent's estate either under a will or under the laws of intestacy. POMS SI CHI 00830.550. In all states in Region V, an inheritance constitutes income as of the date of death, and a resource in subsequent months. *See* POMS SI CHI 00830.550(F); Memorandum from Reg'l Chief Counsel, Chicago, to Assistant Reg'l Comm'r-MOS, Chicago, *Regional Supplement on When Inheritance Property Becomes Income* (Mar. 4, 2003, Update Mar. 13, 2007).

Under Indiana law, title to the real and personal property vests immediately with the heirs, but is subject to possession of the personal representative, who is responsible for paying expenses and administering the estate. *See* Ind. Code Ann. § 29-1-7-23 ("[w]hen a person dies, his real and personal property, passes to persons to whom it is devised by his last will, or, in the absence of such disposition, to the persons who succeeded to his estate as his heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administrating the estate, the payment of other claims . . .").

In Indiana, as an heir, Ms. J~'s interest is transferable prior to final settlement of the estate, since the law provides that, although the final decree in probate is the final adjudication of the transfer of the property to distributees, "no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees." Ind. Code Ann. § 29-1-17-2(d); *see also Helvey v.*

O'Neill, 288 N.E.2d 553, 557 (Ind. Ct. App. 1972) (sale of real property by heir prior to final settlement of estate passed title and right of possession to purchaser); *Boice v. Mallers*, 96 N.E.2d 342, 345 (Ind. Ct. App. 1950) (trustee effectively passed title to stock by transferring it prior to settlement of the estate).

As such, on August 31, 2006, when Ms. J~ became one of four heirs to the Decedent's estate, she had an interest in the property of the estate and title in Decedent's property vested immediately in Ms. J~. The amount of income would be determined by the market value of her right to inherit as of the date of Decedent's death. *See* POMS SI CHI 00830.550(F). Although Ms. J~ had an inheritance interest in the condominium, it is being used as the principal residence for Ms. J~ and Jacque. Therefore, her share of the interest in the condominium constitutes income up to the presumed maximum value rule in the month of Decedent's death. POMS SI 00830.550 (A)(4). However, in the following months it would be excluded as a resource. *See* 20 C.F.R. § 416.1212.

CONCLUSION

In sum, we conclude that Ms. J~'s inheritance was income as of the date of Decedent's death and a resource beginning the following month.

B. PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~

DATE: September 16, 2002

1. SYLLABUS

This opinion addresses whether a personal effect (in this case, a piano) owned by an SSI recipient, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required by her physical condition under the household goods and personal effects exclusion. This is essentially an evidentiary issue; i.e., the key is whether the fact finder in the FO has sufficient evidence to determine that the piano is required by the individual's physical condition. Under 20 CFR 416.1216(c), certain household goods and personal effects are excluded from SSI resource counting if they are "required because of a person's physical condition." As long as there is sufficient evidence for the fact finder to determine that the piano (or similar item) is required as treatment or therapy for the individual's physical condition, then the item could be excluded as a resource. If the fact finder cannot determine that the piano (or similar item) is required, then the current market value of the piano (or similar item) is subject to the $2,000 maximum exclusion for household goods and personal effects [20 CFR 416.1216(a)-(b)]. It should be noted that the exclusions discussed above do not appear in the Social Security Act.

2. OPINION

You asked whether a piano, owned by SSI claimant Alicia W~, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required because of her physical condition. We conclude that, although there is no caselaw or other legal authority interpreting the applicable regulation, 20 C.F.R. § 416.1216(c), the Agency may consider the piano as an excludable resource, under 20 C.F.R. § 416.1216(c), provided Ms. W~ can show that playing the piano is required as treatment or therapy for her physical condition. If the Agency finds that the piano is not so required, further development and consideration may be warranted to determine the actual current market value of the piano.

FACTS

Alicia W~ owns a baby grand piano that the Wausau Field Office reported is worth $7000. It is not clear how the valuation of $7000 was reached. For purposes of this memorandum, we assume that $7000 is likely the amount Ms. W~ paid for the piano. Ruth J~, a benefit specialist with the Aging and Disability Resource Center of Marathon County, has advised SSA that Ms. W~ tried to sell her piano by advertising it in a local newspaper and with the Wausau Conservatory of Music and by contacting several local churches. Two individuals expressed interest, but Ms. W~ received no offers to buy the piano. We do not know what price Ms. W~ asked or whether anyone would be willing to purchase the piano for less than her asking price. Ms. J~ stated, in April 2002, that a local music store sold

only one comparable piano in the preceding year. The price that the music store charged was not reported. Although Ms. J~ indicated that she was providing the field office with a statement from the music store, no such statement was included in the materials forwarded to us. Ms. J~ also reported that Ms. W~ uses the piano daily and that she is the only member of her household.

Ms. W~ has a congestive heart condition and hypertension. On December 12, 2001, her physician, Arthur W~, M.D., wrote a letter stating that playing piano provided Ms. W~ with positive health benefits in terms of stress relief, which resulted in positive benefits for her hypertension. Dr. W~ further stated that being forced to sell her piano in order to receive SSI "would have a deleterious effect on her overall health."

DISCUSSION

The Social Security Act (the Act) provides that certain resources are excludable resources for SSI purposes. 42 U.S.C. § 1382b. Among the resources that may be excluded are household goods and personal effects, but only to the extent that their total value does not exceed the $2000 limit set by the Commissioner. 42 U.S.C. § 1382b(2)(A); 20 C.F.R. § 416.1216(b). The regulations define "personal effects" to include musical instruments. Thus, a portion of the value of Ms. W~'s piano could be excluded as a personal effect, provided the total value of her other personal effects and household goods is less than $2000. However, it appears that Ms. W~'s piano may be worth considerably more than that. We must determine, therefore, whether her piano may be excludable for some other reason, or whether the value of her piano can be considered less than previously assumed.

Exclusion for Items Required for Person's Physical Condition

The exclusion for household goods and personal effects that are required because of a person's physical condition does not appear in the Act. *See* 42 U.S.C. §1382b. The exclusion became a part of SSI regulations effective October 20, 1975. 40 Fed. Reg. 48911, 48916 (October 20, 1975). Neither the preamble to the final regulation published on that date nor the preamble to the proposed regulation states the rationale for the exclusion or gives any further clarification as to its application. *See* 39 Fed. Reg. 2487 (January 22, 1974); 40 Fed. Reg. at 48911. Thus, we cannot ascertain from those publications whether the Agency intended for the exclusion to apply to items such as a piano that provide "positive health benefits" in terms of an individual's physical condition. The POMS, likewise, provides no guidance in this situation. *See* POMS SI 01130.430. We were unable to find any caselaw interpreting the regulatory provision or any OGC precedential opinion on the subject. Similarly, we found no caselaw regarding other needs-based federal entitlement programs that might be helpful in interpreting 20 C.F.R. § 416.1216(c).

The Internal Revenue Code (IRC), however, includes a personal income tax deduction for medical care expenses. 26 U.S.C. § 213(a). The definition of "medical care" includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . .." 26 U.S.C. § 213(d)(1)(A). The Internal Revenue Service (IRS) addressed the issue of whether the cost of a piano could be deducted under the IRC medical care provision in two private letter opinions. In the first, parents bought a piano so that their child, who had polio, could strengthen her finger muscles and improve her posture. Priv. Ltr. Rul. 59-03205410A (March 20, 1959), 1959 WL 59702. The IRS determined that, if the use of the piano was prescribed by a physician to mitigate the effects of the child's illness, and if the child was the only one to use the piano, a portion of the cost could be deducted as a medical care expense. *Id.* The portion of the piano's cost that could be deducted was "the minimum cost of a piano of a quality sufficient for the therapeutic purposes" subject to the ceiling of 7.5% of adjusted gross income, as provided in 26 U.S.C. § 213(a). Priv. Ltr. Rul. 59-03205410A. Another private letter ruling states that, after suffering a nervous breakdown, a taxpayer's daughter "was induced by her doctors to resume piano lessons, in view of her particular aptitude in this area, as it was hoped that this would be good therapeutic treatment and would create a motivation toward recovery." Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. The taxpayer could not find a suitable used piano, so he bought a new piano for $800. The IRS held that the taxpayer could take a medical care deduction for "an amount which does not exceed the minimum cost of a piano of a quality sufficient to effect the prescribed therapy," subject to the limitations in 26 U.S.C. § 213. Priv. Ltr. Rul. 63-02264710A (February 26,

1963), 1963 WL 14192. To the extent, however, that the expenditure was "elaborate," i.e., beyond the need for the prescribed medical therapy, it was not deductible because it was not directly related to medical care. *Id.*

The IRC provision relied upon in these two private letter rulings is not identical to the resource exclusion provision in the Social Security Regulations. The IRC section would apply to expenditures for treatment of a mental condition as well as a physical condition, but the Social Security regulation would allow exclusion of an item only if it is required because of the SSI claimant's physical condition. Compare 26 U.S.C. § 213(d)(1)(A), 20 C.F.R. § 416.1216(c). While the Social Security regulation allows for exclusion of a resource "required because of a person's physical condition," 20 C.F.R. § 416.1216(c) (emphasis added), the IRC provision, 26 U.S.C. § 213(d)(1), allows a tax deduction for "amounts paid" for treatment (emphasis added). Although the IRC section does not address whether an expenditure is medically required, the private letter rulings provide some support for the CONCLUSION that, in some cases, piano playing may be prescribed as part of an individual's medical treatment.

There is nothing in the Social Security Act or Social Security Regulations to direct a CONCLUSION on this issue. We think it reasonable, however, to conclude, based on the private letter rulings, that there are situations in which a doctor may reasonably require a patient to play a piano as a necessary part of treatment or therapy for the patient's physical condition. Unlike the medical care deduction provision in the IRC, the SSI exclusion for items required for a person's physical condition does not place any limitation on the value of items which can be excluded, even though some of the items listed, such as an engagement ring or a dialysis machine, could have considerable monetary value. 20 C.F.R. § 416.1216(c); *see also* POMS SI 01130.430 ("Items Excluded Regardless of Value") (emphasis added).

The letter from Ms. W~'s physician states that it is important that she enjoy the benefits of her piano because it relieves her stress and, consequently, has a positive effect on her hypertension. The doctor further states that selling the piano to receive SSI benefits would be "deleterious" to her health. In the absence of evidence casting doubt on the doctor's credibility, we think this statement may be sufficient for a fact-finder to conclude that the piano is required for Ms. W~'s physical condition. You may want to obtain clarification from the doctor, however, that he considers playing the piano a required part of Ms. W~'s treatment or therapy for her hypertension or her congestive heart condition. You may also want to verify that the "deleterious" effect of selling the piano refers to her inability to receive the therapeutic benefit of playing the piano, rather than to other factors, such as a contemplated elevation of her blood pressure because selling the piano would upset her.

If you find that playing a piano is required for Ms. W~'s physical condition and she is the only person who will use the piano, the entire value of the piano should be considered an excludable resource. If, however, you find that playing piano is not required for Ms. W~'s physical condition, it will be necessary to determine the piano's value.

Determining the Current Market Value

If you determine that the piano is not an excludable resource under 20 C.F.R. § 416.1216(c), the current market value of the piano will be subject to the $2000 maximum exclusion for household goods and personal effects. 20 C.F.R. § 416.1216(a)-(b). Contrary to Ms. J~'s contention, the fact that Ms. W~ was unable to sell her piano does not necessarily mean that the value of the piano is zero. The piano likely has some value, even if it is not the $7000 purchase price. It is possible that the value of the piano is zero, however, if, for example, a buyer's expense to move the piano from Ms.W~'s home to a new location exceeds the price that a buyer would ordinarily pay for the piano.

The information provided to us did not indicate what price Ms. W~ was asking for the piano when she advertised it. It may be that she was simply asking a higher price than the current market value and, therefore, did not get an offer. We suggest further development to ascertain the current market value of the piano. For example, did Ms. W~ get any offers to buy the piano and, if so, what amount was offered? Ms. J~ indicated that the local music store sold one comparable piano over the past year. What was the sale price? Are there other music stores in the area that carry comparable pianos? If so, what price do they charge? Has Ms. W~'s piano been appraised? How much would a pawn shop pay for the piano, given that it could be difficult to sell quickly?

We note that POMS SI 01150.200 contains a provision that, under certain circumstances, allows for conditional SSI benefits for a limited period while an individual attempts to sell a non-liquid resource. The individual must agree to sell the resource at the current market value within a specified period and use the proceeds to refund the

overpayment of conditional benefits. POMS SI 01150.200B.1. The period of conditional benefits where personal property is concerned would generally end after three months, except that there could be one three-month extension granted for good cause. SI 01150.201A. The individual must make reasonable efforts to sell the resource, taking all necessary steps to sell the resource through the local media. SI 01150.201B.1. The information provided to us does not indicate whether Ms. W~ was eligible for, or received, conditional benefits under these POMS provisions.

We also note that, even if Ms. W~ purchased the piano for $7000, and if the Agency determines that the current market value of her piano is less than $7000, it does not necessarily mean that her purchase was a transfer for less than fair market value. *See* POMS SI 01150.005A. (transfers of resources for less than fair market value after December 14, 1999 may result in a period of SSI ineligibility). Nor does the fact that Ms. W~ may not be able to sell her piano for the same price she paid mean that she paid more than the fair market value. Fair market value is the current market value of a resource at the time the resource is transferred, i.e., the going price for which it could reasonably be expected to sell at the time, on the open market in the geographic area involved. POMS SI 01150.005. If Ms. W~ bought her piano on the open market, e.g., from a merchant, the $7000 purchase price is assumed to be the fair market value at the time of the transfer. POMS SI 01140.005C.4.a. It may be that the value of the piano has depreciated since its purchase, or simply that the going price for a comparable piano was $7000 at the time of the purchase but is less now due to economic conditions. A prospective buyer might be willing to pay more for a piano bought from a merchant whose reputation is known than he would pay in a private sale by a stranger. A merchant might also be in a position to charge more because he could offer a factory guarantee or a store guarantee that a private seller like Ms. W~ cannot offer. Finally, a merchant might be in a position to wait until a buyer came along who was willing to pay a higher price. Thus, the current market value of the piano, in Ms. W~'s hands, may be less than the amount she paid for the piano, even though the original purchase was not a transfer for less than fair market value.

CONCLUSION

In summary, we conclude that, if the Agency fact-finder concludes that Ms. W~ has shown that playing piano is required as part of her treatment or therapy for her physical condition, the piano's entire value may be excluded under 20 C.F.R. § 416.1216(c). If the fact-finder concludes that playing piano is not required for Ms. W~'s physical condition, the current market value of the piano should be considered a household good or personal effect subject to the $2000 maximum exclusion for all household goods and personal effects. However, the Agency may want to give further consideration to the current market value of the piano in Ms. W~'s hands.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By:_____
Nancy L. B~
Assistant Regional Counsel

A. PS 03-170 SSI-Indiana Review of Transfer of Resources by Sharon K~ Refer to: S2D5G6; Our Reference: 03PO59

DATE: July 31, 2003

1. SYLLABUS

In this case, an SSI recipient had ownership interest in two homes for the period January 2002 through June 2002. Home A was excluded from resources as her principal place of residence, but when she obtained ownership interest in Home B in January 2002, it was countable as a resource which made her ineligible for SSI. In June 2003, she quitclaimed Home A to her mother for $1 and moved to Home B in July 2002. It was determined that quitclaiming Home A was a transfer of a resource for less than

fair market value, and that she is subject to the 36-month period of ineligibility for SSI because the transfer did not meet any of the exceptions to the transfer penalty provided in the law.

2. OPINION

You asked us whether a transfer of a resource at less than fair market value should be charged to the claimant, Sharon K~, for purposes of Supplemental Security Income ("SSI"). You have also asked us to consider the implications resulting from the claimant's ownership of a townhome, which was not her primary residence.

FACTS

In July 1986, Ms. K~ mother, Elizabeth H~, purchased a home located on Ridgelawn Street (Property A) in Crown Point, Indiana. In October 1986, Ms. H~ executed a deed on Property A, naming Ms. K~ and herself as joint tenants with right of survivorship. Ms. K~ and her children moved into this home in October 1986, using it as their primary residence, and paying Ms. H~ $275 in rent each month. Ms. H~ has never lived on the property.

In October 2000, Ms. K~ applied for SSI; her application was denied due to her resources exceeding the maximum level for eligibility.

In September 2001, Ms. K~ decided to put Property A on the market, reportedly because her children had grown and left home and she was having difficulty maintaining the property. She and her mother listed the property for $110,000.

Ms. K~ reapplied for SSI in November 2001 and her application was granted. Property A remained unsold at this time, with real estate market conditions worsening after the September 11th attacks. However, Ms. K~ began to search for a new home, and in January 2002, her mother purchased a newly constructed townhome for her on Aspen Court (Property B) in Crown Point, Indiana, at the purchase price of $132,000.1 Both Ms. K~ name and her mother's name appeared on the title to Property B, although, according to her attorney, Ms. K~ initially had reservations about the implications that this would have on her eligibility for SSI, Medicaid, and other sources of government aid.

Ms. K~ continued to live in Property A. In June 2002, a third party contracted to purchase the home for $105,000. On June 13, 2002, prior to the closing on Property A, Ms. K~, having learned that there would be $60,000 in proceeds from the sale, and that she would be entitled to $30,000 of it (given her 50% interest in Property A as a joint tenant), executed a quitclaim deed that placed legal title solely in her mother's name. According to the deed, Ms. K~ quitclaimed Property A to Ms. H~ ""in consideration of One Dollar ($1.00) and other valuable consideration." Ms. K~ attorney explains that the claimant quitclaimed the property because she did not feel she was entitled to any profit, since she did not contribute any money towards the original purchase of the home in 1986. Based upon tax assessment records, the fair market value of Property A was calculated as $144,300 as of the sale date.

Ms. K~ moved out of Property A and into Property B (as her primary residence) in July 2002. Her mother did not move into and has never resided in that new property. In September 2002, the Agency issued a Notice of Planned Action, stopping Ms. K~ SSI payments due to her transfer of her interest in Property A for less than fair market value. The notice indicated that Ms. K~ was ineligible for SSI between July 2002 and July 2005. Ms. K~ filed a request for reconsideration. Ms. K~ was also charged with an overpayment between November 2001 and July 2002, given her co-ownership of two properties (one of which was not her home) at the same time, and the fact that the total value of Property B exceeded the resource limit. She subsequently requested waiver of the overpayment on grounds of undue hardship.

DISCUSSION

For these reasons, we conclude that, absent a finding of undue hardship, the claimant's June 2003 transfer of her interest in her home on Ridgelawn Street to her mother, for less than fair market value, should be charged to the claimant as a transfer of resources, for purposes of determining her eligibility for SSI. We also conclude that the claimant's ownership of two properties, one of which was not her principal residence, gave rise to an overpayment, and that, absent grounds for waiver, overpayment should be charged to Ms. K~.

A. Ms. K~ transferred ownership of a resource for less than fair market value.

As of December 14, 1999, transferring ownership of a resource for less than fair market value (FMV) can result in a period of ineligibility for SSI (for a period of up to 36 months). 42 U.S.C. § 1382b(c)(1)(A)(i); POMS SI 01150.001A. The number of months

the person is ineligible depends on the dollar value of the resource that was sold or given away. In the case of a resource held by an individual in common with another person or persons in joint tenancy, tenancy in common, or similar arrangement, the resource or the affected portion of such resource "shall be considered to be disposed of by the individual when any action is taken, either by the individual or by any other person, that reduces or eliminates the individual's ownership or control of such resource." 42 U.S.C. § 1382b(c)(1)(D). FMV is defined as "the current market value (CMV) of a resource at the time the resource is transferred. The CMV of a resource is the going price for which it can be reasonably expected to sell on the open market in the geographic area involved. " POMS SI 01150.005.B.1.

Ms. K~ held Property A in joint tenancy with her mother, and she transferred all of her interest in the property by executing the quitclaim deed in June 2002, naming her mother as the sole titleholder. See West. Annot. Ind. Code § 32-1-2-9 (Quitclaim deed "transfers all the estate which the grantor could convey" by any other deed). The quitclaim deed shows consideration for the transfer, stating that the deed was executed in return for "One Dollar ($1.00) and other valuable consideration." It does not appear that Ms. K~ received any other consideration. As such, Ms. K~ transferred a resource (her half of Property A) for less than FMV.

B. Exceptions other than undue hardship do not apply.

There are exceptions to the general rule concerning transfers of resources for less than FMV. The period of ineligibility for transfer of a home for less than FMV, for example, will not apply if the individual transfers title to: his or her spouse; a child under age 21; a child of any age who is blind or disabled; a child who was residing in the transferor's home for at least two years immediately before the date the individual becomes institutionalized; a child who provided care to the individual, thereby permitting the individual to reside at home rather than in an institution; or to a sibling who has ownership interest (including life estate and equitable ownership) in the home and was residing in the home for at least one year immediately prior to the date the individual was institutionalized. POMS SI 01150.122.A.1, A.2, and A3. As Ms. K~ transferred her interest in her home to her mother, and not to any individuals described above, these exceptions for transfer of a home do not apply.

Additionally, the transfer of a resource under FMV, exclusively for a purpose other than to qualify for SSI benefits, may qualify as an exception. POMS SI 01150.125.A. There is a rebuttable presumption, when an individual gives away or sells resources for less than FMV, that the resources were transferred for the purpose of establishing or maintaining SSI. POMS SI 01150.125B. Such a presumption is rebutted only if the individual presents convincing evidence that the resources were transferred exclusively for a purpose other than to become or remain eligible for SSI, and, if the individual has some other purpose for transferring the resource, but an expectation of establishing or maintaining SSI was also a factor, the period of ineligibility would still apply. POMS SI 01150.125.B.

Here, it does not appear that Ms. K~ has rebutted the presumption with convincing evidence that she transferred her interest in Property A to her mother for under FMV exclusively for a purpose other than to become and remain eligible for SSI. Indeed, in February 2002, four months prior to the sale of Property A (and while Property A was still on the market), Ms. K~ expressed concern over adding her name to the title on Property B, specifically with regard to maintaining her SSI eligibility. See Attachment to Request for Waiver of Overpayment, Section I. She therefore was aware of the potential impact that owning excess resources could have on her SSI eligibility. Moreover, the timing of the quitclaim transaction, just prior to the closing on Property A, also implies an intention to maintain eligibility.

Although Ms. K~ now claims that she intended, by making this transfer, to "repay" her mother for the shelter expenses she received from her mother when living in Property A, this argument is undercut by the fact that she had been paying monthly rent to her mother during the entire period of her residence in Property A and therefore, had likely already covered her shelter expenses. In any event, even if this was a reason behind the quitclaim transfer, as explained above, the evidence nonetheless suggests that this was not the exclusive reason for doing so, and that she also expected to maintain her SSI eligibility by quitclaiming Property A.

Still another exception may apply when all resources transferred for less than FMV have been returned to the individual who transferred them, in the same month. POMS SI 01150.124A . Such cases are treated as if the transfer had never occurred. Ms. K~ argues that by adding her name to the title on Property B, she "effectively retrieved the asset which the Social Security Administration believes she transferred-her one half interest in the home at 547 Ridgelawn. " See Request for Waiver of Overpayment Recovery, Attachment, at II. Her transaction does not fall within the exception, however, since she did not reacquire any interest in Property A; she instead acquired legal title in Property B.

It does not appear that Ms. K~ intended, through execution of the quitclaim deed, for her mother to hold the ½ interest in constructive trust, as repayment for the purchase of Property B. Even if such an equitable agreement did exist (and no evidence suggests this), it is unlikely that an unwritten agreement for the purchase of real property would be enforceable.

When it has been determined that no other exceptions apply, the final exception, that of undue hardship, should be considered. POMS SI 01150.126.A. Undue hardship exists if the individual alleges that failure to receive SSI payments would deprive her of food or shelter (i.e., subject to eviction from current residence and no other affordable housing available) and that her total available funds (income and liquid resources) do not equal or exceed the full Federal Benefit Rate (FBR) plus applicable federally administered state supplement. POMS SI 01150.126.B. We recommend additional development to determine whether the undue hardship exception applies.

C. Ms. K~ is liable for overpayment during the period in which she simultaneously owned Properties A and B, unless grounds for waiver of the overpayment are established.

As a result of owning Properties A and B during the period from February 2002 to June 2002,2] Ms. K~ owned excess resources, since the equity value in Property B (non-home) exceeded the resource limit. Property A, her home, would be excluded as a resource. She should be charged with an overpayment, unless grounds for waiver of the overpayment (claimant was without fault in causing overpayment, and recovery of overpayment would be against equity or good conscience) are found. See POMS SI 02260.001.1. Accordingly, we recommend further development to determine the applicability of waiver provisions.

CONCLUSION

For these reasons, we conclude that, absent a finding of undue hardship, the claimant's June 2003 transfer of her interest in her home on Ridgelawn Street to her mother, for less than fair market value, should be charged to the claimant as a transfer of resources, for purposes of determining her eligibility for SSI. We also conclude that the claimant's ownership of two properties, one of which was not her principal residence, gave rise to an overpayment, and that, absent grounds for waiver, overpayment should be charged to Ms. K~.

Sincerely, Kim Leslie B~

Kim Leslie B~ Regional Chief Counsel, Region V Social Security Administration

By: Jessie A. W~-G~

Assistant Regional Counsel

B. PS 00-498 Non-Home Real Property Transfer for David M~

DATE: June 19, 2000

1. SYLLABUS

Does a valid deed exist even though it has not been recorded? In general, deeds must be recorded in order to provide notice to the public and to potential purchasers of the ownership of land. However, when a deed is executed and delivered, but not recorded, it may still be effective as against the grantor. Indiana law provides that an unrecorded deed is effectual against the grantor and persons having notice of the transfer. Therefore, in this case, the transfer of the property from the SSI recipient to his grandchildren was a valid transfer even though the deed was never recorded.

2. OPINION

You asked whether a quitclaim deed, executed by David M~, an SSI claimant, validly transferred Mr. M~'s interest in property even though the deed was never recorded. For the reasons set out below, we believe that the deed transferred Mr. M~'s interest in the property even though it was not recorded. We recommend, however, that the local office investigate whether Mrs. M~ had any interest in the land and whether Mr. M~ received any consideration in return for executing the quitclaim deed.

Background

David and Savelia M~ are an SSI aged couple. They were determined to have excess resources based on their ownership interest in 10 acres of undeveloped land. On March 2, 1998, however, David M~ completed a quitclaim deed in which he transferred his ownership interest in the land to four people, who are described as his grandchildren. The note from the district office states that the deed was never filed or recorded.

DISCUSSION

1. Role of filing and recording-Mr. M~ transferred his interest in the property to his grandchildren.

In general deeds must be recorded in order to provide notice to the public and to potential purchasers of the ownership of land. See Roger B~, Real Property in a Nutshell (3d e. 1993). However, when a deed is executed and delivered, but is not recorded , it may still be effective as against the grantor. Thus, Indiana law provides that an unrecorded deed is effectual against the grantor and persons having notice of the transfer. See Wests Annot. Ind. Code § 32-1-2-11. The unrecorded quitclaim deed might in certain circumstances allow a third-party to obtain the property, but is binding between the grantor and the grantees. Mr. M~ would be found to have validly transferred his property to his grandchildren.

2. What property did Mr. M~ transfer?

Mr. M~ executed a quitclaim deed. Under Indiana law, a quitclaim deed transfers "all the estate which the grantor could convey "by any other deed. West Annot. Ind. Code § 32-1-2-9. Here, therefore, Mr. M~ transferred all interest he had in the property described in the deed.

3. Did Mrs. M~ have any interest in the land?

The note from the district office states that Mr. and Mrs. M~ were an aged couple entitled to SSI. The quitclaim deed was executed by Mr. M~, not by Mrs. M~. We recommend that the field office investigate how the land was owned prior to Mr. M~'s execution of the quitclaim deed in order to determine whether Mrs. M~ had any ownership interest in the property. If she were a co-owner, and if she has not transferred her interest, she might remain an owner of the property or of part of the property.

4. What, if anything, did they get for the transfer?

The quitclaim deed uses traditional legal language showing consideration for the transfer. It states that the deed was executed in return "for the sum of ONE DOLLAR ($1.00), and other valuable consideration." The recited consideration need not be the only consideration provided for the transfer. Therefore, we recommend that the field office investigate whether Mr. M~ received any consideration for the land. If he did, that consideration would presumably be a resource.

CONCLUSION

For these reasons, we believe that the March 2, 1998, quitclaim deed was legally sufficient to transfer to his grandchildren all of Mr. M~'s ownership interest in the property. We recommend, however, that the field office investigate whether Mrs. M~ had any interest in the property and also whether Mr. M~ received any additional consideration for the transfer. Assuming that Mrs. M~ did not have an ownership interest and that Mr. M~ did not receive other consideration, the property would have ceased to be a resource on March 2, 1998.

Footnotes:

[1] A statement from Ms. H~ dated October 29, 2002, states that she had been making mortgage payments on Property B since January 1, 2002.

[2] The CR's notes state that Ms. K~ gained title to Property B in February 2001, and accordingly, the original decision found Ms. K~ liable for overpayment from November 2001 (the month in which SSI eligibility started) to July 2002. Plaintiff's attorney's letter, however, states that the property was not acquired until February 2002 (see Attachment to Request for Waiver of Overpayment). Accurate determination of the applicable dates should be made so that the overpayment period can be calculated.

4.12 Iowa

A. PS 00-468 Determination of Irrevocability of a Nebraska Trust Kyle D. S~, SSN: ~

DATE: February 23, 2000

1. SYLLABUS

The issue concerns what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

Although the laws of Nebraska have not specifically addressed it, it appears that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable.

There does not appear to be any Kansas statute or case applying the grantor trust rule in Kansas. Generally, a trust is revocable when the grantor is the sole beneficiary.

Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary.

There does not appear to be any Iowa statute or case applying the grantor trust rule in Iowa. It appears Iowa would follow general trust law regarding revocability of a trust when the grantor is the trust's sole beneficiary.

Thus, in all Region VII States, the words "child," "children," "issue," "descedents," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next of kin," or "by intestate succession," in most cases it would justify a finding that a residual beneficiary was not created and a grantor trust is revocable.

2. OPINION

You have asked for our assistance in determining the irrevocability of a trust designated as the Kyle D. S~ Special Needs Trust, ~. You also asked us revisit the question of what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

I. TRUST PROVISIONS

The Kyle D. S~ Special Needs Trust (SNT) was funded with an insurance settlement in the amount of $26,129.20, the result of litigation involving personal injury suffered by Kyle. The Trust Agreement names the County Court of Buffalo County, Nebraska, as the grantor and Kyle's aunt, Catherine L. K~, as the trustee. The Trust Agreement, executed on August 13, 1999, and signed by the County Judge and by the Trustee, describes Kyle, born October 15, 1993, as the Beneficiary who is "a disabled person within the meaning of 42 U.S.C. § 1382c(a)(3)." Trust Agreement, Article 1.

The Trust Agreement specifies that the trust is irrevocable and that "the beneficiary, his guardians or conservator, shall have no right whatsoever to alter, revoke or terminate this Trust, in whole or in part." However, "[t]he Trust may be amended by the Court with notice to the State of Nebraska, Department of Health and Human Services Finance and Support, if amendment would benefit the disabled's [sic] beneficiary." Trust Agreement, Article 4. The Trust Agreement also provides that-

> [t]his Trust is established pursuant to the 1993 Omnibus Reconciliation Act[,] 469 NAC 2.009.07A5B (4) and Neb. Rev. Stat. 68-1047. This trust is not for the support of Kyle D. S~. It is the intent of the Grantor to make provisions in this Trust Agreement to provide funds necessary to Kyle D. S~'s happiness over and above the essential, primary support and services otherwise available to him. This Trust is not to replace or make unnecessary any public or private assistance that Kyle D. S~ may now or in the future qualify to receive. It is the intent to provide resources for non-support purposes including comfort over and above the essentials provided by any state or federal government agency or program. The supplemental resources provided through this Trust may include, but shall not be limited to education, personal care needs, attendants, entertainment, and other goods and services not otherwise provided by public aid or private sources, but which are reasonable and necessary for the rehabilitation and special non-support needs of the Beneficiary.

Trust Agreement, Article 2. In addition, the Trust Agreement provides that-

[w]hile it is the intention that the Trustee have broad and effective powers to carry out the provisions of this Trust Agreement, no power conferred upon any Trustee by this article, shall be exercised in such a manner that it deprives the Trust of an otherwise available tax exemption, deduction, exclusion or credit, nor to deprive the Beneficiary of any public or private assistance as described above. This Trust is intended to qualify under 42 U.S.C. § 1396p(d)(4)(A) and the Trustee shall have no power which is inconsistent with such law and its regulations, and all provisions of this Trust shall be interpreted in a manner consistent with such law.

Trust Agreement, Article 2.

Concerning the Trustee's powers, the Trust Agreement provides that—

[t]he Trustee may distribute income or principal or both, . . . [and] in its sole and absolute discretion, shall apply and distribute such part, all or none of the net income and principal of the Trust estate in such amounts and proportions as the Trustee, in the Trustee's absolute discretion, deems necessary or appropriate for Kyle D. S~'s best interest, [but only after exhausting] all other resources available . . . from all sources other than his trust including, without limitation, payments, services and programs administered, provided or sponsored by any governmental (federal, state or other), private or institutional agency, authority or provider, any rule or regulation of such agency, authority or provider to the contrary notwithstanding.

Trust Agreement, Article 2. The Trust Agreement also includes a spendthrift clause intended to prohibits creditors from attaching the assets of a trust. Trust Agreement, Article 8.

The Trust Agreement provides that the trust terminates upon Kyle's death and "any remaining undistributed income or principal . . . shall be first paid to the State of Nebraska, and to any other state who has made payments under Title XIX" on Kyle's behalf. "In the event that either principal or income remain [after the State is reimbursed], it shall be paid over and distributed pursuant to the intestacy laws of the State of Nebraska." Trust Agreement, Article 11.

II. TRUSTS AS RESOURCES

Generally, if trust principal is available to the trust beneficiary, it will be considered a resource to him for purposes of determining his eligibility to SSI benefits. Regulations define resources for SSI eligibility as follows:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual[.]

20 C.F.R. § 416.1201(a)(1). Regulations further define resources as liquid or nonliquid. Liquid resources are resources in the form of-

cash or other property which can be converted to cash within 20 days . . . . Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources[.]

Id. at § 416.1201(b).

The Commissioner has further construed the meaning of "resource," by issuing interpretive guidelines in the Program Operation Manual System (POMS). With respect to trust instruments, the POMS provides that-

if an individual (claimant, recipient or deemor) has the legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

POMS SI 01120.200D.1.a (emphasis in original). However,

[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes.

POMS SI 01120.200D.2 (emphasis in original). The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or by State law. POMS SI 01120.200D.1.a and SI 01120.200D.2. "Most States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary." POMS SI 01120.200D.3 (emphasis in original).

A trust is generally irrevocable if the grantor fails to reserve the power to revoke or modify it. Restatement (Second) of Trusts §§ 330 and 331 (1957). Nevertheless, the general law of trusts recognizes an exception to this rule when the grantor is the sole beneficiary of the trust agreement. Where the grantor is the sole beneficiary of a trust, he may amend or terminate the trust, even without having reserved the power to do so. Id. at § 339.

Although the laws of Nebraska have not specifically addressed this issue, we believe that Nebraska would follow the general rule. While the Trust Agreement at issue here names the Court as Grantor, the consideration funding the trust belonged to Kyle. Thus, Kyle is the grantor and, if Kyle is the sole beneficiary of the trust, it is revocable notwithstanding the Trust Agreement language to the contrary. However, if the grantor is not the sole beneficiary, the trust would not be revocable.

The trust herein appears to be a "Medicaid Special Needs Trust," a trust created by means other than a will, and which includes a Medicaid payback provision upon termination of the trust or the death of the individual. SSA's policy is that the Medicaid trust "affects the individual's eligibility for Medicaid only, and has no effect on the SSI income and resource determinations." POMS SI 01120.200H.1.a (emphasis in original). In addition, the POMS provide that-

> [a]ccording to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt. This law may or may not apply in your State . . . .

POMS SI 01120.200H.1.b. .

Our research indicates that the purpose of including the State reimbursement provision in the SNT is to qualify the beneficiary for medical assistance from the State. If the SNT meets the exception set out in 42 U.S.C. § 1396p(d)(4)(A) and State requirements, the State does not consider the trust to be a resource and the grantor/beneficiary is eligible for medical assistance. Where there is a pre-existing Medicaid lien, several courts have held that the State may require satisfaction of the lien before any third-party settlement can be put into a SNT. In Nebraska, a Medicaid grantor SNT is considered to be void and revocable by operation of law upon filing for or receiving State public assistance unless the SNT is ordered by a court of competent jurisdiction, for good cause shown. Neb. Rev. Stat. § 68-1047. Although no court order was included in the material received, we are assuming that this requirement was met.

You ask whether the words "pursuant to the intestacy laws of the State of Nebraska" created a residual beneficiary. The Restatement (Second) of Trusts provides that at common law there was a rule of the law of real property that the owner of land could not, by a conveyance inter vivos, create a remainder interest in his heirs. An attempt to do so created a reversionary interest in himself, rather than a remainder interest in his heirs. However, there is no longer any such rule of law. There is only a question of construction. Restatement (Second) of Trusts § 127 cmt. b (1957).

If the owner manifests an intention to create a contingent interest in remainder, legal or equitable, in the persons who on his death may become his heirs, he can do so. In the absence of evidence of a contrary intent, however, the inference is that he does not intend to create a remainder interest in his heirs. The Restatement (Second) provides that if the beneficial interest is limited to the grantor for life and on his or her death the property is to be conveyed to his or her "children, or issue, or descendants" then he or she is not the sole beneficiary of the trust and a remainder interest is created in his or her children, issue, or descendants. Id. at § 127 cmt. b. Where the owner of property, however, transfers it in trust to pay the income to himself or herself for life and upon his or her death to pay the principal to "his heirs or next of kin," in the absence of a manifestation of a contrary intention, "the inference is that he is the sole beneficiary of the trust, and that he does not intend to create any interest in the persons who may become his or her 'heirs or next of kin.'" Id.

Likewise, the inference is that the grantor is the sole beneficiary where the income is to be paid to the grantor for life and upon his or her death the principal is to be paid "as he may by deed or will appoint, and in default of appointment to his heirs or next of kin." If he or she reserves power to appoint by will alone, and in default of appointment the property is to be conveyed to his or her heirs or next of kin, the Restatement (Second) indicates that this is some indication that the grantor intended to confer an interest on his or her heirs or next of kin of which they could be deprived only by a testamentary appointment, "but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to be the sole beneficiary of the trust." Id.

Restatement (Second) presents an example similar to the trust herein. The illustration provides: "A transfers property to B in trust to pay the income to A for life and on A's death to pay the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A is the sole beneficiary of the trust." Restatement (Second) § 127 cmt. b, illus. 2. In addition, the Nebraska Supreme Court has held that an inter vivos trust which purports to convey an interest in property only after the death of the grantor is testamentary in character and passes no present interest in the property. Such a purported conveyance was found to be void because it was in effect a will, and the statutory requirements for the execution of a will had not been met. Thus, it had no validity. Young et al. v. McCoy et al., 40 N.W.2d 540, 542 (Neb. 1950). The court stated that these words were expressly limited to take effect only after the death of the grantor; thus, they were necessarily revocable words. Id.

The primary objective of the Kyle S~ trust appears to be to provide for the grantor/life beneficiary, and not to preserve the trust principal for the grantor's heirs. Examination of the trust agreement does not reveal any manifestation of intent to convey a remainder interest to the grantor's heirs. For the reasons given above, if there is no named residual beneficiary, absent additional language manifesting a contrary intent, we believe you would be justified in finding that the words "distributed pursuant to the intestacy laws of the State of Nebraska" in a grantor trust make the trust revocable despite trust language to the contrary. However, we believe a residual beneficiary would be created by words that any remainder should go to a named beneficiary or to the individual's children, issue, or descendants. In Ellengrod v. Trombla, 95 N.W.2d 635, 638 (Neb. 1959), in interpreting a will devise and the Uniform Property Act, the court said that conveyance of property to a person and his "children," "issue," "descendants" and "words of similar import" create a life interest in the person and a remainder in the life beneficiary's descendants unless a contrary intent is manifested. If no children, issue, or descendants exist presently, the remainder is contingent. Id. at 640. In Wilkins v. Rowan, 185 N.W. 437, 438-39 (Neb. 1921), the court defined "issue," "lawful issue," or "issue of the body" to include children and lineal descendants of every degree in the absence of qualifying words showing a contrary intent.

III. REVIEW OF PRIOR ADVICE

As you requested, we have reviewed our prior advice concerning the revocability of grantor trusts in Region VII. On this issue, although the laws of Nebraska have not specifically addressed it, we believe that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable. Restatement (Second) of Trusts § 339 (1957). The grantor is the sole beneficiary of a trust if he or she does not "manifest an intention to give a beneficial interest to anyone else." If the grantor "manifests an intention to create a vested or contingent interest in others, as for example, his children, or the persons who may be his heirs or next of kin on his death, he is not the sole beneficiary unless such intended interests are invalid. . . ." Id. at § 339 cmt. b. Thus, the question is whether the language of a trust creates a valid remainder interest. If no valid remainder interest is created, the grantor is the sole beneficiary of the trust, the trust is revocable, and the trust principal is a resource (see discussion above).

We found no Kansas statute or case applying the grantor trust rule in Kansas. However, Kansas law does provide that all gifts and conveyances of goods and chattels (but not land) to a trust made for the use of the person making the trust are valid and effective except as to all past, present or future creditors and a nonconsenting wife's statutory rights. Newman v. George, 755 P.2d 18, 20 (Kan. 1988). A trust is irrevocable unless the power to amend or revoke is reserved in the trust agreement. Kan. Stat. Ann. § 58-2417 (1994). Where State law is silent, Kansas courts "have often turned to the guidance of the Restatement of Trusts[.]" In the Matter of the Estate of S~, 929 P.2d 153 (Kan. 1996). Accord Neeley v. Neeley, §§§ P.2d §§§, 2000 W.L. 45835 at *1 (Kan. App.). Although it was not dispositive in the case, in Daughters of the American Revolution of Kansas, Topeka Chapter v. Washburn College, 164 P.2d 128, 132 (Kan. 1945), the Kansas Supreme Court acknowledged the Restatement rule that a trust is revocable when the grantor is the sole beneficiary. The court did not indicate that the rule was improper or would not be followed in Kansas. We believe Kansas would follow this rule in the appropriate case. Kansas law is consistent with the Restatement (Second) in holding that the primary consideration in the construction of trusts is the intention of the grantor as evidenced by an examination of the document. In the Matter of the Estate of Sam Saroff, 625 P.2d 458, 465 (Kan. 1981). In the case of In re Watts, 162 P.2d 82, 87 (Kan. 1945), in interpreting a will, the court made "unknown heirs" parties to the litigation. "'[T]he same rules that apply to [the] construction [of wills] apply to trusts and most other written documents." In the Matter of the Estate of S~, 929 P.2d at 158, quoting In re Estate of H~, 223 P.2d 707 (Kan. 1950).

In Missouri, rights to trust income and property are determined by the trust agreement. Hillyard v. Leonard, 391 S.W.2d 211 (Mo. 1965). Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary. Couch v. Director, Missouri State Division of Family Services, 795 S.W.2d 91, 94 (Mo. App. 1990); Pilgrim Evangelical v. Lutheran Church-Missouri Synod Foundation, 661 S.W.2d 833, 838 (Mo. App. 1983). The intention of the settlor is the key to the construction of a trust. Tidrow v. Director, Missouri State Division of Family Services, 688 S.W.2d 9 (Mo. App. 1985). The term "bodily heirs" is a

technical term which should be accorded its technical meaning unless a contrary meaning clearly appears from the context of the will. Central Trust Bank v. Stout, 579 S.W.2d 825 (Mo. App. 1979). "Nearest blood kin" has no settled meaning but where the testator does not indicate otherwise, the definition in the Restatement of Property will be used. Graves v. Hyer, 626 S.W.2d 661 (Mo. App. 1981). It has been held in Missouri that where one transfers property inter vivos in trust to pay the income to himself for life and on his death it is to be conveyed to his "heirs or next of kin," that he is the sole beneficiary. Stephens v. Moore, 249 S.W. 601 (Mo. 1923).

We found no Iowa statute or case applying the grantor trust rule in Iowa. We believe that Iowa would follow general trust law regarding the revocability of a trust when the grantor is the trust's sole beneficiary. Iowa's probate code defines the word "issue," for purposes of intestate succession, as including "all lawful lineal descendants of a person, whether biological or adopted, except those who are the lineal descendants of the person's living descendants." I.C.A. § 633.3.24 (Supp. 1992). The Iowa Supreme Court has indicated that "heir" is given the popular meaning of issue, children, or descendants when language of the entire will and circumstances in which the will was executed indicated that intention. Cook v. Underwood, 228 N.W. 629 (Iowa 1930). The court subsequently stated that the word "heirs" is a flexible term to which the technical meaning of the word is frequently not applied. The meaning to be given to "heirs" is a question of the testator's intent. In re Austin's Estate, 20 N.W.2d 445 (Iowa 1945). The court also stated that the word "heirs" used by a testator does not have a fixed meaning and meaning must be determined from the instrument read as a whole and in light of all relevant facts and circumstances under which the instruments were executed. Schaefer v. Merchants Nat. Bank of Cedar Rapids, Iowa, 160 N.W.2d 318, 320-21 (Iowa 1968). In a will devising the remainder of a trust estate to an old folks' home if a son died without leaving heirs, the word "heirs" meant "descendants." In re Clifton's Estate, 218 N.W. 926 (Iowa 1928).

CONCLUSION

In summary, we believe that you would be justified in finding that, in all Region VII states, the words "child," "children," "issue," "descendants," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next-of-kin," or "by intestate succession, "we believe you would be justified, in most cases, in finding that a residual beneficiary was not created and a grantor trust is revocable. Accord G.C. Opinion, Accessibility of Discretionary Support Trust Fund as a Resource for Supplemental Security Income Purposes in Nebraska Where Grantor Is also the Sole Beneficiary, dated March 17, 1997. However, if considering the document as whole indicates that the grantor had a different intention, the words "heirs," "heirs-at-law," or "next-of-kin" may make the trust irrevocable. For example, you attached a previous legal opinion concerning the Felicia Ann Bribiesca trust. See G.C. Opinion, Determination of Irrevocability of a Grantor Trust, dated June 21, 1994. You asked whether the naming of heirs in general constituted naming another beneficiary making the trust irrevocable. We affirmed that it did. We cannot conclude, however, that our response was inconsistent with the advice herein. The Bribriesca trust reveals that it was the grantor's intention that any undistributed principal and income should be distributed to Felicia's "descendants who survive." Therefore, we believe the advice given was correct.

As illustrated by the cases cited above, words such as "heirs" do not have a precise meaning and are defined inconsistently by the courts. We are not able to provide a general rule that will apply to all trusts. If the grantor's intent is not clear from a trust document, we suggest you submit the trust document for review by this office.

B. PS 00-466 Request for Iowa, Kansas, Missouri, and Nebraska State Law on Grantor Trusts; SSI Resource Issue

DATE: June 16, 1999

1. SYLLABUS

The regional attorney was asked if a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the States of Missouri, Kansas, Iowa and Nebraska.

All four states are considered creditors and not beneficiaries. Even if a trust contains a State reimbursement provision, it would be revocable if the SSI recipient was the grantor and the sole beneficiary since the state is a creditor and not a beneficiary.

CAUTION: Because of a change in the Social Security Act, this opinion may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked whether in Missouri, Kansas, Nebraska, and Iowa, a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the state. We are of the opinion that in all four states, the state would be considered a creditor. None of the states specifically address a trust which contains a state reimbursement provision; however, all four states have statutes that address reimbursement of Medicaid benefits. As you are aware, each state also follows the rule that a trust is revocable if the grantor is the sole beneficiary. See GC Opinion: Request for Interpretation of State Trust Law, dated June 29, 1992. The following is a DISCUSSION of each state's Medicaid statute.

IOWA

Payments for medical assistance are not recoverable in all circumstances under the Iowa statute. However, under certain circumstances the state is considered a creditor of the recipient or his estate. Under the recovery of payment provision in Iowa, "[m]edical assistance paid to, or on behalf of, a person [by the Department of Human Services] . . . is not recoverable unless . . . it was incorrectly paid." "Incorrectly" paid sums are recoverable from the recipient during his or her lifetime or from the estate of the recipient as a debt due the state. Iowa Code § 249A.5(1). See also Estate of K~, 591 N.W.2d 630, 633 (Iowa 1999). For purposes of collection, the estate includes all interests in property held at the time of the recipient's death. Estate of K~, 591 N.W.2d at 633. However, collection of the debt will be waived if the collection would result in (1) reduced amounts received by the surviving spouse or child who is under 21 years of age, blind, or permanently disabled at the time of the recipient's death or (2) an undue hardship as defined under 42 U.S.C. § 1396p(b)(3).

C. PS 00-464 Emil E. L~ Revocable Trust; Whether Iowa Revocable Trust is a Resource to Glenn L~

DATE: August 12, 1999

1. SYLLABUS

This opinion provides that under Iowa law, a trust is irrevocable unless the power of revocation is specifically reserved.

2. OPINION

The Sioux City, Iowa Field Office has asked for legal advice on whether the principal from the Emil E. L~ trust is a resource to Glenn L~ for SSI purposes.

Background

According the information submitted to our office, on April 14, 1994, Emil E. L~, trustor, who is living, executed a revocable trust in which he named Glenn L~ as a contingent beneficiary. The trust document indicates that upon the trustor's death, providing that certain contingencies are met, the trustee shall distribute all of trustor's interests, if any, in personal and household effects equally among Glenn L~ and his siblings, as they agree. Article 7B.1. Also, upon the death of trustor and trustor's wife, Glenn L~ is to receive a parcel of land located in Lyon County, Iowa. Article 7B.3.c.(3).

DISCUSSION

Resources are defined in the social security regulations to mean any cash or the liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. If an individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse). 20 C.F.R. § 416.1201 (a). The POMS further provide that if an individual has legal authority to revoke a trust and then use the funds to meet his/her food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes. POMS SI 01120.200D.1.a. A beneficiary generally does not have the power to revoke a trust. However, the trust may be a resource to the beneficiary, in the rare instance, where he/she has the authority under the trust to direct the use of the trust principal. In such case, the beneficiary's equitable ownership in the trust principal and his/her ability to use it for support and maintenance means it is a resource. POMS SI 01120.200D.1.b.

Under Iowa law, a trust conveyance is irrevocable unless the power of revocation is expressly reserved. Young v. Young-Wishard, 288 N.W. 420, 426 (Iowa 1939). In this case, the Fourth provision of the trust provides in pertinent part that: "The

trustor reserves the right at any time or times to amend, alter, revoke, or terminate this trust, in whole or in part, or any provisions thereof . . . ." This provision gives Emil E. L~, settlor, the express power to revoke the trust. There is no other provision within the trust that gives Glenn L~, or any other individual the express right to revoke the trust. Thus, according to Iowa law, Emil E. L~ is the only individual that has the right to revoke the trust. Also, the trust does not give Glenn L~ the authority to direct the use of the trust principal. In fact, the Seventh Article directs how the trustee is to dispose of the trust principal. Because the trust does not expressly give Glenn L~ the right to revoke the trust, nor the authority to direct the use of the trust principal, the trust principal cannot not be considered a resource to Glenn L~ for SSI purposes. See 20 C.F.R. § 416.1201 (a); POMS SI 01120.200D.1.a.; POMS SI 01120.200D.1.b.

SUMMARY

The laws of each state provide the circumstances under which the state may be reimbursed by a recipient or his estate for Medicaid payments. In all states, the law provides that monies expended for Medicaid payments which are recoverable are categorized as a debt due to the applicable department, or the department may file a claim against the estate of the recipient. Consequently, we believe the state is properly considered as a creditor and not a beneficiary of the trust. Because each state's statute provides for the right to reimbursement, we do not believe it is relevant whether or not a Medicaid Trust contains a state reimbursement provision. The inclusion of such a provision in a trust would not be of any consequence where the grantor is the sole beneficiary. In all four of the Region VII states, a trust would be revocable, and thus available as a resource for SSI purposes, where the grantor is the sole beneficiary, even if the trust contained a state reimbursement provision.

4.13 KANSAS

A. PS 03-193 ARCare Trust Medicaid Reimbursement Provision and the Supplemental Security Income Resource Pooled Trust Exception Insured: Tammy C~

DATE: September 24, 2003

1. SYLLABUS

This case concerns whether or not the ARCare Trust II is an excluded resource for SSI purposes. According to the Social Security Act, assets held in trust for individuals generally are countable resources, even if state property law might otherwise exclude them, if any portion of the trust property could be used for the benefit of an eligible individual or their spouse. However, there is an exception to this general rule which is commonly referred to as the "pooled trust exception." This exception states that a trust containing the assets of a disabled individual is not a countable resource when certain requirements are met. One of those requirements is that upon death, the trust must use any remaining funds in the account to reimburse the State for any medical assistance provided on behalf of the beneficiary. Before July 29, 2003, the ARCare Trust II was not compliant with this provision. However, the ARCare Trust II was subsequently amended to include all criteria necessary to qualify for the pooled trust exception, and is thus excluded from resources for SSI purposes.

2. OPINION

You asked that we review an ARCare Trust II to determine whether it is an excluded resource as a pooled trust with a qualifying Medicaid payback provision. As a pooled trust with individual sub-accounts, we looked at the date the insured entered into the Joinder Agreement, November 5, 2002, as the date this Trust was established. *See* SI BOS 01120.203; SI 01120.201-04. You also asked that we consider the effect of the July 29, 2003 amendment to the Declaration of Trust upon the Trust's status as a resource. We believe that, prior to the Amendment, the Trust did not meet the Medicaid reimbursement provision of the pooled trust exception to the resource rules applicable to trusts created after January 1, 2000. However, the Amendment appears to comply with the requirements of the exception.

BACKGROUND

ARCare, Inc., a Kansas not-for-profit corporation, established ARCare, Inc. Trust II on April 11, 1996. The Declaration of Trust establishes a pooled trust composed of individual trust accounts, called sub-accounts, that are maintained for individual disabled beneficiaries who enroll in and adopt the trust. While the sub-accounts are separately maintained, the funds from

each sub-account are pooled for investment and management. ARCare, Inc. is the "Settlor" and the "Trustee" of the pooled trust.

An individual, or another on behalf of the individual, establishes a sub-account by entering into a "Joinder Agreement" whereby the individual enrolls in and adopts the ARCare Trust II and the ARCare Trust II Declaration of Trust, pays an enrollment fee, and agrees to administration and other expenses. "Beneficiary" is defined as a person with mental retardation or other developmental disabilities, or disabled as defined by 42 U.S.C. §§ 1382c(a)(3), for whose benefit a sub-account has been established by a Donor. "Donor" or "donors" is defined as the person or persons, entity or entities making contributions from time to time to the Trust for the benefit of a beneficiary pursuant to a properly executed Joinder Agreement.

The purpose of the trust is to provide for each beneficiary's supplemental needs, and not to provide for a beneficiary's basic support and maintenance. The Trustee has sole and absolute discretion to make or decline to make any payments or distributions to or for the benefit of a beneficiary. Neither the beneficiary nor any other person may compel a distribution from a sub-account. The trust documents state that the pooled trust and each sub-account are irrevocable, and a spendthrift provision provides that a beneficiary cannot dispose of, assign, or charge by way of anticipation or otherwise, either voluntarily or involuntarily, any interest in the trust. All sums payable to any beneficiary are free and clear of debts, creditors' claims, contracts, assignments, alienation, and anticipations of such beneficiary, and of all levies and attachments until such sums are actually received by the beneficiary or actually delivered to or for the benefit of the beneficiary. The ARCare Trust Board (Board) has the right and power to conform the Declaration of Trust to 42 U.S.C. §§ 1396p(d)(4)(C) as it is amended from time to time. The Trustee may terminate the trust if it becomes impossible or impracticable to carry out the trust's purposes. Joinder Agreement provisions may be amended upon written agreement by the donor and ARCare, Inc., so long as any such amendment is consistent with the ARCare Trust II Declaration of Trust.

The Declaration of Trust provides that each sub-account will terminate upon the death of the beneficiary. Any assets remaining in the sub-account will be distributed by the Trustee for funeral expenses (at the Trustee's discretion), other expenses (such as administration fees, legal fees, court costs, and taxes), and, upon receipt of a written claim for reimbursement, reimbursement of the State for any medical assistance the State provided to the beneficiary on or after the date of execution of the Joinder Agreement. The Declaration of Trust specifies that the State will be reimbursed after payment of funeral and other expenses. Any assets remaining will be distributed in accordance with the Joinder Agreement. If the Trustee determines that such distribution is not practicable, the Trustee may hold the assets until a court of competent jurisdiction directs their disposition. On July 29, 2003, the ARCare Trust board amended the Declaration of Trust and inserted a provision entitled "Priority of Distributions" that states, "Notwithstanding anything to the contrary, Trustee shall reimburse the required state agencies . . . as required by the applicable federal and state laws, rules, and regulations, and such reimbursement shall have priority over all other claims, expenses, and distributions except for those items that are authorized by the applicable laws, rules, and regulations to be paid ahead of and prior to such reimbursement."

DISCUSSION

Effective January 1, 2000, the Social Security Act expressly directs how to count property held in trust as a resource for SSI purposes. According to the Act, assets held in trust for individuals generally are countable resources, even if state property law might otherwise exclude them, if any portion of the trust property could be used for the benefit of the eligible individual or his or her spouse. 42 U.S.C. §§ 1382(b)(e). However, Paragraph 5 of 42 U.S.C. §§ 1382(b)(e) states that "this subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1917(d)(4)(A) or (C)." Section 1917(d)(4)(C) of the Act, 42 U.S.C. §§ 1396p(d)(4)(C), commonly referred to as the "pooled trust exception," states that a trust containing the assets of a disabled individual is not a countable resource for Medicaid purposes when certain requirements are met. The statute requires that the trust be established and managed by a nonprofit association. A separate account must be maintained for each beneficiary of the trust, although the sub-accounts may be pooled for purposes of investment and management of funds. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual or a parent, grandparent, legal guardian or court. Finally, the trust must provide that to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

Prior to the July 29, 2003 Amendment to the Declaration of Trust, the ARCare Trust II satisfied most of the foregoing criteria, but not all. The Declaration satisfied the statutory requirements in that the Trust was established and is managed by a nonprofit organization; provides for separate sub-accounts for each disabled beneficiary of the trust, but pools the accounts for purposes of investment and management of funds; provides that sub-accounts will be established by the beneficiary or a parent,

grandparent, legal guardian or court; and was established solely for the benefit of the disabled individuals. However, the trust provides that funds remaining in the beneficiary's account at death may be used to pay the beneficiary's funeral expenses, at the Trustee's discretion, and that other expenses shall be paid prior to reimbursing the State for medical assistance provided to the beneficiary. Additionally, the State's reimbursement was limited to expenditures for medical assistance provided by the State after the effective date of the Joinder Agreement. The provisions directing the distribution of the trust's corpus upon the death of the beneficiary remove the trust from the scope of the pooled trust exception because 42 U.S.C. §§ 1396p(d)(4)(C) (iv) requires that the State's reimbursement be paid prior to funeral expenses or other expenses and that reimbursement be made to the State for the "total amount" of medical assistance paid by the State on the beneficiary's behalf under a State Medicaid plan. See SI 01120.203. Although payment of funeral expenses is discretionary, the Declaration permits payment of funeral expenses and other expenses prior to reimbursing the State, which is not permissible under the pooled trust exception. Additionally, if the beneficiary received any State medical assistance prior to execution of the Joinder Agreement, the trust does not provide for reimbursement of the "total amount" of medical assistance provided by the State. Therefore, it appears that the original ARCare Trust did not qualify as an excluded resource pursuant to 42 U.S.C. §§ 1382(b)(e), 1396p(d)(4)(C).

Although prior to July 29, 2003, the ARCare Trust II did not comply with the all of the requirements of 42 U.S.C. §§ 1396p(d)(4)(C), the July 29, 2003 amendment to the Declaration of Trust appears to bring the Trust into compliance with the requirements of the pooled trust exception. As required by the statute, the Amendment unequivocally requires the Trustee to reimburse the State prior to settling any other claim, expense, or distribution. The Amendment also requires the Trustee to reimburse the State "as required by the applicable federal and state laws, rules, and regulations." Although this provision potentially conflicts with the previous paragraph limiting the State to reimbursement for medical benefits bestowed after execution of the Joinder Agreement, we believe that the Amendment would control because it specifically states that the terms set forth in the Amendment are applicable "[n]ot withstanding anything to the contrary" and because it is consistent with the stated intent of the Settlor, which was to "conform to the requirements of 42 U.S.C. §§ 1396p(d)(4)(C) . . . and applicable state rules which create an exception to the treatment of trust assets of disabled individuals." Based on the express language of the Amendment and the stated intent of the Settlor, we believe that the July 29, 2003 Amendment to the Trust Agreement brings the Trust into compliance with the pooled trust exception.

CONCLUSION

It is our opinion that a trust with a provision permitting payment of funeral expenses and other expenses prior to reimbursing the State and limiting the State's reimbursement for medical assistance by the date of the establishment of the trust is outside the scope of the exception at 42 U.S.C. §§ 1396p(d)(4)(C). However, the July 29, 2003 amendment to the Agreement appears to cure the defective provisions. Therefore, as of July 29, 2003, the ARCare Trust II qualifies as an exception to the general rule that assets held in trust must be counted as a resource.

Frank V. S~ III
Chief Counsel

By_____
Jennifer L. F~
Assistant Regional Counsel

B. PS 04-169 (Kansas) Determination of Irrevocability of a Kansas Trust Elizabeth G~ Trust, SSN: ~

DATE: April 25, 2000

1. SYLLABUS

This opinion discusses whether a grantor trust is irrevocable under Kansas law. The trust was determined to be irrevocable because Kansas law holds that the primary consideration in the construction of trusts is the intention of the grantor based on an examination of the entire trust document. In this case, the Trust Agreement Introduction indicates that it was created for the benefit of the beneficiary and the beneficiary's descendants. Therefore, it's assumed that a Kansas court would conclude that in this case the use of the word "descendants" was sufficient to demonstrate the grantor's intent to create a residual beneficiary.

2. OPINION

You have asked for our assistance in determining the irrevocability of a trust designated as the "ELIZABETH R. G~ IRREVOCABLE TRUST." Bonnie L. O~ (also known as Bonnie T~), the mother of Elizabeth R. G~ (Elizabeth), has requested reconsideration of the Field Office decision that the G~ Trust Agreement is revocable. We believe that a Kansas court would find the G~ Trust is irrevocable.

I. TRUST PROVISIONS

The Trust Agreement indicates that Bonnie L. O~ is Conservator of Elizabeth's estate and, in addition, names Bonnie L. O~ as grantor of the trust. Bonnie L. O~ and Bonnie J. S~, Esquire, are named as co-trustees. The Trust Agreement, executed on May 21, 1999, and signed by the co-trustees, names Elizabeth R. G~ as the Trust Beneficiary. Elizabeth is described as the Grantor's child who is disabled as defined in 42 U.S.C. § 1382c(a)(3). Trust Agreement, Introduction and Article I.C. The Trust Agreement specifies that the trust is irrevocable and the Trustee agrees to hold and administer the Trust Estate for the sole benefit of the Beneficiary. Trust Agreement, Articles I and VI.

To establish the Trust, the "Grantor" provided the sum of ten dollars ($10) and "such other property, if any," as was described on an attached schedule (no schedule was attached to the copy we received). This property constituted the initial trust estate which was to be held by the Trustee "for the benefit of the Beneficiary and the Beneficiary's descendants." Trust Agreement, Introduction.

The Trust Agreement provides that,

"[u]pon the death of the Beneficiary, the Trustee shall be required to pay back to the State of Kansas Social Rehabilitation Services (SRS), pursuant to 42 U.S.C. § 1396p(d)(4)(A) and governing SRS regulations, all amounts remaining in the trust up to an amount equal to the total medical assistance paid on behalf of the Beneficiary. The remaining trust estate shall be distributed by the Trustee, in the Trustee's sole discretion, either to the Personal Representative of the Beneficiary's estate, or to the same persons or entities and in the same manner and proportions such distributions would have been made had such remaining trust estate been distributed to the Personal Representative of the Beneficiary's estate.

Trust Agreement, Article I.C.

The Trust Agreement provides that to the extent that the Trustee has discretion to distribute income or principal for the Beneficiary's health, education, support, or maintenance, such trust income or principal shall be supplemental to any resources available for such needs from any local, regional, state or federal government or agency or from private agencies, it being the Grantor's express purpose and intent that such trust income or principal not be utilized for such purposes to the extent such needs are otherwise provided for from such other resources.

Trust Agreement, Article IV.F.

II. TRUSTS AS RESOURCES

Generally, if trust principal is available to the trust beneficiary, it will be considered a resource to him for purposes of determining his eligibility to SSI benefits. Regulations define resources for SSI eligibility as follows:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual[.]

20 C.F.R. § 416.1201(a)(1). Regulations further define resources as liquid or nonliquid. Liquid resources are resources in the form of-

cash or other property which can be converted to cash within 20 days . . . . Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources[.]

Id. at § 416.1201(b).

The Commissioner has further construed the meaning of "resource," by issuing interpretive guidelines in the Program Operation Manual System (POMS). With respect to trust instruments, the POMS provides that-

if an individual (claimant, recipient or deemor) has the legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

POMS SI 01120.200D.1.a (emphasis in original). However,

[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes.

[t]his Trust is established pursuant to the 1993 Omnibus Reconciliation Act[,] 469 NAC 2.009.07A5B (4) and Neb. Rev. Stat. 68-1047. This trust is not for the support of Kyle D. S~. It is the intent of the Grantor to make provisions in this Trust Agreement to provide funds necessary to Kyle D. S~'s happiness over and above the essential, primary support and services otherwise available to him. This Trust is not to replace or make unnecessary any public or private assistance that Kyle D. S~ may now or in the future qualify to receive. It is the intent to provide resources for non-support purposes including comfort over and above the essentials provided by any state or federal government agency or program. The supplemental resources provided through this Trust may include, but shall not be limited to education, personal care needs, attendants, entertainment, and other goods and services not otherwise provided by public aid or private sources, but which are reasonable and necessary for the rehabilitation and special non-support needs of the Beneficiary.

Trust Agreement, Article 2. In addition, the Trust Agreement provides that-

[w]hile it is the intention that the Trustee have broad and effective powers to carry out the provisions of this Trust Agreement, no power conferred upon any Trustee by this article, shall be exercised in such a manner that it deprives the Trust of an otherwise available tax exemption, deduction, exclusion or credit, nor to deprive the Beneficiary of any public or private assistance as described above. This Trust is intended to qualify under 42 U.S.C. § 1396p(d)(4)(A) and the Trustee shall have no power which is inconsistent with such law and its regulations, and all provisions of this Trust shall be interpreted in a manner consistent with such law.

Trust Agreement, Article 2.

Concerning the Trustee's powers, the Trust Agreement provides that—

[t]he Trustee may distribute income or principal or both, . . . [and] in its sole and absolute discretion, shall apply and distribute such part, all or none of the net income and principal of the Trust estate in such amounts and proportions as the Trustee, in the Trustee's absolute discretion, deems necessary or appropriate for Kyle D. S~'s best interest, [but only after exhausting] all other resources available . . . from all sources other than his trust including, without limitation, payments, services and programs administered, provided or sponsored by any governmental (federal, state or other), private or institutional agency, authority or provider, any rule or regulation of such agency, authority or provider to the contrary notwithstanding.

Trust Agreement, Article 2. The Trust Agreement also includes a spendthrift clause intended to prohibits creditors from attaching the assets of a trust. Trust Agreement, Article 8.

The Trust Agreement provides that the trust terminates upon Kyle's death and "any remaining undistributed income or principal . . . shall be first paid to the State of Nebraska, and to any other state who has made payments under Title XIX" on Kyle's behalf. "In the event that either principal or income remain [after the State is reimbursed], it shall be paid over and distributed pursuant to the intestacy laws of the State of Nebraska." Trust Agreement, Article 11.

II. TRUSTS AS RESOURCES

Generally, if trust principal is available to the trust beneficiary, it will be considered a resource to him for purposes of determining his eligibility to SSI benefits. Regulations define resources for SSI eligibility as follows:

(a) *Resources; defined.* For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance. (1) If the

individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual[.]

20 C.F.R. § 416.1201(a)(1). Regulations further define resources as liquid or nonliquid. Liquid resources are resources in the form of-

cash or other property which can be converted to cash within 20 days . . . . Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources[.]

Id. at § 416.1201(b).

The Commissioner has further construed the meaning of "resource," by issuing interpretive guidelines in the Program Operation Manual System (POMS). With respect to trust instruments, the POMS provides that-

if an individual (claimant, recipient or deemor) has the legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

POMS SI 01120.200D.1.a (emphasis in original). However,

[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes.

POMS SI 01120.200D.2 (emphasis in original). The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or by State law. POMS SI 01120.200D.1.a and SI 01120.200D.2. "Most States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary." POMS SI 01120.200D.3 (emphasis in original).

A trust is generally irrevocable if the grantor fails to reserve the power to revoke or modify it. Restatement (Second) of Trusts §§ 330 and 331 (1957). Nevertheless, the general law of trusts recognizes an exception to this rule when the grantor is the sole beneficiary of the trust agreement. Where the grantor is the sole beneficiary of a trust, he may amend or terminate the trust, even without having reserved the power to do so. *Id.* at § 339.

Although the laws of Nebraska have not specifically addressed this issue, we believe that Nebraska would follow the general rule. While the Trust Agreement at issue here names the Court as Grantor, the consideration funding the trust belonged to Kyle. Thus, Kyle is the grantor and, if Kyle is the sole beneficiary of the trust, it is revocable notwithstanding the Trust Agreement language to the contrary. However, if the grantor is not the sole beneficiary, the trust would not be revocable.

The trust herein appears to be a "Medicaid Special Needs Trust," a trust created by means other than a will, and which includes a Medicaid payback provision upon termination of the trust or the death of the individual. SSA's policy is that the Medicaid trust "affects the individual's eligibility for Medicaid only, and has no effect on the SSI income and resource determinations." POMS SI 01120.200H.1.a (emphasis in original). In addition, the POMS provide that-

[a]ccording to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt. This law may or may not apply in your State . . . .

POMS SI 01120.200H.1.b. .

Our research indicates that the purpose of including the State reimbursement provision in the special needs trust (SNT) is to qualify the beneficiary for medical assistance from the State. If the SNT meets the exception set out in 42 U.S.C. § 1396p(d)(4)(A) and State requirements, the State does not consider the trust to be a resource and the grantor/beneficiary is eligible for medical assistance. Previously we indicated that a trust provision for repayment of Medicaid funds to a Region VII state represents repayment of a debt and does not make the State a trust beneficiary. G.C. Opinion, *Iowa, Kansas, Missouri, and Nebraska State Law on Grantor Trusts; SSI Resource Issue*, dated June 16, 1999. Our advice is consistent with the definition of a beneficiary in the Restatement (Second) of Trusts (1959) § 127 (Restatement Second) as "[t]he person for whose benefit property is held in trust." None of the property in a Medicaid-qualifying trust is held for the "benefit" of the State.

You ask whether the language in Article I.C of the Trust Agreement, *see supra* at page 2, makes the trust irrevocable. We previously discussed this issue at length in G.C. Opinion, *Determination of Irrevocability of a Nebraska Trust*, dated February 23, 2000. We also reviewed our prior advice about the revocability of grantor trusts in Region VII states. *Id.* We believe it will be helpful to the Kansas Field Office to repeat part of our prior opinion.

The Restatement (Second) provides that at common law there was a rule of the law of real property that the owner of land could not, by a conveyance inter vivos (between living parties), create a remainder interest in his heirs. An attempt to do so created a reversionary interest in the owner, rather than a remainder interest in his heirs. However, there is no longer any such rule of law. There is only a question of construction. Restatement (Second) § 127 cmt. b (1957).

If the owner manifests an intention to create a contingent interest in remainder, legal or equitable, in the persons who on his death may become his heirs, he can do so. In the absence of evidence of a contrary intent, however, the inference is that he does not intend to create a remainder interest in his heirs. The Restatement (Second) provides that if the beneficial interest is limited to the grantor for life and on his or her death the property is to be conveyed to his or her "children, or issue, or descendants" then he or she is not the sole beneficiary of the trust and a remainder interest is created in his or her children, issue, or descendants. *Id.* at § 127 cmt. b. Where the owner of property, however, transfers it in trust to pay the income to himself or herself for life and upon his or her death to pay the principal to "his heirs or next of kin," in the absence of a manifestation of a contrary intention, "the inference is that he is the sole beneficiary of the trust, and that he does not intend to create any interest in the persons who may become his or her 'heirs or next of kin.'" *Id.*

Likewise, the inference is that the grantor is the sole beneficiary where the income is to be paid to the grantor for life and upon his or her death the principal is to be paid "as he may by deed or will appoint, and in default of appointment to his heirs or next of kin." If he or she reserves power to appoint by will alone, and in default of appointment the property is to be conveyed to his or her heirs or next of kin, the Restatement (Second) indicates that this is some indication that the grantor intended to confer an interest on his or her heirs or next of kin of which they could be deprived only by a testamentary appointment, "but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to be the sole beneficiary of the trust." *Id.*

If the grantor "manifests an intention to create a vested or contingent interest in others, as for example, his children, or the persons who may be his heirs or next of kin on his death, he is not the sole beneficiary unless such intended interests are invalid. . . ." *Id.*at § 339 cmt. b. Thus, the question is whether the language of a trust creates a valid remainder interest. If no valid remainder interest is created, the grantor is the sole beneficiary of the trust, the trust is revocable, and the trust principal is a resource.

In summary, we concluded that you would be justified in finding that the words "child," "children," "issue," "descendants," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next-of-kin," or "by intestate succession ,"we concluded that you would be justified, in most cases, in finding that a residual beneficiary was not created and a grantor trust is revocable. *Accord* G.C. Opinion, *Accessibility of Discretionary Support Trust Fund as a Resource for Supplemental Security Income Purposes in Nebraska Where Grantor Is also the Sole Beneficiary*, dated March 17, 1997. However, if considering the document as whole indicates that the grantor had a different intention, the trust may be irrevocable despite use of the words "heirs," "heirs-at-law," or "next-of-kin." Our research reveals that words such as "heirs" do not have a precise meaning and are interpreted inconsistently by the courts, depending upon how the court perceives the grantor's intent. We are not able to provide a general rule that will apply to all trusts.

Where State law is silent, Kansas courts "have often turned to the guidance of the Restatement of Trusts[.]" *In the Matter of the Estate of Sanders*, 929 P.2d 153 (Kan. 1996). *Accord Neeley v. Neeley*, ___ P.2d ___, 2000 W.L. 45835 at *1 (Kan. App.). Although it was not dispositive in the case, in *Daughters of the American Revolution of Kansas, Topeka Chapter v. Washburn College*, 164 P.2d 128, 132 (Kan. 1945), the Kansas Supreme Court acknowledged the Restatement rule that a trust is revocable when the grantor is the sole beneficiary. The court did not indicate that the rule was improper or would not be followed in Kansas. Although we found no Kansas statute or case applying the grantor trust rule in Kansas, Kansas law does provide that all gifts and conveyances of goods and chattels (but not land) to a trust made for the use of the person making the trust are valid and effective except as to all past, present or future creditors and a nonconsenting wife's statutory rights. *See* Kan. Stat. Ann. § 33-101 (1993). *See also Newman v. George*, 755 P.2d 18, 20 (Kan. 1988); *Ackers v. First National Bank of Topeka*, 192 Kan. 319(1963), a*s modified at rehearing*, 192 Kan. 471 (1964). A trust is irrevocable unless the power to amend or revoke is reserved in the trust agreement. Kan. Stat. Ann. § 58-2417 (1994).

In considering only Article I.C of the G~ trust, it includes no named heir and, initially, one could conclude that the trust was revocable. However, consistent with the Restatement (Second), Kansas law holds that the primary consideration in the construction of trusts is the intention of the grantor as evidenced by an examination of the entire document. *See In the Matter of the Estate of Sam Saroff*, 625 P.2d 458, 465 (Kan. 1981). We believe that, because the Trust Agreement Introduction indicates that it was created for the benefit of the Beneficiary and the Beneficiary's "descendants," a Kansas court would conclude the use of the word "descendants" was sufficient to demonstrate the grantor's intent to create a residual beneficiary. For example, in the case of *In re Watts*, 162 P.2d 82, 87 (Kan. 1945), in interpreting whether the corpus of a discretionary spendthrift trust created by will could be reached by a judgment for alimony due the beneficiary's ex-spouse, a county district court made the testator's "unknown heirs" parties to the litigation. The trustee argued that, if the beneficiary never showed himself capable of handling the trust property, upon his death any remaining property would go to the testator's heirs. Upon appeal, the Kansas Supreme Court held that, in order to determine the meaning and effect of the trust provisions, the unknown heirs were properly made parties to the litigation. However, because it found that the beneficiary had no current vested interest in the trust which could be reached by the ex-spouse's judgment, the court did not have to decide at that time who might receive any remaining trust property upon the beneficiary's death. 162 P.2d at 86-87. The Kansas Supreme Court also has found that "'the same rules that apply to [the] construction [of wills] apply to trusts and most other written documents.'" I*n the Matter of the Estate of Sanders*, 929 P.2d at 158, quoting *In re Estate of Hauck*, 223 P.2d 707 (Kan. 1950).

For the reasons set out above, we believe a Kansas court would find that the G~ Trust is irrevocable.

Frank V. S~ III
Chief Counsel

By_____
C. Geraldine U~
Assistant Regional Counsel

C. PS 00-468 Determination of Irrevocability of a Nebraska Trust Kyle D. S~, SSN: ~

DATE: February 23, 2000

1. SYLLABUS

The issue concerns what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

Although the laws of Nebraska have not specifically addressed it, it appears that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable.

There does not appear to be any Kansas statute or case applying the grantor trust rule in Kansas. Generally, a trust is revocable when the grantor is the sole beneficiary.

Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary.

There does not appear to be any Iowa statute or case applying the grantor trust rule in Iowa. It appears Iowa would follow general trust law regarding revocability of a trust when the grantor is the trust's sole beneficiary.

Thus, in all Region VII States, the words "child," "children," "issue," "descedents," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next of kin," or "by intestate succession," in most cases it would justify a finding that a residual beneficiary was not created and a grantor trust is revocable.

2. OPINION

You have asked for our assistance in determining the irrevocability of a trust designated as the Kyle D. S~ Special Needs Trust, ~. You also asked us revisit the question of what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

I. TRUST PROVISIONS

The Kyle D. S~ Special Needs Trust (SNT) was funded with an insurance settlement in the amount of $26,129.20, the result of litigation involving personal injury suffered by Kyle. The Trust Agreement names the County Court of Buffalo County, Nebraska, as the grantor and Kyle's aunt, Catherine L. K~, as the trustee. The Trust Agreement, executed on August 13, 1999, and signed by the County Judge and by the Trustee, describes Kyle, born October 15, 1993, as the Beneficiary who is "a disabled person within the meaning of 42 U.S.C. § 1382c(a)(3)." Trust Agreement, Article 1.

The Trust Agreement specifies that the trust is irrevocable and that "the beneficiary, his guardians or conservator, shall have no right whatsoever to alter, revoke or terminate this Trust, in whole or in part." However, "[t]he Trust may be amended by the Court with notice to the State of Nebraska, Department of Health and Human Services Finance and Support, if amendment would benefit the disabled's [sic] beneficiary." Trust Agreement, Article 4. The Trust Agreement also provides that-

[t]his Trust is established pursuant to the 1993 Omnibus Reconciliation Act[,] 469 NAC 2.009.07A5B (4) and Neb. Rev. Stat. 68-1047. This trust is not for the support of Kyle D. S~. It is the intent of the Grantor to make provisions in this Trust Agreement to provide funds necessary to Kyle D. S~'s happiness over and above the essential, primary support and services otherwise available to him. This Trust is not to replace or make unnecessary any public or private assistance that Kyle D. S~ may now or in the future qualify to receive. It is the intent to provide resources for non-support purposes including comfort over and above the essentials provided by any state or federal government agency or program. The supplemental resources provided through this Trust may include, but shall not be limited to education, personal care needs, attendants, entertainment, and other goods and services not otherwise provided by public aid or private sources, but which are reasonable and necessary for the rehabilitation and special non-support needs of the Beneficiary.

Trust Agreement, Article 2. In addition, the Trust Agreement provides that-

[w]hile it is the intention that the Trustee have broad and effective powers to carry out the provisions of this Trust Agreement, no power conferred upon any Trustee by this article, shall be exercised in such a manner that it deprives the Trust of an otherwise available tax exemption, deduction, exclusion or credit, nor to deprive the Beneficiary of any public or private assistance as described above. This Trust is intended to qualify under 42 U.S.C. § 1396p(d)(4)(A) and the Trustee shall have no power which is inconsistent with such law and its regulations, and all provisions of this Trust shall be interpreted in a manner consistent with such law.

Trust Agreement, Article 2.

Concerning the Trustee's powers, the Trust Agreement provides that—

[t]he Trustee may distribute income or principal or both, . . . [and] in its sole and absolute discretion, shall apply and distribute such part, all or none of the net income and principal of the Trust estate in such amounts and proportions as the Trustee, in the Trustee's absolute discretion, deems necessary or appropriate for Kyle D. S~'s best interest, [but only after exhausting] all other resources available . . . from all sources other than his trust including, without limitation, payments, services and programs administered, provided or sponsored by any governmental (federal, state or other), private or institutional agency, authority or provider, any rule or regulation of such agency, authority or provider to the contrary notwithstanding.

Trust Agreement, Article 2. The Trust Agreement also includes a spendthrift clause intended to prohibits creditors from attaching the assets of a trust. Trust Agreement, Article 8.

The Trust Agreement provides that the trust terminates upon Kyle's death and "any remaining undistributed income or principal . . . shall be first paid to the State of Nebraska, and to any other state who has made payments under Title XIX" on Kyle's behalf. "In the event that either principal or income remain [after the State is reimbursed], it shall be paid over and distributed pursuant to the intestacy laws of the State of Nebraska." Trust Agreement, Article 11.

II. TRUSTS AS RESOURCES

Generally, if trust principal is available to the trust beneficiary, it will be considered a resource to him for purposes of determining his eligibility to SSI benefits. Regulations define resources for SSI eligibility as follows:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual[.]

20 C.F.R. § 416.1201(a)(1). Regulations further define resources as liquid or nonliquid. Liquid resources are resources in the form of-

cash or other property which can be converted to cash within 20 days . . . . Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources[.]

Id. at § 416.1201(b).

The Commissioner has further construed the meaning of "resource," by issuing interpretive guidelines in the Program Operation Manual System (POMS). With respect to trust instruments, the POMS provides that-

if an individual (claimant, recipient or deemor) has the legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

POMS SI 01120.200D.1.a (emphasis in original). However,

[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes.

POMS SI 01120.200D.2 (emphasis in original). The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or by State law. POMS SI 01120.200D.1.a and SI 01120.200D.2. "Most States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary." POMS SI 01120.200D.3 (emphasis in original).

A trust is generally irrevocable if the grantor fails to reserve the power to revoke or modify it. Restatement (Second) of Trusts §§ 330 and 331 (1957). Nevertheless, the general law of trusts recognizes an exception to this rule when the grantor is the sole beneficiary of the trust agreement. Where the grantor is the sole beneficiary of a trust, he may amend or terminate the trust, even without having reserved the power to do so. Id. at § 339.

Although the laws of Nebraska have not specifically addressed this issue, we believe that Nebraska would follow the general rule. While the Trust Agreement at issue here names the Court as Grantor, the consideration funding the trust belonged to Kyle. Thus, Kyle is the grantor and, if Kyle is the sole beneficiary of the trust, it is revocable notwithstanding the Trust Agreement language to the contrary. However, if the grantor is not the sole beneficiary, the trust would not be revocable.

The trust herein appears to be a "Medicaid Special Needs Trust," a trust created by means other than a will, and which includes a Medicaid payback provision upon termination of the trust or the death of the individual. SSA's policy is that the Medicaid trust "affects the individual's eligibility for Medicaid only, and has no effect on the SSI income and resource determinations." POMS SI 01120.200H.1.a (emphasis in original). In addition, the POMS provide that-

[a]ccording to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt. This law may or may not apply in your State . . . .

POMS SI 01120.200H.1.b. .

Our research indicates that the purpose of including the State reimbursement provision in the SNT is to qualify the beneficiary for medical assistance from the State. If the SNT meets the exception set out in 42 U.S.C. § 1396p(d)(4)(A) and State requirements, the State does not consider the trust to be a resource and the grantor/beneficiary is eligible for medical assistance. Where there is a pre-existing Medicaid lien, several courts have held that the State may require satisfaction of the lien before any third-party settlement can be put into a SNT. In Nebraska, a Medicaid grantor SNT is considered to be void and revocable by operation of law upon filing for or receiving State public assistance unless the SNT is ordered by a court of

competent jurisdiction, for good cause shown. Neb. Rev. Stat. § 68-1047. Although no court order was included in the material received, we are assuming that this requirement was met.

You ask whether the words "pursuant to the intestacy laws of the State of Nebraska" created a residual beneficiary. The Restatement (Second) of Trusts provides that at common law there was a rule of the law of real property that the owner of land could not, by a conveyance inter vivos, create a remainder interest in his heirs. An attempt to do so created a reversionary interest in himself, rather than a remainder interest in his heirs. However, there is no longer any such rule of law. There is only a question of construction. Restatement (Second) of Trusts § 127 cmt. b (1957).

If the owner manifests an intention to create a contingent interest in remainder, legal or equitable, in the persons who on his death may become his heirs, he can do so. In the absence of evidence of a contrary intent, however, the inference is that he does not intend to create a remainder interest in his heirs. The Restatement (Second) provides that if the beneficial interest is limited to the grantor for life and on his or her death the property is to be conveyed to his or her "children, or issue, or descendants" then he or she is not the sole beneficiary of the trust and a remainder interest is created in his or her children, issue, or descendants. Id. at § 127 cmt. b. Where the owner of property, however, transfers it in trust to pay the income to himself or herself for life and upon his or her death to pay the principal to "his heirs or next of kin," in the absence of a manifestation of a contrary intention, "the inference is that he is the sole beneficiary of the trust, and that he does not intend to create any interest in the persons who may become his or her 'heirs or next of kin.'" Id.

Likewise, the inference is that the grantor is the sole beneficiary where the income is to be paid to the grantor for life and upon his or her death the principal is to be paid "as he may by deed or will appoint, and in default of appointment to his heirs or next of kin." If he or she reserves power to appoint by will alone, and in default of appointment the property is to be conveyed to his or her heirs or next of kin, the Restatement (Second) indicates that this is some indication that the grantor intended to confer an interest on his or her heirs or next of kin of which they could be deprived only by a testamentary appointment, "but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to be the sole beneficiary of the trust." Id.

Restatement (Second) presents an example similar to the trust herein. The illustration provides: "A transfers property to B in trust to pay the income to A for life and on A's death to pay the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A is the sole beneficiary of the trust." Restatement (Second) § 127 cmt. b, illus. 2. In addition, the Nebraska Supreme Court has held that an inter vivos trust which purports to convey an interest in property only after the death of the grantor is testamentary in character and passes no present interest in the property. Such a purported conveyance was found to be void because it was in effect a will, and the statutory requirements for the execution of a will had not been met. Thus, it had no validity. Young et al. v. McCoy et al., 40 N.W.2d 540, 542 (Neb. 1950). The court stated that these words were expressly limited to take effect only after the death of the grantor; thus, they were necessarily revocable words. Id.

The primary objective of the Kyle S~ trust appears to be to provide for the grantor/life beneficiary, and not to preserve the trust principal for the grantor's heirs. Examination of the trust agreement does not reveal any manifestation of intent to convey a remainder interest to the grantor's heirs. For the reasons given above, if there is no named residual beneficiary, absent additional language manifesting a contrary intent, we believe you would be justified in finding that the words "distributed pursuant to the intestacy laws of the State of Nebraska" in a grantor trust make the trust revocable despite trust language to the contrary. However, we believe a residual beneficiary would be created by words that any remainder should go to a named beneficiary or to the individual's children, issue, or descendants. In Ellengrod v. Trombla, 95 N.W.2d 635, 638 (Neb. 1959), in interpreting a will devise and the Uniform Property Act, the court said that conveyance of property to a person and his "children," "issue," "descendants" and "words of similar import" create a life interest in the person and a remainder in the life beneficiary's descendants unless a contrary intent is manifested. If no children, issue, or descendants exist presently, the remainder is contingent. Id. at 640. In Wilkins v. Rowan, 185 N.W. 437, 438-39 (Neb. 1921), the court defined "issue," "lawful issue," or "issue of the body" to include children and lineal descendants of every degree in the absence of qualifying words showing a contrary intent.

III. REVIEW OF PRIOR ADVICE

As you requested, we have reviewed our prior advice concerning the revocability of grantor trusts in Region VII. On this issue, although the laws of Nebraska have not specifically addressed it, we believe that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable. Restatement (Second) of Trusts § 339 (1957). The grantor is the sole beneficiary of a trust if he or she does not "manifest an intention to give a beneficial interest to anyone else." If the grantor "manifests an intention to create a vested or contingent interest in others,

as for example, his children, or the persons who may be his heirs or next of kin on his death, he is not the sole beneficiary unless such intended interests are invalid. . . ." Id. at § 339 cmt. b. Thus, the question is whether the language of a trust creates a valid remainder interest. If no valid remainder interest is created, the grantor is the sole beneficiary of the trust, the trust is revocable, and the trust principal is a resource (see discussion above).

We found no Kansas statute or case applying the grantor trust rule in Kansas. However, Kansas law does provide that all gifts and conveyances of goods and chattels (but not land) to a trust made for the use of the person making the trust are valid and effective except as to all past, present or future creditors and a nonconsenting wife's statutory rights. Newman v. George, 755 P.2d 18, 20 (Kan. 1988). A trust is irrevocable unless the power to amend or revoke is reserved in the trust agreement. Kan. Stat. Ann. § 58-2417 (1994). Where State law is silent, Kansas courts "have often turned to the guidance of the Restatement of Trusts[.]" In the Matter of the Estate of S~, 929 P.2d 153 (Kan. 1996). Accord Neeley v. Neeley, §§§ P.2d §§§, 2000 W.L. 45835 at *1 (Kan. App.). Although it was not dispositive in the case, in Daughters of the American Revolution of Kansas, Topeka Chapter v. Washburn College, 164 P.2d 128, 132 (Kan. 1945), the Kansas Supreme Court acknowledged the Restatement rule that a trust is revocable when the grantor is the sole beneficiary. The court did not indicate that the rule was improper or would not be followed in Kansas. We believe Kansas would follow this rule in the appropriate case. Kansas law is consistent with the Restatement (Second) in holding that the primary consideration in the construction of trusts is the intention of the grantor as evidenced by an examination of the document. In the Matter of the Estate of Sam Saroff, 625 P.2d 458, 465 (Kan. 1981). In the case of In re Watts, 162 P.2d 82, 87 (Kan. 1945), in interpreting a will, the court made "unknown heirs" parties to the litigation. "'[T]he same rules that apply to [the] construction [of wills] apply to trusts and most other written documents." In the Matter of the Estate of S~, 929 P.2d at 158, quoting In re Estate of H~, 223 P.2d 707 (Kan. 1950).

In Missouri, rights to trust income and property are determined by the trust agreement. Hillyard v. Leonard, 391 S.W.2d 211 (Mo. 1965). Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary. Couch v. Director, Missouri State Division of Family Services, 795 S.W.2d 91, 94 (Mo. App. 1990); Pilgrim Evangelical v. Lutheran Church-Missouri Synod Foundation, 661 S.W.2d 833, 838 (Mo. App. 1983). The intention of the settlor is the key to the construction of a trust. Tidrow v. Director, Missouri State Division of Family Services, 688 S.W.2d 9 (Mo. App. 1985). The term "bodily heirs" is a technical term which should be accorded its technical meaning unless a contrary meaning clearly appears from the context of the will. Central Trust Bank v. Stout, 579 S.W.2d 825 (Mo. App. 1979). "Nearest blood kin" has no settled meaning but where the testator does not indicate otherwise, the definition in the Restatement of Property will be used. Graves v. Hyer, 626 S.W.2d 661 (Mo. App. 1981). It has been held in Missouri that where one transfers property inter vivos in trust to pay the income to himself for life and on his death it is to be conveyed to his "heirs or next of kin," that he is the sole beneficiary. Stephens v. Moore, 249 S.W. 601 (Mo. 1923).

We found no Iowa statute or case applying the grantor trust rule in Iowa. We believe that Iowa would follow general trust law regarding the revocability of a trust when the grantor is the trust's sole beneficiary. Iowa's probate code defines the word "issue," for purposes of intestate succession, as including "all lawful lineal descendants of a person, whether biological or adopted, except those who are the lineal descendants of the person's living descendants." I.C.A. § 633.3.24 (Supp. 1992). The Iowa Supreme Court has indicated that "heir" is given the popular meaning of issue, children, or descendants when language of the entire will and circumstances in which the will was executed indicated that intention. Cook v. Underwood, 228 N.W. 629 (Iowa 1930). The court subsequently stated that the word "heirs" is a flexible term to which the technical meaning of the word is frequently not applied. The meaning to be given to "heirs" is a question of the testator's intent. In re Austin's Estate, 20 N.W.2d 445 (Iowa 1945). The court also stated that the word "heirs" used by a testator does not have a fixed meaning and meaning must be determined from the instrument read as a whole and in light of all relevant facts and circumstances under which the instruments were executed. Schaefer v. Merchants Nat. Bank of Cedar Rapids, Iowa, 160 N.W.2d 318, 320-21 (Iowa 1968). In a will devising the remainder of a trust estate to an old folks' home if a son died without leaving heirs, the word "heirs" meant "descendants." In re Clifton's Estate, 218 N.W. 926 (Iowa 1928).

CONCLUSION

In summary, we believe that you would be justified in finding that, in all Region VII states, the words "child," "children," "issue," "descendants," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next-of-kin," or "by intestate succession, "we believe you would be justified, in most cases, in finding that a residual beneficiary was not created and a grantor trust is revocable. Accord G.C. Opinion, Accessibility of Discretionary Support Trust Fund as a Resource for Supplemental Security Income Purposes in Nebraska Where Grantor Is also the Sole Beneficiary, dated March 17, 1997. However, if considering the document as whole indicates that the grantor had a different intention, the words "heirs," "heirs-at-law," or "next-of-kin" may make the trust irrevocable. For example, you

attached a previous legal opinion concerning the Felicia Ann Bribiesca trust. See G.C. Opinion, Determination of Irrevocability of a Grantor Trust, dated June 21, 1994. You asked whether the naming of heirs in general constituted naming another beneficiary making the trust irrevocable. We affirmed that it did. We cannot conclude, however, that our response was inconsistent with the advice herein. The Bribriesca trust reveals that it was the grantor's intention that any undistributed principal and income should be distributed to Felicia's "descendants who survive." Therefore, we believe the advice given was correct.

As illustrated by the cases cited above, words such as "heirs" do not have a precise meaning and are defined inconsistently by the courts. We are not able to provide a general rule that will apply to all trusts. If the grantor's intent is not clear from a trust document, we suggest you submit the trust document for review by this office.

D. PS 00-466 Request for Iowa, Kansas, Missouri, and Nebraska State Law on Grantor Trusts; SSI Resource Issue

DATE: June 16, 1999

1. SYLLABUS

The regional attorney was asked if a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the States of Missouri, Kansas, Iowa and Nebraska.

All four states are considered creditors and not beneficiaries. Even if a trust contains a State reimbursement provision, it would be revocable if the SSI recipient was the grantor and the sole beneficiary since the state is a creditor and not a beneficiary.

CAUTION: Because of a change in the Social Security Act, this opinion may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked whether in Missouri, Kansas, Nebraska, and Iowa, a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the state. We are of the opinion that in all four states, the state would be considered a creditor. None of the states specifically address a trust which contains a state reimbursement provision; however, all four states have statutes that address reimbursement of Medicaid benefits. As you are aware, each state also follows the rule that a trust is revocable if the grantor is the sole beneficiary. See GC Opinion: Request for Interpretation of State Trust Law, dated June 29, 1992. The following is a discussion of each state's Medicaid statute.

KANSAS

The statute in Kansas provides that the "amount of any medical assistance paid [by the Secretary of Social and Rehabilitative Services of the state] after June 30, 1992, . . . is a claim against the property or any interest" of the estate of any deceased recipient. If there is no estate, the estate of the surviving spouse, if any, shall be charged for such medical assistance paid to either or both. Kan. Stat. Ann. § 39-709(g)(2). However, there shall be no recovery of medical assistance "correctly paid" except after the death of the surviving spouse of the individual, if any, and only at a time when the individual has no surviving child who is under 21 years of age or is blind or permanently and totally disabled. Id. Where there is a surviving spouse, or a surviving child who is under 21 years of age or is blind or permanently and totally disabled, the amount of any medical assistance paid is "a claim against the estate in any guardianship or conservatorship proceedings." Id.

SUMMARY

The laws of each state provide the circumstances under which the state may be reimbursed by a recipient or his estate for Medicaid payments. In all states, the law provides that monies expended for Medicaid payments which are recoverable are categorized as a debt due to the applicable department, or the department may file a claim against the estate of the recipient. Consequently, we believe the state is properly considered as a creditor and not a beneficiary of the trust. Because each state's statute provides for the right to reimbursement, we do not believe it is relevant whether or not a Medicaid Trust contains a state reimbursement provision. The inclusion of such a provision in a trust would not be of any consequence where the grantor is the sole beneficiary. In all four of the Region VII states, a trust would be revocable, and thus available as a resource for SSI purposes, where the grantor is the sole beneficiary, even if the trust contained a state reimbursement provision.

4.14 KENTUCKY

A. PS 08-108 In Re: Nathan W. R~, SSN: ~ -- Supplemental Security Income (SSI) Trust Policy on Residual Beneficiaries in Kentucky

DATE: May 6, 2008

1. SYLLABUS

This opinion evaluates a trust created for an SSI beneficiary in the state of Kentucky. Whether the subject trust is ultimately determined to be a countable resource for SSI purposes will depend largely on whether the trust was funded with the beneficiary's assets or those of a third party. The opinion does not speak directly to the funding of the trust. The trust was created on January 17, 2002 by the beneficiary's mother and legal guardian. Terms of the trust provide for reimbursement to Medicaid upon the beneficiary's death and leave all distribution discretion to the Trustee. At issue is whether the trust language establishing a remainder interest to the beneficiary's heirs at law establishes an irrevocable trust. Many states have adopted the general rule put forth in the Restatement (Third) of Trusts that creates an renders a trust irrevocable by creation of a remainder interest to indefinite parties such as "heirs at law". The opinion goes on to say that Kentucky has not adopted the position put forth in the Restatement (Third) of Trusts and, as such, would not recognize a trust as irrevocable solely on the basis of a remainder interest to "heirs at law".

2. OPINION

Question Presented

You asked whether the Nathan W. R~ Trust instrument established a valid irrevocable trust under Kentucky law when it states, at the death of Nathan R~ (Claimant), remaining trust funds are to be first distributed to any state in which he lived and received medical assistance, and then to Claimant's heirs at law living at the time of his death.

Opinion

Whether this trust is countable as a resource available to Claimant depends on whose assets were used to establish the trust corpus. If the trust was created with assets not belonging to Claimant, it would not be countable as a resource available to him. However, if it was created with Claimant's assets, it would be countable as a resource available to him because it would not be irrevocable under Kentucky law.

Facts

On January 17, 2002, Ms. Kimberly S. L~, Claimant's legally-appointed guardian and mother, established a trust for Claimant's benefit. Claimant's mother transferred to the trustee certain property listed in a separate schedule as the initial corpus of the trust, and indicated that she may transfer additional assets. *See* Trust Instrument, Art. II. The trust states it is irrevocable and cannot be altered, amended, revoked, or terminated by Claimant's mother. *See id.*, Art. III. The Trustee may use the trust funds for Claimant's benefit, except for his basic support, maintenance, and health needs, *see id.*, Art. IV.A.1, and shall avoid making actual distributions to Claimant, to the extent feasible, *see id.*, Art. IV.A.3. At Claimant's death, the trustee shall first reimburse any state for medical assistance under a State plan, *see id.*, Art. IV.B.1, and "shall distribute any remaining trust funds to [Claimant's] heirs at law living at [Claimant's] death under the laws of the Commonwealth of Kentucky then in existence," *see id.*, Art. IV.B.2.

Legal Authority

Under the Social Security Act (Act), aged, blind, or disabled individuals who meet certain income and resource limitations are eligible for SSI. *See* Act § 1611(a), 42 U.S.C. § 1382(a). "Income" is defined as funds that are earned as wages or other employment-type compensation or as unearned income from a variety of sources, which can be used to meet a claimant's food and shelter needs. Act at § 1612(a)(1)-(2); 42 U.S.C. § 1382a(a)(1)-(2); accord 20 C.F.R. § 416.1102 (2007). Resources are cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. 20 C.F.R. § 416.1201(a) (2007).

Trusts may be countable as resources for SSI purposes in certain circumstances. *See* Act at § 1613(e); 42 U.S.C. § 1382b(e). However, this general rule does not apply to trusts validly established under section 1917(d)(4) of the Act, 42 U.S.C. § 1396p(d)(4), generally termed "Medicaid-Qualifying" or "Special Needs" trusts. *See* Act at § 1613(e)(5). For such trusts, the general resource-counting rules apply. *See* Act at §§ 1611(a)(1)(B), (2)(B), (3).

For trusts established after January 1, 2000, the Agency must determine the identities of both the settlor and the beneficiary. *See* POMS SI 01120.200-01120.204. The Agency must then determine whose property comprised the corpus of the trust. *See* POMS SI 01120.202.A.1.b. If the trust corpus was established solely with the assets of a third party, the trust is generally not a resource provided the claimant has no right to direct the use of or revoke the trust. *See* POMS SI 01120.200.D.2. However, if a trust (or any portion of a trust) contains any assets of the claimant, then the trust (or the portion made up of the claimant's assets, on a pro rata basis) may be considered a resource if the trust is revocable, if the trust is irrevocable and the claimant can receive funds from or direct the distribution of funds, or if the trust is a Special Needs or Medicaid Trusts that is revocable. *See* Act at § 1613(e)(3); POMS SI 01120.200.D, SI 01120.201.A, SI 01120.203.B.1.

DISCUSSION

Although you asked whether Claimant's trust is irrevocable trust Kentucky law, that question does not alone control whether trusts established after January 1, 2000, are considered resources. The Agency must also determine the identities of the settler and the beneficiary. Here, Claimant's mother is the settlor of the trust and Claimant is its beneficiary.

Next, the Agency must determine whether Claimant's trust was created with funds that belonged in any part to Claimant. If we determine the funds or assets that make up the corpus of the trust were entirely those of Claimant's mother, then this trust is not subject to section 1613(e) of the Act. *See* POMS SI 01120.200.A.2.b. For such trusts, the Agency must determine the extent to which, if at all, Claimant has any authority to direct the use of the trust or its assets to meet his own food or shelter needs. *See* POMS SI 01120.200.D. Here, Claimant can neither revoke nor use trust assets as he wishes or for his own support and maintenance. Only the Trustee has the responsibility to use the trust assets or funds as appropriate. *See* Trust Instrument, Art. IV. Moreover, the trustee may not use trust funds to pay for Claimant's basic support and maintenance. *See id.*, at Art. IV.A.1. Thus, if the trust contains no funds belonging to Claimant, the trust is not countable as a resource to him. *See* POMS SI 01120.200.D.2.

If Claimant's trust was created with assets or funds that belonged, in any part, to Claimant, other rules apply. *See* POMS SI 01120.202.A.1.b (referring to POMS SI 01120.201-204 for such trusts). If the entire corpus of the trust is comprised of Claimant's assets or funds, then the entire trust is reviewable under these sections; but, if only a portion of the corpus is based on Claimant's assets or funds, his pro rata amount is reviewed under these sections. *See* POMS SI 01120.201.C.2.c. The instructions refer to the following questions to answer to determine whether such a trust is countable as a resource:

1. Was the trust established with the assets of an individual under age 65?

If yes, go to Step 2.

If no, go to Step 8.

2. Was the trust established with the assets of a disabled individual?

If yes, go to Step 3.

If no, go to Step 8.

3. Is the disabled individual beneficiary of the trust?

If yes, go to Step 4.

If no, go to Step 8.

4. Did a parent, grandparent, legal guardian or a court establish the trust?

If yes, go to Step 5.

If no, go to Step 8.

5. Does the trust provide specific language to reimburse the State for medical assistance paid upon the individual's death as required in SI 01120.203B.1.f.?

If yes, go to Step 6.

If no, go to Step 8.

6. 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 attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception.

Go to Step 7 for treatment of assets placed in trust prior to age 65.

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

7. Is the trust irrevocable?

If yes, assets placed in the trust prior to age 65 are not a countable resource. STOP.

If no, evaluate the trust under SI 01120.200 to determine if it is a countable resource.

8. The trust (or portion thereof) does not meet the requirements for the special-needs trust exception. Determine whether the pooled trust exception in SI 01120.203B.2. applies.

POMS SI 01120.203.D.1 (internal citations omitted). If some or part of Claimant's assets funded the trust and that Claimant is disabled, the trust would meet steps one through six.

Therefore, the remaining question would be whether the trust is irrevocable. Generally, a trust is revocable, regardless of the terms of the agreement, if the settlor is the sole beneficiary of the trust. *See* POMS SI 01120.200. The settler, or true grantor, is the sole beneficiary if there is no other person or entity holding a beneficial or remainder interest in the trust property. The "Doctrine of Worthier Title," in its common law form, provided that a conveyance of land by a grantor with a limitation over to his own heirs resulted in a reversion in the grantor rather than creating a remainder interest in his heirs. *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 561 (D.C. Cir. 1966). That is, a conveyance to a person for life with the remainder to his heirs created an unrestricted ownership for that person. This common law rule no longer exists, but "the question of construction" persists and, in the absence of evidence of contrary intent, there is no intent by an owner to create a remainder interest in his heirs. Restatement (Second) of Trusts § 127, comment b (1959); *see also Hatch*, 361 F.2d at 562. The general rule is:

He is . . . the sole beneficiary where he transfers property in trust to pay the income to himself for life and on his death to pay the principal to his estate, or to his personal representatives. . . . On the other hand, if the beneficial interest is limited to the settlor for life and on his death the property is to be conveyed to his children, or issue, or descendants, he is not the sole beneficiary of the trust, but an interest in remainder is created in his children, issue, or descendants. . . . [A] question of construction arises where the owner of property transfers it in trust to pay the income to himself for life and upon his death to pay the principal to his heirs or next of kin. In the absence of a manifestation of a contrary intention, the inference is that he is the sole beneficiary of the trust and that he does not intend to create any interest in the persons who may become his heirs or next of kin. The same thing is true where the principal is to be paid to the persons who would be entitled to his property on his death intestate, or to the persons who would succeed to his property under the statute of descent and distribution [intestacy statute].

Restatement (Second) of Trusts § 127 cmt. b (1959). The Kentucky Supreme Court has held that a person who is both settlor (grantor) and sole beneficiary of an inter vivos trust may revoke the trust, even when the instrument specifically provides that the trust is irrevocable. *Phillips v. Lowe*, 639 S.W.2d 782, 783 (Ky. 1982). Citing the Restatement (Second) of Trusts, § 339 (1959), the *Phillips* court concluded, "In essence, the corpus of the trust belongs to the settlor who is also the sole beneficiary. Assuming that she is not under an incapacity at the time she requests a change, the settler-sole beneficiary's actions affect that which is hers alone." *Id.*, at 784. Kentucky courts have also adopted the common law doctrine of reversions with respect to inter vivos conveyances. *See Alexander v. DeKermel*, 81 Ky. 345, 1883 WL 7842 (Ky. App. 1883). Later, in a case involving construction of a will, a Kentucky appeals court noted the question of reversions was first presented in Kentucky in Alexander, which adopted the common law doctrine of "reversion," and found that thereafter the "doctrine of reversions has become firmly ingrained in the law of our state." *Mitchell v. Dauphin Deposit Trust Co.*, 142 S.W.2d 181, 183-84 (Ky. App. 1940). This is the longstanding Kentucky position.

Historically, the general terms of "heirs," "heirs at law," "next of kin," "survivors," or similar non-specific language were insufficient to establish a residual interest in a trust that could render a "grantor trust" irrevocable. *See* Restatement (Second) of Trusts, § 339, case citations. However, some states have amended their law to allow such terms to create a binding interest. For example, Florida amended its law to recognize such language as rendering a trust irrevocable. *See* Fla. Stat. Ann. (abolishing the Doctrine of Worthier Title) (effective July 1, 2007). Other states have indicated that they follow the rules found within the Restatement (3d) of Trusts, which has recommended a change in the historical rule to recognize indefinite terms like those listed above are sufficient to create an inalienable remainder interest. Unlike Florida or the other states adopting the Restatement (3d) of Trusts, Kentucky has not amended its law by either abolishing the common law Doctrine of Worthier Title or adopting the Restatement (3d) of Trusts. Indeed, caselaw in Kentucky cites the Doctrine of Worthier Title as recently as 1997, *see, e.g., Dennis v. Bird*, 941 S.W. 2d 486, 489 (Ky. App. 1997), and caselaw as recently as September 2007 has cited the Restatement (2d) of Trusts, *see, e.g., Elliott v. J.C. Bradford & Co.*, LLC, 2007 WL 2687413 *5 (Ky. App. 2007). Thus, the longstanding position of Kentucky law remains in effect and any portion of Claimant's trust created with his assets would be considered a trust created by a person who is both the settler and beneficiary. *See* POMS SI 01120.200.B.2, SI 01120.201.B.7. Therefore, Claimant could revoke the trust created with his assets despite its language stating that it is irrevocable.

Finally, this trust provides that, at Claimant's death, the trustee shall first reimburse any state for medical assistance under a State plan, *see id.*, Art. IV.B.1, before distributing any remaining trust amounts Claimant's heirs at law living at Claimant's death under the laws of the Commonwealth of Kentucky then in existence," *see id.*, Art. IV.B.2. Despite this provision, the trust does not create any remainder interest for the state. Instead, this provision creates a "creditor" interest in the state. *See Carden v. Astrue*, 2008 WL 867942, *4 (S.D. W.Va. 2008) (finding that West Virginia had not indicated that the state was a beneficiary). The state's interest is only payable if there are funds left in the trust when Claimant dies, after administrative costs are paid. If nothing is left, nothing is owed the state(s). As in *Carden*, no Kentucky statute or caselaw indicates that the state should be a residual beneficiary rather than a creditor.

CONCLUSION

For the reasons stated above, this trust, to the extent it was created with Claimant's assets, is countable as a resource available to him because it is not irrevocable under Kentucky law. However, to the extent that this trust was created with assets not belonging to Claimant, it would not be countable as a resource to him provided that no disbursements from the trust could be payable for his food, clothing, or shelter needs.

Mary Ann S~ III
Chief Counsel

By_____
Jerome M. A~
Assistant Regional Counsel

A. PS 10-57 Life Estate Interest Granted Under a Will as a Countable Resource for Supplemental Security Income (SSI) Eligibility Purposes – Kentucky SSI Recipient – Michael E. ~

DATE: January 27, 2010

1. SYLLABUS

This opinion clarifies that under Kentucky law a will established a life estate interest in a piece of property but restricted its sale during the life time of the heirs. Only on the death of the last original heir can the property be sold.

The Regional Chief Counsel finds that this property is not countable as a resource for SSI because of these restrictions.

2. OPINION

QUESTION You asked whether a life estate interest, which the SSI recipient's mother devised to him and his three siblings through her last will and testament, would constitute a countable resource for SSI purposes.

OPINION

We believe the SSI recipient's life estate interest should not be considered a countable resource for SSI purposes because the will lawfully prohibited the SSI recipient from selling his life estate interest while he and his siblings are alive.

BACKGROUND

Michael L~ (Recipient) currently receives SSI. Recipient's mother, Carolyn L~ ("Testator"), published her last will and testament on March 6, 2009. Testator died on April 4, 2009. Testator's will was probated on September 4, 2009. Item IV of the will states that Testator gifted, devised, and bequeathed to each of her four children, including Recipient, a one-fourth "life estate interest" in her 58-acre farm. However, the will provides that the transfer of realty interest to her children is subject to the condition that the realty is never to be sold while any of her four children are alive. Item IV of the will also provides that upon the death of each of her children, that child's undivided one-fourth interest shall pass to his or her children or, if no children, to his or her intestate heirs, in fee; the child's heirs are to share and share alike. Item IV of the will states that, after the death of all of Testator's children, the realty can be sold "be [sic] the heirs of my children." Item IV of the will further provides that for the first five growing years after her death, Testator authorized Roy J. T~ and Charlie F~ to lease the farm for farming purposes upon the payment of $500.00 to her estate annually and on the condition that they maintain the farm and its improvements.

DISCUSSION

Under the Social Security Act (Act), a disabled individual may receive SSI benefits if his or her income and resources do not exceed certain annual limits. *See* Act § 1611(a); 20 C.F.R. § 416.202(c), (d) (2009). The Act does not define "resources" and provides only a list of certain items excluded in determining the resources of an individual. *See* Act § 1613(a). Governing regulations provide that resources include "any real or personal property interest that an individual . . . owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a) (2009). "If the individual has the right, authority or power to liquidate the property, or his or her share of the property, it is considered a resource." 20 C.F.R. § 416.1201(a)(1). The regulations also define liquid and non-liquid resources. *See* 20 C.F.R. § 416.1201(b), (c). Included among "resources" are nonliquid resources, "defined as property which is not cash and which cannot be converted to cash within 20 days. . . . Examples of resources that are ordinarily nonliquid are . . . buildings and land." 20 C.F.R. § 416.1201(c)(1); *see also* Program Operations Manual System (POMS) SI 01110.310 (Resources Assumed to be Nonliquid).

Unless the will establishing a life estate restricts the life estate owner's rights, the owner has the right to use or sell his or her life estate interest. POMS SI 01110.515.B.1.a. We refer to state law to determine the interest Recipient holds in the property in question. *See Cannuni v. Schweiker,* 740 F.2d 260, 264 (3d Cir. 1984) (discussing significance of ownership interest in property and variance in state laws with respect to ownership). Under Kentucky law, if an estate is given by will to a person for life and then to his or her children, and if no children, to his or her heirs, the estate is construed as an estate for life. *See* Ky. Rev. Stat. Ann. § 381.090 (Thomas R~ 2010); *see also Curtsinger v. Curtsinger,* No. 2001-CA-001078-MR, 2003 WL 22059785, at *1 (Ky. Ct. App. Sept. 5, 2003) (where will provided for remaindermen to take the property and where the power to dispose of the property was limited, the estate created was not a fee).

Item IV of the will here states that Recipient and his siblings each received a one-fourth "life estate interest" in Testator's 58-acre farm. This provision further states that Recipient's remainder should go to his children or if no children to his intestate heirs, in fee. Lastly, this will provision also prohibits sale of the farm until after Recipient and his siblings have died. All of this language indicates Recipient and his siblings hold a life estate as joint tenants.

Because Recipient has a life estate interest, the restraint on Recipient's ability to sell the property while he and his siblings are alive is valid. *See Curtsinger,* 2003 WL 22059785, at *1 (will provision that the land was not to be sold for 50 years was deemed valid); *see also Atkinson v. Kish,* 420 S.W.2d 104, 109 (Ky. Ct. App. 1967) ("'It is settled in Kentucky that a restraint prohibiting voluntary alienation of a legal life estate for the entire duration of the estate is valid'") (quoting *Dukeminier,* Perpetuities Law in Action, Kentucky Case Law and the 1960 Reform Act, p. 119)). Because Applicant does not have the power to sell the farm while he or his siblings are alive, the property is not a resource to recipient for SSI purposes. *See* 20 C.F.R. § 416.1201(a)(1); POMS SI 01110.100.B.1 (noting that for real property to be considered a resource, the individual must have the right, authority, or power to convert the property to cash); POMS SI 01110.100.B.3 (providing that an individual who has an ownership interest in property but who is not legally able to transfer that interest to anyone else does not have a resource).

CONCLUSION

For the foregoing reasons, we conclude Recipient is a joint tenant who does not have the power to sell his life estate interest in the farm. Consequently, the farm is not a resource to Recipient for SSI purposes.

Mary A. S~
Regional Chief Counsel
By _____
Arthurice T. B~
Assistant Regional Counsel

4.15 MARYLAND

A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~

DATE: August 27, 2003

1. SYLLABUS

Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

2. OPINION

INTRODUCTION

You requested our advice on whether under the laws of the jurisdictions within Region III, a parent or grandparent can establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. In further conversations with your staff, we were instructed to assume that the trust agreements that you wish us to consider satisfy the requirements of 42 U.S.C. '1382b(e)(5).

SUMMARY

We believe that based on court precedent, every jurisdiction within Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establishes an empty trust or a seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

BACKGROUND

To qualify for supplemental security income (SSI), an individual must not have resources that total more than $2,000. 20 C.F.R. ' 416.1205 (2003). In addition, as a general rule, a trust established with the assets of an individual (or spouse) will be considered a resource for SSI eligibility purposes. 42 U.S.C. '1382b(e)(3). There is, however, an exception to these resource provisions. Under 42 U.S.C. '1382b(e)(5) of the Social Security Act, if any agreement satisfies the criteria found in 42 U.S.C. ' 1396p(d)(4), it is not counted as a resource. Section 1396p(d)(4) provides an exception for counting a trust as a resource if it is a:

trust containing assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

DISCUSSION

Within the state jurisdictions in Region III (including the District of Columbia), neither the courts nor the lawmakers define a trust. Rather, each jurisdiction sets out in court precedent its own test for finding a valid trust. Below is a breakdown by jurisdiction of the applicable case law as applied to your inquiry.

Virginia

According to Virginia precedent:

An express trust is created when the parties affirmatively manifest an intention that certain property be held in trust for the benefit of a third party. *See Peal v. Luther*, 199 Va. 35, 97 S.E.2d 668, 669 (1957); *Broaddus v. Gresham*, 181 Va. 725, 26 S.E.2d 33,35 (1943). An express trust may be created A without the use of technical words.@ *Broaddus*, 26 S.E.2d at 35. All that is necessary are words, *see id*. at 35 (citation omitted), or circumstances, *see Woods v. Stull*, 182 Va. 888, 30 S.E.2d 675, 682 (1944) (citation omitted), A which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . .,@ *Broaddus*, 26 S.E.2d at 35; *see also Schloss v. Powell*, 93 F.2d 518, 519 (4th Cir. 1938).

Old Republic Nat. Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998).

When an agreement satisfies 42 U.S.C. '1382b(e)(5), there will always be a corpus. It is irrelevant that a parent or grandparent sets up an agreement that has little or no funds, because ultimately the disabled individual for whom the trust is established will provide the assets. In addition, in these agreements, the disabled individual will be the settlor. 76 Am. Jur. 2d *Trusts* (1992) (stating that under general trust principles, the person who provides consideration for the trust is the settlor, even though in form the trust is created by another person). Further, the disabled individual will also be a beneficiary, as the trust is established for his/her benefit. Moreover, the essential purpose of the agreement will be to ensure that a trust established with the assets of the settlor is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. In short, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), circumstances unequivocally show an intention that the legal estate be vested in one person, to be held in some manner or some purpose on behalf of another. *Id*. Therefore, Virginia courts will recognize agreements that satisfy 42 U.S.C. ' 1382b(e)(5) as valid trusts.

Delaware

Delaware precedent states that:

No particular words or form are required in order to create an express trust. All that is required is that the parties intended that a relationship, which equity would describe as a trust, exist. “When a question arises as to whether or not an agreement creates a trust, the courts look objectively at the result to determine the matter. . . . The question in each instance is whether the kind of relationship known to the law as a trust has been created.” It is the intent of the settlor as expressed in the agreement itself which is controlling as to whether a trust has been created. It is immaterial that the parties did not know they were creating a trust.

Cravero v. Holleger, Del. Ch., 566 A.2d 8, 13 (1989) (citations omitted).

When an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the settlor's intent will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because the settlor's expressed intent in such an agreement is to establish a trust, a Delaware court would find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5) is a valid trust.

District of Columbia

The District of Columbia Court of Appeals noted that "there must be proof of the settlor's intention to create a trust, which may be manifested “by written or spoken language or by conduct, in light of all surrounding circumstances.” *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983)). The court also added that “[n]o particular form of words or conduct is necessary to manifest an intention to create a trust.” *Id*. at 1136. Rather, the courts in the District of Columbia look to several “evidentiary factors” in determining that intent:

(1) the imperative, as distinguished from precatory, nature of the words used by the settlor to create a trust; (2) the definiteness of the trust property; (3) the certainty of the identity of the trust beneficiaries; (4) the relationship between and financial position of the parties; (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and (6) whether the result reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.

Id.

In an agreement that satisfies the requirements of 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five provides the assets and is the settlor and a beneficiary. The state Medicaid provider(s) will be reimbursed. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI. Logically, the settlor would desire having the agreement construed as a trust. Consequently, when a court within the District of Columbia scrutinizes an agreement established pursuant to 42 U.S.C. '1382b(e)(5) under the evidentiary factors discussed in *Duggan*, it will find a valid trust.

Maryland

The Maryland Supreme Court has stated that:

A trust exists where the legal title to property is held by one or more persons, under an equitable obligation to convey, apply, or deal with such property for the benefit of other persons. . . . The creation of a trust depends upon the intention of the settlor. In fact, it is that purpose and intention, rather than the use of any particular term, that determines whether a valid trust has been established. Thus, a trust will not be created where none in fact was contemplated.

From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002) (citations omitted).

In an agreement established pursuant to 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five, provides the assets and is the settlor. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because under Maryland law the settlor's intent ultimately determines whether a valid trust exists, a court within that jurisdiction will find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5), which has a clear intent, is a valid trust.

Pennsylvania

The Pennsylvania Supreme Court has discussed the criteria for a valid trust using the following language:

[N]o particular form of words or conduct is necessary to create a trust. Neither the presence nor the absence of words “trust,” “trustee,” or “beneficiary” is determinative of an intention to create a trust. The question is whether the agreements taken as a whole evidence an intent by [the settlors] “to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another.” “To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred.”

* * *

'A trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefits of the other. The term 'trust' is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee….'

Buchanan v. Brentwood Federal Savings & Loan Association, 457 Pa. 135, 143, 20 A.2d 117, 122 (1974); *R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Development Inc*., 334 Pa.Super. 72, 77-78, 482 A.2d 1086, 1089 (1984) (quoting *Buchanan*) (citations omitted).

As mentioned in the discussion of Virginia law, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the property, the settlor, a beneficiary, and the purpose will be known. In other words, an agreement that satisfies the requirements established in 42 U.S.C. '1382b(e)(5) would evidence intent by a settlor to impose upon a transferee of property equitable duties to deal with the property for the benefit of another. *Id*. Therefore, under Pennsylvania law such an agreement amounts to a valid trust.

West Virginia

In West Virginia, courts will determine whether a valid trust is created based upon the intent of the parties. *Bowne v. Lamb*, 119 W.Va. 370, 193 S.E. 563, 565 (1937). Further, “[w]hether the parties intended to create a trust is determined not solely from the wording of the agreement but also from their actions under it and the way the fund is handled.” *Id*. When an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), the parties unquestionably intend to create a trust to ensure that the settlor does not have his/her assets in the agreement counted as a resource for purposes of SSI and that the state will be reimbursed

for medical assistance that it paid to the settlor. Because the parties' intent will be apparent when an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), a West Virginia court will find that such an agreement is a valid trust.

CONCLUSION

It is our opinion that every jurisdiction within Region III would recognize as a valid trust any agreement established pursuant to 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

James A. W~
Regional Chief Counsel

By:_____
Andrew C. L~ Assistant Regional Counsel

4.16 MASSACHUSETTS

A. PS 10-058 Trust Resource Opinion – Dorothy R~ Trust

DATE: January 28, 2010

1. SYLLABUS

This opinion examines whether or not a trust established prior to January 1, 2000, with the assets of a third party is a resource for Supplemental Security Income (SSI) purposes. The trust is not subject to the statutory trust provisions in Section 1613(e) of the Social Security Act. If an individual has the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal is a resource for SSI purposes. In this case, the claimant, who is the beneficiary and one of three trustees, cannot unilaterally act to revoke or terminate the trust or to direct the use of the trust assets. Therefore, the trust is irrevocable and not a resource for SSI purposes.

2. OPINION

This Memorandum responds to your 12/29/09 Memorandum asking whether the Trust at issue here is a countable resource for Supplemental Security Income (SSI) eligibility purposes. For the reasons set forth below, the Trust is not a countable resource.

BACKGROUND

The claimant, Harry L. R~, III, is the residual beneficiary of the "Dorothy R~ Trust," which was established on March 13, 1990. The claimant was one of two original Trustees; a third Trustee was added in February 2005. At this writing, the claimant remains one of the three Trustees charged with administering the Trust. The original beneficiary of the Trust, Dorothy R~, is deceased, and pursuant to the terms of the Trust, the claimant receives monthly income of $400/month as the residual beneficiary. The Trust, by its own terms, terminates twenty years from the date of its execution, that is, on March 13, 2010. However, the terms of the Trust also vest the power of termination in the Trustees. Article VII, Paragraph 1 provides:

Notwithstanding any provisions contained in this instrument, the Original Trustees or Successor Trustees hereby reserve the right to terminate this Trust wholly or in part or from time to time and shall convey and distribute the Trust Assets as hereinbefore provided.

You asked whether the claimant, as a Trustee, can unilaterally act to terminate the Trust. For the reasons set forth below, the claimant lacks legal authority to terminate the Trust without the consent of at least one of the other two Trustees. Therefore, the Trust is irrevocable, and is not a countable resource for SSI purposes.

DISCUSSION

A trust is considered a resource for SSI eligibility purposes if the claimant has legal authority to revoke the trust and use its funds to meet food, clothing or shelter needs or to direct the use of trust principal for his support and maintenance. POMS SI 01120.200 D.1.a. Under the terms of the Dorothy R~ Trust, the Trustees "have the absolute control, management, and

disposition of the Trust Property as if they were absolute owners thereof, free from the control of the beneficiaries." R~ Trust, art. IV. Since the Trustees retain absolute control over the Trust, the claimant's role as residual beneficiary gives him no authority to revoke the Trust or direct the use of the Trust principal for his support and maintenance.

You inquired whether the claimant might "singlehandedly terminate" the Trust under art. VII, ¶ 1, which gives the original or successor Trustees the right to terminate the Trust. You question whether the word "act" in art. III, ¶ 2 means that two Trustees must administer the Trust or that at least two Trustees must consent to any actions taken, including Termination of the trust. Your question appears to posit the possibility that the requirement of two Trustees might only apply to administration of the Trust, and not to the other powers conferred to the Trustees under the Declaration of Trust. The precise definition of "act" is irrelevant to answering the question posed, because unless the Trust specifically defined "act," a commonsense definition would be applied. *Cf. Sampson, et al. v. Metropolitan District Comm'n.,* 184 N.E.2d 465, 466 (Mass. 1933) ("It is a canon of the law of statutory construction that the words of a statute ordinarily are to be taken in their common and approved meaning."). "Act" is not defined in the Trust, in the governing Massachusetts statutes, or in the case law. Black's Law Dictionary defines the term as "[s]omething done or performed, esp. voluntarily; a deed… and [t]he process of doing or performing; an occurrence that results from a person's will be exerted on the external world…" BLACK'S LAW DICTIONARY 26 (8th ed. 2004). Thus, whether two Trustees must administer the Trust or two Trustees must consent to any action taken regarding the Trust, the result is the same – the claimant cannot terminate the Trust without another Trustee voluntarily doing or performing some task. BLACK'S LAW DICTIONARY 26.

The express language of the Trust, the intention of the settlors as manifested by their actions as Trustees, and Massachusetts law indicate that at least two Trustees must consent to any actions taken, including termination of the Trust.

Article III, ¶ 2, provides, in its entirety, that

At least two of the Trustees shall act with respect to the administration of the Trust hereunder or to exercise any of the powers hereby conferred. The introductory clause "at least two of the Trustees shall act" modifies both "administration of the Trust" and "to exercise any of the powers hereby conferred." The conjunction "or" makes this clear. *See* BRYAN A. GARNER, THE REDBOOK, A MANUAL ON LEGAL STYLE 178 (2d ed. 2002) (the word "or," as a coordinating conjunctions "join[s] clauses of equal stature"). Thus, the requirement that at least two Trustees "shall act" applies equally to administration of the trust and exercise of any powers conferred in the Trust instrument, including the power of termination provided in art. VII, ¶ 1.

While the language in art. VII, ¶ 1 stating that "Notwithstanding any provision contained in this instrument" arguably limits the application of the two Trustee requirement contained in art. III, ¶ 2 to art. VII, ¶ 1, Massachusetts law requires that at least a majority of Co-Trustees act together to bind the trust, in the absence of a clear contradictory intent in the Declaration of Trust. *See Horwitz v. Horwitz,* 327 N.E.2d 918, 919 (Mass. App. Ct. 1975) (even if trust contained a power of revocation, "such a power would have been exercisable only by two trustees acting jointly in the absence of a provision to the contrary in the trust instrument") (citing *Comm'r of Corps. & Taxn. v. Springfield,* 71 N.E.2d 593 (1947)). No such clear contradictory intent exists here, as art. VII, ¶ 1 expressly refers to Original or Successor Trustees in the plural. Courts generally look to the settlor's intent when interpreting the terms of the trust. *Watson v. Baker,* 829 N.E.2d 648, 652 (Mass. 2005) ("It is fundamental that a trust instrument must be construed to give effect to the intention of the donor as ascertained from the language of the whole instrument considered in the light of circumstances known to the donor at the time of its execution.") (citations omitted). Here, the settlors were the Original Trustees. The settlors' intent regarding the need for joint action may be inferred from the creation of a joint tenancy, and from their past practice in amending the trust. *See also* RESTATEMENT (THIRD) OF TRUSTS § 39 (2003) ("[u]nless otherwise provided by the terms of the trust, if there are two trustees their powers may be exercised only by concurrence of both of them…").

Art. VII, ¶ 2, includes the same introductory provision as art. VII, ¶ 1, and explains that any change, modification, alteration, or termination of the Trust, "including a change in the identity of the Trustees" may be made by written instrument executed and duly acknowledged in the manner required for deeds and filed at the appropriate Registry of Deeds. The Original Trustees, in February 2005, acted jointly in executing a written instrument changing the identity of the Trustees by appointing a new trustee. The change was filed with the Registry of Deeds, and significantly, became effective on February 10, 2005, even though one of the Trustees had signed the appointment on February 8, 2005. The appointment was not effective until signed by the second Co-Trustee. This strongly suggests that the Trustees view art. III, ¶ 2 as applying to Article VII.

As explained above, the Declaration of Trust does give the Trustees the right to terminate the trust. R~ Trust, art. VII, ¶ 1. However, Article III of the trust limits the Trustees by requiring "[a]t least two of the Trustees … to exercise any of the powers hereby conferred." R~ Trust, art. III, ¶ 2 (emphasis added). Because the Trust explicitly requires the presence of at least two

Trustees at all times, the claimant could not act alone to terminate the Trust even if the other Trustees resigned. R~ Trust, art. III, ¶ 1. Since the plain terms of the Declaration of Trust require at least two Trustees to exercise any power conferred upon the Trustees, one Trustee, acting alone lacks authority to exercise any of the powers assigned to the Trustees. *See* RESTATEMENT (THIRD) OF TRUSTS § 64 cmts. b-d (describing Connecticut case where court, acting under its equitable authority to prevent abuse, invalidated a trustee's attempt to terminate a trust "in his sole discretion.").

Additionally, Massachusetts law has long held that when several trustees hold trust property jointly, all trustees are necessary parties to an action concerning it. *See DeLongchamps v. Duquette,* 512 N.E.2d 1146, 1147 (Mass. App. Ct. 1987) ("[u]nless granted the specific power to do so by the terms of a trust, one trustee cannot act on behalf of the trust without the consent of his cotrustees.") (citing *Boston v. Robbins,* 126 Mass. 384, 388 (1879)); *see also Kline v. Reed,* 479 N.E.2d 714, 716 (Mass. App. Ct. 1985) ("the usual rule… would require that all trustees join in such a transaction [to make permissible changes to the trust]"). The Declaration of Trust specifies that the Trustees hold the Trust Property as joint tenants. R~ Trust, art. II, ¶ 1. Further, the Declaration of Trust instructs that all Trust powers and provisions shall be construed according to the laws of Massachusetts. R~ Trust, art. VIII. Given the plain language of the Declaration of Trust, the prohibition under Massachusetts law of unilateral action by a trustee without consent of cotrustees, and the past actions of the Trustees, the claimant lacks authority to revoke or terminate the Trust without the consent of at least one Co-Trustee.

CONCLUSION

Based on the above, the claimant is without legal authority to revoke or terminate the Trust without the consent of at least one additional Co-Trustee. Thus, the Trust is irrevocable and is not a countable resource for purposes of SSI eligibility.

4.17 MICHIGAN

A. PS 09-104 SSI - Request for Six State Legal Opinion on Spendthrift Clauses - REPL Your Reference: S2D5G6, SI 2-1-3 (Spendthrift) Our Reference: 08-0141

DATE: May 8, 2009

1. SYLLABUS

This opinion addresses whether spendthrift clauses are recognized in the six states that compose the Chicago region and whether these states allow for a settler to establish a spendthrift trust for his or her own benefit. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. All states in the Chicago region recognize a spendthrift provision in a third-party trust. Likewise, all states in the Chicago region recognize that a beneficial interest in a self-settled discretionary trust would typically not be a countable resource as it would have little, if any, market value. In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursements, regardless of whether the trust has a spendthrift provision. Due to a lack of precedent, self-settled trusts with a spendthrift provision in Indiana or Ohio should be submitted to the Regional Chief Counsel's office for evaluation.

2. OPINION

You have asked whether spendthrift clauses are recognized in the six states in the Chicago Region and, if so, whether these states allow for a settlor to establish a spendthrift trust for his or her own benefit. Each of the six states in Region V recognizes spendthrift clauses as valid when they are established by a settlor for a third party. Therefore, the beneficiary of a third party trust could not sell the beneficial interest in that trust if it has a spendthrift provision. The validity and effect of a spendthrift provision in a self-settled trust varies somewhat from state to state. However, in all six states, the settlor's interest in a discretionary trust would not be a countable resource, regardless of any spendthrift provision, because in the laws of those states, even if the settlor can sell the interest, it would have no significant market value, since the transferee could not demand any payments. In Illinois, Michigan, Minnesota and Wisconsin, the settlor could sell the right to receive future mandatory disbursements, even if the trust includes a spendthrift clause, and the current market value of those disbursements would be a resource. In Indiana and Ohio, it appears that a spendthrift clause may effectively prevent a settlor from selling future mandatory disbursements such that the right to those future disbursements would not be a resource. However, since the law has not yet been interpreted clearly, we recommend that you send any self-settled trusts with mandatory disbursements and spendthrift provisions to our office for evaluation if they are governed by Indiana or Ohio law.

DISCUSSION

A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. POMS SI 01120.200(B)(16). If a state recognizes the validity of a spendthrift clause, the beneficial interest in the trust, or the right to payments as a beneficiary, is not a countable resource because the beneficiary may not sell his or her beneficial interest in the trust. 1_/ *Id.* In the Chicago Region, all of the states recognize the validity of a spendthrift clause where the trust is established by a settlor for a third party.

However, if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the spendthrift clause may be considered invalid. All of the states in the Chicago Region view such self-settled spendthrift trusts to be invalid with respect to creditors. However, in determining whether an interest in a trust is a resource, the focus is on whether the individual can sell his or her beneficial interest in the trust. The states vary with respect to whether a spendthrift clause would prevent a settlor from selling his or her beneficial interest in the trust. The majority of states in the region, namely Illinois, Michigan, Minnesota and Wisconsin, are likely to follow the Restatement (Third) of Trusts, which indicates that a spendthrift clause in a self-settled trust is invalid with respect to any interest retained by the settlor. RESTATEMENT (THIRD) OF TRUSTS § 58, cmt. e. Under the Restatement, the spendthrift clause would not prevent the settlor's interest from being reached by the creditors or from being sold. *Id.* However, the most a transferee could receive are the rights the settlor has under the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 60, cmts. b, f. Therefore, we would typically not consider a discretionary interest in a self-settled spendthrift trust to be a countable resource, since such an interest would have little, if any, market value. However, the right to receive mandatory disbursements from such trusts would generally be considered a resource, since the spendthrift clause would not prevent the individual from selling the interest and that interest would generally have market value.

In contrast, Indiana and Ohio law could be read to view self-settled spendthrift clauses to be invalid only with respect to the rights of creditors. Therefore, a spendthrift clause governed by the laws of those states may effectively prevent a settlor from selling his or her interest in the trust. If that is the case, then the right to both mandatory and discretionary disbursements from such trusts may not be considered a resource for SSI purposes in those states. However, we have not encountered any cases actually interpreting these provisions to prevent a settlor from selling the right to mandatory disbursements from a trust. Therefore, we recommend that self-settled trusts with spendthrift provisions that are governed by the law of Indiana and Ohio be referred for an opinion at least where the settlor has a right to mandatory disbursements.

Illinois

In Illinois, a spendthrift clause in a trust established by a third party will effectively prevent the beneficiary from selling his or her beneficial interest. 2_/ *See Danning v. Lederer*, 232 F.2d 610, 612 (7th Cir. 1956); *Hopkinson v. Swaim*, 119 N.E. 985, 990 (Ill. 1918). However, a settlor may not establish a spendthrift trust for his or her own benefit. In re *Marriage of Chapman*, 297 Ill. App. 3d 611 (Ill. App. 1998). Therefore, in a self-settled trust, the settlor could sell the right to mandatory future disbursements for their current market value, despite any spendthrift provision. However, the settlor's beneficial interest in a discretionary trust would not be a countable resource, even though the spendthrift clause would not prevent the settlor from selling the interest because the right to receive discretionary disbursements would have no significant market value. Although we were unable to find any case law which directly addressed this issue, we found that the Illinois courts have relied upon the Restatement (Third) of Trusts as persuasive authority in interpreting trusts. *See* In Re *Estate of Feinberg*, 891 N.E.2d 549 (Ill. App. 2008) (generally recognizing Restatement (Third) of Trusts as persuasive authority). Therefore, we believe that Illinois would adopt the Restatement (Third) approach --that a transferee would receive only the rights the settlor had under the trust, i.e., to receive mandatory or discretionary disbursements when the trust is self-settled and contains a spendthrift provision. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e. Therefore, the right to receive discretionary disbursements would not be considered a countable resource, as it is unlikely the right to discretionary disbursements would have any significant market value.

Indiana

Indiana law recognizes spendthrift trusts as generally valid against both voluntary and involuntary transfers. Ind. Code § 30-4-3-2(a). When the settlor is also the beneficiary of the trust, Indiana law recognizes an exception to this rule with respect to the rights of creditors. Ind. Code § 30-4-3-2; *see also Matter of Cook*, 43 B.R. 996 (N.D. Ind. 1984) (recognizing that if a settlor is also the beneficiary of the spendthrift trust, creditors may reach the trust corpus). Because Indiana law expressly addresses only the validity of a spendthrift clause in a self-settled trust with regard to creditors' rights, it is possible that Indiana would recognize a spendthrift provision to be valid to the extent that it would prevent the settlor from selling his beneficial interest in a self-settled trust. *See* POMS PS 01825.01 (PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~) (concluding that even

if the settlor could sell the interest, it would have no value because the trust was discretionary). However, the comments to the section state that it follows the rule in the Restatement (Second) of Trusts section 156, which states that a self-settled spendthrift clause is ineffective against both creditors and transferees. *See* Ind. Code § 30-4-3-2(b); *see also* RESTATEMENT (SECOND) OF TRUSTS § 156(2). If you encounter a self-settled trust governed by Indiana law with a spendthrift provision and with the right to future mandatory disbursements, we recommend that you refer the case to our office for a legal opinion, since the law is not clear at this time.

Michigan

Michigan recognizes the validity of spendthrift trusts, in general, by statute and common law. Mich. Comp. Laws Ann. § 700.2902(2); Matter of *Estate of Edgar*, 389 N.W.2d 696 (Mich. 1986). However, under Michigan law, a person cannot create a true spendthrift trust for himself. *See* In re *Hertsberg Intervivos Trust*, 578 N.W.2d 289, 291 (Mich. 1998) (adopting RESTATEMENT (SECOND) OF TRUSTS § 156). In *Hertsberg Intervivos Trust*, the Michigan Supreme Court adopted Restatement (Second) of Trusts section 156, which states that a creditor or transferee could reach the entire amount of the trust that the trustee could, in his or her discretion, pay to or for the benefit of the settlor of the trust. *See id.* at 291. However, that case involved only the rights of a creditor, and we have previously advised that we think it likely that Michigan would adopt the Restatement (Third) approach--that a transferee, unlike a creditor, would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* POMS PS 01825.025 (PS 09-062 Michigan - SSI-Review of the Annuity and Special Needs Trust for Jeri L. K~) (citing RESTATEMENT (THIRD) OF TRUSTS § 60 and cmts. e, f (2003)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource despite any spendthrift clause; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the right to discretionary disbursements would have any market value.

Minnesota

Minnesota recognizes the validity of spendthrift trusts though common law; there is no Minnesota statute which expressly deals with spendthrift provisions. *See Morrison v. Doyle*, 582 N.W.2d 237, 240 (Minn. 1998); In re *Mack*, 269 B.R. 392 (D. Minn. 2001). Under Minnesota law, cases involving enforcement of spendthrift provisions have always involved protection of the interest of a beneficiary who is not the settlor of the trust; therefore, in Minnesota, it appears that a spendthrift clause in a self-settled trust would likely be considered void and unenforceable. In re *Mack*, 269 B.R. at 399 (citing *Simmonds v. Larison*, (B.A.P. 8th Cir. 1999)). In reaching its holding in *Mack*, the court looked to the Restatement (Second) of Trusts § 156. 3_/ While there is no Minnesota case specifically adopting the Restatement (Third) of Trusts on this issue, we believe it is likely that a Minnesota court would follow the Restatement (Third) approach in determining the extent to which the settlor's interest can be transferred. *See Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571 (Minn. Ct. App. 2003) (relying upon Restatement (Third) of Trusts in determining the role of a trustee); compare In re *Syverson Trust*, 2003 WL 22016795 (Minn. Ct. App. 2003) (unpublished) (declining to adopt the Restatement (Third) of Trusts where doing so would change existing law in Minnesota, noting such change was reserved for the Minnesota Supreme Court or the legislature). Therefore, the settlor's right to mandatory disbursements would be considered a resource; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the discretionary disbursements would have any significant market value. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e.

Ohio

Ohio recognizes the validity of a spendthrift clause through statute and case law. *See* Ohio Rev. Code Ann. § 5805.01; *see also Scott v. Bank One Trust*, 577 N.E.2d 1077 (Ohio 1991). Ohio adopted the Uniform Trust Code in 2007, and the controlling provisions are applicable to spendthrift trusts created before and after 2007. *See* Ohio Rev. Code Ann. §§ 5805.01(A), 5805.06(A)(2), and 5811.03(A)(1). Ohio law recognizes the validity of spendthrift provisions in general, and states that "[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter and in section 5810.04 of the Revised Code, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary." Ohio Rev. Code Ann. § 5801.01(C). This suggests that, even in a self-settled trust, a spendthrift provision will prevent the settler from transferring his or her interest in the trust. The only exceptions to the effectiveness of a spendthrift provision relate to when a creditor or assignee of the beneficiary can reach an interest in or a distribution from the trust. Ohio law further states that whether or not a trust contains a spendthrift provision, the settlor's creditor or assignee may reach the maximum amount that can be distributed to or for the settlor's benefit. *See* Ohio Rev. Code Ann. §§ 5805.06(A)(2), 5811.03(A)(1). Indeed, the official comment notes, "[W]hether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the

settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created." *Id.* Because Ohio law allows such liberal access to the trust assets by "assignees," section 5805.06 could be read to suggest that the beneficiary of a self-settled trust could sell his beneficial interest in the trust and the purchaser could obtain the maximum amount that the trustee could distribute to or for the settlor's benefit. However, the Office of General Counsel has determined that the better reading of this provision presumes that only an assignee who is a creditor, not a purchaser for value, could reach the maximum amount the trustee could distribute for the settlor's benefit. *See* POMS 01825.039 Ohio (PS 08-159 SSI Review of the Trust and Annuity for Dustin J. E~). Therefore, it appears that spendthrift provisions in self-settled trusts governed by Ohio law may be fully valid with respect to the limitation on selling the settlor's beneficial interest in the trust. This interpretation of Ohio law would not have a significant impact where a trust is wholly discretionary. Even if the settlor could sell that interest, it would have no significant value. However, this interpretation would also mean that even the right to future mandatory disbursements could not be sold and therefore would not be a resource. This would be a significant departure from the Restatement (Third) of Trusts, as well as the Restatement (Second) of Trusts, both of which state that a spendthrift provision restraining the voluntary and involuntary alienation of the settlor's interest in the trust is invalid. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(1), RESTATEMENT (THIRD) OF TRUSTS § 58(2). In fact, Ohio adopted the comment to Uniform Trust Code provision, which specifically cites to the Restatement (Second) of Trusts § 58(2) and states that "[a] spendthrift provision is ineffective against a beneficial interest retained by the settler." Ohio Rev. Code Ann. § 5805.01, cmt.; Unif. Trust Code § 502, cmt. It would seem odd, therefore, if the Ohio code (and the uniform code) intended to deviate from the Restatement in this important way. Since the law is not entirely clear, and since there are not yet any cases interpreting the Ohio provisions, we recommend that you refer to our office any self-settled trust governed by Ohio with a spendthrift provision and provisions for mandatory disbursements.

Wisconsin

Wisconsin recognizes spendthrift trusts as valid and not subject to voluntary or involuntary alienation only where the beneficiary is a person other than the settlor. Wisc. Stat. Ann. § 701.06(1)-(2). Therefore, it appears that a spendthrift provision would not prevent a settlor from selling his beneficial interest in the trust when he is also the settlor of the trust. Wisc. Stat. Ann. § 701.06(1)-(2)._4 However, we believe that Wisconsin would likely follow the Restatement (Third) approach--that a transferee would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* In re *Walters Family Trust*, 685 N.W.2d 172 (Wis. Ct. App. 2004) (unpublished) (parties recognizing Restatement (Third) of Trusts as controlling law); *see also* POMS PS 01825.055 (PS 08-156 - Wisconsin - Review of the Trust for Brian G~) (citing to Restatement (Third) of Trusts as controlling authority in Wisconsin)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource; however, the right to discretionary disbursements would not be considered a resource, as it is unlikely the right would be of any significant market value.

CONCLUSION

In sum,

o All states in the Chicago region would recognize the validity of a spendthrift provision in a third party trust.

o In all states in the Chicago Region, the beneficial interest in a self-settled discretionary trust would not be a countable resource because even if the individual can sell the interest, it would have no significant market value.

o In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursement, regardless of whether the trust has a spendthrift provision.

o Trusts governed by Indiana or Ohio law should be referred for a legal opinion if the trust is self-settled and provides for mandatory disbursements and has a spendthrift clause.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Anne M~
Assistant Regional Counsel

/_1 The trust may still be a resource for other reasons.

/_2 In *Matter of Perkins*, 902 F.2d 1254 (7th Cir.1990), the Seventh Circuit Court of Appeals noted the following considerations in determining whether a trust under Illinois law qualifies as a spendthrift trust: "(1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust, and (3) whether the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus and termination of the trust." *See*, e.g., In re *Silldorff*, 96 B.R. 859, 864 (C.D.Ill.1989). The degree of control which a beneficiary exercises over the trust corpus is the principal consideration under Illinois law.

/_3 This provision states:(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest. (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

/_4 Wisconsin law indicates that where a settlor is a beneficiary of a trust regardless of whether it has a spendthrift provision, a creditor may, at the discretion of the court, receive payments from the income or principal of the trust to satisfy a judgment. Wisc. Stat. Ann. 701.06(6)(a).

B. PS 09-062 SSI-Review of the Annuity and Special Needs Trust for Jeri L. K~, ~ REPLY Your Ref: S2D5G6, SI-2-1-3 OH (K~)Our Ref: 08-103-NC

DATE: February 23, 2008

1. SYLLABUS

This opinion examines whether or not a trust established with the assets of an individual is a resource for Supplemental Security Income (SSI) purposes. This opinion also examines whether or not the annuity payments assigned to the trust are income for SSI purposes. The trust in this case satisfies all of the criteria needed to be excluded under the special needs trust exception, however, the trust must still be evaluated under the regular resource rules. The trust is not a resource under regular resource rules because it is irrevocable under State law and the claimant is unable to direct the use of the trust assets for her support and maintenance. With respect to the annuity payments, the payments were irrevocably assigned to the trust by the court and thus are not income to the claimant. Finally, certain distributions from the trust may be income if they result in the claimant receiving food or shelter.

2. OPINION

You asked us whether the Irrevocable Special Needs Trust for Jeri L. K~ is a resource for SSI purposes. You also asked whether annuity payments made to the trust are income. For the reasons discussed below, we conclude that the trust is not a resource, but that certain distributions from the trust may be income. Also, the annuity payments made to the trust are not income.

BACKGROUND

On February 28, 2007, the Irrevocable Special Needs Trust for Jeri L. K~ was created by order of the Oakland County, Michigan Probate Court. The trust agreement states that it is intended to be a special needs trust under 42 U.S.C. § 1396p(d)(4)(A). The trust was created with the proceeds of a wrongful death settlement, part of which included a lump sum of $200,234.

The claimant's wrongful death settlement also included a structured settlement to be purchased by one of the defendants. That defendant's insurer purchased annuity policies from Aviva London Assignment Corporation ("Aviva") and Pacific Life and Annuity Services, Inc. ("Pacific Life"). The order of the Emmet County, Michigan Circuit Court, which approved the settlement, mandated that the annuity payments from Aviva and Pacific Life be paid directly to the trust. Both policies name Citizens Insurance Company of America as the assignor; Aviva and Pacific Life, respectively, as the owners; the claimant as the annuitant or measuring life; and LaSalle Bank (the Trustee of the trust) as the payee. Both policies give only the owners of the annuities the right to change the payee, which must be done in writing. Beginning January 10, 2007, the combined monthly annuity payments of $1,820 have been deposited into the trust, and are to continue throughout the claimant's lifetime, with at least 20 years guaranteed.

The trust states that is irrevocable. Art. 3.

The trust names LaSalle Bank, N.A., as the initial Trustee. Art. 8. It appears, however, that around October 2007, Huntington National Bank succeeded LaSalle Bank as Trustee. The trust states that the Trustee has sole discretion to deal with the funds of the trust. Art. 4(A), 4(B)(2), 9. The claimant does not have the power or authority to demand any distribution or loan from the Trustee. Art. 4(A)(3). The Trustee may also withhold distributions to the claimant in its sole discretion. *Id.*

The trust contains a spendthrift provision, which states that no beneficial interest is subject to anticipation, assignment, pledge, sale, or transfer in any manner, and no beneficiary may anticipate, encumber, or charge such interest. Art. 7.

The trust terminates upon the claimant's death. Art. 4(B)(4). At that time, the Trustee shall distribute the remaining trust assets to any state providing medical assistance paid on the claimant's behalf an amount equal to the previously unreimbursed medical assistance provided under the state's Medicaid plan. *Id.* The balance of the trust shall then be distributed in the following order: (1) according to the terms of the claimant's will, if any, or (2) if none, to her spouse, if any, in such percentages as determined under Michigan's intestacy laws, and (3) if no spouse, or for such amounts beyond that which her spouse would receive, then in equal shares to her descendants, per stirpes, if any, or (4) if none, then to her surviving parent(s) in equal shares, or (5) if none, then to the claimant's heirs-at-law. *Id.*

The trust agreement is governed by Michigan state law. Art. 11(B).

The trust has been paying all of the claimant's household expenses, except rent. The trust also paid off all of her personal loans and credit cards. In January 2008, the trust purchased a house for the claimant for $109,000.

DISCUSSION

I. The Trust is not a Resource

Pursuant to 42 U.S.C. § 1382b(e), the principal of a trust created on or after January 1, 2000, with the assets of an individual will be considered a resource to the extent that the trust is revocable or, in the case of an irrevocable trust, to the extent that any payments from the trust could be made to or for the benefit of the individual (or the individual's spouse), with certain exceptions. *See also* POMS SI 01120.201(D)(1)-(2).

Whether a trust can be revoked or terminated depends on the terms of the trust and/or the applicable state law. *See* POMS SI 01120.200(D)(2). Here, the trust agreement states that it is irrevocable. Art. 3. But a trust is revocable, notwithstanding any contrary language, where a grantor of the trust is also the sole beneficiary. *See* POMS SI 01120.200(B)(2), SI 01120.200(D)(3), SI CHI01120.200(C). In this case, the claimant is the grantor of the trust, since the trust was established with her funds. However, she is not the sole beneficiary, as the trust names specific residual beneficiaries who will receive the remaining assets in the trust upon her death if she does not name anyone in her will to receive the funds, i.e., (1) her spouse, if any, or (2) her descendants, per stirpes, if any, or (3) her surviving parent(s), or (4) her heirs-at-law. *See* Art. 4(B)(4); POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary."), (D) (specifically named categories such as parents, siblings, children, issues, or descendants, are considered residual beneficiaries). Accordingly, the trust is irrevocable.

In addition, the trust was established in February 2007, and payments from the trust could be made to or for the benefit of the claimant, since she is the sole beneficiary during her lifetime. Thus, the entire trust would be considered a resource under 42 U.S.C. § 1382b(e)(3)(B). The trust, however, appears to fall under one of the exceptions to the general rule of § 1382b(e)(3)(B).

The exception under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception, applies to a trust which: (1) contains the assets of an individual under age 65 who is disabled; (2) is established for the benefit of such individual through the actions of a parent, grandparent, legal guardian, or a court; and (3) 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. *See also* 42 U.S.C. § 1382b(e)(5); POMS SI 01120.203(B)(1).

These elements seem to be satisfied here. First, the claimant is under age 65 and is presumably disabled. Second, the trust was established for the claimant's benefit by a court order. Third, the trust agreement includes a provision which states that, upon the claimant's death, the Trustee shall distribute the remaining trust assets to any state providing medical assistance paid on the claimant's behalf an amount equal to the previously unreimbursed medical assistance provided under the state's Medicaid plan. *See* Art. 4(B)(4). Thus, since the trust meets the requirements of the exception under 42 U.S.C. § 1396p(d)(4)(A), it is not considered a resource under 42 U.S.C. § 1382b(e).

The Agency, however, must still apply the regular resource rules set forth in POMS SI 01120.200 to determine whether the trust is a resource. *See* 42 U.S.C. § 1382b(e)(1); POMS SI 01120.203(B)(1)(a). Under the regular resource rules, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet her needs for food or shelter; or (2) direct the use of the trust principal for her support and maintenance under the terms of the trust. *See* POMS SI 01120.200(D)(1)(a). In addition, if the individual can sell her beneficial interest in the trust, that interest is a resource. *See id.*

Here, as explained above, the claimant cannot revoke the trust. The trust agreement also states repeatedly that the Trustee has absolute discretion to make distributions, and that the claimant has no right to compel the Trustee to make a distribution of principal to her or for her benefit. Art. 4(A), 4(B)(2), 9. Therefore, the trust principal is not a resource.

With respect to the claimant's ability to sell her beneficial interest in the trust, the trust agreement contains a spendthrift provision which states that no beneficial interest is subject to anticipation, assignment, pledge, sale, or transfer in any manner, and that no beneficiary may anticipate, encumber, or charge such interest. Art. 7. However, such provisions are generally not valid with respect to the grantor of the trust. *See In re Hertsberg Intervivos Trust*, 578 N.W.2d 289, 291 (Mich. 1998); Restatement (Third) of Trusts § 58(2) & cmt. e (2003) (stating general trust principal that a grantor is not permitted to create a spendthrift trust for her own benefit); POMS SI 01120.200(B)(16). But even if the claimant could sell her beneficial interest in the trust, that interest would likely have no significant market value because we believe that, under Michigan law, the transferee would receive only the interest the claimant had--to receive payment only at the Trustee's discretion. *See* Restatement (Third) of Trusts § 60 and cmt. e, f (2003). Thus, the claimant's beneficial interest in the trust is not a resource.

II. Certain Distributions from the Trust are Income

You also indicated that the trust has been paying all of the claimant's household expenses, except rent, and that the trust purchased a house for the claimant in January 2008. Any disbursements made to a third party resulting in the claimant's receipt of food or shelter are income in the form of in-kind support and maintenance (ISM) and are valued under the presumed maximum value (PMV) rule. *See* 20 C.F.R. §§ 416.1102, 416.1130, 416.1140; POMS SI 00835.300, SI 01120.200(E)(1)(b).

Here, it appears that the trust purchased the house outright, and that the claimant lives in the house as her primary residence. In that case, the trust holds legal title to the home for the benefit of the claimant, who has an equitable ownership interest, and the claimant is considered to be living in her own home. *See* POMS SI 00835.110, SI 01110.515(C)(2), SI 01120.200(F)(1). The purchase of the home outright by the trust results in income in the form of ISM in the month of purchase--January 2008--valued at no more than the PMV. *See* POMS SI 00835.400, SI 01120.200(F)(3)(a). However, the home is an excluded resource in subsequent months. *See* 42 U.S.C. § 1382b(a)(1); POMS SI 01130.100.

In addition, to the extent that the Trustee pays for the claimant's additional shelter expenses including property taxes, heating fuel, gas, electricity, water, sewer, and garbage removal, such expenses would be considered income in the form of ISM in the month the claimant has use of the item (but the total ISM will not be more than the PMV). *See* 20 C.F.R. §§ 416.1130(b), 416.1140; POMS SI 00835.350, SI 00835.465(D), SI 01120.200(F)(3)(c).

III. The Annuity Payments are not Income

Under the income rules, a legally assignable payment that is assigned to a trust that is not a resource is income, unless the assignment is irrevocable. *See* POMS SI 01120.201(J)(1)(d). Here, the court order approving the settlement of the wrongful death claim mandated that the annuity payments from Aviva and Pacific Life be paid directly to the trust. In addition, both annuity contracts name LaSalle Bank, the Trustee of the trust, as the payee. Furthermore, both annuity contracts give only the owners of the annuities (i.e., Aviva and Pacific Life) the right to change the payee. Thus, the annuity payments have been irrevocably assigned to the trust, and they are not income to the claimant.

CONCLUSION

For the reasons discussed above, we conclude that the Irrevocable Special Needs Trust for Jeri L. K~ is not a resource (although certain distributions from the trust may be income), and that the annuity payments made to the trust are not income.

Donna L. C~
Regional Chief Counsel, Region V
By:_____
Cristine B~
Assistant Regional Counsel

C. PS 07-190 SSI-Michigan-Review of the Cheryl I. S~ Irrevocable Special Needs Trust, ~ - REPLY Your Reference: S2D5G6, SI 2-1-3 MI (S~)Our Reference: 07-0302

DATE: August 8, 2007

1. SYLLABUS

This decision emphasizes a more direct approach in defining the requirements of a Special Needs Trust. Although several provisions of the Trust appear ambiguous specific language, taken almost directly from the POMS, leaves no doubt that Medicaid reimbursement is the first priority. The possibility that another party could profit from the Trust during the recipient's lifetime through a partial termination of stock was also addressed and the Regional Counsel makes clear that any distribution could only be made to the recipient. If a distribution was made it would be counted as income.

2. OPINION

You asked whether the Cheryl I. S~ Irrevocable Special Needs Trust is a resource for purposes of determining eligibility for SSI. After reviewing the trust and relevant laws and regulations, we have concluded that the trust should not be considered a resource.

BACKGROUND

On May 29, 2007, a Michigan probate judge ordered the establishment of an OBRA '93 Disability Payback Trust for the benefit of Cheryl I. S~, who was identified as a person in need of protection. Pursuant to that order, the Cheryl I S~ Irrevocable Special Needs trust was created with Cheryl's assets. *See* Trust Art. I(B). The trust states that it is for Cheryl's sole benefit during her lifetime to supplement any government benefits or assistance she receives. *See* Trust Art. I(A)-(B), Art. II(B). The trustee has full discretion to determine whether and how the assets in the trust are to be used to meet Cheryl's special needs. *See* Trust Art. II(A). Generally, the trustee should not disburse trust funds directly to Cheryl in an amount that would disqualify her from any government benefits. Trust. Art. (H)(1). Under one provision, however, the trustee has discretion to distribute stock in an S corporation directly "to the beneficiaries as if the trust had terminated while continuing to hold any other property in such trust." Trust Art. VI(D)(15).

The trust provides that there is an automatic duty to repay Medicaid or any successor program for all benefits received by Cheryl during her lifetime, but only upon her death. Trust Art. I(C), Art. II(D)(7), (F), (G). Under the terms of the trust, the "duty to repay Medicaid has higher priority over all debts and expenses except those given higher priority by law." *See* Trust Art. III(D)(7), Art. IV(A). The trust is to terminate on Cheryl's death, and at that time, the trustee may pay for Cheryl's last illness, funeral, and burial expenses. However, the trust also specifies that payments of debts owed to third parties, funeral expenses, and payments to residual beneficiaries are prohibited and cannot be paid prior to reimbursing the State for any and all medical assistance. Trust Art. IV. If any funds remain in the trust after all of these payments, the funds are to be distributed as Cheryl directs in her will, or, if she does not appoint anyone to receive the trust property in her will, then to her spouse and then her dependents or to her heirs at law. Trust Art. IV.

DISCUSSION

Generally, a trust established with the assets of the individual is considered a resource for SSI purposes under the statute, even if the trust is irrevocable, unless the trust meets one of the Medicaid payback exceptions under 42 U.S.C. § 1396p(d)(4)(A). *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201, 01120.203. For the exception to apply to an individual trust like this one, the trust must:

(1) be established with the assets of a disabled individual under age 65;

(2) be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court; and

(3) provide that the state 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.

42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(a). Although some of the language in this trust document is confusing, we believe that the trust should be read consistently with these requirements.

You noted that the trust contains language that the "duty to repay Medicaid has higher priority over all debts and expenses except those given higher priority by law." *See* Trust Art. III(D)(7), Art. IV(A). This language could be problematic if State or local laws were used to circumvent the duty to repay Medicaid. However, it appears that this language was included in the trust because the Michigan Department of Human Services, which administers the Medicaid program in that State, requires that the trust "provide that repaying Medicaid has priority over all debts and expenses except those given higher priority by law." Program Eligibility Manual 401, at 6 (available at http://www.mfia.state.mi.us/olmweb/ex/pem/401.pdf). The language in the trust appears to be included to track that apparently required language. In fact, the trust incorporates by reference, "the specific regulations promulgated by the Michigan Department of Human Services." Trust Art. I(A).

The Social Security POMS also recognizes that certain payments may be made from the trust prior to reimbursing Medicaid. Specifically, the trustee may pay taxes due from the trust because of the death of the beneficiary and reasonable fees for administration of the trust, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with terminating and wrapping up of the trust. POMS SI 01120.203(B)(3)(a). The POMS also lists examples of payments that may not be made prior to reimbursing Medicaid, including payment of debts owed to third parties, funeral expenses, and payments to residual beneficiaries. POMS SI 01120.203(B)(3)(b).

In this trust, immediately after language stating that expenses "given higher priority by law" may be paid prior to Medicaid, the trust states (in bolded type):

So that there is no misunderstanding, it shall be understood that the State is the first payee and has priority under this Trust over payment of all other debts and administrative expenses, except as permitted by law, such as taxes, reasonable administrative expenses, fees for maintaining the Trust, court costs, or other required actions associated with the termination or disposition of the trust. Payments of debts owed to third parties, funeral expenses and payments to residual beneficiaries are considered Prohibited Expenses and Payments and cannot be paid prior to reimbursing the State for any and all medical assistance.

Trust Art. IV (emphasis in original). This language fairly closely tracks the language in the POMS.

This situation is different from the situation we found in some other trusts that used broad language that would allow payments prior to reimbursing Medicaid if the payment was permitted under any statute or regulation now in existence or hereafter enacted or issued. *Compare* POMS PS 01825.016 (MM. PS 00259) (Illinois). The language in this trust seems to limit payments "permitted by law" to those that would fit within the language of SSA's POMS provisions. It appears that the trust was drafted with an intent to meet the criteria for both the Michigan Medicaid program and the Social Security program and to limit any payments made prior to reimbursing the State for Medicaid payments to those payments that are permitted to be paid first under both of those programs. Indeed, the trust states that "[a]ll terms of this trust, wherever they may appear, shall be interpreted to conform to this primary goal, namely that the governmental financial assistance, which would otherwise be available to the beneficiary if this trust and/or trust corpus did not exist, will in no way be reduced, diminished, or denied." Trust Art. II(A).

We believe that the language in this trust should be interpreted to meet the requirements of the statute and the POMS, because, to the extent the trust allows payments "given higher priority by law," (1) the trust closely tracks language from the POMS regarding permissible and prohibited expenses that may be paid prior to reimbursing Medicaid, and payments "given higher priority by law" appear to be limited to those that would be permissible under the POMS; (2) the trust appears to include language about making payments "given higher priority by law" because this language seems to be required by the Michigan Medicaid program; and (3) the stated intent of the trust is that the State Medicaid payback trust requirements be incorporated into the trust and that the trust be interpreted consistently with the primary goal that the trust not prevent Cheryl from being eligible for governmental financial assistance.

We also carefully examined the trust provision that allows for partial termination of the trust in certain situations when the trust holds stock in an S corporation. Initially, we were concerned that this provision might result in someone benefiting from the trust, besides Cheryl, during her lifetime. The trust provision states that, in some circumstances, the trustee would have discretion to distribute the stock in such a corporation outright to the trust "beneficiaries as if the trust had terminated while continuing to hold any other property in such trust." Trust Art. VI(D)(15). However, it appears that any such distribution would be made only to Cheryl during her lifetime. The trust provides for distributions to other beneficiaries after Cheryl's death, but there are no provisions that would allow payment to any other beneficiaries if the trust is terminated or partially terminated during Cheryl's lifetime. In fact, the trust was intended to be solely for Cheryl's benefit. *See* Trust (introductory paragraphs). Under Michigan law (which controls this trust), when a trust is terminated and there are no provisions stating to whom the

property would pass on termination, the property reverts back to the original owner. *See Thompson v. Stehle*, 116 N.W.2d 900, 905-06 (Mich. 1962). Here, if the partial termination occurred while Cheryl was living, the trust property would revert back to Cheryl, and she would be the only beneficiary entitled to such a distribution. Therefore, this trust provision does not create a beneficial interest in anyone other than Cheryl during her lifetime. If and when the trustee were to make such a distribution, however, that distribution would be income to Cheryl.

Since the trust appears to meet the Medicaid payback exception to counting the trust as a resource under the statute, we also considered whether the trust would be a resource under the regular resource rules. *See* POMS SI 011020.200. We concluded that the trust would not be a resource under those rules since Cheryl cannot revoke the trust without the consent of the contingent residual beneficiaries; she cannot compel the trustee to provide for her support and maintenance; and she is not entitled to mandatory disbursements under the trust which she might be able to sell. *See* POMS SI 011020.200(D)(1)(a).

CONCLUSION

For these reasons, we believe the trust should not be considered a resource under the statutory or regular resource rules.

Donna L. C~
Regional Chief Counsel, Region V
By:_____
Suzanne D~
Assistant Regional Counsel

D. PS 07- 179 SSI-Michigan - Review of Peggy J. V~ Special Needs Trust and Pension Benefits ~ -REPLY Your Reference: S2D5G6, SI 2-1-3 MI (V~) Our Reference: 07-0231

DATE: July 16, 2007

1. SYLLABUS

This precedent involves a non-countable trust funded by countable income. The trust meets all the requirements for exception as a Special Needs Trust. However, the funds that are received by the claimant are considered income because the benefits are non-assignable. The Employee Retirement Income Security Act (ERISA) makes clear that certain types of income are not assignable. The attorney for our claimant used two arguments to assert that the income should not be countable. First, he indicated his claimant was not the individual who earned the pension and second, that it was a state court that awarded her the benefits from her spouse's retirement funds. The Regional Counsel determined that ERISA states that an individual named as alternate payee, as our claimant was, has a right under Federal law to receive payments and these payments cannot be assigned. This Federal act preempts state law. The Trust is not countable but the income is countable.

2. OPINION

You asked us to review a trust agreement created by the Saginaw County Probate Court for the benefit of Peggy J. V~ to determine whether, for Supplemental Security Income (SSI) purposes, the funds placed in the trust constitute a resource to Peggy J. and whether the pension payments awarded to Peggy J. as a result of an Amended Judgment of Divorce by the Saginaw County Circuit Court constitute income to Peggy J. For the reasons set forth below, we believe that the trust meets the requirements of the Medicaid Trust exception and is not a resource. However, we also believe that the monthly annuity payments into the trust constitute income for SSI purposes.

BACKGROUND

On December 12, 2005, the Saginaw County Circuit Court entered an Amended Judgment of Divorce awarding Peggy J. 50% of her ex-husband's General Motors Pension Benefits, including post-retirement surviving spouse benefits. As part of its Amended Judgment, the court ordered that Peggy J.'s portion of the Qualified Domestic Relations Order (QDRO) concerning the General Motors Pension Benefits be paid to a special needs trust based on agreement of the parties.

On May 17, 2006, the Saginaw County Probate Court entered an order establishing the "Peggy J. V~ Discretionary Trust" (hereinafter "the Trust"). In establishing the Trust, the court found clear and convincing evidence that Peggy J. is an adult who is unable to manage her property and business affairs due to her physical and mental disabilities and is dependent in need of

support, care, and welfare which is necessary and desirable for her to obtain. The court ordered that the property and benefits Peggy J. is entitled to receive as part of the QDRO entered by the Saginaw County Circuit Court be irrevocably transferred to the Trust.

The Trust states that it is established pursuant to 42 U.S.C. 1396p(D)(4)(A). The express intent of the Trust is to be a Medicaid payback trust. Trust 1.3. The Trust names Nancy K. M~, Peggy J.'s guardian, as grantor and trustee. Trust, page 1. Under the terms of the Trust, the trustee has full authority and power to manage the funds of the Trust at her discretion. Trust 1.4(B). The trustee shall pay for Peggy J.'s special needs at the trustee's discretion. Trust 2.1(a). The Trust defines "special needs" as including expenses for: medical and dental needs; housing; transportation; companionship; education; entertainment; travel; and quality of life items. Trust 2.1(b). The Trust contains a spendthrift clause, prohibiting any of the principal or income of the estate or any interest therein from being anticipated, assigned, encumbered by any beneficiary. Trust 5.5. The Trust states that it is irrevocable. Trust 1.2. Peggy J. has no right or power, whether alone or in conjunction with others to alter, amend, revoke or terminate the Trust or to designate persons who shall possess or enjoy the Trust estate. Trust 1.2.

The Trust provides that it will terminate upon Peggy J.J.'s death, unless it terminates sooner by exhaustion of the corpus. Trust 3.1. Upon Peggy J.'s death, the trustee shall distribute to the State of Michigan and any other state which has provided medical assistance Trust property up to an amount equal to the total medical assistance paid on behalf of Peggy J. by the State. Trust 3.1(a). The trustee shall have authority to pay administrative expenses, legally enforceable debts, last illness and funeral expenses, and any inheritance, state and succession taxes. Trust 3.1(b). Any undistributed income of the Trust shall be distributed equally to the living children of Peggy J. and their descendents. Trust 3.1(c).

DISCUSSION

The Social Security Act was amended in 1999 to explain when some trusts would be considered resources for purposes of SSI eligibility. Pursuant to the new rules for determining SSI eligibility, a trust established on or after January 1, 2000, counts as a resource if it is a revocable trust established by an individual. *See* 42 U.S.C. § 1382b(e)(3)(A). Irrevocable trusts established by an individual on or after January 1, 2000, count as a resource to the extent that payments from the trust could be made to or for the benefit of the individual or his/her spouse. *See* 42 U.S.C. § 1382(e)(3)(B). However, these rules do not apply where (1) the Commissioner determines that such rules would work an undue hardship on an individual or (2) the trust is a Medicaid payback trust as described in 42 U.S.C. § 1396p(d)(4)(A) or (C). *See* 42 U.S.C. § 1382b(e)(4)-(5); POMS SI 01120.203. If a trust meets the definition of a Medicaid payback trust, the regular resource rules still apply, and the trust will be a resource if: (1) it is revocable; (2) the claimant can compel the trustee to use the funds for her support and maintenance; or (3) the claimant can sell her beneficial interest in the trust. POMS SI 01120.203(B)(1)(a); 01120.200.

The Medicaid payback trust exception for individual trusts applies where a trust created on or after January 1, 2000, (1) is established with the assets of a disabled individual under age 65; (2) is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) expressly provides that any amounts remaining in the trust upon the death of the individual will be distributed first to the state, up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan. *See* POMS 01120.203(B)(1). The "Peggy J. V~ Discretionary Trust" appears to meet these criteria.

First, the protective order authorizing the establishment of the Trust indicates that Peggy J. is under age 65. POMS 01120.203(B)(1)(b). The protective order also indicates that Peggy J. is disabled. POMS 01120.203(B)(1)(c). Further, it appears that the Trust currently consists of Peggy J.'s assets-in particular, assets derived from the December 2005 Amended Judgment of Divorce, including monthly payments from the General Motors pension benefits. Second, the Trust was established by a court and provides that it is for the benefit of Peggy J.. POMS 01120.203(B)(1)(d)-(e). Third, on the death of Peggy J., any remaining funds in the Trust will first be used to reimburse all states where Peggy J. received medical assistance payments. POMS 01120.203(B)(1)(f). Because the Trust satisfies the Medicaid Trust exception requirements, the Trust is not a countable resource under the statute. Therefore, the regular resource rules apply.

Under these rules, the Trust would not be a resource. Peggy J. could not revoke the Trust unilaterally because she is not the sole beneficiary of the Trust. *See* Restatement (Second) of Trusts, § 339 (1959) ("If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust...."); *Henderson v. Sherman*, 11 N.W. 153, 156 (Mich. 1882). The Trust provides that, if Peggy J. does not exercise her limited power of appointment, any remaining residue from the Trust upon Peggy J.'s death after the state is reimbursed and her last expenses are paid, shall be distributed to a limited class of beneficiaries-specifically, to Peggy J.'s children. *See* POMS SI CHI01120.200(D)(3) (remainder of trust assets paid to "heirs at law" presumed, under Michigan law, to create residual beneficiaries). Because the Trust creates a contingent interest in Peggy

J.'s children, Peggy J. is not the sole beneficiary of the Trust and therefore cannot terminate the Trust unilaterally. Secondly, Peggy J. cannot compel the trustee to use the Trust funds for her support and maintenance. *See* POMS SI CHI01120.200(D)(2) ("If an individual does not have the legal authority to revoke the trust or direct the use of the trust assets . . . the trust principal is not the individual's resource for SSI purposes."). Finally, Peggy J. could not sell her interest in the Trust, as it would have no market value because the trustee is not obligated to make any payments. *See* Restatement (Third) of Trusts, § 60 and comments c, f.

The next issue is whether the pension benefits from Peggy J.'s ex-husband constitute income for SSI purposes. Under the Qualified Domestic Relations Order (QDRO) entered August 8, 2006, 50% of Peggy J.'s ex-husband's retirement benefits were awarded to Peggy J., named as the alternate payee on the retirement plan. Under a severable provision of the QDRO, Peggy J.'s share of the retirement benefits are to be paid to the Trustee of Peggy J.'s special needs trust and not directly to Peggy J.. However, if the terms of the severable provision are deemed to be in violation of federal or state law, the severable provision shall be deemed null and void, such that Peggy J. would again be eligible to receive her portion of the retirement benefits directly.

Under the POMS, retirement benefits are not assignable by law, and therefore are to be considered income. *See* POMS SI 01120.201(J)(1)(c) (Certain payments are not assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. Examples of such non-assignable payments include private pensions under the Employee Retirement Income Security Act (ERISA)). The ERISA statute dictates that benefits under the plan may not be assigned or alienated. 29 U.S.C. § 1056(d)(1). There is only one express exception to this anti-assignment provision: assignment of benefits by a QDRO. *See* 29 U.S.C. § 1056(d)(3)(A).

Peggy J.'s attorney concedes that retirement benefits received by Peggy J.'s husband, as the plan's beneficiary, would constitute income under the SSI rules. However, he argues that the anti-assignment provision of ERISA does not apply to Peggy J. because she was not the actual employee. Peggy J.'s position is not supported by the ERISA statute or federal case law. Under the ERISA statute, a person who is an alternate payee under a QDRO shall be considered a beneficiary under a retirement plan and, therefore, is subject to the same anti-assignment provision as her husband. *See* 29 U.S.C. § 1056(d)(3)(J). As a beneficiary, Peggy J. is precluded from assigning her benefits to anyone other than persons specifically defined in the ERISA statute as "alternate payee." The term "alternate payee" is limited to any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of the benefits payable under a plan with respect to such a participant. *See* 29 U.S.C. § 1056(d)(3)(K). There is no provision in ERISA allowing a beneficiary to assign her benefits to a special needs trust, and the Supreme Court has made clear that the QDRO exception to section 1056(d)(1) is to be narrowly construed and is "not subject to judicial expansion." *See Boggs v. Boggs*, 520 U.S. 833 (1997). Although Plaintiff's attorney has argued that the retirement benefits are construed under Michigan state law as an asset of the marriage, ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Therefore, the pension benefits paid to Peggy J. constitute income to Peggy J.. POMS SI 00830.160, 01120.020; *see also* POMS SI CHI 01140.215(B)(3).

CONCLUSION

For the foregoing reasons, we conclude that the Trust is not a resource to Peggy J., but that the pension payments into the Trust are income to Peggy J..

E. PS 07-166 SSI-Review of the Sub-Account of Ricky H~, in the Synod Pooled Disability Trust - REPLY Your Ref: S2D5G6 (H~) Our Ref: 07-0141-NC

DATE: July 2, 2007

1. SYLLABUS

This opinion addresses whether or not the Synod Pooled Disability trust is a resource for SSI purposes. In order to meet the special needs pooled trust exception, a trust must satisfy several criteria. One of those criteria is that the individual trust account be established for the sole benefit of the disabled individual. In this case, there are circumstances where the trustee, during the disabled individual's lifetime, may terminate the trust account and distribute the assets as if the disabled individual had died. This early termination provision violates the requirement that the trust account be established for the sole benefit of

the disabled individual. However, the trust contains a savings clause that renders the early termination provision ineffective. For this reason, the trust satisfies all of the special needs exception criteria and is not a countable resource for SSI purposes.

2. OPINION

You asked whether Ricky H~'s sub-account in the Synod Pooled Disability Trust is a resource for purposes of eligibility for Supplemental Security Income (SSI). We have concluded that the trust is not a resource. However, Ricky and the trustee should be advised that we consider certain trust provisions, which could benefit other individuals during Ricky's lifetime, to be void.

BACKGROUND

Synod Residential Services, Inc., which is apparently a non-profit corporation, established the Synod Residential Services Disability Pooled Trust. The trust was intended to be established consistent with 42 U.S.C. § 1396p as a supplemental needs trust. Pooled Trust Agreement § 3.2. The trustee has discretion to expend trust funds for each beneficiary's supplemental needs and has no obligation to provide for any beneficiary's basic support and maintenance. Pooled Trust Agreement Art. III; Joinder Agreement § 1.2.

A sub-account is created in the pooled trust when an individual signs a joinder agreement and contributes funds. Ricky signed an agreement and established a sub-account with his own funds.

Contributions to the trust are irrevocable. Pooled Trust Agreement § 5.1; Joinder Agreement §§ 1.1, 5.4(e). Only the trustee can amend the trust, primarily to ensure that the trust is consistent with the requirements of 42 U.S.C. § 1396p.

The trust recognizes that, if a sub-account in the pooled trust is funded with a beneficiary's own money, federal law requires that, unless the pooled trust retains the funds, any unspent amounts remaining in the sub-account on the death of that beneficiary must be used to reimburse the State for medical services received. Pooled Trust Agreement § 12.2; Joinder Agreement § 3.7. The trust provides that, if the sub-account is funded by the beneficiary, on his or her death, all amounts remaining in the sub-account shall be retained by the pooled trust to benefit other indigent disabled persons. Pooled Trust Agreement § 12.2(b); Joinder Agreement § 3.7.

If the assets in a sub-account are or will become liable for basic maintenance, support, or care that has been provided by a government or agency, the trustee may terminate the sub-account and distribute the assets as if the individual had died. *See* Pooled Trust Agreement § 12.1(a). Under some circumstances the trustee also has discretion to terminate the trust and to distribute any funds contributed by the beneficiary back to the beneficiary. Pooled Trust Agreement § 12.3.

The tryst states that, notwithstanding the discretionary payments allowable under the trust, trust assets shall not be used in any way that would result in a manner that would result in the reduction or denial of government benefits. Pooled Trust Agreement § 3.5(a). The Joinder Agreement further provides that the trust is "governed by the laws of Michigan, in conformity with the provisions of 42 U.S.C. § 1396p" and that "[t]o the extent there is a conflict between the terms of this Trust and the governing law, the law and regulations shall control." Joinder Agreement § 5.3. The trust provides that if any portion of the trust is held invalid, other provisions of the trust will remain valid and enforceable. Pooled Trust Agreement § 15.2.

DISCUSSION

Under the Social Security Act, a trust established for the benefit of an individual with the assets of that individual on or after January 1, 2000 generally is a resource to the individual, even if the trust is irrevocable, unless a statutory exception applies. 42 U.S.C. § 1382b(e); POMS SI 01120.201(D). There is an exception for pooled trusts, like this one, if certain criteria are met. *See* 42 U.S.C. §§ 1382(b)(e), 1396p(d)(4)(C). However, even if the trust meets an exception to counting it as a resource under the statute, it will still be a resource under the regular resource rules if it is revocable; if the individual can compel the trustee to provide for his support and maintenance; or if there are mandatory disbursements and the individual could sell his beneficial interest in the trust. *See* POMS SI 01120.200(A), (D). Here, the pooled trust meets the pooled trust exception to counting it under the statute, but only because it has a savings clause that renders ineffective any provision that is inconsistent with the statute. The trust is not a resource under the regular resource rules.

To meet the pooled trust exception to counting a trust account under the statute for a disabled person the following conditions must be met:

The trust must be established and maintained by a non-profit association;

The trust must have separate accounts for each beneficiary, although assets may be pooled for investing and management purposes;

The sub-account must be established solely for the benefit of the disabled individual;

The sub-account must be established by the individual, a parent, grandparent, legal guardian or a court; and

The trust must provide that, on the death of the beneficiary, any funds not retained by the trust must be used to reimburse any state for Medicaid payments made for the benefit of the beneficiary during his lifetime.

42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2). Here the only potential problem with the trust appears to be with the third requirement, in that there are some circumstances under which funds in a sub-account could be used other than for the sole benefit of the disabled individual during his lifetime. Specifically, under some circumstances the trustee may, during the disabled individual's lifetime, terminate a sub-account and distribute the assets as if the disabled individual had died. *See* Pooled Trust Agreement § 12.1. In that case, all amounts remaining in the sub-account would be retained by the pooled trust to benefit other indigent disabled persons. Pooled Trust Agreement § 12.2(b); *see also* Joinder Agreement § 3.7. We have previously advised that this type of provision is inconsistent with the requirement that the pooled trust account be established solely for the benefit of the disabled individual during that individual's lifetime. *See* POMS PS 01825.039 Ohio (L) (PS 04-003 SSI-Ohio-Review of the Sub-Account of Mary T~, in the Community Fund Management Foundation Pooled Medicaid Payback Trust Your Reference: S2D5G6 OH) (Sept. 23, 2003).

However, the trust also provides that it is governed by the laws of Michigan in conformity with the provisions of 42 U.S.C. § 1396p, and that to the extent that there is a conflict between the terms of the trust and the governing law, the law and regulations shall control. Joinder Agreement at § 5.3; *see* generally Pooled Trust Agreement § 3.5(a). We have previously advised that this type of provision, if valid under State law, essentially voids any provisions in the trust that are inconsistent with the statutory requirements of 42 U.S.C. § 1396p. *See* POMS PS 01825.016(E) Illinois (PS 05-225 SSI Review of the Sub-Account of Jesus C ~ (~) in the Illinois Disability Pooled Trust). We have also advised that nothing in Michigan law appears to prohibit this type of provision. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI-Michigan-Review of the Sub-Account of Michael J~, ~, in the Elder Law of Michigan, Inc., Pooled Account Trust (Jan. 31, 2007); *see also In re Estate of Butter F v. Page*, 341 N.W.2d 453, 259-60 (Mich. 1983) (courts look to the trust instrument to determine intent regarding the purpose and operation of the trust); RESTATEMENT (THIRD) OF TRUSTS § 4, comment d (2003) (settlor can incorporate terms of statute in a trust). We found no new developments in Michigan law that suggest otherwise. In this case, the trust also provides that, to the extent any provisions are held void, the remainder of the trust provisions will remain valid and enforceable. Pooled Trust Agreement § 15.2. This provides further support for our conclusion that certain trust provisions may be considered void, and that the trust will, nevertheless, continue to operate. Therefore, we can reasonably assume that the termination provision in § 12.1(a) of the trust is void, such that the trust meets the exception to counting it under the statute.

The trust also is not a resource under the regular resource rules. The trust states that it is irrevocable, and there are other remainder beneficiaries to the trust (i.e., the pooled trust beneficiaries) whose consent would be required to revoke the trust. Furthermore, the trustee cannot be compelled to provide for Ricky's support and maintenance, and there are no mandatory disbursements under the trust.

CONCLUSION

For these reasons, we conclude that Ricky's trust account is not a resource under the regular resource rules, and that the trust meets the pooled trust exception to counting it under the statute because the early termination clause, which might otherwise permit other pooled trust beneficiaries to benefit from the funds in his trust during his lifetime, should be considered void. We recommend, however, that you advise Ricky and the trustee that the Agency considers Section 12.1(a) of the pooled trust agreement to be void.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Suzanne L~ D~
Assistant Regional Counsel

F. PS 07-135 SSI-Michigan-Review of the Trust Agreement for the Benefit of Elaine M~, ~ REPLY Your Reference: S2D5G6, SI 2-1-3 MI (M~) Our Reference: 07-0191/561673

DATE: May 15, 2007

1. SYLLABUS

This precedent is included because of the changes made in Michigan law in 1998 and effective in 04/2000. The change in Michigan's law retroactively opens the door for creating a contingent remainder in an individual's estate and, therefore, the individual is no longer the sole beneficiary of the trust. This specific Trust was created in 1993 with only references to distributions upon death to "those persons entitled to a share in her estate" the new Michigan law "expressly abolished the doctrine of worthier title, both as a rule of law and as a rule of construction." Hence, this Trust is considered irrevocable and meeting all other criteria it is not a countable resource.

2. OPINION

You have request an opinion whether a Trust Agreement is a resource of Elaine M~ for purposes of determining her SSI eligibility. We have reviewed the documents that you provided and concluded that, for the reasons stated below, the Trust Agreement is not a resource of Elaine M~.

BACKGROUND

According to the Declaration of Trust and Trust Agreement ("Trust Agreement"), Elaine M~ attorney and another attorney made the trust agreement on December 7, 1993, and named themselves as Trustees. Trust Agreement, p.1. Funds belonging to Ms. M~ from the settlement of a lawsuit established the trust. Trust Agreement, p. 1. The Trust Agreement states that because the trust is intended for the primary benefit of Ms. M~, it is only incidentally for the benefit of those to receive the balance of the trust upon her death. Trust Agreement, Art. Five, A(3), p. 5.

The trust declaration provides that its express intention is to provide benefits to supplement those which may otherwise be available to Ms. M~ form various sources, including insurance benefits and governmentally sponsored programs. Trust Agreement, p. 2. It further states that it is intended to benefit Ms. M~ by providing for her extra and supplemental needs, over and above benefits which she may otherwise be entitled to receive from any governmental or private programs as a result of her disabilities. Trust Agreement, Art. Five, A, p. 4. The trust document provides that, during Ms. M~ lifetime, any portion of the net income or principal of the Trust may, at the sole discretion of the Trustee, be paid for her benefit, or for the benefit of her issue, if any, and any and all discretionary distributions shall be based primarily upon the needs of Ms. M~. Trust Agreement, Art. Five, p. 4. The trust provides that no trust income or principal shall be paid or expended if the Trustee determines there are sufficient resources available to her for her care, comfort, and welfare from any governmental or private programs. Trust Agreement, Art. Five, A(2), p. 5. The Trust Agreement states that, under no circumstances, shall Ms. M~ have the power or authority to demand any distribution from the Trustee, who is under no obligation, implied or otherwise, to make any distributions to her. Trust Agreement, Art. Five, C(2), p. 6. The trust declaration contains a spendthrift provision that protects the trust assets from claims by a beneficiary's creditors and forbids any beneficiary from selling or in any other manner disposing of her interest in the trust principal or income. Trust Agreement, Art. Seven, p. 10-11.

The Trust Agreement provides that, during Ms. M~ lifetime, the trust may be amended, provided that any modification shall always be in Ms. M~ best interest and subject to the prior approval of the probate court having jurisdiction over her estate. Trust Agreement, Art. Three, p.3.

At Ms. M~ death, if funds remain in the trust, the Trustee is authorized, but not required, to pay all estate, inheritance or other similar taxes which may be imposed on Ms. M~ estate, together with the expenses of her last illness, funeral and burial costs, enforceable debts and reasonable administrative expenses. Trust Agreement, Art. Six, A, p. 9-10. The trust further provides that all of the rest of the trust estate shall be distributed to the estate of Ms. M~, deceased, and distributed to those persons who are determined to be entitled to share in her estate by the court having jurisdiction over her estate. Trust Agreement, Art. Six, B, p. 10.

DISCUSSION

The pertinent SSI regulations provide at 20 C.F.R. § 416.1201 that:

resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. . . .

Therefore, if an individual is able to obtain funds or convert property to cash to be used for her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility determinations. Trust assets are a resource to the individual if he or she can revoke the trust and use the assets to meet his or her needs for food, clothing, and shelter or if the individual can direct the use of the trust principle for his or her support and maintenance under the terms of the trust or sell her beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a).

The spendthrift provision would not prevent Ms. M~ from selling her beneficial interest in the Trust since she is the Grantor of the Trust. *See Restatement (Third) of Trusts* § 58(2). However, her interest in the Trust would have no market value, since it is a discretionary trust for her benefit. Under the terms of the Trust, Ms. M~ also does not have any authority to direct the payment of Trust principal for her support and maintenance. Rather, the Trustee has the discretion to make payments from the Trust and Ms. M~ does not have the power or authority to demand any distribution from the Trustee. *See* Trust Agreement, Art. Five, p. 4; Art. Five, C, p. 6. Further, the Trust Agreement explicitly precludes the Trustee from using any of the trust funds for Ms. M~ basic support, which would otherwise be provided for at public expense. *See* Trust Agreement, Art. Five, A(2), C(2)-(3), p. 6-7. Ms. M~ does not have any power to direct payment from the Trust, and the Trustee cannot use funds for Ms. M~ basic support. Therefore, the Trust should not be considered a countable resource for this reason. *See* 20 C.F.R. § 416.1201; POMS SI 01120.200(D)(1)(a).

As stated above, the Trust may also be considered a resource if Ms. M~ can revoke it and use the funds for her support and maintenance. The Trust does not provide whether it is revocable, but states that it may be amended, provided that any modification shall always be in Ms. M~ best interest and subject to the prior approval of the probate court having jurisdiction over her estate. *See* Trust Agreement, Art. Three, p. 3. Therefore, while it might appear that Ms. M~ has the power to amend the Trust, she cannot do so unilaterally, and the probate court would approve a request for amendment only if it concluded it was in her best interest. In determining Ms. M~ best interests, the court might consider the intent and purpose of the Trust to protect her eligibility for benefits.

Nor is the Trust otherwise revocable. Because the Trust was funded with the proceeds of a lawsuit settlement brought on Ms. M~ behalf, she is the Grantor. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm.-MOS, Chicago, *Review of Trust for Stephanie Sue E~* (9/27/99) ("E~ Review"); *In re J~* Trust, 479 N.W. 2d 25, 30 (Mich. App. 1991). In general, where a grantor is also the sole beneficiary of the trust, she can revoke or compel termination of the trust. *See Restatement (Second) of Trusts* § 339, comment a (1959); POMS SI 01120.200(D)(3). The issue then becomes whether Ms. M~ is the sole beneficiary of the trust. If a grantor who is also a beneficiary manifests an intention to create a vested or contingent interest in someone other than herself, she is not the sole beneficiary. *See Restatement (Second) of Trusts* § 339, comment b. Where a grantor is not the sole beneficiary, she cannot revoke the trust without the consent of other beneficiaries. We have previously advised that these general trust principles apply in Michigan. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm. - MOS, Chicago, *Six State Synopsis of Trust Laws* (2/26/92); *E~ Review*; *H~ v. H~*, 543 N.W.2d 19, 20 (Mich. App. 1995) (even irrevocable trust may be terminated with consent of grantor and all beneficiaries).

In the past, the law has presumed that no additional beneficiaries were intended when a grantor transfers property in trust to himself for life and, upon her death, to her heirs or next of kin (doctrine of worthier title). *See Restatement (Second) of Trusts* § 127, comment b (1959). However, in 1998, the Michigan legislature expressly abolished the doctrine of worthier title, both as a rule of law and as a rule of construction. Mich. Comp. Laws § 700.2719 (2000); Uniform Probate Code § 2-710. Michigan law now provides that language in a governing instrument describing the beneficiaries of a disposition as the transferor's "'heirs', 'heirs at law', 'next of kin', 'distributees', 'relatives', or 'family' or language of similar import, does not create or presumptively create a reversionary interest in the transferor." Mich. Comp. Laws § 700.2719 (2000). These provisions took effect on April 1, 2000, but the effective date provision states, "a rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent." *Id.* at § 700.8101(e). We have found no reported case law interpreting these provisions. While this is a close case, we believe that under this rule of construction, a court would likely find that the Trust creates a contingent remainder in the distributees of Ms. M~ estate. Ms. M~, therefore, is not the sole beneficiary of the trust. Therefore, she alone cannot revoke the trust.

CONCLUSION

Under current Michigan law, Ms. M~ would not be considered the sole beneficiary of the Trust. Therefore, she does not have the power to revoke the Trust. While it might appear that Ms. M~ has the power to amend the Trust, it does not seem that she would be able to amend it unilaterally. Finally, Ms. M~ does not have any power to compel the Trustee to use Trust principal or income for her support and maintenance and her beneficial interest in the trust would not have any marketable value. Therefore, the Trust is not a countable resource for SSI purposes. Distributions to Ms. M~ or for her benefit, however, may constitute unearned income in the month in which they are received, *see* 20 C.F.R. §§ 416.1121-416.1124, or cause the "presumed value rule" or "one-third reduction rule" to reduce Ms. M~ benefits. *See* 20 C.F.R. §§ 416.1130-1141; *see also* POMS SI 01120.200.

G. PS 06-142 SSI - Michigan - Review of the Life Insurance Funded Burial Trust for Barbara V~ D~ - REPLY Our Ref: 05-0199 Your Ref: S2D5G6, SI 2-1-4 MI (V~ D~)

DATE: May 24, 2006

1. SYLLABUS

This opinion evaluates whether a life insurance funded burial trust is a countable resource to an SSI beneficiary. In January, 2005 the beneficiary purchased a single premium life insurance policy that was subsequently assigned to a funeral home and transferred to a burial trust by the funeral home. A burial trust is not considered to be a countable resource if an individual irrevocably contracts with a provider of funeral services, funds the contract by prepaying for the goods and services, and the funeral provider places the funds in trust. The transaction ultimately resulting in formation of the trust is deemed to be a purchase of goods and services in those instances. In the case evaluated in this opinion the contract between the beneficiary and the funeral home fails to satisfy three of the Michigan state statutory requirements. As such, a Michigan court would likely find the assignment of proceeds is void. In the absence of a valid contract between the beneficiary and the funeral home, none of the burial trust exceptions can apply and the trust is determined to be a countable resource.

2. OPINION

You have asked whether the above-captioned, life insurance funded burial trust is a resource to Marilyn V~ D~ for SSI purposes. We have concluded that the burial trust would be considered a resource.

BACKGROUND

The National Guardian Life ("NGL") Insurance Policy ("policy"), purchased on January 21, 2005, identifies Barbara J. V~ D~ as the insured and Virginia K~ as the owner. The "Statement of Insured's Incapacity," signed by Ms. K~ (Ms. V~ D~'s sister), informs that Ms. V~ D~ is not capable of signing the application for insurance due to mental incompetence and that Ms. K~ has full authority to use the funds tendered as a premium for the policy. The policy has a single premium of $6,653.00 and does not state the minimum death benefit.

In the "Revocable Assignment of Life Insurance Policy and Death Benefit Proceeds," ("Assignment") executed on the same day, Ms. K~ assigned the proceeds of the life insurance policy to the Matthysse-Kuiper-DeGraaf Funeral Directors (Grandeville) to be used to pay for funeral goods and services upon the death of the insured, Ms. V~ D~. The Assignment specified that Ms. K~ could "cancel this assignment by writing to the Insurer any time before the funeral merchandise and services are provided by the Funeral Provider." Ms. K~ also entered into a funeral arrangement agreement with the funeral home.

Also on January 21, 2005, Ms. K~ signed an "Irrevocable Transfer of Ownership." In this document, Ms. K~ "transfer[red] ownership" of the life insurance policy to the funeral home "in return for the promise to deliver funeral services and merchandise," and for the promise "to immediately transfer ownership of the policy to the [National Guardian Life] American Trust." The document specified that Ms. K~ waived "all rights under the policy to surrender it for cash and to obtain a loan against the policy," and that the change in ownership was "permanent."

Under the Trust provisions, Ms. K~, as owner, retains the right to change the funeral provider before the funeral provider delivers the funeral services or merchandise. The Trust clarifies that this right should not be construed as meaning that the owner may regain ownership of the Policy's cash value or to permit the owner to transfer ownership of the Policy from the Trust (*See* 7).

DISCUSSION

As an initial matter, we note that Ms. K~ appears to be acting under a power of attorney on behalf of Ms. V~ D~. Therefore, any actions that Ms. K~ took with respect to the matter at hand should be attributed to Ms. V~ D~.

A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. § 416.1230. Michigan law provides that all life insurance policies must contain notice that the policyholder may cancel the policy and receive prompt refund of any premiums paid during a period of not less than ten days after the date the policyholder receives the policy. Mich. Comp. Laws 500.4015. As part of her application for the policy, Ms. K~ executed a "Notice of Cancellation" which provides that she may cancel the transaction within three business days after the date of the transaction. The statue, however, probably trumps the contrary policy language, and thus, pursuant to state law, the policy should be considered a resource for the first 10 days.

Next, we must determine whether the trust to which the policy was assigned was a resource after the initial, 10-day cancellation period. A trust established by an individual on or after January 1, 2000, as this one was, will be considered a resource, under federal law, if it is revocable, or even if it is irrevocable, to the extent that payments from the trust could be made to or for the benefit of the individual unless certain exceptions are satisfied. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(1)-(2). This rule applies if payments can be made for the benefit of the individual "under any circumstance, no matter how unlikely or distant in the future." POMS SI 011020.201(D)(2)(b).

But these provisions do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral goods and services and the individual funds the contract by prepaying for the goods and services, and either (1) the funeral provider subsequently places the funds in a trust, or (2) the individual establishes an irrevocable trust, naming the funeral provider as the beneficiary. POMS SI 01120.201(H)(1). The POMS explains that such a transaction is a "purchase of goods and services by the individual" and that the funeral home is considered to have established the trust. *Id.*

In addition, recent guidance from the Office of Income Security Program (OISP) indicates that when an individual irrevocably assigns ownership of a life insurance policy to purchase a revocable burial contract from a funeral provider and the provider places the policy in trust, the transaction constitutes a purchase of goods and services by the individual and not the establishment of a trust by the individual. *See* POMS SI 01120.201(H)(2) (third category of cases where "an individual enters into a revocable funeral contract with a funeral provider, even if the funeral provider places the money in a trust"). The subsequent trust created by the funeral provider is considered to be established by the funeral provider and not the individual, and the trust would then fall under the exceptions of POMS SI 01120.201(H)(1).

Significantly, for purposes of assessing Ms. V~ D~'s burial trust, each of these burial-trust exceptions requires that a valid contract exist between the individual and a funeral home. In this case, however, it appears that the Ms. V~ D~'s pre-need funeral arrangement does not meet all the state statutory criteria for a valid "pre-death assignment of the proceeds of a life insurance policy or annuity contract as payment for cemetery or funeral services or goods." Under Michigan law, each requirement must be met or the assignment will be deemed "void." Mich. Comp. Law 500.2080(6). The assignment here does not meet the following three conditions under Mich. Comp. Law 500.2080(6): the assignment does not contain the bold-faced language described in subsection (6)(d); the assignment does not describe the dispute resolution rights required by subsection 6(h); and the assignment does not contain certification that the insured has not contracted with any other funeral home for funeral goods or services, as required by subsection 6(l). *See* Mich. Comp. Law 500.2080(6)(d), (h), (l).

Because these statutory criteria are not met, a Michigan court would almost certainly find the assignment of insurance proceeds was void and, in the absence of an assignment of proceeds, the funeral home could never be paid for any services. Thus, there is no contractual relationship between Ms. V~ D~ and the funeral home. Without a valid contract between Ms. V~ D~ and the funeral home, the burial trust does not meet any of the statutory exceptions in POMS SI 01120.201(H)(1). As such, the statutory trust resource rules apply and the burial trust would be considered a resource to Ms. V~ D~ under 42 U.S.C. § 1382b(e)(3)(B).

CONCLUSION

We advise that the burial trust would be considered a resource to Ms. V~ D~ for SSI purposes. Under Michigan statutory law, an assignment of insurance proceeds as payment for cemetery or funeral services or goods is void unless a variety of criteria are met. In this case, because the funeral contract fails to satisfy three of the statutory requirements, a Michigan court would likely find the assignment of proceeds void. Because the funeral home could never be paid under such an arrangement, there is no

valid contract between Ms. V~ D~ and the funeral home. In the absence of a valid contract, the trust cannot meet any of the burial-trust exceptions outlined in POMS SI 01120.201(H)(1). As such, the trust is a resource to Ms. V~ D~ under the statutory trust resource rules. POMS SI 01120.201(D)(2)(a).

H. PS 06-060 SSI-Michigan-Review of Irrevocable Trust Agreement and Assignment of Annuity for Julia Z~ - REPLY Our Ref: 05-0194 Your Ref: S2D5G6, SI 2-1-3 MI (Z~)

DATE: February 3, 2006

1. SYLLABUS

A trust was established on 2/16/05 as a result of a personal injury settlement received by an SSI beneficiary. The settlement resulted in an annuity being purchased from an insurance company and the subsequent annuity payments being irrevocably assigned to the court-ordered trust. The trust language provides that the SSI beneficiary has no access to the trust and cannot direct use of the funds found therein. Language found in the trust dictates that, upon the beneficiary's death, any funds remaining in the trust will be distributed to applicable State Medicaid agencies for reimbursement prior to any payments to the SSI beneficiary's "heirs at law". A change in Michigan state law effective 4/1/00 establishes that "heirs at law" or similar language constitutes creation of a beneficial, or remainder, interest. Thus, the trust is irrevocable and meets the Medicaid Trust Exception. As such, the trust itself is excluded from countable resources, and the annuity payments irrevocably assigned to the trust are excluded from countable income.

2. OPINION

You asked whether the Julia Z~ Trust, dated February 16, 2005, is a resource to Julia and whether her annuity payments have been irrevocably assigned to the Trust (and thus would not be income) for purposes of determining eligibility for Supplemental Security Income (SSI). We conclude that the trust is not a resource and that the annuity payments have been irrevocably assigned for purposes of SSI eligibility.

BACKGROUND

On November 9, 2004, a settlement was reached in a certain personal injury lawsuit filed on behalf of Julia by her mother and plenary guardian of the person, Della Z~. To effect the settlement agreement, an annuity was purchased from an insurance company providing for a monthly life annuity for Julia in the amount of $637.61 per month, commencing on January 1, 2005. The payee for the annuity is listed as the "Julia K. Z~ Irrevocable Trust."

After a hearing on February 16, 2005, a Michigan probate court, upon the request of Della, entered an order on March 9, 2005, calling for the establishment of the Julia Z~ Irrevocable Trust, and further ordering that Della, as guardian, should execute the trust for and on behalf of the court. The court also ordered that the net proceeds from a certain personal injury lawsuit filed by Julia, including all future annuity payments, should be paid over to the trust. The court indicated that its order was made after hearing testimony and after reviewing a favorable report from a guardian ad litem.

On February 16, 2005, Della, as grantor and trustee, executed the "Irrevocable Declaration of Trust and Trust Agreement for the benefit of Julia Z~." The Trust provides that the trustee, in her sole and uncontrolled discretion, may make payments for Julia's benefit during Julia's lifetime. Article V. Julia has no power to demand distributions. Article V(B)(2). Upon Julia's death, the Trustee will first reimburse all states where Julia has received medical assistance payments for their proportionate share of Medicaid benefits, and will then make certain other payments for taxes, funeral expenses and other debts. Article VI(A). After that, the trustee will pay the residue as Julia appoints in her will, and in default of such an appointment, to Julia's heirs at law.

DISCUSSION

The Trust Is Not a Resource.

Generally, a grantor of a trust (and Julia should be considered the true grantor since she provided the funds for the Trust) can revoke her contributions to the trust if she is also the sole beneficiary of the trust, even if the trust purports to be irrevocable. *See* POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200; RESTATEMENT (THIRD) OF TRUSTS § 65 & comment a & Reporter's Note (2003). In this case, however, Julia is not the sole beneficiary of the Trust, and she could not unilaterally revoke her contributions to the Trust and recover those assets to use for her support and maintenance. Specifically,

the Trust indicates that Julia can appoint the Trust residue by will, and that, in default, the residue goes to her heirs at law. Although it is unclear whether the power of appointment creates a beneficial trust interest, RESTATEMENT (THIRD) OF TRUSTS §§ 44, 46 (2003), the designation of heirs at law clearly does, POMS SI CHI01120.200(D)(3). Accordingly the Trust is irrevocable.

Pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since Julia is the sole beneficiary during her lifetime), unless one of the exceptions in POMS SI 01120.203 applies.

Here, the exception in POMS SI 01120.203(B)(1) (Section 1917(d)(4)(A) of the Act) applies. This exception requires (1) that the trust be established with the assets of an individual under age 65 who is disabled; (2) that the trust be established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) that the trust provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made on behalf of the individual. These elements are satisfied since Julia is under age 65 and disabled; the Trust was established for her benefit by a court; and the Trust provides for reimbursement to Medicaid. We note that the Trust was actually established prior to entry of the court's order, but it was clearly established pursuant to the court's oral directive (on February 15, 2005), which was later memorialized in the March 2005 written order. And, state law permits a probate court to direct the creation of a trust, so long as certain preliminary findings are made, which we assume was the case here even though the probate court order did not explicitly articulate the findings (e.g., the Trust preamble indicates that the court determined the Trust to be in Julia's best interests). *See* MICH. COMP. LAWS ANN. §§ 700.5401(3), 700.5407(2)(c)(v), 700.5408(2) (West 2006) (requiring finding that individual is unable to manage property effectively and that trust is in individual's best interests).

However, even if a trust is not a resource under POMS SI 01120.201(D)(2), the Agency applies regular resource counting rules to determine if it is a resource. POMS SI 01120.200, SI 01120.203(B)(1). Under the ordinary resource rules, the trust principal will be a resource if (1) the claimant can revoke the trust and use the assets for her support and maintenance, or (2) the claimant can direct the trustee to pay her the funds or use the funds for his support and maintenance. POMS SI 01120.200(D). In addition, the claimant's interest in the Trust is a resource if it can be sold. POMS SI 01120.200(D).

As we have indicated, the Trust is not revocable. Nor does Julia have the power or authority to direct the use of the Trust property for her support and maintenance. Under the terms of the Trust, the Trustee has sole discretion to determine when payments will be made for her benefit. Finally, even if Julia could sell her beneficial interest in the Trust, that interest would have little or no value because the trustee is not required to make any payments for her benefit. *See* RESTATEMENT (THIRD) OF TRUSTS § 60 & comments e, f. Thus, the Trust is also not a resource under the regular resource rules.

B. The Annuity Payments Paid Directly to the Trust Pursuant to the Court Order Are Not Income to Julia.

Because the Trust is not a resource, the annuity payments made to the trust are not income to Julia if she has irrevocably assigned them to the Trust. POMS SI 01120.200(G)(1)(d). Although the court order states that the annuity payments will be made directly to Della, as trustee, if Julia could ask the court to modify the order so that the payments would be made directly to her, the annuity payments should be considered income to her. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Review of the Marital Settlement Agreement for Patricia J. and Floyd A. H~ and the Patricia J. H~ Special Needs Trust*, at 3-4 (Dec. 4, 2003).

It appears, however, that, as with the creation of the Trust, the court's order with respect to the annuity would have to be based on a finding that, among other things, the annuity assignment was in the best interests of Julia. MICH. COMP. LAWS ANN. § 700.5408(2) (West 2006) (probate court may direct transaction related to protected individual's property and business affairs only if court determines that transaction is in individual's best interests). Indeed, the court appointed a guardian ad litem for Julia, and indicated that it had reviewed the guardian's favorable report before issuing its order (thus indicating careful consideration of Julia's best interests). Accordingly, for Julia to convince the court to redirect the annuity payments to her, she (or Della, her guardian) would have to show that such a change was in her best interests. *Id.* This, however, is unlikely since we are not aware of any change of circumstance since the probate court hearing that would cause the court to reconsider its finding that assigning the annuity payments to the Trust is in Julia's best interests. Therefore, the annuity payments are, at this time, irrevocably assigned to the trust, and thus are not income under POMS SI 01120.200(G)(1).

CONCLUSION

For these reasons, we conclude that the trust is not a resource, and the annuity payments are not income.

I. PS 04-186 Michigan Life Insurance Funded Burial Trust for Patricia J. W~, ~; your Ref. No. S2D5B51, SI-2-1-4

DATE: October 10, 1997

1. SYLLABUS

The opinion in this case addresses two issues: 1) Is the SSI recipient's life insurance funded burial trust agreement valid under Michigan law? 2) Is the cash surrender value of the life insurance policy a countable resource? Under Michigan law, a person entering into an irrevocable prearranged funeral contract reserves the right to change funeral providers, although not the right to terminate the underlying services to be rendered. In this case, the trust agreement makes clear that the trust is irrevocable and that the SSI recipient retains the right to change funeral providers but cannot surrender the policy for cash or obtain a loan against it. Consequently, under Michigan law, the life insurance funded burial trust is valid. With regard to whether or not the cash surrender value of the life insurance policy is a countable resource, the SSI recipient no longer owns the policy or has the ability to use it for support and maintenance thus it is not a countable resource for SSI purposes.

2. OPINION

This is in reply to your September 23, 1996 inquiry concerning whether the life insurance funded burial trust agreement for Patricia W~, an SSI recipient, was valid under Michigan law. For the following reasons, we conclude that the trust agreement is valid, and the cash surrender value of the life insurance policy is not a countable resource.

FACTS

On May 23, 1996, Ms. W~ redeemed $4,396.80 in savings bonds. On May 25, 1996, she purchased $4,298.88 in funeral merchandise and services from funeral provider, G~-R~ Company. Specifically, Ms. W~ purchased a $2,000 irrevocable trust, a guaranteed trust in the amount of $1060.00, and a life insurance policy with a face value of $1,424.00.

Services such as embalming, and "basic services of the funeral director and staff" were funded by the irrevocable trust. The casket and outer burial container were funded by the guaranteed trust. Items including unspecified "professional services," memorial cards, and death certificates were funded by the life insurance policy.

The life insurance policy was transferred to the funeral provider, and then to an trust. This trust purports to be irrevocable but allows Ms. W~ the option to obtain the contracted for funeral services with a different funeral provider if she so desires. You asked whether, under these facts, the life insurance funded trust agreement was valid.

DISCUSSION

A life insurance funded burial contract involves an individual purchasing a life insurance policy in his name and then assigning, revocably or irrevocably, either the proceeds or ownership of the policy to a third party, generally a funeral provider. The purpose of the assignment is to fund a pre-arranged burial contract. *See* Program Operating Manual System (POMS) § SI 01130.425(A)(2). Here, ownership of Ms. W~'s life insurance policy was transferred to the funeral provider, and then to an irrevocable trust. Since the policy was placed in trust, the resource value of the trust must be evaluated according to the rules governing trust funds in order to determine whether it is a countable resource for SSI purposes. POMS §§ SI 01130.425(A)(2), SI 01120.200(E).

The "Irrevocable Transfer of Ownership" trust agreement in this case provides that Ms. W~ waived all rights under the insurance policy to surrender it for cash or to obtain a loan against it. Because this transfer is permissible under state law, the trust is irrevocable. The agreement also provided that Ms. W~ "reserves the right to revoke any assignment of benefits and to change the designated Funeral Provider" named in the insurance policy. So the question becomes whether a revocably assigned life insurance policy placed in an irrevocable trust is a countable resource.

A resource, for SSI purposes, is defined as property that the SSI beneficiary owns and can convert to cash, or property or over which the beneficiary has the right, authority, or power to liquidate. 20 C.F.R. § 416.1201. In applying this definition to trusts, the POMS states that if the claimant neither owns nor has the legal right to direct the use of trust assets to meet his support or maintenance needs, and state law allows a revocably assigned life insurance policy that funds a funeral contact to be placed irrevocably in trust, the policy's cash surrender value is not a resource for SSI purposes. SI 01130.425(E)(1).

In 1986, the state of Michigan enacted the Prepaid Funeral Contact Funding Act (PFCFA), which applies to all agreements entered into after March 31, 1987, and makes such agreements generally revocable. *See* MCL §§ 328.204, 328.223. *See* OGC V (L~) to ARC-POS (M~) "SSI Regional Transmittal Concerning Michigan Burial Contracts" (May 20, 1996 (approx.)) However, the PFCFA exempts from revocability certain contracts approved by the Michigan Department of Social Services. *Id.; see also* MCL § 328.228(2). Ms. W~ apparently applied to have the irrevocable funeral contract certified by the Michigan Department of Social Services. The pertinent section indicates that a person entering into an irrevocable prearranged funeral contract reserves the right to change funeral providers, although not the right to terminate the underlying services to be rendered. That is, an irrevocable prearranged funeral contract "shall permit the depositor of the funds in the account to alter the agreement to provide for a different party to provide the [funeral services], but in any event the funds in the account shall be used only to provide [funeral services]." *See* M.L.A. § 328.202(3); *see also* M.L.A. § 328.229(2) (1992). Here, the trust agreement makes clear that the trust itself is irrevocable and that Ms. W~ simply retains the right to change funeral providers, not that she is able to surrender the policy for cash or to obtain a loan against it. Consequently, pursuant to Michigan law, the life insurance trust in this case is valid.

The insurance policy has been transferred to a valid irrevocable trust, and Ms. W~ no longer owns the policy or has the power to use it for her support and maintenance. The cash surrender value of Ms. W~'s life insurance is therefore not a countable resource for SSI purposes. *See* 20 C.F.R. § 416.1201(a); POMS SI 01130.425(E).

CONCLUSION

We conclude that Ms. W~'s irrevocable life insurance funded burial trust agreement is valid under Michigan law, despite her retained ability to change funeral providers. Additionally, the cash surrender value of the life insurance policy is not a countable resource for SSI purposes.

Thomas W. C~
Chief Counsel, Region V

By: _____
Aryka S~ R~
Assistant Regional Counsel

J. PS 04-172 SSI-Michigan-Review of a Trust for Michael Z~, ~-ACTION

DATE: November 22, 1999

1. SYLLABUS

This 1999 opinion concerns a Michigan trust and concludes that the trust is a countable resource for SSI purposes because it is a support trust. In general, a support trust imposes on the trustee the obligation to provide funds for the support of the beneficiary. In this case, the trust imposes such an obligation which gives the beneficiary a judicially enforceable right to receive support.

2. OPINION

You asked us to review a trust dated August 11, 1994, to determine whether the funds placed in trust would be a countable resource to Michael Z~, a minor recipient of Supplemental Security Income payments. For the following reasons, we believe that the money in trust is available for use for Michael Z~'s support and maintenance. Therefore, it is a countable resource to him.

FACTS

We base our opinion on the following facts that have been provided to us. According to a Report of Contact dated April 27, 1998, the trust includes $12,000 from a *Zebley* retroactive benefit award. Michael Z~, the grantor, is the SSI beneficiary and is a minor. His mother, Pamela Z~, is his representative payee and is named as trustee.

The trust document is not wholly clear. It is dated August 11, 1994 "between" Michael Z~, as "Trustor," and Pamela Z~, as "Trustee." Article 1 of the trust purports to transfer funds held in the "Putnam Investment Fund" irrevocably to the trustee to hold and administer. Article 2 or the trust sets out that the trustee will "receive and hold" the investment "for the use and

benefit of" Michael Z~. Apparently inconsistently, Article 2 continues and states that "I hold . . . said securities . . . IN TRUST to the following named beneficiary: Thomas P. Z~ -my father." Later, in Article 4, the trust states that it is "my intention to make to the beneficiary named herein an absolute gift of the asset described" in Article 1.

DISCUSSION

The trust document presented here raises numerous questions concerning its validity and terms. We will not attempt to address all of these possible issues, however, because the trust does provide that the funds in question were given to the trustee "for the use and benefit of" Michael Z~, the SSI recipient. Because the trust allows the use of the funds for his support and maintenance, the amounts in trust are a countable resource to him.

An asset is a resource to an individual if it is cash or if the individual can convert it to cash and use it for his or her support and maintenance. 20 C.F.R. § 416.1201(a) (1999).

If the individual has the right, authority, or power to liquidate the property or his or her share of the property, it is considered a resource.

20 C.F.R. § 416.1201(a)(1). Property held in trust for an individual is a resource if (1) the individual can direct the trustee to use the property for his or her support and maintenance; (2) the individual can revoke or terminate the trust and gain access to the trust property and use it for his or her support and maintenance; or (3) the individual can transfer his or her interest in the trust and use the proceeds for support and maintenance. *See* POMS SI 01120.200(D)(1). Here, the trust document is unclear. It is possible that the trust is either invalid or revocable. (If the trust is invalid or revocable, it is a resource to Michael Z~.) Regardless, the trust expressly allows the trustee, Michael Z~'s mother, to access the trust property and use it for his support and maintenance. Therefore, the property in trust is Michael Z~'s resource.

The declaration of trust states that "[t]he Trustee shall receive and hold said investment in Trust for the use and benefit of: Michael Z~ Trustor." This language suggests what Michigan courts refer to as a "support trust." *See Miller v. Dep't of Mental Health*, 442 N.W.2d 617, 618 (Mich. 1989) (there are three types of trusts: trusts giving the right to receive some portion of the income or principal; support trusts; and discretionary trusts). A support trust is one that provides that the trustee shall pay so much of the income or principal as necessary for the education or support of the beneficiary. *Id.*; *see also 1 Restatement of Trusts (Second)* § 154. Here, the trust document requires the trustee to use the trust property "for the use and benefit of Michael Z~" and does not provide any standards by which the trustee should exercise discretion in the use of the property. Because the trust document imposes on the trustee the duty to use the funds for Michael Z~'s "use and benefit," it is a "support trust." A support trust imposes on the trustee the obligation to provide funds for the support of the beneficiary. Here, the support trust imposes on his mother as trustee the duty to provide funds for the support of Michael Z~, and, as a result, it gives Michael Z~ the entitlement to enforce payment of such amount. *See Miller*, 442 N.W.2d at 619-20 (support trust gives beneficiary a judicially enforceable right to receive support).

Because under Michigan law this trust is a support trust, Michael Z~ has the right to enforce payment of his support by the trustee. *Id.* Consequently, the funds in the trust are available to be used for Michael Z~'s support and maintenance. The funds in trust are a countable resource.

CONCLUSION

For the foregoing reasons, we believe that the property in trust in this matter should be considered a resource to Michael Z~. The trust appears to be a support trust, and Michael Z~ would have a judicially enforceable right to command the trustee to provide necessary support payments from the trust.

Sincerely,

Thomas W. C~
Acting Regional Chief Counsel

By: _____
Michael C. M~
Assistant Regional Counsel

K. PS 03-103 SSI-Michigan-Review of the Transfer of Life Insurance Proceeds to the Pre-Thana Trust for Previsteria S. G~

DATE: March 10, 2003

1. SYLLABUS

In this opinion, OGC found that an insurance policy assigned to a trust was a resource for SSI purposes because the owner retained the power to revoke the agreement and could convert the policy to cash which she could use for her support and maintenance. While the trust established by the funeral provider was irrevocable, the assignment of the insurance proceeds was revocable. Once the 10-day cancellation period under the policy lapsed, the cash surrender value of the insurance policy, i.e., the value of the trust, became a countable resource to the owner. Further, OGC concluded that the undue hardship provision explained at SI 01120.203E. need not be considered in this case because the trust was revocable.

2. OPINION

You asked whether the subject life insurance funded burial trust is a countable resource for Ms. G~ for purposes of SSI eligibility. We conclude that the trust is a resource under federal law. Furthermore, the undue hardship exception would not appear to apply in this case because the trust is likely revocable.

FACTS

On November 19, 2002, Ms. G~ purchased a life insurance policy with a single premium of $3,000. The minimum death benefit amount is not stated in the policy application. Also on November 19, 2002, Ms. G~ signed a "Revocable Assignment of Life Insurance Proceeds," in which she assigned the proceeds of her life insurance policy with Fortis Benefits Insurance Company to the Bagnasco & Calcaterra Funeral Home to be used to pay for funeral goods and services upon her death. The Assignment specified that it could "be revoked by the assignor or assignor's successor. . . or by the representative of the insured's estate before the rendering of the funeral services or goods." That same day, Ms. G~ also signed a "Change of Ownership to Funeral Firm and Pre-Thana Trust." The state purpose of the "Change of Ownership" agreement was to "transfer ownership" of the life insurance policy to the funeral home in return for the promise to deliver funeral services and goods, and "for the promise of the Funeral Firm to immediately transfer ownership of the policy to the Pre-Thana trust" on Ms. G~'s behalf. The "Change of Ownership" agreement specified that the change of ownership was "permanent" and that Ms. G~ renounced her power to control the policy, and that she waived "all rights under the policy to surrender it for cash and to obtain a loan against the policy." Under the trust provisions, Ms. G~ (or her representative) retains the right to purchase funeral services or merchandise from another vendor and change the designated Funeral Firm under the Pre-Thana trust.

DISCUSSION

However, statutory provisions at 42 U.S.C. § 1382b(e)(3)(B) will apply where an individual establishes a burial trust with his or her own assets but does not enter into a pre-need funeral contract with a funeral provider; or the individual enters into an irrevocable funeral contract with a funeral provider, but establishes a revocable trust to fund the contract; or the individual enters into a revocable funeral contract with a funeral provider, even if the funeral provider places the money in a trust. POMS SI 01120.201H.2. In these circumstances, the individual, rather than the funeral home, is considered, for federal law purposes, to have established the trust.

Here, Ms. G~'s assignment of life insurance proceeds to the funeral home is, by its very terms, revocable. The first numbered paragraph of the agreement expressly states that the assignment can be revoked "by the assignor or assignor's successor" or by the representative of the insured's estate after her death at any time before the rendering of funeral goods and services. Therefore, even if the trust is irrevocable, as it purports to be, and even if the insurance policy has been irrevocably assigned to trust, the trust (and therefore the policy held in trust) is a resource to Ms. G~ under federal law. POMS SI 01120.201.H.1. - 2. The value of the trust, after any cancellation period under the policy, is the cash surrender value of the lift insurance policy. 20 C.F.R. § 416.1230.

SSA may waive application of the statutory trust counting provisions if the individual is ineligible for benefits by virtue of counting an irrevocable trust as a resource and if the individual meets the criteria for undue hardship. *See* 42 U.S.C. § 1382b(e)(4); POMS SI 01120.203C.2.a.; *Exclusion of Certain Burial Trusts from Section 206 of Public Law Number (Pub. L. No.) 106-169*, Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development (Aug. 29,

2000). When evaluating whether the individual has established undue hardship, the Agency would not consider the assets in an irrevocable trust to be available funds. *Id.* Here, however, it appears that the Pre-Thana trust is revocable.

The documents submitted suggest that the parties intended the trust to be irrevocable. However, the trust must be evaluated under Michigan law to determine whether the trust may be revoked under state law. In general, where a grantor is also the sole beneficiary of the trust, he or she can revoke or compel termination of the trust, even when the trust declaration states that the trust is irrevocable. Restatement (Second) of Trusts § 339, cmt. a (1959); POMS SI 01120.200D.3. The issue then becomes whether Ms. G~ is the sole beneficiary of the trust. If a grantor who is also a beneficiary manifests an intention to create a vested or contingent interest in someone other than herself, she is not the sole beneficiary. Restatement (Second) of Trusts § 339, comment b. Where a grantor is not the sole beneficiary, she cannot revoke the trust without the consent of the other beneficiaries. We have previously advised that these general trust principals apply in Michigan. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm. - MOS, Chicago, *Six State Synopsis of Trust Laws* (10/16/02); *Hein v. Hein*, 543 N.W.2d 19, 20 (Mich. App. 1995) (even irrevocable trust may be terminated with consent of grantor and all beneficiaries).

Here, Ms. G~ is the sole beneficiary of the trust because the trust proceeds are intended to provide funeral goods and services to her upon her death and she did not manifest an intention to create a vested or contingent interest in someone other than herself. Although her daughter is the named beneficiary of the life insurance policy, there is no evidence that she was an irrevocable beneficiary of that policy or the trust and no evidence that her consent was necessary in order for Ms. G~ to assign the policy to a third party. In addition, it is not necessary to determine whether the funeral home is an intended beneficiary of the trust because Ms. G~'s assignment of her life insurance policy to the funeral home is clearly revocable. Therefore, Ms. G~ is the grantor and sole beneficiary of the trust and the trust is revocable under Michigan law. As such, the Agency cannot waive application of the statutory trust counting provisions even if Ms. G~ could meet the undue hardship criteria. *See* 42 U.S.C. § 1382b(e)(4); POMS SI 01120.203C.2.a.

CONCLUSION

We conclude that the Pre-Thana trust and, thus the insurance policy assigned to the trust, is a resource for SSI purposes because Ms. G~ has the power to revoke the agreement and convert the policy to cash, which could be used for her support and maintenance. The value of the life insurance policy during any cancellation period, which should have been at least ten days (and should be evidence from looking at the policy), is the premiums that had been paid as of that time. After the cancellation period, the value is the cash surrender value of the policy. The undue hardship exception to counting the trust likely need not be considered since the trust appears to be revocable because Ms. G~ appears to be the sole beneficiary of the trust.

Sincerely,

Gary A. S~
Acting Regional Chief Counsel

By: _____
Danielle A. P~
Assistant Regional Counsel

L. PS 01-232 SSI-Michigan-Reconsideration of the Sylvia A. C~ Civil Service Pension Trust, SSN ~

DATE: November 26, 2001

1. SYLLABUS

Federal law prohibits the assignment of a Civil Service Pension annuity to a trust. Therefore, for the purposes of SSI eligibility, the Civil Service Pension Trust assets are a countable resource and the annuity payments are unearned income when received.

2. OPINION

On January 10, 2001, we advised the Agency that a Civil Service Pension Trust established for Sylvia C~, the developmentally disabled daughter of a retired civil servant, constituted a countable resource for purposes of determining her SSI eligibility. We explained that federal law prohibits the assignment of the Civil Service Pension annuity to a trust and, therefore, the "trust" assets should be considered a resource, and the annuity payments should be considered unearned income for purposes of SSI

eligibility. You have asked us to address Ms. C~ request for reconsideration of our earlier decision. We have considered each of Ms. C~ arguments, but still conclude that the pension was not assignable to trust.

Background

As the developmentally disabled daughter of a retired civil servant, Ms. C~ is eligible for a Civil Service Pension Annuity through her father, Guido J. C~. Upon his death, Guido C~ directed that his daughter's United States Civil Service Annuity be placed into trust. *See* First Codicil to Will and Testament, Paragraph I. In accordance with Guido C~ wishes, the Wayne County Probate Court ordered that all money received from Ms. C~ Civil Service Survivor Annuity be placed into a trust. *See* Order of Wayne County Probate Court. The Court further ordered that all trust assets be expended only in accordance with the terms of Mr. C~ will and codicil. *Id.* Guido C~ will appointed Ms. C~ siblings as co-trustees and stated that the trust assets should not be used for his daughter's "basic day to day care for food, shelter and clothing, but only for extraordinary care or needs." *See* C~ Will, § VI, Paragraph 2.

DISCUSSION

Ms. C~ has made several arguments in support of her claim that the annuity payments assigned to the trust are not a resource to her. We do not believe that any of her arguments are convincing, and that the Agency properly found the assets are a resource. We address each of her arguments in turn below.

(1) The assignment to trust was invalid under federal law.

Ms. C~ argues that the Trust assets are not her resource because the Trust is overseen by the Wayne County Probate Court and there are restrictions on the use of and access to the Trust monies. *See* June 4, 2001 letter. However, as we previously stated, we are doubtful that Ms. C~ father had the power or authority after his death to assign the assets on her behalf in his will. Even if he had the power or authority to act on her behalf when he was living, this power would terminate upon his death. Furthermore, if Ms. C~ was the beneficiary of the pensions funds, the funds passed to her upon her father's death, and not to her father's estate.

In any event, even if Ms. C~ father had the power or authority to assign Ms. C~ assets after his death, federal law prohibits the assignment into trust of a Civil Service Pension Annuity. *See* 5 U.S.C. § 8346(a). Because this type of annuity is non-assignable by law, it may not be paid directly into a trust to avoid SSI eligibility. *See* POMS SI 01120.200G.1c. Therefore, the father's assignment of Ms. C~ annuity into trust was invalid.

Because the assignment of Ms. C~ annuity payments into trust was invalid under federal law, the provisions of Guido C~ will cannot govern Ms. C~ use of those annuity payments. Instead, we must look to federal law governing pension annuity expenditures. 5 U.S.C. § 8345(e) expressly states that civil service retirement annuity payments to which a minor child or legally disabled individual is entitled may be paid to a guardian or representative payee “legally vested with the care of the claimant.” Consequently, Ms. C~ annuity was paid to Dottie S~ (Ms. C~ sister and legal guardian) as a representative payee, not as trustee. Thus, the Agency should reject Ms. C~ argument (3(e) in the June 4, 2001 letter) that the CSRS statute, 5 U.S.C. § 8345(e), allows for payment of the CSRS funds to trustees, since the trustees are “fiduciaries” of a mentally incompetent person or person under other legal disability.

In order to meet her obligations as representative payee, it will be necessary for Ms. S~ to make the annuity available for use in meeting the ordinary and necessary expenses related to Ms. C~ care. Because Ms. S~, the representative payee of the annuity, is required to use the annuity for Ms. C~ ordinary care, the annuity payments made to her for Ms. C~ benefit were and are income to Ms. C~, and any funds held in the invalid “trust” were and are a resource to her, under section 1612(a)(2)(B) of the Act, and 20 C.F.R. § 416.1121.

(2) The Agency is not required to ignore Ms. C~ resource simply because it previously found that the annuity payments were not a resource.

In August 1993, the Agency determined that Ms. C~ annuity payments paid to and held in “trust” were not income or resources for purposes of SSI eligibility. That determination became final and binding. Continuing resource and income determinations in SSI cases are made each month after the claimant begins receiving benefits. *See* 20 C.F.R. §§ 416.1123(a), 416.1207. Each such determination is deemed an “initial determination.” *See* POMS SI 04070.015 thru SI 04070.030(A)(1).

The regulations allow the Agency to reopen SSI determinations within one year of an initial determination for any reason and within two years of an initial determination for good cause shown. *See* 20 C.F.R. § 416.1488. Good cause for reopening is shown where it is clear on the face of the evidence that an error was made in making the determination. *See* 20 C.F.R. § 416.1489. There is an error on the face of the evidence in the determination that Ms. C~ annuity payments were paid to and held in "trust," and therefore were not income or resources to her. Therefore, the Agency may reopen the deemed initial determination on eligibility for each month dating back two years.

Furthermore, it is well settled that the Government cannot be stopped on the same terms as any other litigant or party. *See Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 60 (1984). When the Government is unable to enforce the law because the conduct of its agents has given rise to an stopped, the interest of the citizenry as a whole in obedience to the rule of law is undermined. *Id.* Therefore, the Agency should also reject Ms. C~ argument that it must be bound by its previous incorrect determination.

(3) Ms. C~ has provided insufficient evidence that OPM consented to the assignment or that she meets any of the other exceptions under 5 U.S.C. §§ 8346(h) or (j).

In part (a) of her third argument, Ms. C~ alleges that, before he died, her father wrote to the U.S. Civil Service Commission and asked whether the annuity payments could be paid to the co-trustees of the trust he established in his will. Ms. C~ alleges that the response indicated that "[t]he person or institution having care and custody of your daughter can arrange for payments to go into an established trust." This alleged response from OPM is essentially consistent with the Agency's conclusions. OPM's alleged response confirms that the annuity payments could not be assigned directly into trust, but that, after they are received, the payee may have some discretion about how to spend the funds for the care and maintenance of Ms. C~.

In any event, Ms. C~ interpretation of POMS response is entirely inconsistent with OPM's express action in similar cases. OPM has consistently acknowledged that federal law prohibits the direct assignment into trust of CSRS payments, and that funds from the CSRS must be used by the representative payee for the care and maintenance of the annuitant. *See* Office of Personnel Management letter, attached.

In parts (b) and (d) of her third argument, Ms. C~ argues that we should infer that CSRS's legal department decided that it was permissible for the payments to be assigned into trust, since all of the payments have been made to the trust and not to Ms. C~ directly. Ms. C~ relies on a statutory provision that allows individuals to make allotments or assignments of amounts from the annuity "for such purposes as the Office of Personnel Management in its sole discretion considers appropriate." 5 U.S.C. § 8345(h). However, the mere fact that OPM might be making the payments directly to the trustees or the trust itself is not conclusive evidence that OPM affirmatively exercised its discretion to find that the assignment into trust was permissible. In fact, OPM has expressly limited its discretionary exception to the rule against assignment to situations involving allotments to organizations. *See* 5 C.F.R. § 831.1511; *Neikirk v. Massanari*, No. 00-1459, 2001 WL 776812, at *3 (10th Cir. July 11, 2001); *SSA Baltimore Federal Credit Union v. Bizon*, 52 B.R. 338, 345 (D. Md. 1984)("the regulations issued by [OPM] indicate that [the right of assignment in § 8345(h) is severely restricted."). The Agency's position is also consistent with the legislative history of 5 U.S.C. § 8345(h)(originally § 8345(g)), which indicates that this provision was enacted to give Federal annuitants the same rights as Federal employees, who were permitted "to make allotments or assignments from their pay for purposes prescribed by regulations of the Civil Service Commission [now OPM]. Such purposes [included] charitable contributions, dues to labor organizations, family support and savings." *See* S. Rep. No. 537, at 1 (1975), reprinted in 1975 U.S.C.C.A.N. 2064, 2065.

As previously noted, OPM has expressly stated that it does not approve of the assignment of CSRS annuity payments into trust. *See* OPM letter, attached (discussing a case factually similar to this one).

(4) Federal law provides that CSRS annuity payments are not subject to legal process.

Finally, in part (d) of her third argument, Ms. C~ argues that her father's will constitutes a "legal process," which falls within the category of exceptions in § 8346(h). Contrary to Ms. C~ assertions, federal law provides that CSRS payments are not subject to legal process. 5 U.S.C. § 8346(a) ("The money...is not assignable...or subject to execution, levy, attachment, garnishment or other legal process...")(emphasis added). Thus, the probate court was without authority to assign the CSRS payments to trust.

CONCLUSION

None of Ms. C~ arguments change our earlier determination that Ms. C~ annuity payments could not be assigned to a trust. Therefore, the annuity payments should have been considered income when received and a resource when held in the invalid "trust."

M. PS 01-227 SSI-Michigan-Review of the Ashlee N~ Trust SSN: ~

DATE: November 7, 2001

1. SYLLABUS

The issue concerns whether or not the funds held in the irrevocable trust are countable resources for SSI purposes. Under Michigan Law, the recipient is not considered the sole beneficiary of the trust, and cannot unilaterally revoke the trust. Moreover, the recipient cannot direct use of the assets for maintenance and support under the terms of the trust or sell the interest in the trust and use the proceeds for support and maintenance. Recognizing these facts, the trust assets are not considered resources for SSI purposes. However, although the trust principal is not a countable resource, disbursements from the trust, under certain circumstances, would be countable income for determining SSI eligibility and level of benefits.

2. OPINION

INTRODUCTION

You asked us to review a trust agreement created by the St. Clair Circuit Court for the benefit of Ashlee N~ to determine whether the funds placed in the trust constitute a countable resource for Supplemental Security Income (SSI) purposes. For the reasons set forth below, our opinion is that the trust is not a countable resource. However, any distributions or in-kind payments from the trust that are used for the support and maintenance of Ashlee N~ and any cash distributions paid directly to Ashlee N~ would be countable income for SSI purposes.

BACKGROUND

On September 3, 1998, the St. Clair Circuit Court entered an order establishing the "Ashlee M. N~ Irrevocable Trust." The trust agreement provides that the trust is established for the benefit of Ashlee N~, who has multiple physical and developmental disabilities arising from birth trauma. The trust is funded from proceeds resulting from the settlement of litigation associated with the birth trauma. The trust agreement names Michelle B~ (Ashlee's mother) and Comerica Bank as the trustees. The trust states that it is established pursuant to 42 U.S.C. § 1396p(d)(4)(A).

The trust provides that, during Ashlee's lifetime, any person may transfer property to the Trustee for the trust. Article Two. The trust states that it is irrevocable. Article Three. The trust states that trust shall not be construed as a support trust and is established as a purely discretionary trust. Article Five, para. B, section 2. The trustee has sole and uncontrolled discretion to pay to Ashlee or for her benefit any portion of the income or principal of the trust. Article Five. The primary purpose of the trust is to provide for the "greatest degree of security" for Ashlee, who has multiple disabilities. Article Five, para. A. The trust is intended to benefit Ashlee by providing for her extra and supplemental items over and above the benefits she may be entitled to receive from any governmental or private programs as a result of her special needs. Article Five, para. B, section 1.

Distributions from the trust are at the complete discretion of the trustee and may include, but are not limited to, payments for medical and dental expenses, rehabilitative training, adaptive equipment and therapy, tutoring expenses, entertainment and recreation, funeral and burial arrangements, advocacy on her behalf, and a home or a vehicle. Article Five, para. D, section 1. The trust states that Ashlee has no power or authority to compel the trustee to make distributions to her. Article Five, para. D, section 2.

The trust document contains a spendthrift provision that purports to protect the trust assets from any claims by a beneficiary's creditors and forbids any beneficiary from selling or in any manner disposing of his or her interest in the trust or the income it generates. Article Seven.

Ashlee is the sole beneficiary of the trust during her lifetime, and the trust states that it is primarily for her benefit and only "incidentally" for the benefit of those who would receive the balance of the trust upon her death. Article Five, para. B, section 4.

The trust provides that it will continue until Ashlee's death or until all trust funds are expended on her behalf. Article Six. If assets remain at the time of Ashlee's death, the trustee shall first reimburse all states where Ashlee received medical assistance payments. Article Six, para. A. The trustee shall then pay all estate, inheritance or other similar taxes, including funeral and reasonable administration expenses. Article Six, para. A. The residue and remainder of the trust shall be distributed in equal shares to Ashlee's surviving issue, by right of representation. Article Six, para. B. If Ashlee leaves no surviving issue at her death, the residue is distributed to her heirs at law, with distributions made as though she had died intestate under the laws of Michigan in effect at the time of her death. Article Six, para. B. The trust document states that, as of the date on which the trust was established (September 3, 1998), Ashlee's heirs would be her mother and her father (or the survivor of them), and thereafter, her younger sister. Article Six, para. B.

DISCUSSION

Trust assets are resources if the SSI recipient can: terminate the trust and use the assets for food, clothing, and shelter; direct the use of the assets for personal maintenance and support under the terms of the trust; or, sell the interest in the trust and use the proceeds for support and maintenance. 20 C.F.R. § 416.1201(a); POMS SI 01120.200(D)(1)(a). We conclude that the trust is not a resource under any of these tests.

A. Can Ashlee terminate the trust?

In general, where a grantor is also the sole beneficiary of a trust, he or she can revoke or compel termination of the trust, even when the trust declaration states that the trust is irrevocable. Restatement (Second) of Trusts § 339, comment a (1959); POMS SI 01120.200(D)(3). Because this trust was funded with the proceeds of a personal injury suit brought on Ashlee's behalf, she is the grantor. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't. Reg. Comm.-MOS, Chicago, Review of a Trust for Anthony C~ (6/29/01) (hereinafter C~ Review); *In re Johannes Trust*, 479 N.W. 2d 25, 30 (Mich. App. 1991).

The issue then becomes whether Ashlee is the sole beneficiary of the trust. If a grantor who is also a beneficiary manifests an intention to create a vested or contingent interest in someone other than herself, she is not the sole beneficiary. Restatement (Second) of Trusts § 339, comment b (1959). Here, the trust provides that any remaining residue from the trust upon Ashlee's death after the state is reimbursed and her last expenses are paid, shall be distributed to Ashlee's issue, or if there are no surviving issue, then to Ashlee's heirs at law. Previously, OGC advised that a grantor trust, created under Michigan law, which names only “heirs at law” as residual beneficiaries, is revocable and therefore, would be countable as a resource. *See C~* Review; Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm.-MOS, Chicago, Michigan Trust for Arthur J. F~ (7/15/97). However, there has been a recent change in Michigan law. Effective April 1, 2000, the new law states that language in a governing instrument describing the beneficiaries of a disposition as the transferor's “'heirs' [or] 'heirs at law' . . . does not create or presumptively create a reversionary interest in the transferor." Mich. Comp. Laws § 700.2719 (West 2000). The law provides that, absent evidence to the contrary, this language manifests an intent to create a beneficial interest in a particular class of people. *See* Mich. Comp. Laws § 700.2719. Here, Ashlee appears to have intended just that, since she specifically names certain individuals. The new Michigan law applies to trusts created before April 1, 2001, as it appears Ashlee's trust was. *See* Mich. Comp. Laws § 700.8101. In any event, the naming of Ashlee's issue probably would be sufficient to create additional beneficiaries even under prior law. Restatement (Second) of Trusts § 127, comment b.

We believe that the provisions in the trust must be read as creating a contingent interest in Ashlee's issue and heirs. She is therefore not the sole beneficiary of the trust, and cannot unilaterally revoke the trust.

B. Can Ashlee direct the trustees to use the trust for her support and maintenance or sell her interest in the trust?

Ashlee also could not direct the use of the assets for her maintenance and support under the terms of the trust or sell the interest in the trust and use the proceeds for support and maintenance. The trust states that the trustee has sole and uncontrolled discretion to pay to Ashlee or for her benefit any portion of the income or principal of the trust and that under no circumstances shall Ashlee serve as trustee or have any power or authority to compel the trustee to make distributions to her. Articles Four, para. A, and Five. Given that the trustees have full discretion as to whether or not to make payments from the trust, Ashlee could not direct the use of assets, and we assume that her beneficial interest in the trust would have no significant fair market value, even if it is sellable. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm.-MOS, Chicago; Review of Supplemental Needs Trust for Christopher S~ (9/21/01); Restatement (Third) of Trusts § 60 and comment f (Tentative Draft No. 2, Mar. 10, 1999).

B. How do we treat disbursements from the trust?

Although the trust principal is not a countable resource, disbursements from the trust, under certain circumstances, would be countable income for determining Ashlee's SSI eligibility and level of benefits. *See* POMS SI 01120.201(I)(1). If the trustee were to authorize disbursements from the trust consisting of cash paid directly to Ashlee or payments to a third party for any food, clothing, or shelter received by Ashlee, such disbursements or in-kind payments would constitute income for SSI purposes. *See* POMS SI 01120.200(E)(1)(a)-(b). Trust disbursements resulting in Ashlee's receipt of goods or services other than food, clothing, or shelter—such as medical care— would not constitute countable income for SSI purposes. *See* POMS SI 01120.200(E)(1)(c).

CONCLUSION

For the foregoing reasons, we conclude that the trust assets are not a resource to Ashlee, but that trust disbursements may, under some circumstances, constitute income to her.

N. PS 01-183 SSI-Michigan—Review of a Trust for Anthony C~

DATE: June 29, 2001

1. SYLLABUS

This trust is not a resource for SSI because the beneficiary cannot revoke the trust, direct the use of the funds for his support and maintenance or sell his beneficial interest. However, disbursements from the trust may be income to the beneficiary.

Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00.

2. OPINION

You have requested an opinion on whether the assets of the "Anthony C~ Irrevocable Trust" count as a resource of Anthony C~ for purposes of determining his SSI eligibility and whether a change in Michigan law creates an exception to OGC's previous opinions. For the reasons discussed below, our opinion is that the trust is not a countable resource.

FACTS

On May 4, 1994, the Oakland County Probate Court of the State of Michigan entered an Order Appointing Trustee and Establishing Trust Agreement. That Order states that "all payments from the 1982 settlement" shall be received into the Trust. A report of contact verified that the money in the trust came from the settlement of a malpractice suit brought on Anthony's behalf as an infant. The Order appoints Richard and Mary C~ as trustees.

The trust declaration provides that its primary purpose is to "provide for the greatest degree of security" for Anthony, who has developmental disabilities, and that the trustees are authorized to pay any portion of the income or principle of the trust for the benefit of Anthony "or his issue." Trust Declaration, Article Five. It also states, "[b]ecause this trust is intended for the primary benefit of Anthony C~, it is only incidentally for the benefit of those named to receive the balance of the trust, if any, upon his death." Trust Declaration, Article Five, B.4. The trust document states that it should be "administered and managed so as to maximize and protect any insurance and public assistance benefits for which Tony is or may be eligible for." Trust Declaration, Article Five, A. Distributions are in the discretion of the trustee, and the trust states it shall not be construed as a support trust. Trust Declaration, Article Five, B. Distributions are to be made only to supplement any public or private benefits to which Anthony is entitled for support and maintenance. Trust Declaration, Article Five, D.3. The trustee also has the discretion not to make distributions and Tony has no power or authority to demand any distributions. Trust Declaration, Article Five, C, D. The trust declaration contains a spendthrift provision that protects the trust assets from any claims by a beneficiary's creditors and forbids any beneficiary from selling or in any other manner disposing of his or her interest in the trust principal or income. Trust Declaration, Article Seven.

Regarding revocation or amendment, article three of the trust states, "[d]uring Tony's lifetime, this trust shall not be amended or revoked unless a court of competent jurisdiction determines any modification is in the best interest of Anthony C~." If a court or other competent authority determines that the trust renders Anthony ineligible for government benefits, then the trustee has the discretion to terminate the trust and distribute the principle to Anthony's heirs at law or under a court approved alternate distribution plan. Trust Declaration, Article Six, B, Article Ten, B.

At Anthony's death, the trust is authorized to pay all taxes, the expenses of his last illness, funeral and burial costs, enforceable debts, and any State claim for Medicaid benefits. Trust Declaration, Article Six, A. The remainder of the trust is to be "distributed to those persons who are determined to be Anthony C~'s heirs at law, with distributions in the manner provided as though Anthony C~ died intestate under the laws of the State of Michigan in effect at that time" Trust Declaration, Article Six, B. The trust declaration further states that, "[n]otwithstanding these directives, a court of competent jurisdiction may approve an alternate distribution plan for the remainder of the trust property if it determines the plan to be in the best interests of" Anthony. Trust Declaration, Article Six, B. Anthony does not have any power of appointment by will.

DISCUSSION

Trust assets are resources if the SSI recipient can: terminate the trust and use the assets for food, clothing, and shelter; direct the use of the assets for personal maintenance and support under the terms of the trust; or sell the interest in the trust and use the proceeds for support and maintenance. 20 C.F.R. § 416.1201(a); POMS SI 01120.200(D)(1)(a). Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm. - MOS, Chicago, Clarification of Regional Program Circular 94-05—Question from LitchF D.O. Concerning Trust with Multiple Grantors (December 17, 1999).

Can Anthony terminate the trust?

The trust declaration provides that the trust cannot be revoked or amended, except with court approval, and only if it is in Anthony's best interest. Trust Declaration, Article Three. Because the trust was funded with the proceeds of a personal injury suit brought on Anthony's behalf, he is the grantor. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm.- MOS, Chicago, Review of Trust for Stephanie S. E~ (9/27/99) (hereinafter "E~ Review"); In re J~ Trust, 479 NW 2d 25, 30 (Mich. App. 1991). Therefore, we must consider whether the grantor trust rule makes this trust revocable.

In general, where a grantor is also the sole beneficiary of the trust, he or she can revoke or compel termination of the trust, even when the trust declaration states that the trust is irrevocable. Restatement (Second) of Trusts § 339, cmt. a (1959); POMS SI 01120.200(D)(3). The issue then becomes whether Anthony is the sole beneficiary of the trust. If a grantor who is also a beneficiary manifests an intention to create a vested or contingent interest in someone other than himself, he is not the sole beneficiary. Restatement (Second) of Trusts § 339, comment b. Where a grantor is not the sole beneficiary, he cannot revoke the trust without the consent of the other beneficiaries. We have previously advised that these general trust principals apply in Michigan. *See* Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm. - MOS, Chicago, Six State Synopsis of Trust Laws (2/26/92); E~ Review; *H~ v. H~,* 543 N.W.2d 19, 20 (Mich. App. 1995)(even irrevocable trust may be terminated with consent of grantor and all beneficiaries).

Generally, the law has presumed that no additional beneficiaries were intended when a grantor transfers property in trust to himself for life and, upon his death, to his heirs or next of kin. Restatement (Second) of Trusts § 127, cmt. b (1959). In the past, OGC has advised that a grantor trust, created under Michigan law, which names only "heirs at law" as residual beneficiaries is revocable and, therefore, would be a countable resource. *See* e.g., Memorandum from Reg. Chief Counsel, Chicago to Ass't Reg. Comm. - MOS, Chicago, Michigan Trust for Arthur J. F~ (July 15, 1997) (hereinafter "F~ Trust"). Anthony's attorney suggests that a change in Michigan probate law, repealing the "Doctrine of Worthier Title," would make the trust irrevocable and, thus, not a countable resource. *See* Mich. Comp. Laws § 700.2719 (West 2000). Under the Doctrine of Worthier Title, the owner of property could not, during his life, create a remainder interest in his heirs and, if he purported to do so, he instead created a reversionary interest in himself. During the grantor's life, the heirs were deemed to hold no interest at all. *See* generally David A. T~, Anglo-American Land Law: Diverging Developments From A Shared History Part II: How Anglo-American Land Law Diverged After American Colonization and Independence, 34 REAL PROP. PROB. & TR. J. 295, 306-07 (1999); 56 N.Y. JUR. 2d Estates, Powers, and Restraints on Alienation § 170 (1986 & Supp. 2001). The Restatement (Second) of Trusts explains that this common law rule no longer exists, but "the question of construction" persists and, in the absence of evidence of contrary intent, there is no intent by an owner to create a remainder interest in his heirs. Restatement (Second) of Trusts § 127, cmt. b (1959). The doctrine has been unevenly applied as a rule of construction. *See* e.g., *H~ v. R National Bank*, 361 F.2d 559 (D.C. Cir. 1966)(criticizing application of doctrine of worthier title as a rule of construction; ruling that doctrine has no applicability in District of Columbia; ruling that settlor's heirs must give consent before settlor may revoke trust).

We have advised in the past that Restatement (Second) of Trusts, § 127 applies in Michigan. In 1998, however, the Michigan legislature adopted the provisions of the 1990 version of the Uniform Probate Code which abolish the doctrine of worthier title, both as a rule of law and as a rule of construction. Mich. Comp. Laws § 700.2719 (West 2000); Unif. Probate Code § 2-710. Michigan law now provides that language in a governing instrument describing the beneficiaries of a disposition as the transferor's "'heirs' [or] 'heirs at law' . . .does not create or presumptively create a reversionary interest in the transferor."

Mich. Comp. Laws § 700.2719 (West 2000). The legislature further defined how the terms "heirs" or "heirs at law" would be interpreted. *Id.* at §700.2720. These provisions took effect on April 1, 2000, and the effective date provision states, "a rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent." *Id.* at § 700.8101. We have found no reported case law interpreting these new provisions. We believe that we must read these provisions as creating a contingent remainder in Anthony's heirs.

Because we believe that the trust declaration creates an interest in Anthony's heirs, we believe that Anthony is not the sole beneficiary of the trust. Therefore, he cannot revoke the trust alone.

Can Anthony direct the trustees to use the trust for his support and maintenance?

The trust declaration explicitly provides that distributions of income or principal are to be made in the sole discretion of the trustees and only to supplement benefits from governmental or private programs. Trust Declaration, Article Five. The trust declaration also states, "Under no circumstances shall Tony have the power or authority to demand any distribution from the Trustee, who is under no obligation, implied or otherwise, to make any distributions to him." Trust Declaration, Article Five, D2. In addition, the spendthrift provision protects the trust principal and income from the claims of Anthony's creditors. Trust Declaration, Article Seven. Anthony, thus, cannot compel the trustees to use any portion of the trust for his support and maintenance.

Can Anthony sell his interest in the trust?

The trust declaration explicitly provides that no beneficiary "shall have any power to sell, assign, transfer, encumber or in any other manner anticipate or dispose of his or her interest in this trust or the income it generates." Trust Declaration, Article Seven. Thus, Anthony cannot sell his interest in the trust. Even if Anthony had the power to sell his beneficial interest in the trust, his interest would presumably have no value on the open market because the trustees, having full discretion as to whether or not to make payments from the trust, cannot be compelled to make any distributions.

CONCLUSION

Under current Michigan law, Anthony would not be considered the sole beneficiary of the trust. Therefore, he does not have the power to revoke the trust. Nor does Anthony have any power to sell his beneficial interest in the trust or to compel the trustees to use trust principal or income for his support and maintenance. Therefore, the trust is not a countable resource for SSI purposes. Distributions to Anthony or for his benefit, however, may constitute countable unearned income in the month in which they are received, *see* 20 C.F.R. §§ 416.1121- 416.1124, or cause the "presumed value rule" or "one-third reduction rule" to reduce Anthony's benefits. *See* 20 C.F.R. §§ 416.1130-1141 (1999); *see also* POMS SI 01120.200.

O. PS 01-112 SSI-Michigan-Review of Richard O~ American Century Giftrust, SSN: ~

DATE: February 20, 2001

1. SYLLABUS

This opinion concerns a "Giftrust" in the State of Michigan. The trust was established by a father (the grantor) for his son (the beneficiary) and will mature in February 2021. The beneficiary cannot revoke the trust, cannot direct the use of the trust assets, and cannot sell his beneficial interest due to a spendthrift clause. Therefore, the trust is not a resource for SSI purposes. In 2021, the funds will be released to the beneficiary and will be considered income.

2. OPINION

You have asked whether the assets of a trust established by Richard D. O~, for his son Richard E. O~, should be considered a countable resource for purposes of determining the son's eligibility for SSI. For the reasons set forth below, we conclude that the assets in the trust should not be considered a countable resource.

FACTS

On February 19, 1991, Richard D. O~ entered into a Trust Agreement and established a "Giftrust" for "Richard E. O~." The Giftrust agreement named Richard D. O~ as the creator or grantor of the Giftrust, and Richard E. O~ as the sole beneficiary. The directors of the Giftrust fund appointed the trustee. Richard D. O~ initially funded the trust with $250.00, which the fund

invested. The Giftrust agreement provides that the trust was established as an irrevocable trust for the benefit of Richard E. O~, from his father, with a maturity date of February 5, 2021. During the period of the trust agreement, the Giftrust provides that the trustee will reinvest any dividends earned on the principal. As of March 31, 2000, the Giftrust was worth $2,870.29. On the maturity date of February 5, 2021, the Giftrust will terminate and the accumulated trust assets will be distributed to Richard E. O~ "to use as you please."

The Giftrust agreement provides that if Richard E. O~, the beneficiary, dies before the maturity date, the trust shall terminate and the trustee shall distribute the remaining trust property to the designated alternate beneficiary. Page 3 of American Century Giftrust, "What Happens When the Giftrust Matures?"

The Giftrust agreement does not allow the grantor, the beneficiary or any other person to revoke or terminate the trust or to redeem any portion of the trust principal or dividends until the maturity date of the trust. *See* February 13, 1991 letter from Nancy D. S~, Registered Agent, Twentieth Century Investors; *see also* Giftrust Agreement, paragraph 4. Nor can the beneficiary of the trust sell his beneficial interest at any time before the maturity date of February 5, 2021. *Id.*

DISCUSSION

A countable resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance. *See* 20 C.F.R. § 416.1201(a); Program Operations Manual System ("POMS") SI 01110.100(B)(1). If the individual has the right, authority, or power to liquidate the property or his share of the property, it is considered a resource. *See* 20 C.F.R.. § 416.1201(a)(1); POMS SI 01110.100(B)(1). Trust assets are a resource if (i) the individual can revoke or terminate the trust and obtain unrestricted access to the trust assets; (ii) the individual has access to the trust assets and can direct the use of the trust assets to meet his need for food, clothing, and shelter; or (iii) the individual can sell his beneficial interest in the trust. *See* POMS SI 01120.105(A)(1), 01120.200(D)(1)-(3).

Whether the claimant can revoke or terminate the trust or direct use of the trust assets depends upon the terms of the trust agreement and applicable state law. *See id.* SI 01120.200(D)(2). We have reviewed the documents you provided, as well as the actual trust terms (which we requested from the creators of the trust fund), and conclude that the trust principal and accumulated dividend income are not currently countable resources to Richard E. O~, because he does not have the right, under the terms of the Giftrust agreement or Michigan state law, to revoke or terminate the trust before its maturity date of February 5, 2021. Furthermore, until February 5, 2021, Richard E. O~ does not have any access to the trust assets and cannot direct the use of the trust assets to meet his needs for food, clothing, and shelter. Nor can he sell his beneficial interest in the trust before the maturity date.

A. Beneficiary Does Not Have the Right to Revoke or Terminate the Trust Before February 5, 2021.

Whether a trust is revocable or terminable depends on the terms of the trust and applicable state law. *See* POMS SI 01120.200(D)(2). Here, Richard E. O~ does not have the right to terminate the trust under its own terms or Michigan state law.

Here, the father of Richard E. O~ was expressly named as the creator or grantor of the Giftrust agreement, and there is no indication that anyone other than the father provided the consideration for the trust. The terms of the Giftrust agreement itself do not give Richard E. O~ or anyone else the right to terminate or modify the trust. There is no indication that the grantor of the trust intended that his son could terminate the trust and obtain the assets. Nothing in state law would give the beneficiary of a trust the right to terminate a trust and obtain the assets where the grantor of the trust did not so provide. As of February 5, 2021, however, the trust will terminate, and Richard E. O~ will be entitled to access the entire balance of the trust at that time.

B. Beneficiary Does Not Have the Right to Direct Use of the Trust's Assets Before Maturity Date of February 5, 2021.

Although Richard E. O~ does not have the legal authority to terminate the trust, the trust may still be counted as a resource in determining SSI eligibility if he has the ability to direct the use of the trust principal. *See* POMS SI 01120.200(D)(1)(a).

Such authority may be included specifically in a trust provision allowing the beneficiary to act on his own or in a provision allowing him to order actions by the trustee. *See id.* SI 01120.200(D)(1)(b). Here, the trust agreement includes no such provisions, and only allows the trust assets to be distributed on the date of the Giftrust's maturity, which is February 5, 2021. The Giftrust agreement gives the trustee the discretion to reinvest the trust dividends, but does not allow Richard E. O~ the right to unilaterally direct use of the trust's assets until after the maturity date.

C. Beneficiary Cannot Sell His Beneficial Interest in the Trust Before February 5, 2021.

A trust can also be a resource if the individual can sell his beneficial interest in the trust. Here, however, the Giftrust agreement contains a spendthrift clause that prevents Richard E. O~ from assigning or otherwise transferring his rights in the trust. *See* Giftrust Agreement, paragraph 4 (copy attached).

D. Dividend Payments Are Reinvested In The Giftrust, And Therefore Are Not Currently Income.

Lastly, the Giftrust does not provide for any disbursements of income from the trust, and in fact, provides that any dividend income be reinvested in the trust until the maturity date. Thus, under these circumstances, the trust dividends would not be income, during the term of the trust, for determining Richard E. O~'s SSI eligibility and level of benefits. The Giftrust does not provide for any payment of the trust assets, including the reinvested dividends, until the maturity date in February 2021.

CONCLUSION

Based on the documents provided to us, it is our opinion that the trust established for the benefit of Richard E. O~ is not currently a countable resource for purposes of determining his eligibility for SSI. Prior to the date of the trust's maturity in February 2021, Richard E. O~ does not have the right to revoke the trust; direct the use of its assets to meet his needs for food, clothing, and shelter; or sell his beneficial interest in the trust. In February 2021, the funds will be released to him and will constitute income.

P. PS 01-098 SSI-Michigan-Review of the Sylvia A. C~ Civil Service Pension Trust, SSN~

DATE: January 10, 2001

1. SYLLABUS

Federal law prohibits the assignment of a Civil Service Pension annuity to a trust and, therefore, the "trust" assets should be considered a resource and any annuity payments should be considered unearned income for purposes of SSI eligibility.

2. OPINION

You asked whether a Civil Service Pension Trust established for Sylvia C~, the developmentally disabled daughter of a retired civil servant, constitutes a countable resource for purposes of determining her SSI eligibility. We conclude that federal law prohibits the assignment of the Civil Service Pension annuity to a trust and, therefore, the "trust" assets should be considered a resource and the annuity payments should be considered unearned income for purposes of SSI eligibility.

You also asked us when Ms. C~ could be charged with the income and resource, should we determine that the assignment to the trust was invalid. We conclude that the Agency can reopen the case (based on good cause) and suspend her benefits (if appropriate) effective up to two years ago.

Background

As the developmentally disabled daughter of a retired civil servant, Ms. C~ is eligible for a Civil Service Pension Annuity through her father, Guido J. C~. Upon his death, Guido C~ directed that his daughter's United States Civil Service Annuity be placed into trust. *See* First Codicil to Will and Testament, Paragraph I. In accordance with Guido C~'s wishes, the Wayne County Probate Court ordered that all money received from Ms. C~'s Civil Service Survivor Annuity be placed into a trust. *See* Order of Wayne County Probate Court. The Court further ordered that all trust assets be expended only in accordance with the terms of Mr. C~'s will and codicil. *Id.* Guido C~'s will appointed Ms. C~'s siblings as co-trustees and stated that the trust assets should not be used for his daughter's "basic day to day care for food, shelter and clothing, but only for extraordinary care or needs." *See* C~ Will, § VI, Paragraph 2.

DISCUSSION

Trust assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can revoke the trust and use the assets to meet his needs for food, clothing, and shelter, or if the individual can direct the use of the trust assets to be used for her support and maintenance, or sell her beneficial interest in the trust. *See* POMS SI 01120.200(D).

Although Guido C~'s will expressly states that the trust assets should not be used for Ms. C~'s care and maintenance for food, clothing, and shelter, we must first determine whether the trust is valid. If the trust is invalid, the annuity payments would be unearned income and would affect Ms. C~'s eligibility for SSI. *See* 20 C.F.R. § 416.1121(a)(annuities are unearned income for purposes of SSI eligibility).

1. Federal Law Prohibits the Assignment of a Civil Service Pension Annuity.

As the developmentally disabled daughter of a retired civil servant, Ms. C~ is entitled to Civil Service Pension Annuity payments. Ms. C~'s father attempted to assign her annuity payments into a trust, but federal law prohibits the assignment of a Civil Service Pension Annuity. *See* 5 U.S.C. § 8346(a). Because this type of annuity is non-assignable by law it may not be paid directly into a trust to avoid SSI eligibility. *See* POMS SI 01120.200G.1c. Therefore, the father's assignment of Ms. C~'s annuity into trust was invalid.

It is also doubtful that Mr. C~ had the power or authority to assign the assets to trust after he died. Even if he had the power and authority to assign his daughter's assets on her behalf while he was living, this power and authority presumably would terminate upon his death.

2. Civil Service Annuity Payments were (and are) Unearned Income When Received, and Resources When Held.

Because the assignment of Ms. C~'s annuity payments into trust was invalid under federal law, the provisions of Guido C~'s will cannot govern Ms. C~'s use of those annuity payments. Instead, we must look to federal law governing pension annuity expenditures. 5 U.S.C. § 8345(e) expressly states that civil service retirement annuity payments to which a minor child or legally disabled individual is entitled may be paid to a guardian or representative payee "legally vested with the care of the claimant." Consequently, Ms. C~'s annuity was paid to Dottie S~ (Ms. C~'s sister and legal guardian) as a representative payee, not as trustee.

In order to meet her obligations as representative payee, it will be necessary for Ms. S~ to make the annuity available for use in meeting the ordinary and necessary expenses related to Ms. C~'s care. Because Ms. S~, the representative payee of the annuity, is required to use the annuity for Ms. C~'s ordinary care, the annuity payments made to her for Ms. C~'s benefit were and are income to Ms. C~, and any funds held in the invalid "trust" were and are a resource to her, under section 1612(a)(2)(B) of the Act, and 20 C.F.R. § 416.1121.

3. Ms. C~'s Claim Can Be Reopened For Up to Two Years Prior Based on Good Cause, and Benefits Should Be Suspended Effective With the First Month in the Past Two Years When Her Income and Resources Exceeded the Eligibility Limitations.

Because Ms. C~'s annuity payments should have been considered income and resources to her, we must determine the extent to which Ms. C~'s SSI eligibility is affected. In August 1993, we made a reconsideration determination that Ms. C~'s annuity payments paid to and held in "trust" were not income or resources for purposes of SSI eligibility. That determination became final and binding. However, continuing resource and income determinations in SSI cases are made each month after the claimant begins receiving benefits. *See* 20 C.F.R. §§ 416.1123(a), 416.1207. Each such determination is deemed an "initial determination." *See* POMS SI 04070.015 thru SI 04070.030(A)(1).

The regulations allow the Agency to reopen SSI determinations within one year of an initial determination for any reason and within two years of an initial determination for good cause shown. *See* 20 C.F.R. § 416.1488. Good cause for reopening is shown where it is clear on the face of the evidence that an error was made in making the determination. *See* 20 C.F.R. § 416.1489. There is an error on the face of the evidence in the determination that Ms. C~'s annuity payments were paid to and held in "trust," and therefore were not income or resources to her. Therefore, the Agency may reopen the deemed initial determination on eligibility dating back two years.

Benefits should be suspended effective with the first month, within that two year period, when Ms. C~'s income or resources (including income and resources resulting from the annuity payments), exceeded applicable limits. 20 C.F.R. §§ 416.1123(a), 416.1323.

CONCLUSION

In summary, we conclude that Ms. C~'s annuity payments could not be assigned to a trust. Therefore, the annuity payments should have been considered income when received and a resource when held in the invalid "trust." The Agency should determine whether this income or resource would have rendered Ms. C~ ineligible for SSI within the last two years. If so, the

Agency should reopen her case (based on good cause) and suspend her benefits effective with the first month within the last two years when her income or resources (including that resulting from the annuity payments) rendered her ineligible for SSI. The income and resources from the annuity payments also should be considered when determining any future eligibility.

Q. PS 01-092 SSI-Michigan-Review of a Trust for Vanessa B~, ~; Your ref: S2D5G3

DATE: November 28, 2000

1. SYLLABUS

This trust, which was created in July 2000, satisfies the requirements of the Medicaid Trust exception (SI 01120.203). Therefore, the trust principal is not a countable resource. However, even though the principal is not a resource, any income distributions from the trust could be income and should be developed under the SSI income rules. For example, any cash disbursements made to the SSI beneficiary would be considered unearned income.

2. OPINION

You asked us to review a trust agreement created by the Wayne County Probate Court for the benefit of Vanessa N. B~ to determine whether the funds placed in the trust constitutes a countable resource for Social Security Income (SSI) purposes. For the reasons set forth below, we believe that the trust meets the requirements of the Medicaid Trust and the trust principal is not a countable resource to Vanessa N. B~. Some distributions may, however, constitute unearned income.

FACTS

Following settlement of a medical malpractice claim initiated on behalf of Vanessa N. B~, the settlement funds were transferred into a trust for the benefit of Ms. B~. The trust was created in July 2000, by the Wayne County Probate Court, naming Ms. B~, a minor, the sole beneficiary of the trust. Trust Declarations, Article One § 1.2.

The trust agreement states that the "Trust is intended to be a special needs trust for the benefit of a person with a disability under the age of sixty-five (65) under 42 U.S.C. Section 1396p(d)(4)(A)." Trust, Declarations. The trust purports to be a "nonsupport, supplemental needs trust." Trust Article One § 1.2. Pursuant to the trust agreement, neither the income nor the principal of the trust is to be used for Ms. B~'s support, including her food clothing and shelter needs. Trust Article Five § 5.4. The trustee is authorized to make payments for goods and services, including uninsured medical or dental treatments, rehabilitative or educational training, entertainment, recreation, travel, vacations, funeral and burial expenses and other amenities not available from public assistance. Trust Article Five § 5.2. Ms. B~ has no power or authority to demand distributions from the trustee. Trust Article Five § 5.3. In addition, the trustee is not permitted to make payments of income or principal, other than small amounts of money advanced for incidentals, directly to Ms. B~. Trust Article Five § 5.3.

Ms. B~'s attorney and conservator submitted a statement indicating that the state court authorized creation of the trust on or about August 31, 2000. The agreement provides upon Ms. B~'s death, the trust will terminate and the trustee will repay the State of Michigan for any Medicaid assistance received by Ms. B~. Trust Article Seven § 7.1. Likewise, if Ms. B~ lives in any other state the trust will repay that state for any Medicaid Ms. B~ received. Trust Article Seven § 7.1.

ANALYSIS

Under the regulations, "resources" are "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). If an individual has the right, authority or power to liquidate the property it is considered a resource. 20 C.F.R. § 416.1201(a)(1). Certain trusts are considered countable resources to individuals who created them. 42 U.S.C. § 1382b(e)(3). However, trust assets are not considered a countable resource if the trust was created in compliance with 42 U.S.C. section 1396p(d)(4)(A) after January 1, 2000. *See* 42 U.S.C. §1382b(e)(5). Under this provision a trust created after January 1, 2000 will not be considered a resource if the following four elements are met: (1) the trust was established for the benefit of a disabled individual under the age of 65; (2) the assets contained in the trust are the individual's; (3) the trust was established by the individual's parent, grandparent, legal guardian or the court; and (4) upon the individual's death the State will be reimbursed for any medical assistance paid on the individual's behalf. 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(A); POMS EM 00067(D).

This trust expressly states that it was intended to be a special needs trust under 42 U.S.C. section 1396p(d)(4)(A) and it appears to meet the criteria of this section. The state court authorized and established the trust in August 2000. *See*, File 28. Ms. B~ is apparently disabled for SSI purposes and is under the age of sixty-five. Trust Agreement, Declarations, 1.2.

Because the trust principal consists of funds Ms. B~ received as settlement of a medical malpractice claim, the assets deposited in the trust are Ms. B~'s. POMS EM 00067(B)(2)(b). Finally, upon Ms. B~'s death, the trustee is required to repay the State of Michigan any Medicaid assistance Ms. B~ received during her lifetime. Trust Article Seven, § 7.1. Therefore, the trust satisfies the requirements of the Medicaid Trust exception and the trust principal is not a countable resource for SSI purposes. 42 U.S.C. § 1382b(e)(5); POMS EM 00067(D),(I).

Although the trust principal is not considered a countable resource, certain distributions may be considered income. POMS EM 00067(E). For example, any disbursements of cash made directly to Ms. B~ are considered unearned income. POMS SI 01120.200(E)(1)(a). The trustee is permitted to advance small amounts of cash to Ms. B~ for incidentals. Trust Article Five § 5.3. These advancements would be considered income. POMS SI 01120.200(E)(1)(a). In addition, any disbursements made to a third party which result in Ms. B~ receiving food, clothing or shelter would be considered income in the form of "in-kind support." POMS SI 01120.200(1)(b). Thus, if despite provision 5.4, which prohibits the trustee from distributing trust income or principal for Ms. B~'s support, the trustee authorized payments to a third party for any food, shelter or clothing received by Ms. B~, these disbursements would be considered income for SSI purposes.

CONCLUSION

The trust principal is not a countable resource for Ms. B~. Under some circumstances, distributions from the trust may be considered an applicable resource.

R. PS 01-001 Review of the Scott ~ Trust, SSN ~

DATE: June 26, 2000

1. SYLLABUS

The issue concerns a discretionary trust where the individual does not have a judicially enforceable right to command the trustee to make disbursements from the trust. Furthermore, he cannot unilaterally revoke the trust or transfer his interest in the trust, and thereby gain access to trust assets. Thus, the trust assets are not a countable resource for SSI purposes. However, since the individual does have limited withdrawal rights in contributions made to the trust, those contributions may be considered income when received and a resource for a brief period thereafter.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked us to review a trust dated February 4, 1999, to determine whether the assets placed in trust would be a countable resource to Scott ~, an SSI claimant. For the following reasons, we believe that the assets in trust are not available for use for Mr. ~ support and maintenance. Therefore, the assets in trust are not a countable resource to him.

FACTS

We base our opinion on our review of the trust instrument you provided to us, as well as information provided by the attorney who drafted the trust, Dirk H~. The trust was established by Scott ~ grandmother, Helen M. E~, on February 4, 1999. Jean A~ ~ , Ms. E~'s daughter and Scott's mother, was named as trustee. The trust instrument does not indicate how the trust was funded, but Mr. H~ advised us that the trust was initially funded with approximately $5000 (cash). The trust indicates that assets of any type may be added to the trust, either by the settlor, Ms. E~, or by others (art. 1.2). According to Mr. H~, Ms. E~ made an additional contribution of approximately $5000 in the Spring of 2000.

Article Two provides that Scott has certain withdrawal rights. In particular, it provides that whenever a contribution is made to the trust prior to Ms. E~'s death, the trustee must notify Scott in writing within 15 days of the contribution that he has the right to withdraw the amount of the contribution, subject to certain limitations (art. 2.1, 2.2). The amount of the withdrawal is

limited to $20,000 if the donor is married and $10,000 if the donor is unmarried (art. 2.7). Scott's withdrawal rights expire 30 days after the date of the contribution (art. 2.3).

Article Three provides that the trustee "may distribute any portion or all of the income and principal of the Trust for Scott's benefit if, in the exercise of its sole discretion, the Trustee deems it appropriate for any purpose whatsoever to supplement other income and resources available to him" (art. 3.1). It further provides that "no distribution shall be made for Scott's benefit ... that would reduce any aid otherwise available for his maintenance, health care, education, or general welfare" (art. 3.1).

Scott ~ is the sole current beneficiary of the trust. If Scott dies before complete distribution of the trust assets, the remaining assets will be distributed to his estate provided he exercises his general power appointment in his last will and testament (art. 3.2(a)). However, if Scott fails effectively to exercise his general power of appointment, the trust assets will be distributed to the issue then living of Jean A~ (art. 3.2(b)). If there is no taker under that provision, then the trust assets will be distributed to the settlor's issue then living, by right of representation (art. 3.2(c)). Thus, in addition to Scott's current beneficial interest, two additional classes of individuals have contingent future interests in the trust property.

DISCUSSION

Property held in trust for an individual is a resource under 20 C.F.R. 416.1201 if: (1) the individual has legal authority to revoke the trust and gain access to the trust property and use it for his or her support and maintenance; (2) the individual can direct the trustee to use the property for his or her support and maintenance under the terms of the trust; or (3) the individual can transfer his or her interest in the trust and use the proceeds for support and maintenance. *See* POMS SI 01120.200(D)(1)(a); 20 C.F.R. 416.1201(a)(1) (1999) ("If the individual has the right, authority, or power to liquidate the property or his or her share of the property, it is considered a resource."). We have reviewed the Scott ~ Trust and conclude that the trust assets are not a countable resource for purposes of determining Scott's SSI eligibility.

Because Scott did not create the trust and the trust creates future interests in addition to Scott's current beneficial interest, the trust is not revocable by Scott alone, and it does not appear that Scott has the legal authority to revoke the trust and use the assets for his support and maintenance. Further, the trust provides that the trustee may at her discretion distribute "any portion" of the trust assets for "any purpose whatsoever" (art. 3.1). Because the trustee has unfettered discretion as to whether and when distributions may be made for Scott's benefit, the trust appears to be a discretionary trust. *See* 1 Restatement of Trusts (Second) 155; *see also Miller v. Dep't of Mental Health*, 442 N.W.2d 617, 618 (Mich. 1989) (distinguishing discretionary trusts and support trusts). The trustee is not required to distribute any of the assets, and the trust does not create any asset or income rights in the beneficiary. *See generally Lawrence A. F~, Discretionary Trusts for a Disabled Beneficiary: A Solution or Trap for the Unwary*, 46 U. Pitt. L. Rev. 335, 341-42 (1985). Therefore, Scott does not have a judicially enforceable right to direct distribution of trust property for his support and maintenance. *See Miller*, 442 N.W.2d at 619 (providing that because the beneficiary's receipt of any amount depends on the trustee's discretion, the beneficiary does not have an ascertainable interest in the assets of a discretionary trust); 1 Restatement of Trusts (Second) 187 ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court....."). Scott ~ thus does not have the power to direct distribution of trust assets.

However, Scott does have certain withdrawal rights. In particular, within the first 30 days after a contribution to the trust, Scott has the right to withdraw the contribution, subject to the limitations provided Articles 2.6 and 2.7. Accordingly, contributions to the trust should be considered income to Scott on the date of the contribution. *See* 20 C.F.R. 416.1121(g), 416.1207(a). (The contribution should be considered income, however, only to the extent of any withdrawal limits set forth by the donor, as provided in Article 2.6, or to the extent of the withdrawal ceiling outlined in Article 2.7.) If Scott does not exercise his withdrawal rights by the first day of the subsequent month, and the 30-day period has not expired, then the amount of the contribution (subject again to any limits imposed by Articles 2.6 and 2.7) should be considered a resource to him for that subsequent month. *See* 20 C.F.R. 416.1207(d). Since Scott's withdrawal rights expire 30 days from the date of the contribution, and thus cannot extend beyond the following calendar month, the contribution will be a resource to him only for this one month. The trust specifically provides that the withdrawal rights are not cumulative and will lapse if not exercised (art. 2.3).

We note two reservations regarding the analysis outlined above. First, Scott's withdrawal rights apply only to contributions made to the trust prior to Ms. E~'s death (she is currently in her nineties) (art. 2.1). After her death, Scott has no right of withdrawal. Second, the trust provides that Scott must be notified of his withdrawal rights within 15 days after each contribution (art. 2.2). If he is not notified as required by the terms of the trust, he may have a legal cause of action against the

trustee for breach of trust. We assume for purposes of our analysis that the trustee, where necessary, has complied with (and will in the future comply with) the notification provision as outlined in Article 2.2.

Finally, the trust contains a spendthrift provision which provides that no principal or income payable may be assigned by its beneficiary or be reached by any creditor (art. 6.7). Thus, it does not appear that Mr. ~ has any power to transfer his interest in the trust and use those proceeds for support and maintenance. In sum, Mr. ~ does not have the legal authority to revoke the trust, direct the use of the trust assets for his own support and maintenance, or transfer his interest in the trust, and the trust assets are not a countable resource for SSI purposes.

CONCLUSION

For the foregoing reasons, we believe that the trust assets should not be considered a countable resource to Scott ~ . The trust appears to be a discretionary trust, and Mr. ~ does not have a judicially enforceable right to command the trustee to make disbursements from the trust. Furthermore, he cannot unilaterally revoke the trust, or transfer his interest in the trust, and thereby gain access to trust assets. However, Scott does have limited withdrawal rights in contributions made to the trust, and those contributions may be considered income when received and a resource for a brief period thereafter, as discussed above.

S. PS 00-601 State Law on A Trust Agreement for Brian ~

DATE: January 31, 2001

1. SYLLABUS

The trust was established in the State of Michigan. It is not a countable resource for the following reasons:

The SSI applicant is not the settlor or the sole beneficiary. He does not have direct use of the assets for his support and maintenance, and, He cannot sell his interest in the trust.

NOTE: Because of a change in the Social Security Act, this precedent may only apply to trusts established before 1/1/00.

2. OPINION

You have asked whether the assets of a trust established by John ~ should be considered a countable resource for purposes of determining the eligibility of one of his children, Brian ~, for SSI. For the reasons set forth below, we conclude that the assets in the trust should not be considered a countable resource.

FACTS

On or about June 1, 1997, John ~ entered into a Trust Agreement and established the “John ~ FBO Brian ~ Irrevocable Trust.” The Trust Agreement named John ~ as settlor and John ~ Jr. and Mark ~ as co-trustees. John ~ apparently funded the trust with certain life insurance policies and property identified in a Schedule of Insurance and a Schedule of Property, copies of which were not provided to this office. The Trust Agreement provides that the trust was established for the benefit of John ~ 's family and so that all assets of the trust could be excluded from his gross estate for federal estate tax purposes.

The Trust Agreement provides that the trustee may, in his or her discretion, pay to Brian or use for his benefit so much as or all of the net income and principal as the trustee determines to be required or desirable for his health, care, support, emergencies, education, the maintenance of his accustomed standard of living, establishing or purchasing a business or profession, purchasing a residence, providing for all expenses of a first wedding, or for any special purpose that the trustee may determine to be in his best interest. Trust Agreement, Article 3(A)(1). The Trust Agreement provides that if Brian dies before the complete distribution of the trust, the trust shall terminate and the trustee shall distribute the remaining trust property to or for the benefit of Brian's children. Trust Agreement, Article 3(A)(2). If Brian does not have any children at the time of his death, the Trust Agreement provides that the trustee shall distribute the remaining trust property to the settlor's then living children and then the children of any deceased child. Trust Agreement, Article 3(A)(2).

The Trust Agreement further provides that a beneficiary shall have the right to demand that a portion of the trust income and principal be distributed to himself or herself under certain circumstances. Trust Agreement, Article 4. Specifically, any beneficiary shall have the right to immediate distribution from the income and principal of the trust where the settlor or any other donor makes a contribution to the trust and provides written notice to the trustee that such contribution is subject to

withdrawal by a beneficiary. Trust Agreement, Article 4(A). Under these circumstances, the immediate distribution from the income and principal cannot exceed the amount of the contribution. Trust Agreement, Article 4(A). If the beneficiary is under a legal disability, a legal guardian can exercise this right to demand on behalf of the beneficiary. Trust Agreement, Article 4(B)(2). The demand must be made within thirty of the contribution. Trust Agreement, Article 4(B)(4).

The Trust Agreement provides that the settlor waives all right, power, and authority to amend or revoke the trust. Trust Agreement, Article 12.

DISCUSSION

A countable resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance.

See 20 C.F.R. § 416.1201(a); Program Operations Manual System ("POMS") SI 01110.100(B)(1). If the individual has the right, authority, or power to liquidate the property or his share of the property, it is considered a resource. *See* 20 C.F.R.. § 416.1201(a)(1); POMS SI 01110.100(B)(1). Trust assets are a resource if (i) the individual can revoke or terminate the trust and obtain unrestricted access to the trust assets; (ii) the individual has access to the trust assets and can direct the use of the trust assets to meet his need for food, clothing, and shelter; (iii) or the individual can sell his beneficial interest in the trust. *See* POMS SI 01120.105(A)(1), 01120.200(D)(1)-(3).

Whether the claimant can revoke or terminate the trust or direct use of the trust assets depends upon the terms of the trust agreement and applicable state law. *See id*. SI 01120.200(D)(2). We have reviewed the documents you provided and conclude that the trust principal and accumulated income are not countable resources to Brian. Brian does not have the right, under the terms of the Trust Agreement or Michigan state law, to revoke or terminate the trust and thereafter obtain unrestricted access to the trust's assets or to direct use of the trust's assets to meet his need for food, clothing, and shelter. Nor can he sell his beneficial interest in the trust.

Brian Does Not Have the Right to Revoke or Terminate the Trust

Whether a trust is revocable or terminable depends on the terms of the trust and applicable state law. *See* POMS SI 01120.200(D)(2). Here, Brian does not have the right to revoke or terminate the trust under its own terms or Michigan state law.

First, the terms of the Trust Agreement itself do not give Brian or anyone else the right to revoke or modify the trust. To the contrary, the Trust Agreement is titled as an irrevocable trust agreement and provides that the settlor has waived his right to amend or revoke the agreement. Trust Agreement, Article 12. There is no other indication that the settlor of the trust intended the trust to be revocable. *See Fornell v. Fornell Equipment, Inc.*, 213 N.W.2d 172, 176 (Mich. Ct. App. 1973) ("Ordinarily, revocability is a question of the intention of the settlor . . . .").

Second, Brian does not have the right to revoke the Trust Agreement or otherwise modify it in order to gain access to the principal under Michigan law. In the absence of express language providing a right of revocation or termination, a trust cannot be revoked or modified unless the grantor or settlor and all of the beneficiaries agree. *See Hein v. Hein*, 543 N.W.2d 19, 20 (Mich. Ct. App. 1995) (citing RESTATEMENT (SECOND) OF TRUSTS § 338(1)). Thus, Brian would only be capable of revoking the Trust Agreement if he were the sole beneficiary as well as grantor or settlor of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 339 & comment a (1959) (grantor or settlor of trust can compel termination of trust irrevocable by its terms if she is the sole beneficiary).

There is no evidence in the documentation provided to us that Brian was the actual settlor of the trust. The settlor of a trust is generally the person who provides the consideration for the trust, even if another entity nominally creates the trust. *See Ronney v. Department of Social Services*, 532 N.W.2d 910, 913 (Mich. App. 1995); 76 Am. Jur. 2d § 55. Here, John C. B~ was expressly named as the settlor in the Trust Agreement and there is no indication that anyone other than John ~ provided the consideration for the trust.

Moreover, regardless of whether Brian is or is not the settlor, he is not the sole beneficiary. The Trust Agreement provides that the trustee shall make discretionary payments to Brian during his lifetime and, upon Brian's death, shall terminate the trust and distribute the remaining trust property to Brian's children. Trust Agreement, Article 3(A)(2). Under such circumstances, Brian's children are considered to be beneficiaries of the trust, even if Brian does not currently have any children, regardless of whether Brian is or is not the settlor of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 127, comment b ("[I]f the beneficial

interest is limited to the settlor for life and on his death the property is to be conveyed to his children, or issue, or descendants, he is not the sole beneficiary of the trust, but an interest in remainder is created in his children, issue or descendants."); RESTATEMENT (SECOND) OF TRUSTS § 127, comment c ("[I]f a beneficial interest is limited to a person other than the settlor for life and the remainder on his death is limited to his heirs or next of kin, his heirs or next of kin as well as the person himself are beneficiaries of the trust in the absence of a manifestation by the settlor of an intention to give the whole beneficial interest to him."). Brian, therefore, cannot unilaterally revoke the trust in order to use the principal for food, clothing, or shelter.

Brian Does Not Have the Right to Direct Use of the Trust's Assets

Although Brian does not have the legal authority to revoke the trust, the trust may still be counted as a resource in determining SSI eligibility if Brian has the ability to direct the use of the trust principal. *See* POMS SI 01120.200(D)(1)(a).

Such authority may be included specifically in a trust provision allowing the beneficiary to act on his own or in a provision allowing him to order actions by the trustee. *See id.* SI 01120.200(D)(1)(b). Here, the trust agreement includes no such provisions.

Instead, the Trust Agreement gives the trustee discretion to apply to or expend trust assets and income for the benefit Brian.

Trust Agreement, Article 3(A)(1). Although Brian does have the right to demand a portion of any contribution made to the trust, this is only applicable if the settlor or donor who made the contribution specifically informs the trustee that the contribution is subject to withdrawal. Trust Agreement, Article 4(A). Thus, Brian does not have the right to unilaterally direct use of the trust's assets to meet his need for food, clothing, or shelter.

Brian's Interest in the Trust Has No Marketable Value

A trust can also be a resource if the individual can sell his beneficial interest in the trust. Here, however, the Trust Agreement contains a spendthrift clause that prevents Brian from assigning or otherwise transferring his rights in the trust. Trust Agreement, Article 5. Moreover, even if the Trust Agreement did not contain a spendthrift clause, the trust would still not have any marketable value. Under the terms of the Trust Agreement, Brian only has the right to receive payments at the discretion of the trustee. Thus, Brian could only sell the right to receive or have distributions made on his behalf in the sole discretion of the trustee. We assume this would have no significant value. *See Zebley Trust as an SSI Resource - Wisconsin Bernard W~*, OGC-V (M~) to John P. M~, ARC (February 23, 1993) at 4-6.

Payments Made from the Trust May be Income

Lastly, although the trust principal is not a countable resource, disbursements from the trust under certain circumstances would be countable income for determining Brian's SSI eligibility and level of benefits. If the trustee were to authorize disbursements from the trust consisting of cash paid directly to Brian, or payments to a third party for any food, clothing, or shelter received by Brian, such disbursements or in-kind payments would constitute income for SSI purposes. *See* 20 C.F.R. § 416.1102; POMS SI 01120.200(E)(1)(a), (b).

CONCLUSION

Based on the documents provided to us, it is our opinion that the trust established for the benefit of Brian ~ is not a countable resource for purposes of determining his eligibility for SSI. Brian does not have the right to revoke the trust; direct the use of its assets to meet his need for food, clothing, and shelter; or sell his beneficial interest in the trust.

T. PS 00-497 SSI-Review of the Joshua C. Y~ Irrevocable Special Needs Trust, SSN: ~

DATE: June 15, 2000

1. SYLLABUS

A supplemental needs trust is not a resource when the grantor (the SSI recipient) cannot direct the assets for his/her food, clothing, or shelter needs, cannot terminate or revoke the trust and gain access to the trust property, and cannot sell his/her beneficial interest in the trust.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked for our assistance in determining whether the trust agreement in question is a resource to Joshua C. Y~, a Supplemental Security Income ("SSI") claimant. For the following reasons, it is our opinion that the trust is not a countable resource for Joshua.

FACTS

The Joshua C. Y~ Special Needs Trust appears to have been executed in 1994. Art I § 1. The trust agreement names Joshua C. Y~ as sole lifetime beneficiary, Tracey L. Y~ (apparently Joshua's mother) as settlor, and Tracey L. Y~ and Mark C. Y~ (apparently Joshua's parents) as trustees. *Id.* It states that it is being funded with the proceeds of a personal injury settlement and that Joshua is the beneficial owner of these funds. It states that it is irrevocable. Art. I, sec. 4.

The trust allows the trustee almost total discretion concerning the use of the trust assets. Art. II, secs. 1, 2. The trust, however, expresses the general intent that the trust assets be used for the Joshua's "supplemental needs." Art. II, sec. 1. The trust further makes clear the intention that the trustees should attempt to use trust assets to benefit Joshua in ways that do not affect his eligibility for public or private assistance, including SSI. Art. II, sec. 1. The trust also includes a spendthrift clause. Art. II, sec. 5.

Upon Joshua's death, the trust allows Joshua the right to exercise a general power of appointment by will. Art. III, sec. 1. If Joshua does not exercise this power of appointment, the trust provides for distribution of the remaining trust property to Joshua's parents, or to his siblings. Art. III, sec. 2.

DISCUSSION

1. Introduction

Under the applicable regulation, "resources" are cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. If the individual has the right, authority, or power to liquidate the property or his or her share of the property, it is considered a resource. 20 C.F.R. § 416.1201(a) (1999). Therefore, if an individual is able to obtain funds or convert property to cash to be used towards his or her support and maintenance, such funds or property is resources for purposes of determining SSI eligibility. Trust assets are a resource if (1) the individual has access to the trust assets and can direct the use of the assets to meet his or her need for food, clothing, and shelter; (2) if he or she can revoke or terminate the trust and obtain unrestricted access to the trust assets; or (3) if beneficial interest in the trust can be sold. *See* POMS SI 01120.200(D).

Based on the documents you provided, we conclude that the assets held in trust should not be considered a countable resource under 20 C.F.R. § 416.1201.

2. Joshua C. Y~ does not have authority to direct the use of the trust assets.

The trust agreement expressly provides that the trustee (Joshua C. Y~'s parents) have "sole discretion" to direct the use of the assets for the satisfaction of Joshua's supplemental needs. Art II, sec. 2. Thus, Joshua cannot "direct the use of the assets." *See* POMS SI01120.200(D)(1)(a), (b).

3. Joshua C. Y~ cannot revoke or terminate the trust.

Joshua is the grantor and the primary beneficiary of this trust. The grantor or settlor of a trust is generally the person who provides the consideration for the trust, even if another entity nominally creates the trust. 76 Am. Jur. 2d § 55; *see In re Johannes Trust*, 479 N.W. 2d 25, 29 (Mich. App. 1991). We generally regard trusts that have been established from personal injury settlements as being established by the person who received the awards. POMS SI 01120.200(B)(2). Hence, although Tracy L. Y~, Joshua's mother (his conservator), is named as the grantor in the trust agreement, Joshua is, in fact, the grantor of the trust, since it is his personal injury settlement award that comprises the trust fund. The trust, itself, acknowledges that Joshua is the beneficial owner of the assets that were initially placed in the trust. Art. 1, sec. 2.

Although Joshua Y~ is the grantor, he cannot revoke or terminate the trust and obtain unrestricted access to the trust assets because the trust is irrevocable on its face. Art I, sec. 4. Although the general law of trusts recognizes an exception to the irrevocability of a trust where the grantor is also the sole beneficiary, Joshua is not the sole beneficiary of the trust assets. Upon Joshua's death, the trust agreement provides for distribution of the remaining trust principal and trust estate to his parents or

to his siblings. Art III § 1-2. Thus, the he cannot revoke or terminate the trust without the consent of the other beneficiaries, and we do not assume that he can obtain their consent.

4. Joshua C. Y~ cannot sell his beneficial interest in the trust.

The trust could be resource if Joshua could sell his beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(b). Here, the trust is discretionary; therefore, the trustee has no obligation to make any payments to Joshua. Additionally, the trust includes a spendthrift provision, Art. II, sec, 5, which prohibits makes the trust not subject to assignment. Therefore, Joshua cannot sell his interest in trust payments.

5. CONCLUSION

The trust includes assets set aside for Joshua's supplemental needs. Joshua cannot direct the use of the assets for his food, clothing, or shelter needs. He cannot terminate or revoke the trust and gain access to the trust property. And he cannot sell his beneficial interest in the trust. Therefore, the property held in the trust is not a countable resource for SSI purposes.

U. PS 00-433 (Michigan) Michigan Trust for Karmone W~ SSN: ~ File Code: SI-2-1-3-MI

DATE: May 6, 1998

1. SYLLABUS

A trust was established for an SSI beneficiary in 1996 based on a personal injury settlement. The corpus of the trust was funded with the distribution from the settlement. Trust language indicated that upon the SSI beneficiary's death, remaining funds would be distributed to pay expenses and then to persons determined to be the beneficiary's "heirs at law." However, trust language indicating a remainder interest for unspecified persons determined to be "heirs at law" does not create additional beneficiaries. The trust agreement also names the SSI beneficiary's guardian as the grantor, however, trusts funded with personal injury awards are generally regarded as established by the recipient of the award. Even though the trust is described as irrevocable, when a grantor of a trust is also the sole beneficiary the trust is deemed revocable despite language to the contrary. Since the SSI beneficiary is the grantor and also the sole beneficiary, the trust is determined revocable and, thus, a countable resource for SSI purposes.

2. OPINION

You have asked for our assistance in determining whether assets of the trust in question are a resource to Karmone W~, a Supplemental Security Income (SSI) claimant. For the following reasons, it is our opinion that Karmone W~ is the grantor of the trust, the trust agreement is revocable, and the assets in the trust can be considered a countable resource.

FACTS

On October 2, 1996, a Michigan circuit court authorized settlement of a personal injury suit involving Karmone W~, a disabled child. The court ordered that settlement proceeds of $224,959.46 be deposited in a trust established for the benefit of Karmone W~. The trust agreement names Joseph P. B~, Karmone W~'s guardian ad litem, as the grantor and Michelle W~, Karmone's mother, and Pamela S. M~ as the co-trustees. Trust Declaration at 1. By its terms, the trust agreement is to be irrevocable during Karmone W~'s life time. Trust Declaration Article 3. However, the trust also provides that it can be amended or modified if a "court of competent jurisdiction" determines that a change would be in Karmone's "best interests". *Id.* In addition, the trust allows the trustees "administer the trust so as to...address the change" if Karmone has a "material change of circumstances" Trust Dec. Art. 5, Paragraph F.

The trust agreement directs the trustee on Karmone W~'s death to pay expenses such as state inheritance taxes, or other similar taxes, any expenses associated with his last illness, funeral and burial costs, and reasonable administration expenses. Trust Dec. Article 6(A). Finally, the agreement provides that any remaining residue of the trust should be distributed to persons determined to be Karmone W~'s "heirs at law." *Id* at 6(B).

DISCUSSION

Resources are cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to be used for his or her support or maintenance. 20 CFR § 416.1201 (a)(1997). If the individual has the right, authority, or power

to liquidate the property or his share of the property, it is considered a resource. 20 CFR § 416.1201 (a)(1)(1997); *see also* Program Operations Manual System (POMS) SI 01110.100(B).

Therefore, if an individual is able to obtain funds or convert property to cash to be used towards his support and maintenance, such funds or property are resources for purposes of determining SSI eligibility. 20 C.F.R. § 416.1201(a) (1997). Trust assets are a resource if the individual has access to the trust assets, and can direct the use of the assets to meet his need for food, clothing, and shelter, or if he can revoke the trust and obtain unrestricted access to the trust assets. *See* POMS SI 01120.105 (A)(1), 01120.200(D)(1)-(3).

According to the express language of the agreement, the trust in this case is irrevocable. Trust Decl. at Article 3. Under general trust law, however, where the grantor or settler of a trust is also the sole beneficiary of the trust, he can compel termination of the trust, even where the trust, by its terms, is irrevocable. *Restatement (Second) of Trusts* § 339 and comment a (1959). We have reviewed the documents you have provided and, for the following reasons, we conclude that the assets subject to the trust agreement should be considered a countable resource under 20 C.F.R. § 416.1201(1997).

The trust agreement establishes a grantor trust because Karmone W~ is the legal grantor and is also the sole beneficiary. The grantor or settler of a trust is generally the person who provides the consideration for the trust, even if another entity nominally creates the trust. We generally regard trusts that have been established from personal injury settlements as being established by the person who received the awards. POMS SI 01120.200(J)(3). Hence, although Joseph P. B~ is named as the grantor in the trust agreement, Karmone W~ is in fact the grantor of the trust, since it is his personal injury settlement award that comprises the trust fund.

The trust agreement's language that the remainder of the trust's assets are to be distributed to "those persons who are determined to be Karmone W~'s heirs at law," does not create any additional beneficiaries. As a general rule, when a trust purports to create an interest in favor of the grantor's heirs at law, the grantor is considered the sole beneficiary of the trust. *Restatement (Second) of Trusts* § 127 comment b (1959); *Clarification of Regional SSA Program Circular 94-05 Concerning Trusts*, OGC-V (K~) to L~, Acting ARC, at 3-5 (5/24/95); *Michigan Trust for Harley L~*, OGC-V (M~) to Gloria J. P~, ARC-MOS, at 5 (6/27/97). Thus, Karmone W~ is the sole beneficiary of the trust. Because Karmone W~ is the sole beneficiary as well as the grantor of the trust, he can compel termination of the trust, even though it is irrevocable on its face. *See Hein v. Hein*, 543 N.W. 2d 19, 20 (Mich. Ct. App. 1995) ("irrevocable" trust may be terminated with consent of the settlor and all beneficiaries); *Ronney v. Dept. Of Social Servs*., 532 N.W. 2d 910, 913-14 (Mich. Ct. App. 1995) ("irrevocable" trust could be revoked because settlor was also sole beneficiary). Because Karmone can revoke the trust, he has access to the trust assets. Those assets are his resources for purposes of determining SSI disability.

CONCLUSION

Since Karmone W~ as both grantor and sole beneficiary, can "revoke the trust and obtain unrestricted access to the trust assets," the trust is a countable resource.

Thomas C~
Chief Counsel, Region V
by: _____ Yusef D~
Assistant Regional Counsel

V. PS 00-378 Michigan Trust - Countable Resource - Nathan D. S~

DATE: October 4, 1993

1. SYLLABUS

If an SSI recipient is a beneficiary of a trust but his/her access to the trust is restricted, the trust funds are not a resource to the recipient. If the SSI recipient is the trustee and has the right to revoke the trust, the trust funds are a resource to that individual.

Caution: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

ISSUE

This is with reference to your memorandum inquiring whether the trust created by Karen S~ is a countable resource to Nathan W~, an SSI recipient and whether the trust is a countable resource to Karen, also an SSI recipient. We conclude that this trust is not a countable resource to Nathan but is a countable resource to Karen under 20 C.F.R. § 416.1201 (1993).

FACTS

The facts may be briefly summarized: On September 16, 1992, Karen S~, as grantor, created a Discretionary Revocable Trust Agreement. Karen appointed herself as trustee and she deposited $2,000 into the trust account. Janice H~ was appointed as the successor trustee. The Agreement stated in relevant part:

(1) The trustee is authorized to hold, manage, pledge, invest and reinvest said funds in his sole discretion; (2) The undersigned grantor reserves the right to revoke said trust in part or in full at any time and any partial or complete withdrawal by the original trustee if he is the grantor shall be a revocation by the grantor to the extent of such withdrawal. . .

According to the terms of the trust, Nathan's access to the trust funds were restricted until he reached his 21st birthday.

DISCUSSION

The primary issue to be resolved here is whether either Nathan or Karen, both SSI recipients, has any access to the trust funds. If either has access, then the trust is considered as a countable resource to that individual. A resource, for the purpose of this opinion, is defined as property that the SSI recipient owns and could convert to cash, or property over which the recipient has the right, authority, or power to liquidate. 42 U.S.C. § 1382b; 20 C.F.R. § 416.1201 (1993). In applying this definition to trusts, the Program Operation Manual System ("POMS") states that if the recipient is a beneficiary of a trust but has his access to the trust funds restricted, then the funds are not a resource for the claimant. POMS § 01120.105(A)(2). As we explain below, Nathan currently has no access to the trust funds, and they, as a result, cannot be counted as a countable resource to him. The POMS explains further, however, that if the recipient is the trustee and has the right to revoke the trust, the funds are a resource to that individual. POMS § 01120.105(A)(1). As we shall explain, Karen's access to the trust funds, is unrestricted, and, as a result, the funds are a countable resource to her.

It is clear from the terms of the trust agreement that Nathan has no right to access the trust funds until he reaches 21. As a result, the trust is not a countable resource to him. It is equally clear, however, that Karen, as grantor and trustee of the trust, has unfettered access to the trust funds. The trust grants her the right to manage, hold, and invest the trust funds. Moreover, she has the right to revoke the trust at any time. Accordingly, the trust funds are a countable resource to Karen.

W. PS 00-367 Supplemental Security Income - Michigan Trust - Brian P~, SSN ~; Your Reference: S2D5G3

DATE: February 22, 1999

1. SYLLABUS

The source of the funds in a trust is important in determining if the trust is revocable. An otherwise irrevocable trust is considered to be revocable if the grantor is also the sole beneficiary.

2. OPINION

You inquired whether the funds held pursuant to the terms of a trust agreement should be treated as a countable resource for purposes of SSI eligibility for Brian P~, the beneficiary of the trust.

The pertinent SSI regulations provide at 20 C.F.R. § 416.1201(a) that:

resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource....

Thus, if an individual is able to obtain funds or convert property to cash to be used toward his support and maintenance, such funds or property are to be included as resources for purposes of determining SSI eligibility. Trust assets are a resource to the individual if he can revoke the trust and use the assets to meet his needs for food, clothing, and shelter. *See* POMS SI 01120.200(D)(1)-(3).

We have reviewed the documents provided to us. If the funds held in the shared savings account (which constitutes the trust principal) belonged to or were attributable to Brain P~ prior to the creation of the trust, then those funds would constitute a countable resource for Brian P~ under 20 C.F.R. § 416.1201. If, however, the funds were not Brian P~'s, then the trust would not be a resource. Further factual development, therefore, is necessary to determine the outcome.

FACTS

The trust agreement provides that Roger P~ and Rhonda P~, the settlors, transfer and assign to themselves, as co-trustees, the trust principal for the benefit of Brian P~, the beneficiary. By its terms, the trust is irrevocable. The trust is to terminate either upon the death of the beneficiary, with the remaining principal and interest being distributed to the heirs at law of Brian P~, or the trust terminates in the event that judicial proceedings and or governmental administrative action is commenced to reach funds in the Trust, "which in the sole opinion of the Trustee is likely to result in a loss or reduction of benefits or eligibility of the beneficiary." Trust Agreement, Paras. 12, 13. The trust principal consists of $ 10,267.43 held in a shared savings account by the co-trustees. We do not know the source of these funds.

DISCUSSION

Although the trust agreement at issue is by its terms irrevocable, the presence of an express irrevocability clause is not determinative. The general trust principle is that, where a grantor or settlor is the sole beneficiary of the trust and is not under an incapacity, he can compel termination of the trust, although the purposes of the trust have not been accomplished. Restatement (Second) of Trusts § 339 (1959); 76 Am. Jur. 2d § 96 (1992). We have previously advised that absent any statute or case law in Michigan prohibiting the revocability of a grantor trust in which the grantor is the sole beneficiary, this general trust principle applies in Michigan. *See* Six State Synopsis of Trust Laws, OGC-V (P~) to Panama-W~, ARC, POS SSA-V (2/26/92) at 4; *see* generally Mich. Comp. Laws Ann. Ch. 555 (West 1988 & Supp. 1998) and § 700.801 et seq. (West 1995 & Supp. 1998).

The information we have been provided does not indicate whether the funds held in the shared savings account (which constitutes the trust principal) belonged to or were attributable to Brain P~ prior to the creation of the trust. That is significant because it determines whether he is the grantor or settlor of the trust. The grantor or settlor of a trust is the person who provides the consideration for the trust, even if another entity nominally creates the trust. 76 Am. Jur. 2d § 55 (1992); *In re Johannes Trust*, 479 N.W.2d 25, 29 (Mich. App. 1991). The money held in the shared savings account would still be considered to have come from Brian P~ if it was money derived through the settlement of a claim belonging to or attributable to him. *See* POMS SI 01120.200(J)(3) (grantor trust created where recipient's mother, as his legal guardian, established the trust with a monetary judgment received by recipient as a result of a car accident because the funds belonged to the recipient and mother's actions were imputed to the recipient); Michigan Trust for Nibras S~, OGC-V (M~) to K~, Director, POS-RSI/SSIB, SSA-V (4/14/97) at 2 (grantor trust created where claimant's conservator established the trust with personal injury settlement proceeds belonging to the claimant/beneficiary although paid to the conservator on behalf of the claimant). Brian P~ would properly be characterized as the settlor of the trust if he contributed the assets to the trust.

Brian P~ is the sole, identifiable beneficiary of the trust.

To revoke a trust, it is required that the settlor and all beneficiaries consent to the revocation, 76 Am. Jur. 2d § 94 (1992), and a contingent beneficiary appears to be considered a beneficiary for that purpose. *See* Restatement (Second) of Trusts § 127 cmt. b, § 339 cmt. b (1959); 76 Am. Jur. 2d § 95 (1992) ("a trust cannot be terminated by the consent or acts of beneficiaries where there are contingent interests in the trust which cannot be determined until the happening of certain events"). Brian P~ is the only beneficiary of the trust during his lifetime. The only other possible beneficiaries are his heirs at law who, on the event of his death, appear to take any remaining assets after reimbursement (due to 42 U.S.C. § 1396) of any State medical assistance provided on his behalf. *See* Trust Agreement, paras. 13, 16. But the Restatement (Second) of Trusts § 127 cmt. b (1959) supports an inference that, if the only other beneficiaries are Brian P~'s "heirs at law," he is the sole beneficiary of the trust.

As stated above, the general rule is that where the settlor is the sole beneficiary of the trust, he "can compel termination of the trust, although the purposes of the trust have not been accomplished." Restatement (Second) of Trusts § 339 (1959); *see also* 76 Am. Jur. 2d § 96 (1992). If Brian P~ provided the assets of the trust, he is the grantor or settlor. Because he also appears to

be the sole beneficiary of the trust, Brian P~ could revoke the trust, have unrestricted access to the trust principal, and use the principal for his support and maintenance.

But, if further factual development reveals that the funds were not Brian P~'s, then he would not be the grantor or settlor of the trust, and the trust would not be a resource.

CONCLUSION

In sum, we conclude that if further factual development confirms that funds held in the shared savings account belonged to or were attributable to Brian P~ before the creation of the trust, those funds constitute a countable resource for determining Brian P~'s SSI eligibility.

X. PS 00-310 Supplemental Security Income - Michigan Trust - Carl R. L~, SSN ~, Your Reference: S2D5G3

DATE: November 8, 1999

1. SYLLABUS

This opinion concerns a discretionary trust in Michigan. The trust is countable as a resource for SSI purposes because the individual can revoke the trust and use the assets for his own support and maintenance. The trust was established with the individual's own funds which makes him the grantor under Michigan law. And the individual is the sole beneficiary of the trust because the trust does not establish a residual beneficiary. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked that we review the "L~ Family Discretionary Trust" to determine whether it is a countable resource for Carl R. L~ (Carl), a Supplemental Security Income (SSI) recipient. For the reasons stated below, we conclude that the funds in the trust should be considered a resource to Carl.

FACTS

This trust was established by Carl's mother, Millie L~ (Millie) as Carl's guardian, and it appears to be funded with a personal injury settlement payment of $240,000 related to injuries received by Carl. Prior to this financial settlement, Millie was appointed guardian over Carl's person and estate by the Tribal Court of the Sault Ste. Marie Tribe of Chippewa Indians because he was not capable of caring for himself, including his financial affairs. The trust names Millie as settlor or grantor, and Millie and Calvin S~ as trustees. Under this trust, the trustees may in their discretion distribute any part of the net income or principal in the best interest or benefit of Carl as the trustees determine to be for the greatest degree of "security" for Carl. Carl's "security" shall include consideration of his overall circumstances and maximization of his personal, spiritual, social, and financial well-being. The trust provides that Carl does not have the power or authority to demand any distribution of the trust estate from the Trustee.

The trust also provides that on Carl's death, the trustees shall pay debts, taxes, and expenses imposed on Carl's estate, and then pay state claims where Carl received medical assistance payments. After satisfaction of these provisions, the remainder of the trust estate shall be distributed to classes of beneficiaries identified by Carl consisting of his immediate family, relatives by blood, marriage, or adoption, or to those charities designated by Carl under his Last Will and Testament. If Carl does not exercise this power of appointment, the Trustee shall distribute the trust estate to Carl's heirs at law as though he died intestate under the laws of the State of Michigan.

DISCUSSION

To qualify for SSI benefits, a claimant must show that his or her resources are below a statutory maximum. 20 C.F.R. §§ 416.202, 416.1205; 42 U.S.C. § 1382(a). Under the applicable regulation, "resources" are defined as:

> cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

20 C.F.R. § 416.1201(a).

If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource.

20 C.F.R. § 416.1201(a)(1).

A trust can be a resource. The Program Operations Manual System (POMS) specifies that if an individual has the authority to revoke the trust and use the trust assets for his support and maintenance, the trust assets are a resource to the individual. POMS SI 01120.200(D)(1). In this case, the trust is a countable resource for determining Carl's SSI eligibility because he can revoke the trust and use the assets for his support and maintenance under the terms of the trust. POMS SI 01120.200(D)(1)(a).

In general, and under Michigan law, the grantor of a trust is the person who provides the consideration for the trust. 76 Am. Jur. 2d § 55; POMS SI 01120.200(B)(2); *see In re Johannes Trust*, 479 N.W.2d 25, 29 (Mich. App. 1991). When a trust is funded with proceeds from the settlement of a personal injury claim brought by the guardian on behalf of the ward, the ward is the individual who established the trust and is considered the true grantor of the trust. POMS SI 01120.200(J)(3)(A); *see Ronney v. Department of Social Services*, 532 N.W.2d 910, 913 (Mich. App 1995). In this case, although Millie created the trust and was named as settlor in the trust agreement, she established the trust using assets Carl received from a personal injury settlement. Therefore, Carl is the legal grantor of the trust.

Carl is also the sole beneficiary of the trust. If the grantor of the trust estate has the power to appoint the residue of the trust estate by will alone, and in default of appointment the property is to be distributed to his heirs at law who would be entitled as though he had died intestate, he intended to be the sole beneficiary of the trust. Restatement (Second) of Trusts § 127, cmt. b (1959). The terms of the trust instrument provide that on Carl's death, the Trustee shall pay all taxes, debts, and expenses and costs imposed on Carl's estate, and then pay state claims where Carl received medical assistance payments,

Finally, after satisfaction of these provisions, the remainder or residue of the trust estate shall be distributed to classes of beneficiaries identified by Carl consisting of his immediate family, relatives by blood, marriage, or adoption, or to those charities designated by Carl under his Last Will and Testament.

Carl's power of appointment to distribute the residue of the trust estate by will is limited to these beneficiaries. However, Carl may default in appointing the trust property by not executing a will, and in the event he does execute a will, he has the power to change the beneficiaries at any time prior to his death. Because of these two possibilities, none of the beneficiaries has any interest in the residue of the trust estate. If Carl does not exercise this power of appointment, the trust contains explicit instructions that the Trustee shall distribute the trust estate to Carl's heirs at law as though he died intestate under the laws of the State of Michigan. Even though upon Carl's death the residue of his estate is to be distributed by will or upon default of such appointment to his heirs at law as if he died intestate, he is still considered the sole beneficiary of the trust.

Because Carl is the grantor and the sole beneficiary of the trust, he can revoke or compel termination of the trust. Restatement (Second) of Trusts § 339, cmt. a (1959); POMS SI 01120.200(D)(3). We have previously advised that this general trust principal applies in Michigan. *See* Six State Synopsis of Trust Laws, OGC-V (P~) to P~-W~, ARC, SSA-V (2/26/92); R~, 532 N.W.2d at 911-13. Because Carl is the grantor and the sole beneficiary of the trust, he can revoke the trust and use the funds for his benefit and security. The trust, therefore, is a resource.

Thus, we conclude that the trust property at issue should be considered a resource to Carl for SSI purposes because as grantor and sole beneficiary of the trust, he can revoke the trust and use the trust income and principal for his best interest and security.

Y. PS 00-294 Review of the Scott ~ Trust

1. SYLLABUS

The trust addressed in this opinion is generally a standard irrevocable trust established by a third party. The opinion provides an analysis of a provision whereby the trust beneficiary has a limited right to withdraw certain additions to the trust for 30 days after the addition is deposited. NOTE: This limited right of withdrawal confers certain gift tax rights on the donor.

2. OPINION

You asked us to review a trust dated February 4, 1999, to determine whether the assets placed in trust would be a countable resource to Scott ~ , an SSI claimant. For the following reasons, we believe that the assets in trust are not available for use for Mr. ~ support and maintenance. Therefore, the assets in trust are not a countable resource to him.

FACTS

We base our opinion on our review of the trust instrument you provided to us, as well as information provided by the attorney who drafted the trust, Dirk ~. The trust was established by Scott ~ grandmother, Helen M. ~ , on February 4, 1999. Jean A. ~ , Ms. ~ daughter and Scott's mother, was named as trustee. The trust instrument does not indicate how the trust was funded, but Mr. ~ advised us that the trust was initially funded with approximately $5000 (cash). The trust indicates that assets of any type may be added to the trust, either by the settlor, Ms. ~ , or by others (art. 1.2). According to Mr. ~ , Ms. ~ made an additional contribution of approximately $5000 in the Spring of 2000.

Article Two provides that Scott has certain withdrawal rights. In particular, it provides that whenever a contribution is made to the trust prior to Ms. ~ death, the trustee must notify Scott in writing within 15 days of the contribution that he has the right to withdraw the amount of the contribution, subject to certain limitations (art. 2.1, 2.2). The amount of the withdrawal is limited to $20,000 if the donor is married and $10,000 if the donor is unmarried (art. 2.7). Scott's withdrawal rights expire 30 days after the date of the contribution (art. 2.3).

Article Three provides that the trustee "may distribute any portion or all of the income and principal of the Trust for Scott's benefit if, in the exercise of its sole discretion, the Trustee deems it appropriate for any purpose whatsoever to supplement other income and resources available to him" (art. 3.1). It further provides that "no distribution shall be made for Scott's benefit that would reduce any aid otherwise available for his maintenance, health care, education, or general welfare" (art. 3.1).

Scott ~ is the sole current beneficiary of the trust. If Scott dies before complete distribution of the trust assets, the remaining assets will be distributed to his estate provided he exercises his general power appointment in his last will and testament (art. 3.2(a)). However, if Scott fails effectively to exercise his general power of appointment, the trust assets will be distributed to the issue then living of Jean A~ (art. 3.2(b)). If there is no taker under that provision, then the trust assets will be distributed to the settlor's issue then living, by right of representation (art. 3.2(c)). Thus, in addition to Scott's current beneficial interest, two additional classes of individuals have contingent future interests in the trust property.

DISCUSSION

Property held in trust for an individual is a resource under 20 C.F.R. § 416.1201 if: (1) the individual has legal authority to revoke the trust and gain access to the trust property and use it for his or her support and maintenance; (2) the individual can direct the trustee to use the property for his or her support and maintenance under the terms of the trust; or (3) the individual can transfer his or her interest in the trust and use the proceeds for support and maintenance. *See* POMS SI 01120.200(D)(1)(a); 20 C.F.R. § 416.1201(a)(1) (1999) ("If the individual has the right, authority, or power to liquidate the property or his or her share of the property, it is considered a resource."). We have reviewed the Scott ~ Trust and conclude that the trust assets are not a countable resource for purposes of determining Scott's SSI eligibility.

Because Scott did not create the trust and the trust creates future interests in addition to Scott's current beneficial interest, the trust is not revocable by Scott alone, and it does not appear that Scott has the legal authority to revoke the trust and use the assets for his support and maintenance. Further, the trust provides that the trustee may at her discretion distribute "any portion" of the trust assets for "any purpose whatsoever" (art. 3.1). Because the trustee has unfettered discretion as to whether and when distributions may be made for Scott's benefit, the trust appears to be a discretionary trust. *See* 1 Restatement of Trusts (Second) § 155; *see also Miller v. Dep't of Mental Health*, 442 N.W.2d 617, 618 (Mich. 1989) (distinguishing discretionary trusts and support trusts). The trustee is not required to distribute any of the assets, and the trust does not create any asset or income rights in the beneficiary. *See generally Lawrence A. F~*, Discretionary Trusts for a Disabled Beneficiary: A Solution or Trap for the Unwary, 46 U. Pitt. L. Rev. 335, 341-42 (1985). Therefore, Scott does not have a judicially enforceable right to direct distribution of trust property for his support and maintenance. *See Miller*, 442 N.W.2d at 619 (providing that because the beneficiary's receipt of any amount depends on the trustee's discretion, the beneficiary does not have an ascertainable interest in the assets of a discretionary trust); 1 Restatement of Trusts (Second) § 187 ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court ."). Scott N~ thus does not have the power to direct distribution of trust assets.

However, Scott does have certain withdrawal rights. In particular, within the first 30 days after a contribution to the trust, Scott has the right to withdraw the contribution, subject to the limitations provided Articles 2.6 and 2.7. Accordingly, contributions to the trust should be considered income to Scott on the date of the contribution. *See* 20 C.F.R. §§ 416.1121(g), 416.1207(a). (The contribution should be considered income, however, only to the extent of any withdrawal limits set forth by the donor, as provided in Article 2.6, or to the extent of the withdrawal ceiling outlined in Article 2.7.) If Scott does not exercise his withdrawal rights by the first day of the subsequent month, and the 30-day period has not expired, then the amount of the contribution (subject again to any limits imposed by Articles 2.6 and 2.7) should be considered a resource to him for that subsequent month. *See* 20 C.F.R. 416.1207(d). Since Scott's withdrawal rights expire 30 days from the date of the contribution, and thus cannot extend beyond the following calendar month, the contribution will be a resource to him only for this one month. The trust specifically provides that the withdrawal rights are not cumulative and will lapse if not exercised (art. 2.3).

We note two reservations regarding the analysis outlined above. First, Scott's withdrawal rights apply only to contributions made to the trust prior to Ms. ~ death (she is currently in her nineties) (art. 2.1). After her death, Scott has no right of withdrawal. Second, the trust provides that Scott must be notified of his withdrawal rights within 15 days after each contribution (art. 2.2). If he is not notified as required by the terms of the trust, he may have a legal cause of action against the trustee for breach of trust. We assume for purposes of our analysis that the trustee, where necessary, has complied with (and will in the future comply with) the notification provision as outlined in Article 2.2.

Finally, the trust contains a spendthrift provision which provides that no principal or income payable may be assigned by its beneficiary or be reached by any creditor (art. 6.7). Thus, it does not appear that Mr. ~ has any power to transfer his interest in the trust and use those proceeds for support and maintenance. In sum, Mr. ~ does not have the legal authority to revoke the trust, direct the use of the trust assets for his own support and maintenance, or transfer his interest in the trust, and the trust assets are not a countable resource for SSI purposes.

CONCLUSION

For the foregoing reasons, we believe that the trust assets should not be considered a countable resource to Scott ~. The trust appears to be a discretionary trust, and Mr. ~ does not have a judicially enforceable right to command the trustee to make disbursements from the trust. Furthermore, he cannot unilaterally revoke the trust, or transfer his interest in the trust, and thereby gain access to trust assets. However, Scott does have limited withdrawal rights in contributions made to the trust, and those contributions may be considered income when received and a resource for a brief period thereafter, as discussed above.

Z. PS 00-239 Conservatorship/Blocked Account for Melanie G~; your reference S2D5B51

DATE: July 26, 1993

1. SYLLABUS

The issue concerns whether funds held by a conservator as fiduciary for a minor SSI beneficiary are countable resources for SSI purposes. Generally, under Michigan law, such funds are presumed to be available for support and maintenance. However, if a court restricts use of the funds to certain medical expenses and precludes use of the funds for everyday support of the child, the funds are not resources of the beneficiary for SSI purposes.

2. OPINION

SUBJECT:

This is with reference to your May 13, 1993 inquiry concerning whether funds held by a conservator as fiduciary for a minor SSI beneficiary, Melanie G~, would constitute countable resources for Supplemental Security Income (SSI) purposes. We conclude that, although generally such funds are presumed to be available for support and maintenance under Michigan law, in this particular case a court order restricts use of the funds to certain medical expenses and precludes use of the funds for everyday support of the child. The funds, therefore, are not resources of the beneficiary for SSI purposes.

Ms. G~ apparently had claims for personal injuries she sustained as a result of an automobile accident. On May 29, 1990, a Michigan court entered an order authorizing Ms. G~' conservator to settle an uninsured motorist claim on Ms. G~' behalf in the amount of $20,000, out of which $6,809.77 in attorney's fees and costs was to be paid. The net recovery was to be placed in a joint account that would require two signatures for withdrawal -- that of her conservator, and that of the court. The funds were

not to be distributed except for payment of bond premiums unless ordered by the court. On November 26, 1991, the court entered a second order authorizing Ms. G~' conservator to settle all the minor's claims against Mason County Central Schools for the amount of $7,500, out of which $2,499.75 in attorney's fees was to be paid. The net recovery was to be placed in a joint account that would require both the conservator's and the court's signatures. On April 16, 1993, the court entered a third order "to emphasize the necessity of maintaining the restricted withdrawal of these accounts as ordered by the Court on May 29, 1990." The court restricted the funds to be used only in a medical emergency for medical expenses related to the accident. The court explicitly precluded use of the funds for the everyday support of the child. The court indicated that the funds are intended to be released when Ms. G~ reaches the age of eighteen. The order applied retroactively.

It is not entirely clear whether the April 16, 1993 order emphasizing the restriction applies to the account created by the November 26, 1991 order, as the April 1993 order mentions only the May 29, 1990 order specifically./ The April 1993 order, however, refers in the first paragraph to "these accounts," which suggests that the order applies to the accounts created by both the May 29, 1990 and November 26, 1991 orders. Also, all of the orders were issued by the same judge under the same case caption, and the judge used the same language in both the May 1990 and November 1991 orders regarding the deposit of the funds into joint accounts that would require the signature of both the conservator and the court. The April 16, 1993 order, therefore, likely applies to both the May 1990 and the November 1991 orders. You may wish to ask for clarification, however, as to which accounts are specifically covered by the April 1993 order. Any accounts determined to be covered by the April 16, 1993 order would not be countable resources for SSI purposes for the reasons explained below.

A resource, for SSI purposes, includes assets that the individual owns and could convert to cash to be used for his or her support and maintenance. 20 C.F.R. § 416.1201(a) (1992). When a fiduciary (such as a conservator) manages and controls funds owned by an SSI recipient, those funds are considered to be available to the recipient for the recipient's support and maintenance, absent a legal restriction on the use of or access to the funds. *See* POMS SI 01120.010.C (Feb. 1992); POMS SI 01120.110.C (Mar. 1988). The funds in this case are held in a "blocked" account, in that the conservator may access funds held on behalf of Ms. G~ only with the permission of the court. We have previously advised that funds held in a blocked account under Michigan law are presumed to be available to beneficiaries for their support and maintenance, absent a legal restriction on the conservator's use of or access to the funds. *See Blocked Account in Michigan as SSI Resource: Richard B~, ~*, OGC-V (M~) to SSA-V, ARC-POS (P~ W~) (Dec. 4, 1990) [hereinafter *B~* Memorandum]; Blocked Accounts as SSI Resources — ACTION, OGC-V (L~) to SSA-V, ARC-POS (W~) (Aug. 3, 1989), at 1 [hereinafter Blocked Accounts Memorandum]; *see also* POMS SI 01140.215.B.1 (Mar. 1992); *see also* POMS SI 01120.010.C.3 (Feb. 1992); POMS SI R01120.010 (May 1991) (regional instructions—Michigan); Mich. Stat. Ann. § 700.485(1)(b) (West 1980).

We have also advised, however, that certain circumstances may nullify the presumption of availability of such funds. *See B~* Memorandum, supra, at 2; Blocked Accounts Memorandum, supra, at 2. The POMS explains that the presumption of availability can be overcome by "restrictive language in the court order that established the account or in a subsequent court order." POMS SI 01140.215.B.2 (Mar. 1992); *see also B~F* Memorandum, *supra* (conservatorship funds that could not be withdrawn until recipient reached age eighteen or until further order of the court were not a resource). The POMS also indicates that when the court or state law restricts the use of a damage award from a personal injury action to be paid only for medical expenses related to the accident, the funds are not considered resources, as they are not available for food, clothing, or shelter. *See* POMS SI 01140.215D.2 (Mar. 1992) (if state law restricts use of personal injury funds held in conservatorship accounts to use for medical expenses only, funds are not resources); POMS SI 01120.010D.5 (Feb. 1992) (if court orders the damage award in automobile accident case to be used solely for medical expenses related to the accident, the funds are not a resource). Here, the court order specifically restricted use of the funds received for settlement of the personal injury claims to pay for medical expenses related to the accident; the order explicitly precludes use of the funds for the child's food, clothing, or shelter. The order, therefore, nullifies the presumption of availability of the funds in the affected accounts. The funds are not countable resources for SSI purposes.

AA. PS 00-233 Michigan Forethought Life Insurance-Funded Burial Agreements: Ora N~, ~ (Your December 4, 1991 Request), and Minnie M~, ~ (Your December 10, 1991 Request), (Your ref: S2D5B51, SI 2-1-4)

DATE: March 2, 1992

1. SYLLABUS

This 1992 opinion explains why the cash surrender value of the Forethought life insurance-funded burial agreement was not a resource at that time.

However, Section 205 of the Foster Care Independence Act of 1999 changes how certain trusts are evaluated under SSI resource counting rules. Therefore, adjudicators should be aware that trusts established after 1/1/00 must be evaluated under the revised rules.

2. OPINION

On December 4, 1991, you asked us to review under Michigan law a Forethought life insurance-funded burial agreement for Ora N~, an SSI applicant. On December 10, 1991, you asked us to review under Michigan law a Forethought life insurance-funded burial agreement for Minnie M~, another SSI applicant. We are providing you one answer that responds to both inquiries.

The Forethought life insurance-funded burial agreement package marketed in Michigan consists of: (1) a Forethought life insurance policy purchased by the SSI applicant; (2) irrevocable transfer of ownership of the life insurance policy to the Forethought Trust in Batesville, Indiana; (3) a Funeral Planning Agreement between the insured individual and a particular funeral home; and (4) revocable assignment of the proceeds of the life insurance policy to the funeral home.

We have specifically considered if irrevocable assignment of ownership of Forethought life insurance policies was consistent with the state law requirement that assignment of the policy's proceeds to a funeral home be revocable.

In our opinion, the Forethought life insurance-funded burial agreement packages marketed in Michigan are valid under Michigan law. In a practice that is not prohibited by Michigan law, the purchasers irrevocably transfer ownership of the life insurance policy to a trust and neither own nor have the legal right to direct the use of trust assets to meet their support and maintenance needs. Therefore, the cash surrender values (CSVs) of the policies are not resource of the purchasers for SSI purposes. This is true even though, as required by Michigan law, the purchasers (and their representatives and survivors) retain the right to change the funeral firm that will provide the burial goods and services.

You also notified us that Forethought's attorney asked Regional Commissioner Paul D. B~ on December 27, 1991 to confirm that the Michigan Forethought policies that have been irrevocably assigned to the Forethought Trust are not resources of the purchasers for SSI purposes. At that time, Forethought was advised that state law aspects of the matter were still pending in our office. The Regional Commissioner will now wish to respond to Forethought's inquiry. To that end, we are attaching hereto a draft response.

DISCUSSION

At M.C.L.A. 500.2080(6), created by P.A. 1986, No. 318, § 1, effective June 1, 1987, Michigan law permits a life insurer to "write a life insurance policy ... which is subject to an assignment of the proceeds of the insurance policy ... as payment for cemetery services or goods or funeral services or goods" if certain conditions regarding the pre-death assignment of the proceeds of the life insurance policy are met. The assignment must be in writing on a form approved by the commissioner of insurance; the assignment must be an inseparable part of the contract for funeral services for which the assigned proceeds serve as payment; the assignment must be revocable; if the assignment is revoked funeral services may be obtained from any other funeral establishment; the revocability of the assignment must be disclosed in boldfaced type; and several other conditions described in the statute must also be met.

The Michigan Commissioner of Insurance has approved the form used by Forethought for assignment of the life insurance proceeds to the funeral home. It also appears to us that the Forethought documents meet all the requirements of M.C.L.A. 500.2080(6). Therefore, under Michigan law Forethought has created a valid, but revocable, assignment of life insurance proceeds.

Under SSI policy, such a life insurance policy must meet two additional conditions under state law in order to not constitute resources of the insured individual. In response to an inquiry on behalf of Forethought, SSA Commissioner Gwendolyn S. K~ summarized SSI's policy in a July 8, 1991 letter to Congressman Andy J~, Jr. She stated that revocably assigned policies could be placed in trust to avoid having them count as resources in determining eligibility for SSI if: (1) the state allows insurance policies funding a funeral arrangement to be placed irrevocably in trust; and (2) if such a policy is placed in trust, the individual must have no access to it. On August 8, 1991, Associate Commissioner for SSI Rhoda M. G. D~ gave Mark A. W~, counsel for Forethought, essentially the same opinion. She stated:

If an individual irrevocably transfers ownership of a life insurance policy to a trust and neither owns nor has the legal right to direct the use of trust assets to meet his or her support and maintenance needs, the cash surrender value (CSV) of the policy is not a resource for SSI purposes. The provisions of the document titled "Change of Ownership to the Forethought Trust" meets these requirements. Under the terms of the document, the CSV is not a resource even though the individual retains the right to change the funeral firm that will provide the burial goods and services.

We agree that a revocably assigned policy placed in an irrevocable life insurance trust will be treated exactly the same as an irrevocably assigned life insurance policy. In both cases, the CSV of the policy is not a resource for SSI purposes since the individual neither owns nor can legally use the CSV for support and maintenance. With respect to a life insurance-funded burial arrangement, State law must permit a policy which funds such an arrangement to be placed irrevocably in trust in order for the policy's CSV not to be considered a resource.

A POMS clarification, teletype No. 52-91 dated August 30, 1991 (with a destruction date of December 31, 1991) states the same thing. We are advised that POMS instructions that will replace the teletype are imminent. We have seen a draft, and they essentially repeat the language of the teletype.

Thus, the determinative questions that must next be answered are: Does Michigan law allow a revocably assigned life insurance policy that funds a funeral contract to be placed irrevocably in trust? And, if so, have the Forethought purchasers irrevocably assigned ownership of the life insurance policies in trust so that they neither own nor have the legal right to direct the use of trust assets to meet their support and maintenance needs?

Forethought has advised you that the Michigan Department of Licensing and Regulation, Insurance Bureau, has approved both the process and the forms used to effect the irrevocable assignment of the Forethought life insurance policy to the Forethought Trust. Forethought stated that the Department of Insurance does not issue formal approval letters, but instead uses a procedure whereby Forethought's letter submitting a form for approval is stamped as approved if the form is authorized. Forethought submitted stamped approvals of two versions of the form it uses to both transfer ownership of the policy to the Forethought Trust and at the same time to preserve the right of the purchaser to change the designated funeral establishment under the trust. We contacted John E~ of Michigan's Department of Licensing and Regulation's Insurance Bureau, and also talked to a lawyer and program personnel from the Michigan Department of Social Services. All recalled a meeting that had included representatives from their offices as well as from the Michigan Attorney General's Office at which the process and the forms were discussed. The requirements of M.C.L.A. 500.2080(6) that the purchaser retain the right to revoke the assignment of the policy's proceeds was not found to be inconsistent with the purchaser's simultaneously irrevocably assigning ownership of the policy to the Forethought Trust. The approval process was as Forethought had described it, and Forethought's forms are in fact approved for use in Michigan.

The transfer of ownership form states that the owner transfers ownership of the life insurance policy to the Forethought Trust, that the owner understands that the transfer is permanent, that the owner renounces his or her power to control ownership of the policy, and that the owner waives all rights under the policy to surrender it for cash and to obtain a loan against the policy. At the same time, the owner states, as required by the Michigan statute described above, that the change of ownership does not restrict the purchaser (or his or her representative or family) from revoking the assignment of the proceeds of the policy to the designated funeral establishment at any time prior to the funeral.

For the foregoing reasons, in our opinion Michigan law does not prohibit a revocably assigned life insurance policy that funds a funeral contract to be placed irrevocably in trust. In addition, the Forethought purchasers have irrevocably assigned ownership of the life insurance policies to the Forethought Trust so that they neither own nor have the legal right to direct the use of trust assets to meet their support and maintenance needs. Therefore, the cash surrender values (CSVs) of the policies are not a resource for SSI purposes.

CONCLUSION

For the foregoing reasons, in our opinion the Forethought life insurance-funded burial agreement plan is valid under Michigan law. Nothing in Michigan law prohibits irrevocably assigning to a trust ownership of a life insurance policy whose proceeds have been revocably assigned to fund a funeral contract, and such a practice has in fact been approved by the Michigan Department of Licensing and Regulation's Bureau of Insurance after consultation with the Attorney General's Office. Even though the Forethought purchasers retain the right to revoke the assignment of the life insurance proceeds to the funeral home, they have irrevocably assigned ownership of the life insurance policies to the Forethought Trust so that they neither own nor have the legal right to direct the use of trust assets to meet their support and maintenance needs. We therefore conclude that the cash surrender values (CSVs) of the policies are not a resource for SSI purposes.

BB. PS 00-154 Review of a Trust for Cynthia J. B~

DATE: May 13, 1999

1. SYLLABUS

This case concerns whether or not a "Special Needs" Trust is considered a countable resource and whether alimony payments placed in the trust from the beneficiary's former spouse are countable as income for SSI eligibility.

A general rule of trust law asserts that even if a trust purports to be irrevocable, it nevertheless may be revoked if the individual is both the settler and the sole beneficiary of the trust. The addition of residual beneficiaries makes the trust irrevocable because these beneficiaries' consent would be required to revoke the trust. Consequently the trust property is not a resource for SSI purposes.

The corpus of the trust is the alimony that the court ordered to be paid to the beneficiary. The alimony payments are first received by the beneficiary's trustee on her behalf, rather than paid directly into the trust, thus the alimony constitutes income when received. Moreover, the inclusion of the alimony payments in a trust which expressly precludes using the trust assets for the beneficiary's support is improper under Michigan law.

2. OPINION

You asked whether the Cynthia J. B~ "Special Needs" Trust constitutes a countable resource for purposes of SSI eligibility.

You also asked us to consider whether the alimony payments from the SSI beneficiary's former husband are countable as income for SSI purposes.

We conclude that the trust assets would not be a resource, because the SSI beneficiary ("Cynthia") could not direct that the trustee use the trust assets for Cynthia's support and maintenance; sell or otherwise transfer her interest in the trust; or revoke or terminate the trust to obtain the assets.

We conclude that the alimony payments cannot be properly paid into a supplemental needs trust under Michigan law. The alimony payments, when made to Cynthia's conservator on her behalf, are countable income for SSI purposes.

Facts

Cynthia B~ is a legally incapacitated adult who receives SSI and Medicaid. By order of the Kent County Circuit Court, dated November 30, 1998, Cynthia was awarded weekly alimony payments in the amount of $200 and weekly payments of $50 for arrearages, from her former husband, David B~. On January 8, 1999, the Kent County Probate Court entered an order that directed and authorized her conservator, Daniel Z~, to deposit all alimony (including arrearage) payments into a Special Needs Trust created pursuant to 42 U.S.C. § 1396p(d)(4)(A). The trust was intended to create a "safe harbor" for Cynthia, whose receipt of alimony and arrearage payments would otherwise render her ineligible for SSI and Medicaid.

The trust agreement was entered into on February 12, 1999. The Kent County Probate Court was named as settlor (grantor), and Daniel Z~, Cynthia's court-appointed conservator, was named as trustee. The stated purpose of the trust is to provide for Cynthia's "special needs and is not intended to take the place of federal, state, or local governmental benefits, including but not limited to Medicaid and Supplemental Security Income, or other sources of support which may otherwise be available to beneficiary through any governmental agency, office or department, non-profit organization or other public or private source."

Art. IV.B. Distributions to provide support and maintenance can be made only to supplement benefits available through government or private programs. *Id.* Distributions shall not be used to pay for Cynthia's basic food, clothing, or shelter costs, or for any other forms of primary support for Cynthia. Art. IV.B, Art. IV.D.

The trust states that it is irrevocable and that the trust is interpreted under Michigan law. Art. II, Art. VII.G. No income or principal may be used for anyone else during Cynthia's lifetime. Art. IV. The trust states that it is created pursuant to 42 U.S.C. § 1396p(d)(4)(A). This statute exempts certain types of trusts from being considered as countable resources for purposes of determining Medicaid eligibility.

Neither Cynthia nor any trustee shall have the right or power to alter, amend, revoke, or terminate the Trust, in whole or in part. Art. II. Upon Cynthia's death, the remaining assets of the trust will be used to reimburse the appropriate State agencies, as reimbursement for any amount expended by the state for the Cynthia's medical assistance. Art. IV.F.1. Any remaining balance is to be distributed to Cynthia's children, Michelle J. B~ and Michael J. B~. Art. IV.F.2. If either of these children is not then living, his or her share shall pass to Cynthia's surviving child. *Id.*

On March 3, 1999, the Kent County Probate Court approved the Cynthia J. B~ Trust. The probate court also appointed Daniel Z~ as trustee, and authorized him to deposit all alimony (including arrearage) payments received from the Kent County Friend of the Court, or directly from Cynthia's former husband, into the trust.

DISCUSSION

1. The trust is irrevocable.

As we previously advised, the rules governing when trust assets affect eligibility for Medicaid are different from the SSI rules for determining when assets are a countable resource. Even if a trust is consistent with the provisions of the Omnibus Reconciliation Act of 1993, it still may be a countable resource for SSI purposes.

See States Named as Beneficiary to a Trust, OGC-V (D~) to Gloria P~, ARC-MOS (June 24, 1997), at 2.

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can revoke the trust and use the assets to meet his needs for food, clothing, and shelter, or if the individual can direct the use of the trust assets to be used for his support and maintenance. *See* POMS SI 01120.200(D). An individual's beneficial interest in a trust may also be a resource if the individual can sell that interest. *See* SSI-Illinois- Trust for Heather C~, SSN ~, OGC-V (P~) to Donna M~, ARC-MOS (April 9, 1999), at 3.

The trust agreement in this case explicitly states that the trust is irrevocable. However, as we previously advised, even if a trust purports to be irrevocable, it nevertheless may be revoked if the individual is both the settlor and sole beneficiary of the trust. *See* Supplemental Security Income-Ohio-Medicaid Trust for Silas K~, ~, OGC-V (C~) to Donna M~, ARC-MOS (July 13, 1998) at 3; *see also Hein v. Hein*, 543 N.W. 2d 19 (Mich. App. 1995). Since the corpus of the trust in this case is the alimony that the court ordered to be paid to Cynthia, it would appear that Cynthia is the settlor of the trust. *See Michigan Trust for Arthur J. F~F*, ~, OGC-V (F~) to Gloria P~, ARC-MOS (July 15, 1997), at 3. This is the case, even though the Kent County Probate Court was named settlor. Here, however, Cynthia cannot revoke the trust, because she is not its sole beneficiary.

The addition of residual beneficiaries makes the trust irrevocable because these beneficiaries' consent would be required to revoke the trust. *See* Restatement (Second) of Trusts, § 127, comment b. While the language of the trust makes it clear that Cynthia is intended to be the sole beneficiary while she is alive, the amount left in the trust upon Cynthia's death is to be distributed to her children, Michelle J. B~ and Matthew J. B~. Therefore, Cynthia does not possess the sole interest in the trust, and she would not be entitled to revoke the trust without their consent.

Additionally, the language of the trust does not reserve any power to Cynthia to direct how the income or principal are to be expended. Rather, the trustee appears to have the absolute discretion to distribute the net income or principal for Cynthia's benefit, and then, only to purchase assets exempt from consideration for Medicaid or SSI purposes, to provide for Cynthia's extra and supplemental needs. Art. IV.B. It is also significant that the trust provides that no distributions may be made which would in any way disqualify, frustrate, or reduce any governmental financial assistance which would be available to Cynthia. Art. IV.B.

2. The alimony payments are income.

While we conclude that, based on the considerations addressed above, the trust established for Cynthia is irrevocable, we also conclude that the alimony constitutes countable income for SSI purposes. As an initial matter, the Kent County Probate Court's March 3, 1999 Order authorizes the trustee to deposit "all alimony payments, including arrearage payments received from the Kent County Friend of the Court or directly from [Cynthia's] ex-husband into the Cynthia J. B~ Trust." Since the alimony payments are first received by Cynthia's trustee on her behalf, rather than paid directly into the trust, the alimony would appear to constitute income when received. *See* 20 C.F.R. § 416.1102; *see also* POMS SI 00810.030.

Additionally, the inclusion of alimony payments in a trust which expressly precludes using the trust assets for Cynthia's primary support is improper under Michigan law. Michigan law provides that "[i]n every action for divorce . . . either party may be required to pay alimony for the suitable support and maintenance of the adverse party." MCL 552.13 § 13(1). Michigan courts consider eleven factors when determining alimony/spousal support, including the ability of the parties to work, the present situation of the parties, the needs of the parties, and the health of the parties. These cumulative factors indicate that alimony, under Michigan law, is intended to serve as a source of primary support for the recipient spouse.

Here, effectuation of the trust's stated purpose — to supplement, but not supplant, any government benefits to which Cynthia is entitled — precludes use of the trust assets for Cynthia's primary support needs. Yet, as discussed above, in Michigan, alimony payments are intended to serve as funds for the recipient spouse's primary needs. Consequently, we conclude that inclusion of David B~'s alimony payments in the special needs trust is improper under Michigan law, and that the alimony is not sheltered from being countable income to Cynthia. Cf. Illinois Trust for Krystal L. S~, ~, OGC-V (B~), to Donna M~, ARC-MOS (July 10, 1998), at 4 (payment of child support into trust directly at odds with Illinois Law and trust declaration that specifically prohibited use of trust assets for beneficiary's basic support).

CONCLUSION

In summary, we conclude that the Cynthia B~ Trust should not be considered a resource to the Cynthia, but that the alimony (and amount in arrears) may not be properly paid into the trust under Michigan law, and that the alimony constitutes countable income for SSI purposes.

A. PS 06-093 SSI-Michigan-Review of the Life Insurance Funded Burial Trust for Mildred N~ -REPLY Our Ref: 06-0007 Your Ref: S2D5G6, SI 2-1-4 MI (N~)

DATE: March 14, 2006

1. SYLLABUS

This opinion addresses whether or not a life insurance funded burial contract is a resource for SSI purposes. As SI 01130.420(B) explains, a burial contract is not a resource if it cannot be revoked or sold without significant hardship. In this situation, the SSI claimant purchased a prepaid funeral agreement by irrevocably assigning ownership of her life insurance policies. This agreement was approved by the State of Michigan and is irrevocable. Because the funeral agreement is irrevocable and cannot be sold without significant hardship, it is not a resource for SSI purposes.

2. OPINION

BACKGROUND

On May 2, 2005, Mildred N~ entered into a Prepaid Funeral and Escrow Agreement with Anderson Diehm Funeral Home, by assigning the proceeds of her preexisting life insurance policies in the amount of $4767.00. The Agreement stated that the purchase price of the merchandise and services to be furnished by the funeral director shall be the retail price for which the merchandise and services are customarily offered by the funeral director at the time of the beneficiary's death. The Agreement also contained Escrow and Investment Requirements which stated that all funds paid by the buyer to the funeral director before the death of the beneficiary shall be placed in one or more interest bearing accounts, and that the funeral director may serve as the escrow agent or may appoint an escrow agent. That same day, on May 2, 2005, Ms. N~ entered into a "REVOCABLE ASSIGNMENT OF INSURANCE PROCEEDS" in which she assigned ownership of the proceeds of her life insurance policies, upon her death, to Anderson Diehm Funeral

Home. On May 24, 2005, Ms. N~ transferred ownership of her life insurance policies to Gary A~, funeral director. That same day, Mr. A~ revoked previous beneficiary designations on one insurance policy, and endorsed that death benefits be paid to him. On September 19, 2005, the Michigan Family Independence Agency certified Ms. N~'s funeral agreement irrevocable, pursuant to Section 19 of Public Act 255 of 1986, as amended.

DISCUSSION

Here, Ms. N~, through the funeral home, has created a life insurance funded burial trust. A trust "established" by an individual on or after January 1, 2000, generally will be considered a resource under federal law, even if it is irrevocable, to the extent that payments from the trust could be made to or for the benefit of the individual, unless the trust provides for Medicaid reimbursement. 42 U.S.C. § 1382b(e). This statutory rule applies if payments can be made for the benefit of the individual "under any circumstance, no matter how unlikely or distant in the future." POMS SI 01120.201(D)(2)(b). This is the case here, since the life insurance funded burial trust clearly benefits Ms. N~ by providing her with funeral services and goods, if she has a funeral.

However, these resource provisions do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral good and/or services; the individual pre-pays for the goods and services; and the funeral provider subsequently places the funds in a trust. POMS SI 01120.201(H)(1). Under these circumstances, the funeral home is considered to have "established" the trust for purposes of 42 U.S.C. § 1382b(e). *Exclusion of Certain Burial Trusts from Section 205 of Public Law Number* (Pub. L. No. 106-169), Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development (August 29, 2000). In such a case, the Agency applies only the regular resource rules for prepaid burial contracts.

Here, the statutory trust resource provisions would not apply because Ms. N~ has irrevocably contracted with a provider of funeral goods and/or services, she pre-paid for the goods and services; and the funeral director, Gary A~, subsequently was required to place the funds in a trust. Specifically, Ms. N~ entered into a certified irrevocable contract with the funeral home, and in that escrow account the funeral home agreed to provide certain specified funeral goods and services in exchange for the death benefits of the life insurance policies. Under Michigan law, a prepaid funeral agreement may be made irrevocable if the Family Independence Agency or Department of Community Health determines that the contract is a fully paid guaranteed price contract, the proceeds of which have been assigned as payment for funeral goods or funeral services for the contract beneficiary that are not more than the amount allowed under section 2080(6)(g) of the insurance code of 1956, plus $2,000, exclusive of income. MI ST 328.229(1). A prepaid funeral agreement approved by the Family Independence Agency or Department of Community Health shall not be revoked or cancelled by the contract seller, contract provider, contract buyer, or their successors, or the estate of the contract beneficiary either before or after the contract beneficiary's death. MI ST 328.229(2). The Prepaid Funeral and Escrow Agreement indicated that Ms. N~ could cancel the Agreement and get a full refund. We assume, however, that these statutory provisions trump this inconsistent language. In addition, Ms. N~ pre-paid for the goods and services by irrevocably assigning ownership of her life insurance policies. We note that Ms. N~ also executed a Revocable Assignment of Insurance Proceeds. However, the subsequent irrevocable assignment of *ownership* of the policies supersedes the irrevocable assignment of proceeds. *See* POMS PS 01825.025 Michigan, S. PS-00-233 (Forethought Life Insurance Funded Burial Agreements). And lastly, the funeral home agreed to subsequently transfer ownership of the life insurance policy to an escrow account, or trust. Thus, per POMS SI 01120.201(H), the arrangement should be evaluated under the regular resource rules as a purchase of goods and services by Ms. N~.

Funds used to fund a prepaid funeral agreement are a resource if the individual can revoke the prepaid plan and recover the funds paid. *See* POMS SI 01130.420(B). However, funds paid to a prepaid funeral agreement are not a resource if the agreement is irrevocable and cannot be sold without significant hardship. *Id.* This prepaid funeral agreement cannot be sold without significant hardship because of the uncertainty of Ms. N~'s death. Because the funeral agreement is irrevocable and cannot be sold without significant hardship, it would not be a resource for SSI purposes. *See* POMS SI 01130.420(B).

We note that the result above is inconsistent with POMS SI CHI 01130.425(B), which provides that life insurance funded burial trusts will always be a resource. We thus recommend that the POMS language be updated to reflect our current understanding of Michigan Law.

CONCLUSION

For these reasons, we conclude that the life insurance funded burial trust is not a resource.

B. PS 04-019 SSI-Michigan-Review of Michigan Life Insurance Funded Burial Contracts, OGC control number 03P054

DATE: October 20, 2003

1. SYLLABUS

The opinion below makes a recommendation that CHI TN 333 and 345 be revised to reflect current law in the state of Michigan regarding the irrevocability of life insurance funded burial contracts.

2. OPINION

You asked for the current state of the law in Michigan regarding the irrevocability of life insurance funded burial contracts, and whether the current law changes the instructions in CHI TN 333 and 345. We advise that CHI TN 333 and 345 be changed to reflect the current state of Michigan law as set forth below.

BACKGROUND

You informed us that you received a fax of an internal Family Independence Agency (FIA) memo dated July 2, 2002, which indicated that the monetary limitation on irrevocable burial contracts had been changed under Michigan law. You also indicated that information in the memo was contrary to the amounts in TN 333. You further noted that some of the information discussed in the FIA memorandum seemed inconsistent with TN 345. You expressed concern about these discrepancies and your ability to properly assess future life insurance funded burial contract issues arising out of Michigan.

DISCUSSION

A life insurance policy can be a resource for SSI purposes if the individual can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. § 416.1230. Michigan law provides that all life insurance policies must contain notice that the policyholder may cancel the policy and receive prompt refund of any premiums paid during a period of not less than ten days after the date the policyholder receives the policy. Michigan Stat. Ann. (MI ST) 500.4015. Therefore, any life insurance policy is a resource during that initial period of time (at least ten days under Michigan law) because the individual has the unrestricted right to cancel the policy and recover the full premium paid.

The next determination is whether the trust to which the policy was assigned was a resource after the initial cancellation period. A trust established by an individual on or after January 1, 2000, generally will be considered a resource, under federal law, if it is revocable, or even if it is irrevocable, to the extent that payments from the trust could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(1)-(2). This rule applies if payments can be made for the benefit of the individual "under any circumstance, no matter how unlikely or distant in the future." POMS SI 011020.201(D)(2)(b).

These provisions do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral goods and services *and* either (1) the funeral provider subsequently places the funds in a trust, *or* (2) the individual establishes an irrevocable trust naming the funeral provider as the beneficiary. POMS SI 01120.201(H)(1). Under these circumstances, the funeral home is considered, for federal law purposes, to have established the trust. S*ee Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No.) 106-169*, Associate General Counsel Office of Program Law to Associate Commissioner for legislative Development (Aug. 29, 2000).

Regional Transmittal 333

Due to a change in the law, effective May 23, 2002, FIA can render irrevocable a prepaid funeral agreement if that agreement is a fully paid guaranteed price contract, for up the amount allowed under section 2080 of the insurance code, plus $2,000, exclusive of interest. The amount allowed under section 2080 of the insurance code is $5,000 adjusted annually since June 1987, in accordance with the consumer price index,. *See* Mich. Compiled Laws Ann. §§ 328.229(1), 500.2080(6)(g). The FIA has determined that the total amount that could be made irrevocable as of June 1, 2002 (and, presumably, as of May 23, 2002) is $10,050, apparently based on calculating the increase in the consumer price index from the statutory $5,000 up to $8,050. *See* Program Administrative Manual, *State of Michigan Family Independence Agency 805 (Oct. 1, 2002);* Memorandum from Jim N~ for Field Operations, FIA, to County Directors, Field Office Managers, *Irrevocable Prepaid Funeral Contracts* (July 2, 2002).

The amount that can be made irrevocable is reduced by the amount of a death benefit from an insurance policy or annuity contract, the proceeds of which have been assigned as payment for funeral goods or funeral services for the contract beneficiary. We recommend that language be added to Regional Transmittal 333 Part B to reflect that, effective May 23, 2002, the limit was raised to $8,050_11, plus $2,000, exclusive of interest. *See* Mich. Compiled Laws Ann. § 328.229(1).

When rendering a prepaid funeral agreement irrevocable, the FIA must also indicate that the state will not be liable for the funeral goods or services, excluding an outside receptacle when required by the chosen cemetery, of the applicant for or recipient of assistance. *Id.* According to MI ST 328.229(2), a prepaid funeral contract approved by the FIA or department of community health shall not be revoked or cancelled by the contract seller, contract provider, contract buyer, or their successors, or the estate of the contract beneficiary either before or after death of the contract beneficiary. Furthermore, an irrevocable contract under this section shall not be considered in determining the eligibility of an applicant or recipient for assistance under the social welfare act.

Regional Transmittal 345

Under Michigan law, any assignment of proceeds from a life insurance policy or annuity used to fund a funeral contract must be revocable. *See* Mich. Compiled Laws Ann. § 500.2080(6)(b). We therefore advise changing the wording in POMS SI CHI01130.425 (MI), section B to reflect that "Michigan law does not permit an irrevocable assignment of a life insurance policy or annuity to fund a burial contract." There are no requirements that can lead to an exception to this rule of law and section B should be revised accordingly.

We further note that the first paragraph of section C of POMS SI CHI01130.425 (MI) is duplicative of TN 333, and unnecessary in the context of this provision. Since the POMS already contains sections relating to the creation of irrevocable burial contracts, it may be confusing to address those issues here. Instead, we advise cross-referencing Regional Transmittal 333. In the third paragraph, both sentences should be modified to reflect that the amounts are "$5,000, adjusted annually since June 1987 in accordance with the consumer price index." It may be helpful to note that, as of 2002, this amount had increased to $8,050, based on changes in the consumer price index. It may also be helpful to point out that, as stated in TN 333, effective May 23, 2003, the amount of any funeral contract that can be made irrevocable will be reduced by the amount of any proceeds of a life insurance policy or annuity for payment of funeral goods and expenses.

Under section D, it may be helpful to cross-reference POMS provisions for determining whether a trust is a resource, especially POMS SI 01120.201(H)(1).

CONCLUSION

We advise revising CHI TN 333 and 345 to reflect the current state of Michigan law as set forth above.

_11 In theory, this amount should change annually, consistent with any increases in the consumer price index.

C. PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~

DATE: September 16, 2002

1. SYLLABUS

This opinion addresses whether a personal effect (in this case, a piano) owned by an SSI recipient, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required by her physical condition under the household goods and personal effects exclusion. This is essentially an evidentiary issue; i.e., the key is whether the fact finder in the FO has sufficient evidence to determine that the piano is required by the individual's physical condition. Under 20 CFR 416.1216(c), certain household goods and personal effects are excluded from SSI resource counting if they are "required because of a person's physical condition." As long as there is sufficient evidence for the fact finder to determine that the piano (or similar item) is required as treatment or therapy for the individual's physical condition, then the item could be excluded as a resource. If the fact finder cannot determine that the piano (or similar item) is required, then the current market value of the piano (or similar item) is subject to the $2,000 maximum exclusion for household goods and personal effects [20 CFR 416.1216(a)-(b)]. It should be noted that the exclusions discussed above do not appear in the Social Security Act.

2. OPINION

You asked whether a piano, owned by SSI claimant Alicia W~, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required because of her physical condition. We conclude that, although there is no caselaw or other legal authority interpreting the applicable regulation, 20 C.F.R. § 416.1216(c), the Agency may consider the piano as an excludable resource, under 20 C.F.R. § 416.1216(c), provided Ms. W~ can show that playing the piano is required as treatment or therapy for her physical condition. If the Agency finds that the piano is not so required, further development and consideration may be warranted to determine the actual current market value of the piano.

FACTS

Alicia W~ owns a baby grand piano that the Wausau Field Office reported is worth $7000. It is not clear how the valuation of $7000 was reached. For purposes of this memorandum, we assume that $7000 is likely the amount Ms. W~ paid for the piano. Ruth J~, a benefit specialist with the Aging and Disability Resource Center of Marathon County, has advised SSA that Ms. W~ tried to sell her piano by advertising it in a local newspaper and with the Wausau Conservatory of Music and by contacting several local churches. Two individuals expressed interest, but Ms. W~ received no offers to buy the piano. We do not know what price Ms. W~ asked or whether anyone would be willing to purchase the piano for less than her asking price. Ms. J~ stated, in April 2002, that a local music store sold only one comparable piano in the preceding year. The price that the music store charged was not reported. Although Ms. J~ indicated that she was providing the field office with a statement from the music store, no such statement was included in the materials forwarded to us. Ms. J~ also reported that Ms. W~ uses the piano daily and that she is the only member of her household.

Ms. W~ has a congestive heart condition and hypertension. On December 12, 2001, her physician, Arthur W~, M.D., wrote a letter stating that playing piano provided Ms. W~ with positive health benefits in terms of stress relief, which resulted in positive benefits for her hypertension. Dr. W~ further stated that being forced to sell her piano in order to receive SSI "would have a deleterious effect on her overall health."

DISCUSSION

The Social Security Act (the Act) provides that certain resources are excludable resources for SSI purposes. 42 U.S.C. § 1382b. Among the resources that may be excluded are household goods and personal effects, but only to the extent that their total value does not exceed the $2000 limit set by the Commissioner. 42 U.S.C. § 1382b(2)(A); 20 C.F.R. § 416.1216(b). The regulations define "personal effects" to include musical instruments. Thus, a portion of the value of Ms. W~'s piano could be excluded as a personal effect, provided the total value of her other personal effects and

household goods is less than $2000. However, it appears that Ms. W~'s piano may be worth considerably more than that. We must determine, therefore, whether her piano may be excludable for some other reason, or whether the value of her piano can be considered less than previously assumed.

Exclusion for Items Required for Person's Physical Condition

The exclusion for household goods and personal effects that are required because of a person's physical condition does not appear in the Act. *See* 42 U.S.C. §1382b. The exclusion became a part of SSI regulations effective October 20, 1975. 40 Fed. Reg. 48911, 48916 (October 20, 1975). Neither the preamble to the final regulation published on that date nor the preamble to the proposed regulation states the rationale for the exclusion or gives any further clarification as to its application. *See* 39 Fed. Reg. 2487 (January 22, 1974); 40 Fed. Reg. at 48911. Thus, we cannot ascertain from those publications whether the Agency intended for the exclusion to apply to items such as a piano that provide "positive health benefits" in terms of an individual's physical condition. The POMS, likewise, provides no guidance in this situation. *See* POMS SI 01130.430. We were unable to find any caselaw interpreting the regulatory provision or any OGC precedential opinion on the subject. Similarly, we found no caselaw regarding other needs-based federal entitlement programs that might be helpful in interpreting 20 C.F.R. § 416.1216(c).

The Internal Revenue Code (IRC), however, includes a personal income tax deduction for medical care expenses. 26 U.S.C. § 213(a). The definition of "medical care" includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . .." 26 U.S.C. § 213(d)(1)(A). The Internal Revenue Service (IRS) addressed the issue of whether the cost of a piano could be deducted under the IRC medical care provision in two private letter opinions. In the first, parents bought a piano so that their child, who had polio, could strengthen her finger muscles and improve her posture. Priv. Ltr. Rul. 59-03205410A (March 20, 1959), 1959 WL 59702. The IRS determined that, if the use of the piano was prescribed by a physician to mitigate the effects of the child's illness, and if the child was the only one to use the piano, a portion of the cost could be deducted as a medical care expense. *Id.* The portion of the piano's cost that could be deducted was "the minimum cost of a piano of a quality sufficient for the therapeutic purposes" subject to the ceiling of 7.5% of adjusted gross income, as provided in 26 U.S.C. § 213(a). Priv. Ltr. Rul. 59-03205410A. Another private letter ruling states that, after suffering a nervous breakdown, a taxpayer's daughter "was induced by her doctors to resume piano lessons, in view of her particular aptitude in this area, as it was hoped that this would be good therapeutic treatment and would create a motivation toward recovery." Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. The taxpayer could not find a suitable used piano, so he bought a new piano for $800. The IRS held that the taxpayer could take a medical care deduction for "an amount which does not exceed the minimum cost of a piano of a quality sufficient to effect the prescribed therapy," subject to the limitations in 26 U.S.C. § 213. Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. To the extent, however, that the expenditure was "elaborate," i.e., beyond the need for the prescribed medical therapy, it was not deductible because it was not directly related to medical care. *Id.*

The IRC provision relied upon in these two private letter rulings is not identical to the resource exclusion provision in the Social Security Regulations. The IRC section would apply to expenditures for treatment of a mental condition as well as a physical condition, but the Social Security regulation would allow exclusion of an item only if it is required because of the SSI claimant's physical condition. Compare 26 U.S.C. § 213(d)(1)(A), 20 C.F.R. § 416.1216(c). While the Social Security regulation allows for exclusion of a resource "required because of a person's physical condition," 20 C.F.R. § 416.1216(c) (emphasis added), the IRC provision, 26 U.S.C. § 213(d)(1), allows a tax deduction for "amounts paid" for treatment (emphasis added). Although the IRC section does not address whether an expenditure is medically required, the private letter rulings provide some support for the CONCLUSION that, in some cases, piano playing may be prescribed as part of an individual's medical treatment.

There is nothing in the Social Security Act or Social Security Regulations to direct a CONCLUSION on this issue. We think it reasonable, however, to conclude, based on the private letter rulings, that there are situations in which a doctor may reasonably require a patient to play a piano as a necessary part of treatment or therapy for the patient's physical condition. Unlike the medical care deduction provision in the IRC, the SSI exclusion for items required for a person's physical condition does not place any limitation on the value of items which can be excluded, even though some of the items listed, such as an engagement ring or a dialysis machine, could have considerable monetary value. 20 C.F.R. § 416.1216(c); *see also* POMS SI 01130.430 ("Items Excluded Regardless of Value") (emphasis added).

The letter from Ms. W~'s physician states that it is important that she enjoy the benefits of her piano because it relieves her stress and, consequently, has a positive effect on her hypertension. The doctor further states that selling the piano to receive SSI benefits would be "deleterious" to her health. In the absence of evidence casting doubt on the doctor's credibility, we think this statement may be sufficient for a fact-finder to conclude that the piano is required for Ms. W~'s physical condition. You may want to obtain clarification from the doctor, however, that he considers playing the piano a required part of Ms. W~'s treatment or therapy for her hypertension or her congestive heart condition. You may also want to verify that the "deleterious" effect of selling the piano refers to her inability to receive the therapeutic benefit of playing the piano, rather than to other factors, such as a contemplated elevation of her blood pressure because selling the piano would upset her.

If you find that playing a piano is required for Ms. W~'s physical condition and she is the only person who will use the piano, the entire value of the piano should be considered an excludable resource. If, however, you find that playing piano is not required for Ms. W~'s physical condition, it will be necessary to determine the piano's value.

Determining the Current Market Value

If you determine that the piano is not an excludable resource under 20 C.F.R. § 416.1216(c), the current market value of the piano will be subject to the $2000 maximum exclusion for household goods and personal effects. 20 C.F.R. § 416.1216(a)-(b). Contrary to Ms. J~'s contention, the fact that Ms. W~ was unable to sell her piano does not necessarily mean that the value of the piano is zero. The piano likely has some value, even if it is not the $7000 purchase price. It is possible that the value of the piano is zero, however, if, for example, a buyer's expense to move the piano from Ms.W~'s home to a new location exceeds the price that a buyer would ordinarily pay for the piano.

The information provided to us did not indicate what price Ms. W~ was asking for the piano when she advertised it. It may be that she was simply asking a higher price than the current market value and, therefore, did not get an offer. We suggest further development to ascertain the current market value of the piano. For example, did Ms. W~ get any offers to buy the piano and, if so, what amount was offered? Ms. J~ indicated that the local music store sold one comparable piano over the past year. What was the sale price? Are there other music stores in the area that carry comparable pianos? If so, what price do they charge? Has Ms. W~'s piano been appraised? How much would a pawn shop pay for the piano, given that it could be difficult to sell quickly?

We note that POMS SI 01150.200 contains a provision that, under certain circumstances, allows for conditional SSI benefits for a limited period while an individual attempts to sell a non-liquid resource. The individual must agree to sell the resource at the current market value within a specified period and use the proceeds to refund the overpayment of conditional benefits. POMS SI 01150.200B.1. The period of conditional benefits where personal property is concerned would generally end after three months, except that there could be one three-month extension granted for good cause. SI 01150.201A. The individual must make reasonable efforts to sell the resource, taking all necessary steps to sell the resource through the local media. SI 01150.201B.1. The information provided to us does not indicate whether Ms. W~ was eligible for, or received, conditional benefits under these POMS provisions.

We also note that, even if Ms. W~ purchased the piano for $7000, and if the Agency determines that the current market value of her piano is less than $7000, it does not necessarily mean that her purchase was a transfer for less than fair market value. *See* POMS SI 01150.005A. (transfers of resources for less than fair market value after December 14, 1999 may result in a period of SSI ineligibility). Nor does the fact that Ms. W~ may not be able to sell her piano for the same price she paid mean that she paid more than the fair market value. Fair market value is the current market value of a resource at the time the resource is transferred, i.e., the going price for which it could reasonably be expected to sell at the time, on the open market in the geographic area involved. POMS SI 01150.005. If Ms. W~ bought her piano on the open market, e.g., from a merchant, the $7000 purchase price is assumed to be the fair market value at the time of the transfer. POMS SI 01140.005C.4.a. It may be that the value of the piano has depreciated since its purchase, or simply that the going price for a comparable piano was $7000 at the time of the purchase but is less now due to economic conditions. A prospective buyer might be willing to pay more for a piano bought from a merchant whose reputation is known than he would pay in a private sale by a stranger. A merchant

might also be in a position to charge more because he could offer a factory guarantee or a store guarantee that a private seller like Ms. W~ cannot offer. Finally, a merchant might be in a position to wait until a buyer came along who was willing to pay a higher price. Thus, the current market value of the piano, in Ms. W~'s hands, may be less than the amount she paid for the piano, even though the original purchase was not a transfer for less than fair market value.

CONCLUSION

In summary, we conclude that, if the Agency fact-finder concludes that Ms. W~ has shown that playing piano is required as part of her treatment or therapy for her physical condition, the piano's entire value may be excluded under 20 C.F.R. § 416.1216(c). If the fact-finder concludes that playing piano is not required for Ms. W~'s physical condition, the current market value of the piano should be considered a household good or personal effect subject to the $2000 maximum exclusion for all household goods and personal effects. However, the Agency may want to give further consideration to the current market value of the piano in Ms. W~'s hands.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By:_____
Nancy L. B~
Assistant Regional Counsel

D. PS 02-121 SSI Regional Supplement on Prepaid Burial Contracts Under Michigan Law Your Reference: S2D5G6

DATE: August 13, 2002

1. SYLLABUS

This opinion examines regional transmittal SI R01130.420 (MI), which addresses prepaid burial contracts in the state of Michigan. The opinion states that all of the information contained in the regional transmittal regarding Michigan State law is accurate. However, a recommendation is made to amend paragraph A to reflect the fact that the Department of Mental Health also approves prepaid burial agreements if the agreement is made when the individual is a patient in a mental health facility.

2. OPINION

You requested a legal review and update of regional transmittal SI R01130.420 (MI), formerly SI R01130.420 (MI) (RTN 126). We have reviewed the state law, and conclude that the information contained in the regional transmittal regarding Michigan State law remains accurate. However, we note that the Department of Mental Health also approves prepaid burial agreements if the agreement is made when the individual is a patient in a mental health facility. Therefore, for clarity, we recommend amending Paragraph A to read as follows:

Burial contracts in Michigan entered into by Aid to the Aged, Blind, or Disabled recipients (conversion cases) prior to January 1, 1974, which were approved by the Michigan Family Independence Agency (FIA), are irrevocable. Prepaid burial agreements entered into January 6, 1979 or later, which are approved by FIA or the Department of Mental Health, are irrevocable. FIA does not consider these irrevocable burial contracts in determining eligibility for its services. Verification of FIA's or the Department of Mental Health's approval is required prior to excluding these contracts from SSI resource computation.

Burial contracts, which do not meet the provisions in this supplement, are considered revocable. If the agreement is irrevocable, it remains so, regardless of whether the applicant/recipient continues to receive FIA services.

To have an irrevocable agreement, the funeral home must be located in Michigan, and the financial institution must be authorized to do business in the State of Michigan. The irrevocable burial agreement can be transferred between the funeral home and a financial institution, if both the individual and the funeral home agree.

The information contained in Paragraphs B, C, and D remain accurate.

Thomas W. C~
Regional Chief Counsel, Region V

By: _____
Karen S~
Assistant Regional Counsel

E. PS 00-343 Review of Michigan Trust for Neal P~

DATE: December 1, 1999

1. SYLLABUS

Because the SSI claimant is both the grantor of the trust and the sole beneficiary, under Michigan law the trust is revocable and, therefore, a countable resource.

NOTE: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked whether the trust established for Neal P~ is a countable resource for SSI purposes. Mr. P~ 's attorney has requested a reconsideration of SSA's prior determination that the trust is a countable resource, arguing that an individual without capacity has no ability to revoke a trust, and citing three recent Michigan ALJ decisions as support. For the following reasons, it is our opinion that the trust agreement is a revocable grantor trust and that the trust property can be considered a countable resource.

FACTS

According to the trust, Mr. P~ has multiple special needs arising from circumstances surrounding his birth in 1980, and Shailesh B. P~ and Kalpana S. P~ have been appointed by the Oakland County Probate Court as co-conservators of Mr. P~'s estate. *See* Trust, Introduction. In April 1999, a trust was established for Mr. P~, using the proceeds from the revoked "Neal P~ Revocable Living Trust" which had been established with proceeds received from a medical malpractice action filed on behalf of Mr. P~. *See* Protective Order, items 1 and 2. The trust was approved by the Probate Court of Oakland County, Michigan. *Id.*

DISCUSSION

A resource, for SSI purposes, is any property that an individual owns and could convert to cash to be used for his support or maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property or his share of the property, it is considered a resource. *See* 20 C.F.R. § 416.1201(a)(1). Trust assets are considered to be resources if the individual can revoke the trust and obtain unrestricted access to the trust assets. *See* Program Operations Manual System (POMS) SI 01120.200 (D). We apply state trust law to determine whether trust property is a resource. *See* POMS SI 01120.200(A). There are two questions at issue in Mr. P~'s case. First, is his trust a grantor trust and second, does his incapacity, if any, result in an inability to terminate the trust.

Mr. P~'s Trust is a Revocable Grantor Trust

Under general trust law, a grantor trust is revocable, even when, as in this case, the trust states that it is irrevocable. *See* Trust, Articles 3 and 5(A); *see* also Restatement (Second) of Trusts § 339, comment a. Michigan law appears to follow this principle, just as it follows other sections of the Restatement. In *Ronney v. Department of Social Services, 532 N.W.2d 910* (Mich. Ct. App. 1995), a claimant inherited assets which her guardian placed in an "irrevocable" Michigan trust with the claimant as beneficiary. Because the claimant was both the settlor and the sole beneficiary, the trust was revocable under Michigan law. *Id.* at 913. Again, in *Hein v. Hein 543 N.W. 2d 19, 21* (Mich. Ct. App. 1995), the court held that even an "irrevocable" trust may be terminated with consent of the settlor and all beneficiaries. More recently, the Michigan Supreme Court has held that where an individual provides the assets for the trust, that individual is the settlor. *See* In re Hertsberg Intervivos Trust, 578 N.W.2d 289 (1998).

The trust is a grantor trust because Mr. P~ is both the grantor and the sole beneficiary. Where a beneficiary acting through his guardian establishes a trust with funds that actually belong to the beneficiary, the beneficiary can legally be considered the grantor of the trust. *See* POMS SI 01120.200(J)(3). Here, Mr. P~ acted through his guardians to establish a trust with his own funds. Michigan courts have ruled that if the beneficiary of a trust held legal title to the assets of the trust (or the trust beneficiary's guardian held legal title on behalf of the trust beneficiary) immediately prior to the transfer of the assets, the trust beneficiary was the settlor of the trust, even though the declaration of the trust might state otherwise. *See* Hertsberg, 578 N.W. 2d at 289; In re *Johannes Trust, 479 N.W. 2d 25, 29* (Mich. Ct. App. 1991). As a result, although Shailesh B. P~ and Kalpana S. P~ are named as grantors, it is Neal P~ who is, in fact, the grantor of the trust agreement since the funds for the trust actually belong to him. *See* Trust, signatures; *see* also Protective Order, item 4.

Mr. P~ is also the sole beneficiary of the trust, notwithstanding the trust provision that, upon his death, the assets are to be distributed to the State of Michigan for reimbursement of medical assistance benefits; taxes, expenses of his last illness and funeral, and reasonable administrative expenses; and the residue in accordance with his last will and testament; or failing probate of a will, to his heirs-at-law as determined by the intestate laws in effect at the time of his death. *See* Trust, Article 6. That the trust agreement directs the trustee to repay any medical assistance state claims does not mean that there is a named beneficiary. Instead, the medical assistance claims must be repaid because of statutorily-imposed reimbursement requirements. *See* 42 U.S.C. 1396p(4)(B); *see* also Michigan Compiled Laws Annotated (West 199) (M.C.L.A.) § 400.77.

Mr. P~'s trust merely requires that the trust reimburse the appropriate state agencies for benefits already conferred on him during his lifetime. The money repaid is for Mr. P~'s benefit, and not the State's benefit. Nor does the trust establish additional beneficiaries by a provision that allows payments to be made to cover taxes and expenses of his last illness and funeral costs, and reasonable administrative expenses. These payments relate either to trust administration or providing goods or services for Mr. P~ benefits. The trust does provide distribution to a class of beneficiaries designated by Mr. P~ though a will, or by Michigan intestate law. However, this description does not create additional beneficiaries because there are no identifiable residual beneficiaries, either by name or by class. *See* Restatement (Second) of Trusts, § 127, comment b. We have discovered no Michigan cases that run contrary to these general trust rules and, therefore, at least on the face of the document, Mr. P~'s trust is a grantor trust.

Although Mr. P~ is "incompetent" his trust can be revoked

SSA defines the term "legal incompetency" as "a decision by a court of law that a claimant is unable to manage his/her affairs." *See* POMS GN 00501.010. For all practical purposes, the term is interchangeable with "legal incapacity." *See* Black's Law Dictionary at 764, 768 (17th ed. 1990). The trust document states that Mr. P~ has been determined to be "a person in need of protection" but does not state that he has been judged legally incapacitated or incompetent. *See* Trust, Introduction. The appointment of a conservator for a claimant does not necessarily mean that the claimant is legally incapacitated or incompetent. *See* POMS GN 00502.139. In fact, Michigan law specifies that the appointment of a conservator does not constitute a finding of legal incapacity or incompetency. *See* .M.C.L.A. § 400.468(2). However, the Michigan Probate Code provides for appointment of a conservator where the individual is

unable to manage his property and affairs. *See* M.C.L.A. § 700.461(b). When we compare Michigan's definition of "legally incapacitated person" with the grounds for appointment of a conservator, we *see* a great deal of overlap. Compare M.C.L.A. § 700.8(3) with M.C.L.A. § 700.461(b).

The issue in Mr. P~'s case is whether the court order of protection demonstrates, on its face, that the court made a finding equivalent to "legal incompetency", i.e., whether the court has found that he is unable to manage his own affairs. Since we do not have a copy of the original court order of protection, we cannot know if the court specified any of the grounds to be the same as those that define a legally incapacitated person. However, since M.C.L.A. § 700.21(c) gives Probate Courts exclusive legal and equitable jurisdiction over protected individuals, and the Probate Court has continued its protection of Mr. P~, it is reasonable to assume that the Probate Court considers him to be legally incompetent. *See Thornell v. Chesapeake & Ohio Railway Co.*, 166 F.Supp. 61 (W.D.Mich 1958). For purposes of this opinion, we assume that Mr. P~ has been judged incompetent as contemplated by 20 C.F.R. § 416.615(a).

While a competent person could establish and/or revoke a trust without court approval, it is our opinion that approval of the court would be necessary for Mr. P~ to establish or to revoke a trust agreement. *See* M.C.L. § 700.21. The question is whether the Probate Court would allow Mr. P~, through his conservator, to establish a trust and to revoke that same trust and, further, whether the Michigan Supreme Court would uphold the Probate Court's decisions. It is our opinion that the Probate Court would allow both actions and that the Michigan Supreme Court would uphold the decisions.

Mr. P~, through his conservator, could create a trust, albeit with Probate Court approval. The Michigan statute that confers powers and duties of a conservator states that a conservator may acquire or dispose of an estate asset, manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset. *See* M.C.L.A. § 700.484(3)(g). The Probate Court has certain powers which may be exercised directly, or through a conservator, with respect to the estate and affairs of protected persons. *See* M.C.L.A. § 700.468 (1). These powers include, but are not limited to, creation of revocable or irrevocable trusts of property of the protected person's estate. *See* M.C.L.A. § 700.468(1)(c). A reasonable reading of this statute is that a conservator could establish a trust with the permission of the Probate Court. The fact that the Probate Court has already allowed Mr. P~ to establish two different trusts supports our contention that he has the power to establish a trust. *See* Protective Order, item 3. Then, the fact that Mr. P~'s first trust was revoked supports our contention that Mr. P~, through his conservator, and with the permission of the Probate Court, can revoke a trust. *Id.* Although the current trust claims to be irrevocable, the Court has the power to revoke Mr. P~'s trust because it is a grantor trust.

It is our opinion that, if asked, the Probate Court would likely allow the current trust to be revoked if the assets were used for Mr. P~'s support and maintenance. Mr. P~'s guardian might argue that revocation is not in his best interest because, under the current trust, SSA meets his basic needs, and the Trust meets his supplemental needs and, if revoked, he would lose his eligibility for SSI. This argument is unavailing. The appropriate resource question is whether the individual has the right, power or authority to obtain the assets and use them for his support and maintenance. Michigan statutes contemplate that basic needs of a protected person will be met by his own assets. M.C.L.A. § 5425(b) states that a protected person's assets are to be used for his "support, education, care, or benefit." There is no reason to assume that the Probate Court would deny access to Mr. P~'s funds for his own support, education, care or benefit. While there are no Michigan Supreme Court cases on point, it is clear that the Probate Court has jurisdiction in matters of both protective persons and trust instruments. *See* M.C.L.A. § 555.82. There is no reason to assume that the Michigan Supreme Court would overturn a reasoned decision by the Probate Court.

Other ALJ decisions do not impact this opinion

Mr. P~ argues, through his attorney, that his trust cannot be revoked because an individual without capacity has no ability to revoke a trust, and cites three recent Michigan ALJ decisions as support. He argues that his trust agreement is similar to those described in the ALJ decisions, and should thus be construed in the same manner, that is, as not a countable resource. We believe that the three ALJ decisions have no impact on our opinion in Mr. P~'s case because (1) the three ALJ decisions are not precedential, and (2) in our opinion, are incorrectly decided.

Under general principles of administrative law, an agency can choose to proceed either "by general rule or by individual ad hoc litigation." *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

The SSA has been given broad rule-making authority. 42 U.S.C. § 405(a). Further, its regulations establish no binding precedent for ALJ decisions. *See* 20 C.F.R. § 402.45 (1997) (records that will be used as precedent must be published). Individual ALJ adjudications, therefore, are not binding beyond the parties to the hearing. *See* 20 C.F.R. § 416.1455. Therefore, individual ALJ decisions are not binding in adjudicating other claims. *See* Kenneth Culp Davis, Administrative Law Treatise, § 11.5 (1994); *see also Mashaw et al.*, Social Security Hearings and Appeals, 90 (1978). In only one instance is a decision in an individual case precedential. That instance is when SSA adopts the decision as a Social Security Ruling and publishes it in the Federal Register. 20 C.F.R. § 402.35. That exception does not apply here.

Moreover, in our opinion, the three ALJ decisions were incorrectly decided. On April 27, 1999, ALJ William E. D~ found claimant's trust was irrevocable because she was not the grantor. *See* ALJ D~ decision at 6-7. However, as discussed above, if the trust was established with funds that actually belong to the claimant, then the claimant is the grantor of the trust. *See* POMS SI 01120.200(J)(3). The Michigan Supreme Court has expressly held that a settlor is one who provides the consideration. Hertsberg, 578 N.W. 2d at 292. On November 18, 1998, ALJ Edward P. G~ found that claimant's trust was irrevocable because the State of Michigan was a beneficiary. *See* ALJ G~ decision at 3. However, as discussed above, repayment of any medical assistance state claims does not mean that there is a named beneficiary. Instead, the medical assistance claims must be repaid because of statutorily-imposed reimbursement requirements, and, ultimately, the reason for the repayment is for claimant's benefit and not the State's benefit. Indeed, the Hertsberg decision held that the state was a creditor that could attack the trust. *See Hertsberg, 578 N.W. 2d at 291*. On December 22, 1998, ALJ John A. R~ found that claimant's trust was irrevocable because it was under the jurisdiction of Probate Court with no provision for the claimant to liquidate the trust or have access to the funds. *See* ALJ R~ decision at 3. Further, ALJ R~ found that this jurisdiction, since there was no Michigan law to the contrary, had precedence over general trust laws. *Id.* However, Mr. P~'s history directly contradicts this finding. In Mr. P~'s case, the Probate Court did dissolve a trust, and, although that trust was revocable, the Probate Court action demonstrated that it had the power to revoke a trust as well as establish one. In our opinion, the decisions in these three cases were not correctly decided and do not create a precedent for Mr. P~.

CONCLUSION

Because Mr. P~ is both the grantor and the sole beneficiary of the trust, he can compel termination of the trust through permission of the Probate Court and use the trust assets for his support and maintenance, thus making the current trust a countable resource for SSI purposes.

F. PS 00-304 SSI Regional Transmittal Concerning Michigan Life Insurance Funded Burial Contracts

DATE: January 30, 1996

1. SYLLABUS

Life insurance funded burial contracts are valid in Michigan. The only dollar limits placed on assignment of ownership of life insurance funded burial contracts occur when dealing with minors, legally incapacitated persons or recipients of public aid. There is no prohibition on placing revocably assigned life insurance policies to fund burial contracts irrevocably in trust.

2. OPINION

You have asked for advice about three specific matters of Michigan law:

1. Are Life Insurance funded burial contracts valid in the State of Michigan?

2. Does Michigan have a law that places a dollar limit on the irrevocability assignment of ownership of insurance policies funding burial contracts?

3. Does Michigan law permit a revocably assigned life insurance policy that funds a funeral contract to be placed in an irrevocable trust?

ANSWERS

1. Chapter 328 of the Michigan Compiled Laws (Annotated) discusses "Dead Human Bodies." Section 328.211 through Section 328.235 is known as the "prepaid funeral contract funding act."

Such contracts are valid in Michigan. As noted, Michigan Law 328.211 is known as the Prepaid Funeral Contract Funding Act and § 328.213(6) defines a "contract" as a written prepaid funeral contract and all documents pertinent to the terms of the contract under which, for consideration paid, the seller promises to make available or provide funeral services or funeral goods after the death of a contract beneficiary.

There are two types of funeral contracts in Michigan. A "Guaranteed price contract" fixes the price for which the specified funeral goods and/or services are sold. Under a "Guaranteed price contract" the price cannot change regardless of the cost or value of the goods and services at the time of the death of the contract beneficiary.

A "Non guaranteed price contract" does not obligate the contract beneficiary's estate to purchase specific goods and services, or to expend a specific amount on the funeral goods and services.

2. Is there a Michigan law that places a dollar limit on the irrevocable assignment of ownership of insurance policies funding burial contracts?

In general the answer to this question is no. Section 328.228, for example, lists "Prohibited practices," but does not place any limits on the irrevocable assignment of ownership of insurance policies funding burial contracts. Similarly, section 328.223 discusses cancellations and transfers, but says nothing about amounts. However, there are some possible exceptions most of which deal with recipients of public aid, incompetents, or children.

Section 328.201 Refers to Dead Human Body; final disposition; funeral plan account, deposit... This section anticipates section 328.202 (discussed below) and states that once the funds are paid in advance they can be released upon the request of the person making the deposit, unless an irrevocable agreement has been made under Section 328.202.

Section 328.202 discusses "Social welfare aid agreements; rules, prearranged funeral plan account, conversion to an irrevocable agreement." This provision allows, upon the request of the applicant or the recipient, for the Michigan Department of Social Services to convert a prearranged funeral plan account to an irrevocable agreement so long as the amount of money in the account does not exceed $2,000. The funds in such an account can only be used to provide for the final disposition of the (public aid recipient's) body under Section 328.201.

In addition, section 328.229 is similar to section 328.202 because it discusses prepaid funeral contracts approved by the Michigan Department of Social Services. Such contracts cannot be revoked or cancelled by the contract seller, contract provider, or contract buyer. Like section 328.202, section 328.229 discusses prepaid funeral contracts that may be made with applicants for assistance under the Social Welfare Act. This section talks about fully paid guaranteed price contracts of not more than $2,000.

Only one other law addresses a specific dollar amount. A different dollar amount is discussed in the statute dealing with guardianship and protective proceeding(s) in terms of Michigan's Revised Probate Code. There, section 700.408 "Proceeds of Life Insurance; payment of funeral and burial costs," states that a conservator of the estate of a minor or legally incapacitated person may receive as beneficiary the proceeds of a life insurance policy (upon the life of a decedent). However, if the decedent has no estate or if there is not enough money in the estate to pay the decedent's reasonable funeral and burial expenses, then the conservator may petition the court and ask it to direct payment out of the proceeds. The amount applied to the cost of the funeral and burial here, should not exceed $1,000.

Other than these provisions which mention the $2,000 amount, and the single instance of the $1,000 amount, there seem to be no other mentions of specific dollar amounts in the Michigan laws dealing with prepaid funeral contract funding.

However, section 328.224 (2) states that an escrow agent (the person who holds, invests, and disburses principal and income from funds received under a prepaid burial contract) cannot invest the funds by purchasing life insurance or annuities which are not payable in full until the happening of an event, especially if the event is the death of the contract beneficiary.

3. There is no prohibition against the practice of permitting a revocably assigned life insurance policy that funds a funeral contract to be placed irrevocably in a trust. There are a number of sections that discuss revocability of prepaid burial contracts.

Section 328.225(3) provides that prepaid funeral contracts can be cancelled within 10 business days after entering into the contract. Subpart (4) states that prepaid funeral contracts shall disclose the buyer's right to cancel and the amount of refund that he/she is entitled to on cancellation. Whereas subpart (6) allows the contract buyer to designate a new contract beneficiary at any time prior to the death of the beneficiary originally specified in the prepaid funeral contract. Thus, there is quite a bit of latitude under Michigan law in terms of revocability.

In summary, life insurance funded burial contracts are valid in the state of Michigan. The only time a dollar limit is placed upon assignment of ownership occurs when dealing with minors, legally incapacitated persons, or recipients of public aid. Moreover, after consulting the section dealing with prohibited practices, it appears that there is no prohibition under Michigan law against placing these revocably assigned life insurance policies to fund burial or funeral contracts irrevocably in trust.

A. PS 06-122 SSI-Michigan-Review of Property of John E~, ~ REPLY Your Reference: S2D5G6, SI 2-1-6 MI (E~) Our Reference: 05-0134

DATE: April 24, 2006

1. SYLLABUS

This opinion analyzes a probate court order that provided non-home real property to an SSI beneficiary, and the beneficiary's subsequent transfer of the property. In June, 2000 a probate court order was executed resulting in an SSI beneficiary receiving sole ownership of one piece of non-home real property (Property A) and a one-third interest in another (Property B). The beneficiary entered into a land contract agreement with a third party for property A in October, 2001 and property B was sold on the open market in July, 2004. In January, 2004 the beneficiary established a living trust with the intention of placing property A in the trust for the benefit of two of the beneficiary's relatives. Property A is determined to be the beneficiary's resource until the land contract was issued. At that time, the land contract becomes a resource to the beneficiary in the amount of the balance due. The beneficiary's one-third interest in property B is also determined to be a resource. The transfer of property A into the trust is determined to be a transfer for less than fair market value since no compensation was received. Additionally, the beneficiary did not receive one-third of the proceeds from the sale of property B, resulting in another transfer for less than fair market value.

2. OPINION

We have reviewed the documents that you provided and concluded that, for the reasons stated below, the house in Saginaw, Michigan, as well as his one-third interest in the real property in White Cloud, Michigan, should be considered a resource of John E~. We further conclude that Mr. E~ later disposed of these resources for less than fair market value.

BACKGROUND

According to the facts provided, a probate court order was executed in June 2000 due to the death of John E~'s brother, Thomas E~. The order provided that the house in Saginaw, Michigan be transferred and deeded to John E~ and the real property in White Cloud, Michigan, be transferred and deeded to John E~ and Thomas E~'s two minor children as joint tenants with full rights of survivorship.

In July 2000, Mr. E~ signed a notarized statement indicating that the Saginaw house will pay all the expenses for the house in White Cloud, including taxes, insurance and maintenance expenses. At that time, Mr. E~ was renting the Saginaw house for $300 per month. He further stated that he was "just the overseer" of the two properties for his brother's estate.

When the Agency became aware of this situation, Mr. E~ was notified that he was no longer eligible for SSI due to excess resources because of his sole ownership of the Saginaw house (Mr. E~ also owned the home in which he lived in Weidman, Michigan). Mr. E~ insisted that he never benefited or profited from either the Saginaw or White Cloud properties and claimed they were deeded to him because his niece and nephew were minors.

In October 2001, Mr. E~ entered into a land contract agreement for the property in Saginaw in the amount of $14,000. He alleged that the buyer continued to make monthly payments of $300, which paid the expenses of the White Cloud home. Later, Mr. E~ alleged that the money went towards renovations and back taxes on the Saginaw property and that he "lost" money on the arrangement.

Mr. E~'s attorney informed the Agency that he believed that the Saginaw house being deeded in Mr. E~'s name was incorrect. He was unable to discuss the matter with the attorney or attorneys involved in the probate matter. Mr. E~'s attorney then prepared a living trust agreement, in January 2004 (about three and one-half years after the probate court order was entered). The living trust agreement names Mr. E~ as the settlor and initial trustee, refers to the probate court order and provides that the intent of the conveyances of the properties was for Mr. E~ to act as trustee for the benefit of his brother's two children and manage the properties. It also provided that the Saginaw property was sold pursuant to a land contract and had been deeded to Mr. E~ solely for the purpose of collecting the proceeds to maintain the White Cloud house. The living trust agreement also indicated that it was not intended that Mr. E~ have any beneficial interest in the Saginaw property. It further provides that the agreement is intended to be irrevocable and for the sole purpose of transferring the Saginaw property to the trust intending to effectuate the actual practice of the parties since the date of the court order of June 2000.

In July 2004, the buyer of the Saginaw house allegedly stopped making the monthly land contract payment. The last monthly payment was received in early July 2004.

Also in July 2004, the White Cloud house was sold for $60,000.00. Apparently, Mr. E~'s niece and nephew were no longer minors and decided to sell the home. Mr. E~ and his niece and nephew signed the Seller's Statement and Warranty Deed, however, Substitute Form 1099S and copies of checks show that the proceeds of the sale were issued only to Mr. E~'s niece and nephew.

Finally, in February 2005, the buyer of the Saginaw house fulfilled the land contract and the agreed payoff amount was $6000. According to an attorney, a check made out to John E~ was sent directly to him. He deducted attorney and title insurance fees, which left a balance of $5,090, and sent a check in this amount to Mr. E~'s nephew, Thomas E~, Jr.

DISCUSSION

A. The Saginaw Property.

For SSI purposes, "resource means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support or maintenance." 20 C.F.R. § 416.1201(a). Generally, real property that is not a beneficiary's principal place of residence is a countable resource. POMS SI 01130.100A.6.a. It is our understanding that Mr. E~'s niece and nephew did not reside in either property. Therefore, from the time the Saginaw house was transferred and deeded to Mr. E~ until October 12, 2001, when he entered into a land contract agreement, it should be considered a resource of Mr. E~'s as it was transferred and deeded solely to him. Further, the $300 monthly rent payment constitutes income belonging to Mr. E~. POMS SI 00830.505 (rent is a payment which an individual receives for the use of real or personal property). However, since Mr. E~ used these payments for maintaining the Saginaw property and/or the White Cloud property, the rental payments were offset by ordinary and necessary expenses, such that Mr. E~ did not have any net rental income. See POMS SI 00830.505.

As stated above, in October 2001, Mr. E~ entered into a land contract agreement for the Saginaw house for $14,000. POMS SI 01140.300B.2. The land contract is a resource to the seller, who is the owner of the agreement. POMS SI 01140.300.C.1. The resource value of a land contract (to the Seller) is assumed to be its outstanding principal balance, unless the individual provides evidence to the contrary. POMS SI 01140.300.C.3. Here, since Mr. E~ and the buyer of the Saginaw house ultimately agreed to a contract payoff amount of $6,000, we believe that the land contract is a resource which should be valued at $6,000 belonging to Mr. E~ but the Saginaw house is no longer a resource as of the date of the contract. Any principal payments on the land contract would be a conversion of a resource, and interest payments would be income. POMS SI 01140.300.C.1.

In January 2004, Mr. E~ transferred the land contract for the Saginaw house into a living trust. The trust agreement names Mr. E~ as settlor and initial trustee and refers to the probate court order and provides that the intent of the conveyances of the properties was for Mr. E~ to act as trustee for the benefit of his brother's two children and manage the properties. It also provided that the Saginaw property was sold pursuant to a land contract and had been deeded to Mr. E~ solely for the purpose of collecting the proceeds to maintain the White Cloud house. The living trust agreement also indicated that it was not intended that Mr. E~ have any beneficial interest in the Saginaw property. It further provides that the agreement is intended to be irrevocable and for the sole purpose of transferring the Saginaw property to the trust intending to effectuate the actual practice of the parties since the date of the court order of June 2000. The trust agreement also provided that any sums left over after payment of the costs associated with the White Cloud property shall be held in trust for Mr. E~'s niece and nephew and paid in equal shares upon their attaining the age of twenty-five.

Although Mr. E~ claimed that he had always held the Saginaw property for the benefit of his niece and nephew, we have been informed that he later acknowledged that he and his deceased brother never discussed that the decedent would leave the property to Mr. E~ and he was not even sure that the decedent wished for him to receive the property. Therefore, from the time of the June 2000 probate court order through the creation of the living trust agreement, the Saginaw property, and the subsequent land contract, were resources belonging to Mr. E~.

Mr. E~'s transfer of the Saginaw into the trust was a transfer for less than fair market value, as Mr. E~ did not appear to receive anything in exchange for the home. POMS SI 01150.001, et. seq. We note that the exception in POMS SI 01150.125 (Exceptions - transfers for purposes other than to obtain SSI) would not be applicable since the trust was created in apparent response to an Agency notification of excess resources.

B. The White Cloud Property.

The June 2000 probate court order ordered that the real property in White Cloud be transferred and deeded to Mr. E~ and Thomas E~'s two minor children as joint tenants with full rights of survivorship. We conclude that Mr. E~'s one-third interest in the White Cloud property was a resource. Based upon information provided to us, it is our understanding that the White Cloud property was a "hunting and fishing cabin" and Mr. E~'s niece and nephew did not reside there. Since Mr. E~'s niece and nephew were not living in the house in White Cloud, Mr. E~'s one-third interest was a resource. POMS SI CH101110.510.

The White Cloud property was sold in July 2004 and, apparently, Mr. E~'s niece and nephew received all the proceeds from the sale. This constitutes another transfer for less than fair market value, as Mr. E~, as one-third owner of the White Cloud property, was entitled to one-third of the proceeds from the sale.

CONCLUSION

In sum, we conclude that the Saginaw house and land contract through the date of the January 21, 2004, living trust agreement, as well as the one-third interest in the White Cloud house were resources belonging to Mr. E~. Further, Mr. E~'s transfer of the Saginaw land contract into the trust constituted a transfer for less than fair market value. Finally, the sale of the White Cloud property also constituted a transfer for less than fair market value, as Mr. E~ did not receive any of the sale proceeds despite having a one-third interest in the property.

4.18 MINNESOTA

A. PS 09-107 SSI - Minnesota: Review of the Nathan A~ Special Needs Trust, ~ Reply Your Reference: S2D5G6 SI 2-1-3 MN (A~)Our Reference: 08-0224-NC

DATE: May 27, 2009

1. SYLLABUS

This opinion evaluates whether an "Amendment and Complete Restatement" of a trust formed in 1991 is permissible under Minnesota law, and whether the resultant trust is a countable resource for SSI purposes. The opinion concludes that Minnesota law concerning trust amendments is intended to give courts the authority to make substantive alterations in the terms of a trust, in addition to authorizing interpretation and construction of a trust. In pertinent case, the court, in 2008, made certain changes in the distributive provisions of the trust. Because the amendments were valid under Minnesota law, the revised trust

was then evaluated under the applicable SSI resource provisions in place for trusts formed prior to 1/1/00. The opinion considers those resource policies and concludes that the amended trust is not a resource for SSI purposes.

2. OPINION

You asked whether Nathan A~ 2008 "Amendment and Complete Restatement" of his 1991 Trust is a resource for SSI purposes. For the following reasons, we conclude that the amended trust was a modification of Nathan's 1991 trust, and that the amended trust is not a resource.

BACKGROUND

In 1991, pursuant to a state court order, a trust was established for Nathan's benefit. The trust was funded with a court settlement on Nathan's behalf and provided that the trustee shall pay to Nathan all or such part of the trust's net income as the trustee determined was necessary for Nathan's support, maintenance, education and health. The trustee was also authorized to invade the principal of the trust if the trustee determined that the principal was needed to provide for Nathan's support, maintenance, education and health. The trustee had the power to terminate the trust at any time if the trustee determined that the trust was no longer in Nathan's best interests. In the event of such a termination, trust proceeds would be distributed to Nathan. Upon Nathan's death, the trust provided that the residuary would be distributed as directed by Nathan in a testamentary power of appointment, or, in default of such appointment, to Nathan's heirs at law.

On July 21, 2008, Nathan applied for SSI.

Two days later, upon petition by the trustee and Nathan's parents as guardians, the state court entered an order finding that, due to Nathan's increasing medical needs, the corpus of the trust was rapidly depleting. As a consequence, pursuant to Minnesota Statutes § 501B.16(4), the court further ordered that the trust should be reformed in accordance with the "amended trust" attached to the court petitions. The court stated that the amended trust would qualify as a special needs trust under Minnesota law and 42 U.S.C. § 1396p(d).

Under the amended trust, the trustee is authorized to make discretionary disbursements for Nathan's "reasonable expenses and needs when benefits from publicly funded benefit programs are not sufficient to provide adequately for those expenses and needs." The trustee has the power to terminate the trust at any time if the trustee determines that the trust is no longer in Nathan's best interests. In the event of such a termination, trust proceeds would first be used to reimburse Minnesota's Medical Assistance Program for benefits provided to Nathan, and the balance would then be distributed to Nathan. Upon Nathan's death, the trustee is instructed to pay administrative expenses, Nathan's funeral expenses, and taxes. After these payments, the trustee is instructed to reimburse Minnesota's Medical Assistance Program for benefits provided to Nathan during his lifetime. Any residuary is to be distributed as Nathan designates in his will, and, in default of such appointment, to Nathan's heirs in accordance with the laws of intestate succession.

DISCUSSION

As an initial matter, we must address whether the state court had authority to amend the trust pursuant to Minn. Stat. Ann. § 501B.16(4) (2009). This section provides that a trustee or other interested person may petition a court "to construe, interpret, or reform the terms of a trust, or authorize a deviation from the terms of a trust, including a proceeding under section 501B.31."

Prior to the enactment of this provision, Minnesota's common law was clear in providing that a court could authorize a trustee to deviate from the investment provisions of a trust if necessary to prevent substantial impairment of the purposes of the trust in light of changed economic circumstances. In *re Trusteeship under Agreement with Mayo*, 105 N.W.2d 900 (Minn. 1960). However, the Minnesota Supreme Court was unwilling to extend this line of law to permit the alteration of beneficial rights within a trust, even in the face of changed economic circumstances. In *re Trusteeship under Will of Whelan*, 116 N.W.2d 811 (Minn. 1962). The court's holding in *Whelan* is to be contrasted with the contrary position taken by the Restatement (Third) of Trusts, which is intended to reflect the collective current common law, and which would permit court alterations of distributive provisions, as well as administrative provisions, "if, because of circumstances not anticipated by the settlor, the modification or deviation will further the purposes of the trust." Restatement (Third) of Trusts § 66(1) (2003). In a comment, the Restatement explains that "[t]he objective of the rule allowing judicial modification (or deviation) and the intended consequences of its application are not to disregard the intention of a settlor. The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated."

Section 501B.16(4), in its current form, was enacted in 1989. However, there is very little case law interpreting the scope of this provision, and we were unable to find any legislative history. In *In the Matter of the Foley Trust*, 671 N.W.2d 206 (Minn. App. 2003), an A late court found that, pursuant to a section 501B.16(4) petition, a district court could decline to void certain trust distributions to beneficiaries that were not authorized by the trust. *Id.* at 211-12. The unauthorized trust distributions were made by the trustee to minimize taxes that would otherwise be incurred if the distributions were not made. *Id.* at 208. The *Foley* court also found that, pursuant to a section 501B.16(4) petition, a district court was authorized to deviate from the terms of the trust in calculating the effect of a distribution on a subsequent distribution so as to avoid unfairness to the distributee as compared to the other trust distributees. *Id.* at 212. Although the *Foley* court did not explicitly say so, it appears that the foregoing findings were based on an implicit consideration of the settlor's intent under circumstances not contemplated by the settlor, since the court disallowed a different modification of a distribution because it was inconsistent with the settlor's clearly expressed intent. *Id.* at 212-13.

Based on the foregoing, our best understanding of section 501B.16(4) is that it is intended to give courts the authority to make substantive alterations in the terms of a trust, in addition to authorizing interpretation and construction of a trust. Certainly, the section 501B.16(4) language ("reform the terms of a trust, or authorize a deviation from the terms of a trust") is not as expansive as the language used to permit alteration of charitable trusts. *See* Minn. Stat. Ann. § 501B.31(2) (court may order that charitable trust be administered or expended in manner that will accomplish general purposes of instrument and intention of the donor "without regard to, and free from any specific restriction, limitation, or direction [the trust] contains"). But, in enacting section 501B.16(4), the Minnesota legislature presumably intended that there would be some departure from the common law principle expressed in *In re Trusteeship under Will of Whelan*, which did not permit courts to make any substantive alterations to a trust's distributive provisions. And, the *Foley* court clearly permitted a district court to make substantive alterations in distributive provisions under section 501B.16(4).

In the case at hand, pursuant to a section 501B.16(4) petition, the court made certain changes in the distributive provisions of the trust. In contrast to the original trust, the amended trust has a discretionary lifetime distribution to Nathan, rather than a mandatory support distribution; the amended trust has different distributive provisions upon Nathan's death, including reimbursement to Minnesota's Medical Assistance Program; and the amended trust has an altered (pre-death) termination provision. Because we conclude that a court is probably authorized to a make changes to the distributive provisions of a trust under section 501B.16(4), we believe the court's action probably effected a valid amendment to the trust.

Turning then to a consideration of SSA's resource rules, even though the trust was amended after January 1, 2000, the trust is still considered to have been established (for purposes of applying SSA's resource rules) in 1991. Cf. POMS PS 01825.055 Wisconsin, 05-228 ("We have recently opined that a trustee-to-trustee transfer, such as occurred here, does not constitute the "establishment" of a new trust for purposes of applying the statutory trust resource rules . . . ."). Thus, the regular trust resource rules in POMS SI 01120.200 apply. POMS SI 01120.200(A)(2)(a). Under these rules, the amended trust will be a resource to Nathan if he (through his guardians) can revoke or terminate the amended trust and use the proceeds for his food or shelter, or if he (through his guardians) can direct the use of the amended trust's principal to meet his needs for food or shelter. POMS SI 01120.200(D)(1)(a). The amended trust will also be a resource to Nathan if he (through his guardians) can sell his beneficial interest.

As to revocability, Minnesota follows the rule that even an irrevocable trust can be revoked or modified if the grantor and all beneficiaries agree. In re *Scholl*, 297 N.W.2d 282, 284 (Minn. 1980). Therefore, if Nathan is the grantor and sole beneficiary, he can revoke the trust unilaterally. However, he is not the sole beneficiary here because his heirs will receive any remaining property upon Nathan's death if he does not exercise his testamentary power of appointment. POMS SI CHI01120.200(D)(4) ("For trusts created after 1939, in the absence of a contrary intent, you may assume that the grantor intended to name residual beneficiaries by naming his . . . heirs."). Thus, the amended trust is not revocable as to Nathan. Nathan also lacks the ability to direct the use of the amended trust's principal to meet his food or shelter needs. Finally, even if Nathan could sell his beneficial interest in the trust, that interest would have little or no value because the trustee is not required to make any payments for his benefit. *See* Restatement (Third) of Trusts § 60 & comments e, f. Therefore, the amended trust is not a resource to Nathan.

CONCLUSION

We conclude that Nathan's amended trust is not a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V
By:_____

Kyle K~
Assistant Regional Counsel

B. PS 09-104 SSI - Request for Six State Legal Opinion on Spendthrift Clauses - REPL Your Reference: S2D5G6, SI 2-1-3 (Spendthrift) Our Reference: 08-0141

DATE: May 8, 2009

1. SYLLABUS

This opinion addresses whether spendthrift clauses are recognized in the six states that compose the Chicago region and whether these states allow for a settler to establish a spendthrift trust for his or her own benefit. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. All states in the Chicago region recognize a spendthrift provision in a third-party trust. Likewise, all states in the Chicago region recognize that a beneficial interest in a self-settled discretionary trust would typically not be a countable resource as it would have little, if any, market value. In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursements, regardless of whether the trust has a spendthrift provision. Due to a lack of precedent, self-settled trusts with a spendthrift provision in Indiana or Ohio should be submitted to the Regional Chief Counsel's office for evaluation.

2. OPINION

You have asked whether spendthrift clauses are recognized in the six states in the Chicago Region and, if so, whether these states allow for a settlor to establish a spendthrift trust for his or her own benefit. Each of the six states in Region V recognizes spendthrift clauses as valid when they are established by a settlor for a third party. Therefore, the beneficiary of a third party trust could not sell the beneficial interest in that trust if it has a spendthrift provision. The validity and effect of a spendthrift provision in a self-settled trust varies somewhat from state to state. However, in all six states, the settlor's interest in a discretionary trust would not be a countable resource, regardless of any spendthrift provision, because in the laws of those states, even if the settlor can sell the interest, it would have no significant market value, since the transferee could not demand any payments. In Illinois, Michigan, Minnesota and Wisconsin, the settlor could sell the right to receive future mandatory disbursements, even if the trust includes a spendthrift clause, and the current market value of those disbursements would be a resource. In Indiana and Ohio, it appears that a spendthrift clause may effectively prevent a settlor from selling future mandatory disbursements such that the right to those future disbursements would not be a resource. However, since the law has not yet been interpreted clearly, we recommend that you send any self-settled trusts with mandatory disbursements and spendthrift provisions to our office for evaluation if they are governed by Indiana or Ohio law.

DISCUSSION

A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. POMS SI 01120.200(B)(16). If a state recognizes the validity of a spendthrift clause, the beneficial interest in the trust, or the right to payments as a beneficiary, is not a countable resource because the beneficiary may not sell his or her beneficial interest in the trust. 1_/ *Id.* In the Chicago Region, all of the states recognize the validity of a spendthrift clause where the trust is established by a settlor for a third party.

However, if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the spendthrift clause may be considered invalid. All of the states in the Chicago Region view such self-settled spendthrift trusts to be invalid with respect to creditors. However, in determining whether an interest in a trust is a resource, the focus is on whether the individual can sell his or her beneficial interest in the trust. The states vary with respect to whether a spendthrift clause would prevent a settlor from selling his or her beneficial interest in the trust. The majority of states in the region, namely Illinois, Michigan, Minnesota and Wisconsin, are likely to follow the Restatement (Third) of Trusts, which indicates that a spendthrift clause in a self-settled trust is invalid with respect to any interest retained by the settlor. RESTATEMENT (THIRD) OF TRUSTS § 58, cmt. e. Under the Restatement, the spendthrift clause would not prevent the settlor's interest from being reached by the creditors or from being sold. *Id.* However, the most a transferee could receive are the rights the settlor has under the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 60, cmts. b, f. Therefore, we would typically not consider a discretionary interest in a self-settled spendthrift trust to be a countable resource, since such an interest would have little, if any, market value. However, the right to receive mandatory disbursements from such trusts would generally be considered a resource, since the spendthrift clause would not prevent the individual from selling the interest and that interest would generally have market value.

In contrast, Indiana and Ohio law could be read to view self-settled spendthrift clauses to be invalid only with respect to the rights of creditors. Therefore, a spendthrift clause governed by the laws of those states may effectively prevent a settlor from selling his or her interest in the trust. If that is the case, then the right to both mandatory and discretionary disbursements from such trusts may not be considered a resource for SSI purposes in those states. However, we have not encountered any cases actually interpreting these provisions to prevent a settlor from selling the right to mandatory disbursements from a trust. Therefore, we recommend that self-settled trusts with spendthrift provisions that are governed by the law of Indiana and Ohio be referred for an opinion at least where the settlor has a right to mandatory disbursements.

Illinois

In Illinois, a spendthrift clause in a trust established by a third party will effectively prevent the beneficiary from selling his or her beneficial interest. 2_/ *See Danning v. Lederer*, 232 F.2d 610, 612 (7th Cir. 1956); *Hopkinson v. Swaim*, 119 N.E. 985, 990 (Ill. 1918). However, a settlor may not establish a spendthrift trust for his or her own benefit. In re *Marriage of Chapman*, 297 Ill. App. 3d 611 (Ill. App. 1998). Therefore, in a self-settled trust, the settlor could sell the right to mandatory future disbursements for their current market value, despite any spendthrift provision. However, the settlor's beneficial interest in a discretionary trust would not be a countable resource, even though the spendthrift clause would not prevent the settlor from selling the interest because the right to receive discretionary disbursements would have no significant market value. Although we were unable to find any case law which directly addressed this issue, we found that the Illinois courts have relied upon the Restatement (Third) of Trusts as persuasive authority in interpreting trusts. *See* In Re *Estate of Feinberg*, 891 N.E.2d 549 (Ill. App. 2008) (generally recognizing Restatement (Third) of Trusts as persuasive authority). Therefore, we believe that Illinois would adopt the Restatement (Third) approach --that a transferee would receive only the rights the settlor had under the trust, i.e., to receive mandatory or discretionary disbursements when the trust is self-settled and contains a spendthrift provision. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e. Therefore, the right to receive discretionary disbursements would not be considered a countable resource, as it is unlikely the right to discretionary disbursements would have any significant market value.

Indiana

Indiana law recognizes spendthrift trusts as generally valid against both voluntary and involuntary transfers. Ind. Code § 30-4-3-2(a). When the settlor is also the beneficiary of the trust, Indiana law recognizes an exception to this rule with respect to the rights of creditors. Ind. Code § 30-4-3-2; *see also Matter of Cook*, 43 B.R. 996 (N.D. Ind. 1984) (recognizing that if a settlor is also the beneficiary of the spendthrift trust, creditors may reach the trust corpus). Because Indiana law expressly addresses only the validity of a spendthrift clause in a self-settled trust with regard to creditors' rights, it is possible that Indiana would recognize a spendthrift provision to be valid to the extent that it would prevent the settlor from selling his beneficial interest in a self-settled trust. *See* POMS PS 01825.01 (PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~) (concluding that even if the settlor could sell the interest, it would have no value because the trust was discretionary). However, the comments to the section state that it follows the rule in the Restatement (Second) of Trusts section 156, which states that a self-settled spendthrift clause is ineffective against both creditors and transferees. *See* Ind. Code § 30-4-3-2(b); *see also* RESTATEMENT (SECOND) OF TRUSTS § 156(2). If you encounter a self-settled trust governed by Indiana law with a spendthrift provision and with the right to future mandatory disbursements, we recommend that you refer the case to our office for a legal opinion, since the law is not clear at this time.

Michigan

Michigan recognizes the validity of spendthrift trusts, in general, by statute and common law. Mich. Comp. Laws Ann. § 700.2902(2); Matter of *Estate of Edgar*, 389 N.W.2d 696 (Mich. 1986). However, under Michigan law, a person cannot create a true spendthrift trust for himself. *See* In re *Hertsberg Intervivos Trust*, 578 N.W.2d 289, 291 (Mich. 1998) (adopting RESTATEMENT (SECOND) OF TRUSTS § 156). In *Hertsberg Intervivos Trust*, the Michigan Supreme Court adopted Restatement (Second) of Trusts section 156, which states that a creditor or transferee could reach the entire amount of the trust that the trustee could, in his or her discretion, pay to or for the benefit of the settlor of the trust. *See id.* at 291. However, that case involved only the rights of a creditor, and we have previously advised that we think it likely that Michigan would adopt the Restatement (Third) approach--that a transferee, unlike a creditor, would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* POMS PS 01825.025 (PS 09-062 Michigan - SSI-Review of the Annuity and Special Needs Trust for Jeri L. K~) (citing RESTATEMENT (THIRD) OF TRUSTS § 60 and cmts. e, f (2003)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource despite any spendthrift clause;

however, the right to discretionary disbursements would not be considered a resource as it is unlikely the right to discretionary disbursements would have any market value.

Minnesota

Minnesota recognizes the validity of spendthrift trusts though common law; there is no Minnesota statute which expressly deals with spendthrift provisions. *See Morrison v. Doyle*, 582 N.W.2d 237, 240 (Minn. 1998); In re *Mack*, 269 B.R. 392 (D. Minn. 2001). Under Minnesota law, cases involving enforcement of spendthrift provisions have always involved protection of the interest of a beneficiary who is not the settlor of the trust; therefore, in Minnesota, it appears that a spendthrift clause in a self-settled trust would likely be considered void and unenforceable. In re *Mack*, 269 B.R. at 399 (citing *Simmonds v. Larison*, (B.A.P. 8th Cir. 1999)). In reaching its holding in *Mack*, the court looked to the Restatement (Second) of Trusts § 156. 3_/ While there is no Minnesota case specifically adopting the Restatement (Third) of Trusts on this issue, we believe it is likely that a Minnesota court would follow the Restatement (Third) approach in determining the extent to which the settlor's interest can be transferred. *See Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571 (Minn. Ct. App. 2003) (relying upon Restatement (Third) of Trusts in determining the role of a trustee); compare In re *Syverson Trust*, 2003 WL 22016795 (Minn. Ct. App. 2003) (unpublished) (declining to adopt the Restatement (Third) of Trusts where doing so would change existing law in Minnesota, noting such change was reserved for the Minnesota Supreme Court or the legislature). Therefore, the settlor's right to mandatory disbursements would be considered a resource; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the discretionary disbursements would have any significant market value. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e.

Ohio

Ohio recognizes the validity of a spendthrift clause through statute and case law. *See* Ohio Rev. Code Ann. § 5805.01; *see also Scott v. Bank One Trust*, 577 N.E.2d 1077 (Ohio 1991). Ohio adopted the Uniform Trust Code in 2007, and the controlling provisions are applicable to spendthrift trusts created before and after 2007. *See* Ohio Rev. Code Ann. §§ 5805.01(A), 5805.06(A)(2), and 5811.03(A)(1). Ohio law recognizes the validity of spendthrift provisions in general, and states that "[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter and in section 5810.04 of the Revised Code, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary." Ohio Rev. Code Ann. § 5801.01(C). This suggests that, even in a self-settled trust, a spendthrift provision will prevent the settler from transferring his or her interest in the trust. The only exceptions to the effectiveness of a spendthrift provision relate to when a creditor or assignee of the beneficiary can reach an interest in or a distribution from the trust. Ohio law further states that whether or not a trust contains a spendthrift provision, the settlor's creditor or assignee may reach the maximum amount that can be distributed to or for the settlor's benefit. *See* Ohio Rev. Code Ann. §§ 5805.06(A)(2), 5811.03(A)(1). Indeed, the official comment notes, "[W]hether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created." *Id.* Because Ohio law allows such liberal access to the trust assets by "assignees," section 5805.06 could be read to suggest that the beneficiary of a self-settled trust could sell his beneficial interest in the trust and the purchaser could obtain the maximum amount that the trustee could distribute to or for the settlor's benefit. However, the Office of General Counsel has determined that the better reading of this provision presumes that only an assignee who is a creditor, not a purchaser for value, could reach the maximum amount the trustee could distribute for the settlor's benefit. *See* POMS 01825.039 Ohio (PS 08-159 SSI Review of the Trust and Annuity for Dustin J. E~). Therefore, it appears that spendthrift provisions in self-settled trusts governed by Ohio law may be fully valid with respect to the limitation on selling the settlor's beneficial interest in the trust. This interpretation of Ohio law would not have a significant impact where a trust is wholly discretionary. Even if the settlor could sell that interest, it would have no significant value. However, this interpretation would also mean that even the right to future mandatory disbursements could not be sold and therefore would not be a resource. This would be a significant departure from the Restatement (Third) of Trusts, as well as the Restatement (Second) of Trusts, both of which state that a spendthrift provision restraining the voluntary and involuntary alienation of the settlor's interest in the trust is invalid. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(1), RESTATEMENT (THIRD) OF TRUSTS § 58(2). In fact, Ohio adopted the comment to Uniform Trust Code provision, which specifically cites to the Restatement (Second) of Trusts § 58(2) and states that "[a] spendthrift provision is ineffective against a beneficial interest retained by the settler." Ohio Rev. Code Ann. § 5805.01, cmt.; Unif. Trust Code § 502, cmt. It would seem odd, therefore, if the Ohio code (and the uniform code) intended to deviate from the Restatement in this important way. Since the law is not entirely clear, and since there are not yet any cases interpreting the Ohio provisions, we recommend that you

refer to our office any self-settled trust governed by Ohio with a spendthrift provision and provisions for mandatory disbursements.

Wisconsin

Wisconsin recognizes spendthrift trusts as valid and not subject to voluntary or involuntary alienation only where the beneficiary is a person other than the settlor. Wisc. Stat. Ann. § 701.06(1)-(2). Therefore, it appears that a spendthrift provision would not prevent a settlor from selling his beneficial interest in the trust when he is also the settlor of the trust. Wisc. Stat. Ann. § 701.06(1)-(2)._4 However, we believe that Wisconsin would likely follow the Restatement (Third) approach--that a transferee would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* In re *Walters Family Trust*, 685 N.W.2d 172 (Wis. Ct. App. 2004) (unpublished) (parties recognizing Restatement (Third) of Trusts as controlling law); *see also* POMS PS 01825.055 (PS 08-156 - Wisconsin - Review of the Trust for Brian G~) (citing to Restatement (Third) of Trusts as controlling authority in Wisconsin)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource; however, the right to discretionary disbursements would not be considered a resource, as it is unlikely the right would be of any significant market value.

CONCLUSION

In sum,

o All states in the Chicago region would recognize the validity of a spendthrift provision in a third party trust.

o In all states in the Chicago Region, the beneficial interest in a self-settled discretionary trust would not be a countable resource because even if the individual can sell the interest, it would have no significant market value.

o In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursement, regardless of whether the trust has a spendthrift provision.

o Trusts governed by Indiana or Ohio law should be referred for a legal opinion if the trust is self-settled and provides for mandatory disbursements and has a spendthrift clause.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Anne M~
Assistant Regional Counsel

/_1 The trust may still be a resource for other reasons.

/_2 In *Matter of Perkins*, 902 F.2d 1254 (7th Cir.1990), the Seventh Circuit Court of Appeals noted the following considerations in determining whether a trust under Illinois law qualifies as a spendthrift trust: "(1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust, and (3) whether the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus and termination of the trust." *See*, e.g., In re *Silldorff*, 96 B.R. 859, 864 (C.D.Ill.1989). The degree of control which a beneficiary exercises over the trust corpus is the principal consideration under Illinois law.

/_3 This provision states:(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest. (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

/_4 Wisconsin law indicates that where a settlor is a beneficiary of a trust regardless of whether it has a spendthrift provision, a creditor may, at the discretion of the court, receive payments from the income or principal of the trust to satisfy a judgment. Wisc. Stat. Ann. 701.06(6)(a).

C. PS 09-021 SSI-Review of the Request for Reconsideration on the Judith C~ Trust, ~ ACTION Your Reference: SI 2-1-4 MN (C~) Our Reference: 08-128

DATE: November 6, 2008

1. SYLLABUS

The opinion in this case examines whether or not the special needs trust in question is a countable resource for SSI purposes. There is an exception to counting a special needs trust as a resource if certain criteria are met. One of the criteria is that the trust be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court. This trust does not satisfy this criterion because the adult claimant's funds were used to establish the trust and the trust contains an early termination provision that could allow a third party to benefit from the trust during the claimant's lifetime. In addition, the trust does not comply with the Medicaid payback requirement as it allows for the payment of prohibited expenses and limits the amount and state jurisdictions that can be reimbursed. For the reasons outlined above, the trust is a countable resource for SSI purposes.

2. OPINION

BACKGROUND

On August 8, 2006, Robert S~, Judith's father, established The Judith R. C~ Trust for the benefit of Judith (an adult). Claimant's Memorandum (Memorandum) at 1. The trust was created because Judith expected to receive funds in connection with a settlement in a class action lawsuit. *Id.*

The trust is intended to qualify as a supplemental needs trust or special needs trust under 42 U.S.C. § 1396p(d)(4)(A) and Minn. Stat. § 501B.89. *See* Trust Recitals. When Judith received her first check from the settlement in January 2007, the trustee opened an account for the trust and deposited the funds. *See* Memorandum at 1.

The purpose of the trust is to provide for Judith's "reasonable living expenses and other needs when benefits from publicly funded benefit programs are not sufficient to provide adequately for those needs." Article II, § 2.02. However, disbursement that would have the effect of replacing, reducing, or substituting publicly funded benefits available to Judith or rendering Judith ineligible for publicly funded benefits are prohibited. *Id.*

The trustee has sole discretion to use sums from the income and principal for expenditures, which may include entertainment, education, travel, comfort, convenience and reasonable luxuries, home maintenance, improvements or remodeling, purchase of a new home, and special medical care not covered by publicly funded benefit programs. Article II, § 2.02A.

The trust provides that, upon Judith's death,

1) The trustee shall pay the reasonable administrative expenses (including attorney's fees and trustee's fees), funeral expenses, last bills and valid debts of JUDITH, as approved by the Minnesota Department of Human Services or by the District Court with advance notice to Department of Human Services, if required by law. Further, and only if required by applicable state or federal law at that time, the trustee shall reimburse the State of Minnesota for whatever sums of medical assistance paid for JUDITH's benefit that the law requires to be reimbursed, but no more.

2) The remainder of the trust share shall be distributed to JUDITH's descendants, per stirpes.

Article II, § 2.02F.

The trust also provides that it may be terminated for reasons other than death of the beneficiary, only if continued administration is contrary to the best interests of the beneficiary because of state or federal legislation or unforeseen changes or conditions or circumstances, or because the value of the assets makes administration unduly burdensome or uneconomical for the beneficiary. Article VI, § 6.02. Court approval for termination must be obtained and distribution is made pursuant to the provision of Article II, § 2.02F. Article VI, § 6.02.

The trust states that it is irrevocable, except as may be ordered by a Court in the beneficiary's best interest or if a Court determines the trust is not a supplemental needs trust or special needs trust as defined by applicable law. Article III, § 3.01.

The trust contains a spendthrift provision which provides that "no right, title, or interest in any of the property of this Trust or income accruing therefrom or in the accumulations of such income payable or distributable under the provisions of this instrument shall vest in the beneficiary, nor shall the principal or interest of the Trust be liable for the debts of the beneficiary, nor shall the beneficiary (except as may be expressly provided herein) have the right or power to sell, transfer, assign, pledge, encumber or in any other manner dissipate or dispose of her interest in this Trust prior to the actual distribution, in fact, by the trustee to the beneficiary off property or income of this Trust, until such time of actual distribution, all rights and interest of the beneficiary herein shall not subject to any judicial process of levy upon attachment for or on behalf of such beneficiary's creditors or other claimant."

DISCUSSION

Generally, trusts established with the assets of the individual are considered a resource for SSI purposes, even if the trust is irrevocable, unless the trust meets one of the Medicaid payback exceptions under 42 U.S.C. § 1396p(d)(4)(A) (commonly referred to as the special needs trust exception). *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201, 01120.203. For this exception to apply, the trust must be:

(1) established with the assets of a disabled individual under age 65;

(2) established for the benefit of the individual by a parent, grandparent, legal guardian, or court; and

(3) provide that the state 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.

42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(a). In addition, even if a trust satisfies the Medicaid payback trust exception to counting it as a resource under the statutory trust rules, the trust will still be a resource, under the regular resource rules if: (1) the beneficiary can revoke the trust; (2) the beneficiary can compel the trustee to provide for his support and maintenance; or (3) the beneficiary is entitled to mandatory disbursements and the beneficiary is not prohibited from anticipating, assigning or selling the right to future payments. POMS SI 01120.200(D).

The Social Security Administration (Agency) previously determined that the trust in question did not satisfy all of the Medicaid payback trust requirements. Specifically, the Agency determined that the trust did not satisfy the second requirement that the trust be established for the sole benefit of Judith by a parent, grandparent, legal guardian or court for two reasons: 1) it did not comply with Agency policy that requires a parent to first create a "seed trust" prior to transferring a competent adult's funds to the trust; and 2) the early termination clause created contingent interests that could benefit third parties during the lifetime of the claimant.

In addition, the Agency determined that the trust did not satisfy the third requirement that the state 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 because: 1) the trust permits payment of prohibited expenses prior to reimbursing the state for medical assistance; 2) the trust does not provide that the state will receive all amounts remaining in the trust upon the death of Judith up to an amount equal to the total medical assistance; rather, it would reimburse the State of Minnesota only if required by applicable state or federal law at the time; and 3) the trust provides only that the State of Minnesota will be reimbursed.

On March 25, 2008, the Judith's attorney filed a request for reconsideration. Notably, the attorney did not raise any concerns regarding the issue of whether the trust was established for the sole benefit of Judith by a parent. For the reasons discussed below, we agree that the trust does not meet the requirements for the special needs trust exception to counting it as a resource under the statutory trust rules. However, we note that, if the deficiencies were remedied, such that the trust was not considered a resource under 42 U.S.C. § 1382b(e), the trust as written would not be a resource under the regular resource rules.

The Trust Was Not Established For The Sole Benefit Of Judith By A Parent, Grandparent, Legal Guardian, Or Court

Under Agency policy, where a parent creates a trust with a competent adult's funds to satisfy the Medicaid Payback exception, the parent must create a "seed trust." POMS PS 01205.026. This would require that some amount of funds not belonging to Judith would have to initially fund the trust prior to transferring Judith's assets to the trust.

In addition, the early termination provision in Article VI creates contingent interest that could benefit third parties during Judith's lifetime. Thus, the trust was not established for the "sole benefit" of Judith.

The Trust Allows The Trustee To Make Prohibited Payments Prior to Reimbursing The State

According to the trust, the trustee shall pay the reasonable administrative expenses (including attorney's fees and trustee's fees), funeral expenses, last bills and valid debts of JUDITH, as approved by the Minnesota Department of Human Services or by the District Court with advance notice to Department of Human Services, if required by law.

Article II, § 2.02F. Judith's attorney recognizes that, although the POMS does not carry the weight of law, it does provide additional guidance on how to qualify for a Medicaid payback trust. Memorandum at 2. Indeed, courts have recognized that the POMS are entitled to deference. *See Washington Dept. of Social Servs. v. Keffeler*, 537 U.S. 371, 385 (2003) ("While these administrative interpretations [POMS] are not products of formal rulemaking, they nevertheless warrant respect . . . ."); *Martin v. OSHRC*, 111 S. Ct. 1171, 1179 (1991) ("In addition, the Secretary regularly employs less formal means of interpreting regulations . . . . Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial review.") (citing *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980)); *Hartfield v. Barnhart*, 384 F.3d 986, 988 (8th Cir. 2004) ("While these internal rules [POMS] do not have legal force and do not bind the Commissioner, courts should consider them in their findings.").

According to POMS SI 01120.203(B)(1)(f):

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 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. The State must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203(B)(3)(a).

NOTE: Labeling the trust as a Medicaid pay-back trust, OBRA 1993 pay-back trust, trust established in accordance with 42 U.S.C. 1396, or as an MQT, etc. is not sufficient to meet the requirement for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

POMS SI 01120.203(B)(3)(a) sets forth that only taxes due from the trust to the State or Federal government because of the beneficiary's death and reasonable fees for administration of the trust estate may be paid prior to reimbursement of the state.

Judith's attorney contends that, upon Judith's death, no expenses, administrative or otherwise, can be paid from the trust without first obtaining approval of the Minnesota Department of Human Services or a Court, pursuant to Minnesota law. Memorandum at 3 (citing. § 19.25.35.20 of the Minnesota Health Care Programs Manual). She argues that, because neither the Minnesota Department of Human Services or a Court will violate federal or state law, if the law prohibits payment of any expenses listed in Article II, § 2.02F, such expenses will not be paid by the trustee. *Id.* at 3-4. Judith's attorney explains that the provision was written in order to provide flexibility; thus, if the federal law changes and permits payment of funeral expenses, then the trust can provide for these. *Id.* at 4. Judith's attorney also maintains that the trust at hand substantially complies with the statutory language (of the Medicaid payback trust). Memorandum at 4.

However, the trust requires the approval of the Minnesota Department of Human Services or a Court only "if required by law." Furthermore, the expenses which are listed in Article II, § 2.02F, namely funeral expenses and last bills and valid debts, are not legally impermissible expenses, and therefore, the Minnesota Department of Human Services or a Court would not be required by law to disallow such expenses. Although these are considered "prohibited" expenses for purposes of meeting the Medicaid Payback trust exception, the attorney identified no legal prohibition on paying such expenses in general before reimbursing the state. *See* POMS SI 01120.203(B)(3)(b).

Further, the "substantially similar" provision that Judith's attorney refers to in the POMS is designed to address situations that are not specifically addressed by the POMS. Here, the Agency has interpreted 42 U.S.C. § 1396p(d)(4)(A) through its POMS, and has expressly stated that the only expenses that may be paid prior to payment to the state include taxes due from the trust to the State or Federal government because of the beneficiary's death and reasonable fees for administration of the trust estate. *See* POMS SI 01120.203(B)(3)(a). Thus, the provision is not substantially similar to the language that would be sufficient under the statute.

The Trust Does Not Provide That The State Will Receive All Amounts Remaining In The Trust Upon Judith's Death

The trust provides:

Further, and only if required by applicable state or federal law at that time, the trustee shall reimburse the State of Minnesota for whatever sums of medical assistance paid for JUDITH's benefit that the law requires to be reimbursed, but no more.

Article II, § 2.02F.

Judith's attorney argues that the fact that the trust states that Medicaid will be reimbursed "only if required by applicable state or federal law at the time" should not disqualify the trust from the Medicaid payback trust exception because the trust language "simply provides for the possibility that state or federal law could change sometime in the future." Memorandum at 4. The Office of Income Security Programs has advised, however, that SSA considers this trust provision to frustrate the Medicaid Payback provisions of the statute. The statute excepts trusts from counting as resources under the statutory trust provisions only "if the state will receive all amounts remaining in the trust on the death of such individual up to an amount equal to the total medical assistance paid." 42 U.S.C. §1396p(d)(4)(A). There is no language in the statute that permits the limitation on the obligation to repay that is reflected in this trust's language.

The Trust Does Not Provide for Reimbursement to All States that Have Provided Medical Assistance For Judith's Benefit

Finally, the Agency has previously determined that a trust that provides for reimbursement to only one state does not meet the Medicaid payback trust exception to counting it as a resource under the statute because, if the individual were to move to another state at any time during her lifetime, the trust provisions would frustrate the other state's ability to receive reimbursement for any medical assistance paid to the individual during his lifetime. *See* POMS PS 01825.016 Illinois (PS 07-153 SSI-Illinois-review of the David C f/k/a K-- Supplemental Care and Needs Trust).

According to the terms of the trust, any funds remaining at Judith's death, "shall reimburse the State of Minnesota for whatever sums of medical assistance paid for JUDITH's benefit that the law requires be reimbursed, but no more." Article II, § 2.02F (emphasis added). The trust does not provide for reimbursement to any other state that may provide medical assistance.

Judith's attorney argues that nothing in the federal law or the POMS that requires that a Medicaid payback trust must reference that reimbursement be made to any and all states. Memorandum at 4. However, the statute does require that a Medicaid payback trust must provide for reimbursement of "the total medical assistance paid on behalf of the individual under a State plan . . . ." 42 U.S.C. § 1396p(d)(4)(a). Thus, a fair reading of the statute suggests total repayment to any state from which an individual receives Medicaid. Indeed, the Center for Medicaid has also interpreted the statutory provisions to require that the trust provide for reimbursement to every state where the individual may have lived. *See* The State Medicaid Manual § 3259.7 ("When an individual has lived in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf."). There is no indication in the statute that reimbursement can be limited to only one individual state. In addition, the POMS at PS 01825.016 recognizes that all states must be reimbursed, as well. Judith's attorney seems to concede that, if Judith received Medicaid from other states, then repayment to those state's Medicaid plans would be required.

Judith's attorney states "it goes without saying that if [Judith] moved out of the State of Minnesota and obtained Medicaid benefits from another state, that such state would also be entitled to reimbursement upon [Judith's] death." Thus, she does not seem to be arguing that reimbursement to any and all states would not be required. The plain language of the trust, however, does not require the trustee to reimburse any other state. Indeed, there is no language permitting the trustee to reimburse any other state besides Minnesota. Thus, the plain, unambiguous language of the trust appears to limit reimbursement only to the State of Minnesota. We do not believe the trust language is substantially similar to that required by the Act. The substantially similar requirement only allows for slightly dissimilar language which still meets the substantive provisions of the exception. *See* POMS PS 01825.039 (PS 07-024 SSI-Ohio-Review of Request for Reconsideration on the James J. S-- Trust Agreement).

CONCLUSION

For the reasons discussed above, we agree that this trust should be considered a resource.

Donna L. C~
Regional Chief Counsel, Region V
By:_____

Shefali B~
Assistant Regional Counsel

D. PS 07-125 SSI-Minnesota-Review of 3 versions of the David L. H~ Special Needs Trust SSN: ~ -REPLY Your Reference: S2D5G6, SI-2-1-3 MN (H~) Our Reference: 07-0117-NC

DATE: April 30, 2007

1. SYLLABUS

This opinion evaluates whether a father's use of a minor's UTMA account to establish a trust satisfies the requirements to meet the Medicaid Trust Exception found in Section 1917(d)(4)(A) of the Act. The trust states that the minor beneficiary established the trust with his own funds. However, since the funds originated from an UTMA account to which the minor had ownership, but not legal access, his father is determined to have established the trust for the beneficiary's benefit in his capacity as UTMA custodian. Since an UTMA custodian is analogous to a guardian acting in a financial capacity, there is no requirement to establish a "seed" trust when the beneficiary of the UTMA has no legal right to access the funds. Moreover, the trust meets all other requirements for exclusion under the Medicaid trust exception. As such, the trust is an excluded resource for SSI purposes.

2. OPINION

You have asked us to review and determine whether any of the three trusts entitled "The David L. H~ Special Needs Trust," which were all established for the benefit of David L. H~ (David), were resources for purposes of determining David's eligibility for SSI. For the reasons explained below, we conclude none of the trusts were resources to David.

BACKGROUND

On October 24, 2005, "The David L. H~ Special Needs Trust" was created for the benefit of David. After reviewing this trust, on September 25, 2006, the Agency concluded that the trust was a resource to David because it did not meet one of the Medicaid Trust Exceptions. After the H~'s attorney was advised that the trust was a resource, on November 3, 2006, a revised trust named "The David L. H~ Special Needs Trust" was created for the benefit of David. And less than two weeks later, on November 16, 2006, the H~'s attorney submitted what appears to be a third version of the trust named "The David L. H~ Special Needs Trust." We describe all three trusts, in turn.

I. Initial October 24, 2005 Trust

On October 24, 2005, "The David L. H~ Special Needs Trust" (trust) was established. David was named the settlor while his father, Lee H. H~, was named as the trustee. *See* Art. I, § 1. This special needs trust was funded solely by David's assets, which amounted to $4,000.00 in cash. *See* Schedule A of the October 24, 2005 trust. Thereafter, you advised us that Claims Representative Mary P~ spoke to David's father, Lee H. H~, to clarify how the trust was funded. Mr. H~ stated that the trust was "entirely funded from UTMA accounts." He explained that the UTMA accounts were converted to checks payable to Lee H~, Custodian for David L. H~, and then directly deposited into the trust. For purposes of our analysis, we presume that the information Mr. H~ gave Ms. P~ is accurate.

The trust stated that its purpose was to supplement, but not to supplant, whatever benefits and services David might receive as a result of his disability from any local, state, or federal government or any other private agency. Trust Art. 2 § 7.

The trust provided that it was irrevocable, except upon approval by the District Court specifically authorized by the trust (in Hennepin County, Minnesota). Trust Art. 7 § 1. The trust also provided that the trustee had sole and absolute discretion to make distributions from the trust. Trust Art. 2 § 1. The trust did not provide for any mandatory periodic payments; rather, the trust indicated that it would be used for David's special needs, from time to time. Trust Art. 2 § 1. The special needs were described as referring to David's reasonable living expenses for maintaining his good health, safety, and welfare when such requisites were not being provided by any governmental agency. Trust Art. 2 § 1.

The trust provided that it would terminate upon David's death. Trust Art. 3 § 1. Upon the trust's termination, the assets would be used to repay the Minnesota Department of Human Services in an amount equal to the total medical assistance paid on behalf of David. Trust Art. 3 § 1 A. If any assets remained after reimbursement to the state of Minnesota, the assets would then

be used to pay reasonable administrative expenses, attorney's fees, and trustee's fees, with a provision that administrative expenses, attorney's fees, and trustee's fees could be paid prior to reimbursing the state if approved by the Department of Human Services or a probate court (with advance notice to the Department of Human Services). Trust Art. 3 § 1 B & C. Any remaining assets would be used to pay for David's funeral expenses, last bills, taxes, and valid debts and then to David's heirs (as determined by Minnesota state law). Trust Art. 3 § 1 D & E.

The trust indicated that its terms were to be construed under Minnesota law. Trust Art. 2 § 2; Art 3 § 1 E; Art 4 § 8.

After reviewing this trust, on September 25, 2006, the Agency concluded that the trust was a resource to David because the trust did not meet one of the Medicaid Trust Exceptions, namely, the trust was established by David, himself, and not by a parent, grandparent, legal guardian, or court-as required by the Social Security Act. *See* 42 U.S.C. § 1396p(d)(4)(A), POMS SI 01120.203.

II. Revised November 3, 2006 Trust

On November 3, 2006, David's father Lee H. H~ created a second version of "The David L. H~ Special Needs Trust." This November 3, 2006 trust differed from the October 24, 2005 trust of the same name in only one way. In the November 3, 2006 trust, David's father was named the sole settlor (instead of only David). *See* Art. I, § 1 of November 3, 2006 trust. All other provisions of the November 3, 2006 were identical to the October 24, 2005 trust. Mr. H~ submitted this revised November 3, 2006 trust to the Agency for approval, but before obtaining any opinion as to the validity of the November 3, 2006 trust, he created and submitted to the Agency another revised trust in its place: the trust dated November 16, 2006.

III. Revised November 16, 2006 Trust

On November 16, 2006, David's father, Lee H. H~, created a third version of "The David L. H~ Special Needs Trust." This November 16, 2006 trust differed from the October 24, 2005 trust in two ways. Like the November 3, 2006 trust, the November 16, 2006 trust named David's father as the sole settlor. *See* Art. I, § 1 of November 16, 2006 trust. The second difference between the trusts was that the November 16, 2006 trust was no longer funded solely by David's assets. In this trust, David's father had added $100.00 of his own funds into the trust. *See* Schedule A of the November 16, 2006. All other provisions of the November 16, 2006 were identical to the October 24, 2005 trust.

DISCUSSION

Here, the trust funds for all three trusts came from David's UTMA account. The records you provided us show that David had not yet reached the age of majority pursuant to the Minnesota UTMA statute; he would turn 21 on November 30, 2007. *See* MN UTMA § 527.21. However, even though David had not yet reached the age of majority when David's father transferred his UTMA funds into the three trusts, the portion of the trust corpus (of each trust) stemming from David's UTMA account should nevertheless be considered as established with David's assets since the UTMA account was held by a custodian-his father-with legal authority to act on David's behalf with regard to the money. *See* POMS SI 01120.201B.2 ("asset" includes "any other payment or property to which the individual . . . is entitled, but does not receive or have access to because of action by . . . a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse . . ..)." As such, the trusts, which originated from David's UTMA account, were established with David's assets. *See* POMS SI 01120.201B.7.

I. October 24, 2005 Trust

As explained below, we believe that the October 24, 2005 trust should not be considered a resource to David under the Medicaid Trust exception. POMS SI 01120.203.

Specifically, the Medicaid trust exception for irrevocable individual trusts applies where the trust is:

(1) established with the assets of an individual under age 65 who is disabled;

(2) established for the sole benefit of such individual by a parent, grandparent, legal

guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

POMS SI 01120.203(B)(1).

As an initial matter, for the Medicaid trust exception to apply, the trust must be irrevocable. POMS SI 01120.203(B)(1)(a). Here, the trust states that it is irrevocable. Trust Art. 7 § 1. Notwithstanding the language that indicates the trust is irrevocable, another provision of the trust further establishes that the trust is indeed irrevocable. Specifically, despite David being named as the settlor of the trust, he is not the sole beneficiary of the trust; rather, the trust named residual beneficiaries-his heirs per Minnesota statute-to receive the remaining trust assets after David's death. Trust Art. 3 § 1 (E); POMS SI CHI 01120.200 (C) & (D)(4). Accordingly, the trust is irrevocable.

Next, regarding the three core requirements of the Medicaid Trust exception, we find that the trust meets all three requirements. The trust meets the first requirement as David is under age 65 (born November 30, 1986) and is disabled. The trust meets the third requirement as the trust provides that, upon David's death, any remaining funds would be used to reimburse the State for medical assistance paid on his behalf during his lifetime. Trust Art. 3 § 1(A).

Regarding the second requirement-that the trust be established for the benefit of David by a parent, grandparent, legal guardian or a court, we believe that although the trust states that David created this trust, David could not have legally established the trust himself. Since the trust funds originated from David's UTMA account and he had not attained the age of majority when this trust was created, David would not legally be able to access the UTMA funds. Only the account custodian, David's father, had access to David's UTMA account. Our interpretation is supported by David's father's statements and documents submitted to CR Mary P~. Specifically, after submitting this October 24, 2005 trust for the Agency's approval, David's father advised the CR that he had converted the funds from David's UTMA account into checks payable to Lee H~, Custodian for David H~ pursuant the Minnesota UTMA statute and then deposited those checks directly into the trust. As such, David's father, as his UTMA custodian, established the trust for the benefit of David.

Next, we do not believe it was necessary for David's father to "seed" the trust with his own money. Here, David's father transferred David's UTMA funds in his capacity as custodian of David's UTMA funds. And while pursuant to the UTMA, the account belonged to David, since he had not reached the age of majority, he had no legal right to access or transfer those funds. Thus, David's father did not merely transfer assets which David could have transferred himself. *See* POMS SI 01120.010 referring to: SI 01110.100 (Despite having an ownership interest, property cannot be a resource if the owner lacks the legal ability to access funds for spending or to convert noncash property into cash). Accordingly, we believe that this situation is akin to a situation where a legal guardian establishes a trust on behalf of an incompetent adult or child. Both a legal guardian and an UTMA custodian are entrusted with the possession and management of the minor or incompetent adult's assets, which the minor or incompetent adult have no legal right to access or transfer. Since we believe that an UTMA custodian is akin to a guardian and since we do not require a guardian to "seed" a trust, an UTMA custodian should also not be required to "seed" a trust when the beneficiary of the UTMA funds has not reached the age of majority and has no legal right to access those funds. Accordingly, we believe that the October 24, 2005 trust met the Medicaid Trust exceptions pursuant to POMS SI 01120.203, and thus the Trust should not be considered David's resource under the statutory trust rules.

Finally, the trust would not be a resource under the regular resource rules because, as noted above, David cannot revoke the trust, and David has no right to direct principal or receive mandatory payments from the trust. POMS SI 01120.200(D).

II. November 3, 2006 Trust

The only difference between the October 24, 2005 trust and the November 3, 2006 trust that replaced it is that the November 3, 2006 trust named David's father, Lee H~ as the settlor of the trust instead of David - as provided by the October 24, 2005 trust. *See* Art. I, § 1 of November 3, 2006 trust. This change in naming the settlor was of no consequence. While David was no longer named the settlor, he should still be considered the true settlor of the trust since the trust was established with funds that legally belonged to him even though he did not have a legal right to access the funds. Thus, for the same reasons the October 24, 2005 trust should not be considered a resource, the November 3, 2006 trust also should not be considered a resource for purposes of David's SSI eligibility.

III. November 16, 2006 Trust

This November 16, 2006 trust differed from the October 24, 2005 trust in only two ways. Like the November 3, 2006 trust, the November 16, 2006 trust named David's father as the sole settlor. *See* Art. I, § 1 of the November 16, 2006 trust. However, as we indicated regarding the November 3, 2006 trust, this change in naming the settlor to someone other than David was of no consequence, as David was the true settlor since the trust was established with funds that legally belonged to David.

The second difference was that the November 16, 2006 trust was no longer funded solely by David's assets; in this trust, David's father had added $100.00 of his own funds into the trust. *See* Schedule A of the November 16, 2006. However, it would not be a resource whether it was seeded or not. For the reasons we stated regarding the October 24, 2005 trust, we do not believe it was necessary for the father to "seed" the trust.

CONCLUSION

For the reasons discussed above, we conclude that all three versions of the David L. H~ trust should not be considered David's resources.

E. PS 07-102 Opinion Request Transfer; Treatment of Trust for SSI Resource Purposes (James S~) - REPLY Our Ref: 07-0169

DATE: March 26, 2007

1. SYLLABUS

Note: This trust was established in 1998 and thus was evaluated under the trust rules in place prior to 1/1/00. This precedent may not apply to trusts established after 1/1/00.

This opinion provides an analysis of a special needs trust established for an SSI beneficiary with the proceeds of a court-approved personal injury settlement. Because the trust was established prior to January 1, 2000, the regular trust resource rules found at POMS SI 01120.200 govern the determination of whether the trust is a resource to the SSI beneficiary. The trust principal would be a countable resource if the SSI beneficiary: (1) has legal authority to revoke or terminate the trust and use the funds to meet food or shelter needs; (2) can direct use of the trust principal for support and maintenance; or (3) can sell beneficial interest in the trust, and the trust provides for mandatory disbursements. Under the provisions of the trust, the SSI beneficiary does not have the authority to effectuate any of the disqualifying provisions listed above and thus the trust is not a countable resource for SSI purposes.

2. OPINION

You asked whether a supplemental needs trust established for the benefit of SSI beneficiary James S~ ("James") is a resource to James, a disabled individual, for SSI purposes. For the reasons discussed below, we conclude that the Trust is not a resource.

Facts

On July 28, 1998, when James was 10 years old, Michael S~, the father of James S~, established the James S~ Irrevocable Supplemental Trust (hereinafter "Trust"). Prior to this, on July 8, 1998, a Minnesota state court apparently "approved" the establishment of the Trust. Trust, at 1, introductory paragraph. According to the information provided by you, it was funded pursuant to a personal injury settlement James received as a minor. Michael S~ was named as Trustee. Trust, at 5, Par. 4.1. The Trustee holds the Trust estate "solely for the benefit" of James to provide reasonable expenses and needs that are not covered by benefits from publicly funded programs. *Id.* at 3, 3.1. But, the Trustee is under no obligation to make any such expenditures. *Id.* at 4, Par. 3.4. Further, the Trustee cannot make distributions for James' food, shelter, clothing, medical care, or other basic necessities that are provided by, or would be provided by, any governmental unit, to the extent that such distributions would supplant publicly funded benefits or render James ineligible for publicly-funded benefits. *Id.* at 4, Par. 3.8. In addition, the Trustee is forbidden from making distributions directly to James, or to any person with legal authority to act on James' behalf with respect to financial matters. *Id.* at 3.5. The Trustee is also required to obtain court permission prior to spending more than $1,000 on a single item or group of related items. *Id.* at 4, Par. 3.4.

Upon James's death, the Trustee shall first pay, subject to approval by the Minnesota Department of Human Services, administrative expenses, attorney fees, and trustee fees related to the administration and termination of the trust. *Id.* at 3, Par. 3.9.1. The Trustee is then required to pay the State of Minnesota a sum equal to the total Medicaid benefits paid on James's behalf. *Id.* at 5, Par. 3.9.2. The Trustee may then pay James's funeral expenses, last bills, taxes, and valid debts. *Id.* at 5, Par. 3.9.3. After paying the above-mentioned expenses and reimbursements, the Trust Agreement terminates, and the residue of the Trust corpus is distributed according to the last will of James, if any; if no will exists, the remainder is distributed according to the laws of intestacy of the State of Minnesota in effect at that time. *Id.* at 5, Par. 3.9.4.

The purpose of the Trust is to supplement all financial and service benefits to which James might become eligible as a result of his disability from any local, county, state or federal agency, or through any corporations, entities or agencies. Trust, at 1, Par. 1.1. The Trust Agreement states that it is "irrevocable" and that James does not have the right, either alone or in conjunction with anyone else, to alter, amend, revoke or terminate the Trust Agreement. *Id.* at 2, Par. 1.3. The Trust Agreement provides that at no time will the estate of the Trust become available to James, or be placed in his possession. *Id.* at 2, Par. 2.1. The Trustee's ability to amend the Trust Agreement is limited to making changes, with approval of a court of competent jurisdiction, in order to conform to any changes in law or regulation "relating to 42 U.S.C. § 1396, Minn. Stat. § 501B.89, or related statutes, including state and federal statutes that are consistent with the provisions and purposes of the Omnibus Budget Reconciliation Act of 1993 and amendments of such Act, and so that it conforms with any amendment to relevant state or federal laws." *Id.* at 2, Par. 1.4.

DISCUSSION

Because the Trust was established prior to January 1, 2000, the regular trust resource rules found at POMS SI 01120.200 govern the determination of whether the Trust is a resource to James. Specifically, the Trust principal would constitute a resource if James: (1) has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs; (2) can direct the use of the trust principal for his support and maintenance under the terms of the trust; or (3) can sell his beneficial interest in the trust, and the Trust provides for mandatory disbursements. POMS SI 01120.200(D)(1)(a).

A. James cannot revoke or terminate the Trust.

The Trust Agreement expressly provides that James does not have the right, either alone or in conjunction with anyone else, to alter, amend, revoke or terminate the Trust Agreement. *Id.* at 2, Par. 1.3. However, although James' father, Michael, is named as the Settlor in the Trust Agreement, James is in fact the settlor (or grantor) of the trust, since it is his personal injury settlement award that comprises the trust fund. POMS SI 01120.200(B)(2); SI CHI01120.200(B). And, if James were both the grantor of the trust and its sole beneficiary, the trust would be revocable even if it states otherwise. POMS SI CHI01120.200(C).

However, James is not the sole beneficiary of the Trust. The Trust Agreement provides that, upon James's death, after payment of various debts and expenses, the Trust terminates. Trust at 3, Par. 3.9.1; 3.9.2; 3.9.3. The remainder of the Trust corpus is then distributed according to the last will of James, and if no will exists, according to the laws of intestacy of the State of Minnesota in effect at that time. *Id.* at 5, Par. 3.9.4. The act of naming heirs at law or persons who would be entitled to inherit via intestacy or through a statute of descent and distribution is sufficient to create residual beneficiaries, and thus the grantor (James) could not unilaterally revoke the Trust. POMS SI CHI01120.200(D)(4); RESTATEMENT (THIRD) OF TRUSTS § 49, comment a(1) (2003) ("[t]here remains only a question of construction, with the presumption that language expressing an apparent intention to create a remainder in someone's heirs is so intended and is to be given that effect.").

B. James cannot direct the use of the Trust assets.

The Trust Agreement expressly provides that at no time will the estate of the Trust become available to James, or be placed in his possession. Trust at 2, Par. 2.1. In addition, the Trustee is forbidden from making distributions directly to James, or to any person with legal authority to act on James' behalf with respect to financial matters. *Id.* at 3.5. Most significantly, the Trustee has complete discretion and is not required to make any particular expenditures. *Id.* at 3, Par. 3.4. Thus, James is unable to direct the use of the Trust assets. *See* POMS SI 01120.200(D)(1)(a).

C. James cannot sell his beneficial interest in the trust.

As noted above, the Trust could also be a resource to James, if the Trust provided for mandatory disbursements to James, and if he were able to sell his beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a). Here, however, the Trustee's ability to expend sums from the Trust principal is entirely discretionary; therefore, the trustee has no obligation to make any payments to James. Trust at 3, Par. 3.4. In fact, as outlined above, the Trustee is prohibited from making distributions of any kind directly to James or any person with the authority to act on his behalf in financial matters. *Id.* at 3.5. Accordingly, there are no mandatory disbursements, even if James has an alienable interest in the Trust which could be sold.

CONCLUSION

The principal of James S~ Special Needs Trust should not be considered a resource. Because this self-settled trust was established before January 2000, the regular trust resource rules apply. Under these rules, James cannot terminate or revoke

the trust and gain access to the trust property. He cannot direct the use of the assets for his food or shelter needs. Finally, he cannot sell his beneficial interest in the trust. Therefore, the property held in the trust is not a resource for SSI purposes.

F. PS 07-045 SSI-Minnesota-Review of the Jennifer T~ Special Needs Trust, ~, - REPLY Your Ref: SI 2-1-3 MN Our Ref: 06-0056

DATE: January 11, 2007

1. SYLLABUS

This opinion provides detailed analysis of a special needs trust established for an SSI beneficiary with the proceeds of a court-approved personal injury settlement. While the trust purports itself to be irrevocable, the SSI beneficiary is both the settler (grantor) and sole beneficiary of the trust. Since the settler of the trust is also the sole beneficiary, the trust is revocable and, thus, a countable resource for SSI purposes. This remains true despite that fact that the trust otherwise meets the requirements to be excluded under the special needs trust provisions. Naming a residual beneficiary would likely have the effect of making the trust irrevocable, but the deemed death provision would then allow for the residual beneficiary to potentially benefit from the trust during the lifetime of the beneficiary. In that instance, the trust no longer meets the special needs trust requirement dictating that the trust must be for the sole benefit of the beneficiary during their lifetime.

2. OPINION

You asked whether a supplemental needs trust established for the benefit of SSI beneficiary Jennifer ~ (Jennifer) is a resource to Jennifer, a disabled individual, for SSI purposes. For the reasons discussed below, we conclude that the Trust is a resource for purposes of SSI eligibility.

Background

The Jennifer T~ Special Needs Trust was established on June 7, 2004. Trust, at 1, paragraph 1. It was funded with $6,233,872.31, which constitutes the proceeds of a court-approved settlement of a personal injury lawsuit filed on Jennifer's behalf. Trust, at 1, paragraphs 3- 4; Trust, at Appendix A. The named settlors of the Trust are Jennifer's parents, Kyle and Lori T~, and the trustees are Lee H~ and Comerica Bank and Trust, National Association. Trust, at 1, paragraph 1.

The stated purpose of the Trust is to provide for Jennifer's supplemental needs and supplement all financial and service benefits to which Jennifer might become eligible to receive as a result of her disability from any local, county, state or federal agency, or through any corporations, entities or agencies. Trust, at 1, paragraph 6; Article Three, Paragraph 3.1. The Trust Agreement states that it is "irrevocable" and that neither Jennifer nor her parents have the right to alter, amend, revoke or terminate the Trust Agreement. Trust, Article Two, paragraph 2.1. The trustees retain the right to amend the Trust Agreement, with approval of the court, in order to conform to any rule or regulation "relating to 42 U.S.C. § 1396 or related statues, including state statutes which are consistent with the provisions and purposes of the Omnibus Budget Reconciliation Action of 1993 and any amendments of such Act, so that this Trust Agreement conforms with any amendments to relevant state or federal laws." Trust, Article Two, paragraph 2.1. The Trust incorporates, by reference, the provisions of 42 U.S.C. §1396p(c)(2)(B) and "the United States Department of Health and Human Services, Health Care Financing Administration, State Medicaid Manual, Part 3, § 3257.6" (hereafter the Medicaid Manual) "regarding required language or any other requirement for 'special needs trusts.'" Trust, Article Two, paragraph 2.2.1. The Trust Agreement further states:

If this Trust Agreement is deficient in any regard or if any provision in the Trust Agreement is inconsistent with any provision of those sections or any other provision of federal law that establishes requirements for 'special needs' trusts, the required language or other requirement of § 1396p(c)(2)(B) or Section 3257.6 or other applicable federal law shall be deemed to be included in this Trust Agreement and shall prevail to the extent necessary to conform this Trust Agreement to the requirements for 'special needs' trusts, and this Trust Agreement shall be deemed to be amended accordingly, without need for court approval of an amendment pursuant to Article Two of this Trust Agreement

Trust, Article Two, paragraph 2.2.1 The Trust Agreement also contains a similar paragraph, purporting to allow for a deemed amendment of the Trust Agreement so as to conform the Trust Agreement to Chapter 256B, Section 501B.89 of the Minnesota Statutes. Trust, Article Two, paragraph 2.2.2.

The trustees have "sole and absolute discretion" to make distributions from the Trust principal to pay for Jennifer's supplemental needs. Trust, Article Three, paragraphs 3.1, 3.2.2. The trustees shall not make distributions for Jennifer's food, shelter, medical care or other basic necessities that are provided by, or to be provided by, any governmental unit, to the extent that such distributions would replace, reduce or substitute for publicly-funded benefits available to Jennifer or render her ineligible for publicly-funded benefits. Trust, Article Three, paragraph 3.2.3. The trustees may, in their sole and absolute discretion, provide in-kind support and maintenance to her as long as Jennifer remains eligible to receive SSI, Medicaid or other government benefits and her monthly SSI benefit amount is not reduced below $1.00. Trust, Article Three, paragraph 3.2.5. The Trust assets cannot be assigned or alienated by Jennifer, are not subject to garnishment, attachment, levy or other legal process by Jennifer's creditors, and are not considered an asset of Jennifer's in a bankruptcy proceeding. Trust, Article Three, paragraph 3.2.4.

The Trust shall terminate upon Jennifer's death, or upon the first of the following to occur: (1) a court finds that the Trust renders Jennifer ineligible for benefits from any governmental unit or agency; or (2) the trustees determine that the Trust is or may be subject to garnishment, attachment, execution or bankruptcy proceedings by a creditor of Jennifer. Trust, Article Three, paragraphs 3.2.7, 3.3. If the Trust is terminated prior to Jennifer's death, the Trust assets shall be distributed as if Jennifer were deceased. Trust, Article Three, paragraph 3.2.7. Upon Jennifer's death, the trustees shall pay to the State of Minnesota or other State sums equal to the total Medicaid benefits paid on Jennifer's behalf. If Trust assets remain, the trustees may then pay expenses of Jennifer's funeral and last illness. The trustees shall also pay all reasonable and necessary administrative expenses relating to the termination of the Trust, and these may be paid prior to the sums paid to the State of Minnesota or other State. Trust, Article Three, paragraphs 3.3-3.3.1. After paying the above-mentioned expenses and reimbursements, any assets remaining in the Trust shall be distributed to Jennifer's estate. Trust, Article Three, paragraph 3.3.2.

If any provision of the Trust Agreement is invalid or unenforceable, the remaining provisions shall continue to be fully effective. Trust, Article 5, paragraph 5.2.3. In addition, a court may "modify any provision of this trust to the extent necessary to maintain the eligibility of Jennifer T~ for Medical Assistance or other public benefits." Trust, Article 5, paragraph 6.34.

DISCUSSION

The Trust is Revocable

A trust established by an individual after January 1, 2000 will be considered a resource to her if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1)(a). Although a trust agreement may contain language stating that the trust is irrevocable, *see* Trust, Article Two, paragraph 2.1, a trust is revocable where the grantor or settlor of the trust is also the sole beneficiary. Restatement (Second) of Trusts § 339, comment a (1959); Restatement (Third) of Trusts § 65 and comment a and Reporter's Note (2003). Here, the Trust Agreement identifies Kyle and Lori T~ as the settlors, but Jennifer is the true settlor of the Trust because the Trust was formed with her assets. POMS SI 1120.200(L)(3).

Jennifer is also the sole beneficiary of the Trust. Jennifer is the only named beneficiary of the Trust during and after her lifetime. On termination of the Trust, and after the State is reimbursed for Medicaid benefits paid to Jennifer, administrative expenses for terminating the Trust are paid, and Jennifer's funeral and last illness expenses are paid, any remaining Trust assets are to be distributed to Jennifer's estate. Trust, Article Three, paragraphs 3.2.7, 3.3.1, 3.3.2. Under *Scott on Trusts*, a settlor is the sole beneficiary when she conveys property in trust to pay the income to her for life, and on her death the trust property is conveyed to her estate. William F. F~, *Scott on Trusts*, § 127.1 (1987). Likewise, under the Restatement (Second) of Trusts, a settlor is the sole beneficiary when she transfers the property in the trust to pay the income to herself for life and on her death the trust principal is transferred to her estate. *See* Restatement (Second) of Trusts, § 127, comment b. Here, the assets are distributed to Jennifer's estate (after the Medicaid benefits are reimbursed and administrative, funeral and last illness expenses are paid) upon the Trust's termination. Thus, Jennifer is the sole beneficiary of the Trust. Because Jennifer is both the sole beneficiary and the settlor of the Trust, the Trust is revocable and should be considered a resource.

The Trust Modification Provisions Do Not Render The Trust Irrevocable.

The Trust Agreement purports to self-correct certain deficiencies. The Trust provides that, if any provision of the Trust Agreement is inconsistent with the provisions of 42 U.S.C. §1396p(c)(2) (B) or Part 3 § 3257.6 of the Medicaid Manual regarding required language "*and any other requirement for special needs trusts,*" the Trust Agreement "shall be deemed to be amended accordingly, without need for court approval" to "conform this Trust to the requirements for 'special needs' trusts." Trust, Article Two, paragraph 2.2.1 (emphasis added). The Trust also allows court-ordered modifications "to the extent necessary" to

maintain Jennifer's eligibility for "Medical Assistance or other public benefits." Trust, Article 5, paragraph 6.34. Based on our review, we do not believe that either of these modification provisions can be invoked to make the Trust irrevocable.

As an initial matter, we note that the Trust Agreement is consistent with 42 U.S.C. § 1396p(c)(2) (B) and Part 3, § 3257.6 of the Medicaid Manual. More specifically, 42 U.S.C. § 1396p(c)(2)(B) provides, in pertinent part, that "[a]n individual shall not be ineligible for medical assistance … to the extent that … assets were transferred to a trust established solely for the benefit of an individual under 65 years of age who is disabled." *See* 42 U.S.C. § 1396p(c)(2)(B). Because the Trust was established for Jennifer's sole benefit, the Trust Agreement is consistent with this provision. Part 3, § 3257.6 of the Medicaid Manual provides that, "[i]n order for a trust to be considered for the sole benefit of a disabled individual, the trust instrument must provide that any funds remaining in the trust upon the death of the individual must go to the State, up to the amount of Medicaid benefits paid on the individual's behalf." *See* U.S. Dept. of Health and Human Servs., Health Care Financing Administration State Medicaid Manual, Part 3, § 3257.6. The Manual further states that the trust may provide for disbursal of funds to other beneficiaries, so long as the trust does not permit such disbursals until the State's claim is satisfied. *Id.* Here, the Trust Agreement states that the trustees shall pay the State "sums equal to the total Medicaid benefits paid on Jennifer's behalf" before paying administrative, funeral and last illness expenses and distributing any remaining assets to Jennifer's estate. Trust Article Three, paragraphs 3.3.1, 3.3.2. Consequently, the Trust Agreement is consistent with Part 3, § 3257.6 of the Medicaid Manual and includes the "required language" for special needs trusts. *See* POMS SI 01120.203.

This Trust Would Not Be Considered A Resource If A Residual Beneficiary Were Added.

This Trust is currently revocable. Although the Trust could be made irrevocable by adding a residual beneficiary, this has not yet occurred. Moreover, we do not believe that this task could be accomplished under the Trust Agreement's "self-correction" provisions. The provisions relate to the requirements for special needs trusts and Medicaid benefits. They do not concern irrevocability or residual beneficiaries. Furthermore, we could find no legal authority that would allow a "self-correcting" trust provision to substitute for the settlor's intent to name beneficiaries to the trust. *See* Restatement (Third) of Trusts § 48 ("A person is a beneficiary of a trust if the settler manifests an intention to give the person a beneficial interest…"); *see also Id.* § 44, comment a ("The interests of some beneficiaries may be valid although the intended interests of others are not, including invalidity for indefiniteness…."). Until a residual beneficiary is added, the Trust remains a resource to Jennifer. I

We caution, however, that if additional residual beneficiaries are added to the Trust, the Trust would not satisfy the Medicaid payback provisions of the statutes, due to the inclusion of the deemed death provision of the Trust in Section 3.2.7. The statute provides that a trust will qualify for the Medicaid payback exception only if it is established for the benefit of the individual. 42 U.S.C. § 1396p(d)(4)(A). The Agency has reasonably interpreted 42 U.S.C. § 1396p(d)(4)(A) to require that the trust be established for the sole benefit of the individual during her lifetime. *See* POMS SI 01120.201(F)(2) (defining established for the sole benefit of the individual); Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Illinois-Michigan-Review of the Brian V~ Irrevocable OBRA Pay Back Trust, (Nov. 22, 2004). Under paragraph 3.2.7 of the Trust Agreement, Trust assets may, under some circumstances, be distributed to residual beneficiaries of the Trust during Jennifer's lifetime as if she had died. Thus, if residual beneficiaries were added to the Trust, the Trust would no longer be for Jennifer's sole benefit during her lifetime, as required to meet the Medicaid payback provisions of the statute.

CONCLUSION

Jennifer is the settler and sole beneficiary of the Trust, rendering the Trust revocable and making it a resource to Jennifer, even though it complies with the requirements of special needs trusts. The self-correction provision cannot be used to add a residual beneficiary. Until such time as a residual beneficiary is named, this Trust will constitute a resource to Jennifer. Furthermore, even if a residual beneficiary is named, the Trust will still be a resource unless Paragraph 3.2.7 is removed from the Trust Agreement or otherwise modified so that no other beneficiary could benefit from the Trust during Jennifer's lifetime.

G. PS 06-091 Opinion Request Transfer; Treatment of Trust for SSI Resource Purposes (Ryan A. S~)-Reply Your Reference: S2D8B51:RLM Our Reference: 06-0012

DATE: March 9, 2006

1. SYLLABUS

This opinion involves a transfer by a beneficiary's parents of Uniform Transfer to Minors Act (UTMA) funds to newly established trusts for the beneficiary prior to his attainment of the age of majority. Two issues arose. First, does State law permit the transfer of UTMA funds into a trust and, second, are the trusts resources for SSI purposes? Regional counsel determined that Minnesota law did permit the parents to transfer the UTMA funds and that such action was not a breach of their fiduciary responsibilities. However, because each trust contained a discretionary termination clause in the event of the beneficiary's noneligibility for public assistance (e.g., SSI), the trusts created a contingent interest in third parties. Because neither trusts would be for the sole benefit of the beneficiary during his lifetime, the statutory trust exceptions discussed at POMS SI 00120.203B.1.d. would not apply and the trusts would be resources for SSI purposes (*also see* SI 01120.201F.2. for a DISCUSSION of sole lifetime beneficiary).

2. OPINION

You have asked whether Minnesota state law allows the custodian of a Uniform Transfers to Minors Act (UTMA) account to transfer the funds into a trust, and whether the custodian had legal authority to make the transaction. If so, you have further asked whether the resulting trusts are a resource for the purposes of determining Ryan S~'s (Ryan's) eligibility for Supplemental Security Income. We believe, for the reasons stated below, that the custodians had authority to transfer the UTMA funds, but that the trusts are a resource to Ryan.

FACTS

Ryan, born October 17, 1986, is a resident of Minnesota. According to the information provided, when he was a minor, he received an inheritance from his grandparents, which was placed in a Uniform Transfers to Minors Act (UTMA) account governed by Minnesota law. On October 8, 2004, prior to Ryan's eighteenth birthday, his parents established the "Ryan A. S~ Irrevocable Special Needs Trust" ("Trust") with $5,980.35 in UTMA funds.

The Trust states that it is irrevocable. Trust, Article One. The Trust's purpose is to supplement Ryan's care which is provided by public assistance. Trust, Article Three. The Trust provides that the Trust shall terminate upon Ryan's death. Trust, Article Three, subsection 7. When Ryan dies, all amounts remaining in the Trust are to be distributed to the State up to the amount of medical assistance paid by the State on his behalf. Trust, Article Three, subsection 8(a). The Trustee may then use the remaining Trust assets for funeral expenses, applicable taxes, and certain fees. Trust, Article Three, subsection 8(b). After these payments, the Trustee is directed to pay the remaining undistributed principal equally to Ryan's issue. Trust, Article Three, subsection 8(c).

The Trust also contains provisions for terminating the Trust prior to Ryan's death. The Trust provides that the Trust shall be terminated "if as a matter of law or regulation, the principal of this trust would ever be deemed to be an available asset for the purpose of determining eligibility for any publicly funded program which our Trustee deems essential to Ryan's well-being." Trust, Article Three, subsection 7(a). In addition, "if a federal, state, county or local administrative or legislative body or court shall determine that this trust disqualifies Ryan from receiving benefits from any publicly funded benefit program which our Trustee deems essential to his well-being," the Trust is terminated. Trust, Article Three, subsection 7(b). Upon such termination, the Trust is to be distributed in the same manner as though Ryan died. Trust, Article Three, subsection 7.

In addition to this main Trust, Ryan's parents also established a second trust with UTMA funds in the amount of $100.01, called the "Ryan A. S~ Irrevocable Supplemental Needs Trust" ("Supplemental Trust"). The provisions of the Supplemental Trust largely mirror the main Trust except that, upon termination of the trust, after the State is reimbursed for medical assistance, and funeral expenses, applicable taxes and other fees are paid, the remainder will go to the Special Olympics, Saint Paul's Lutheran Church of Perham, and the Boy Scouts of America, in equal amounts. Supplemental Trust, Article Three, subsection 8.

DISCUSSION

1. Transfer of Funds from the UTMA Account to the Trusts Was Proper.

Under Minnesota law, the custodian of an UTMA account "has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property. . . ." Minn. Stat. Ann. § 527.33. However, that power is subject to the limitation that "a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another . . . ." Minn. Stat. Ann § 527.32. The statute further empowers the custodian to "deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor. . . ." Minn. Stat. Ann § 527.34.

These statutory provisions allow the custodian of an UTMA account to transfer funds into a trust account so long as it is not a breach of fiduciary duty. Here, it appears that Ryan's parents, the custodians with the legal authority to act on his behalf, were acting consistent with these statutory provisions and did not breach their fiduciary duty when they transferred the UTMA funds to an irrevocable trust. If Ryan's parents had not so acted, the UTMA funds would have been available to Ryan when he reached the age of majority, which would have affected his eligibility for public assistance programs, including Supplemental Security Income. POMS SI CHI01120.205(A). By placing the UTMA funds in a trust that they anticipated would not count as a resource, Ryan's parents were attempting to maintain his eligibility for public assistance programs and thereby conserve his funds. Although, as discussed below, it appears that their attempt failed, there does not appear to be any indication that they were not observing a reasonable standard of care in creating the trusts. *See In re Estate of King*, 668 N.W.2d 6, 9 (Minn. App. 2003) (no breach of fiduciary duty as long as acting in good faith, from proper motives, and within the bounds of reasonable judgment); *see also Matter of Irrevocable Inter Vivos Trust Established by R.R. Kemske by Trust Agreement Dated October 24, 1969*, 305 N.W.2d 755, 761 (Minn. 1981) (quoting Restatement (Second) of Trusts and noting that whether fiduciary acted prudently depends upon circumstances as they reasonably appeared to him at the time he acted and not at some subsequent time when the conduct may be questioned). Thus, we conclude that Minnesota law allows the transfer of UTMA funds into a trust and that Ryan's parents acted with proper legal authority in making this transfer.

Trusts Are Resources Under Statutory Resource Rules.

Under SSA's statutory trust resource rules, an irrevocable special needs trust established by an individual after January 2000 generally will be considered a resource to him, unless it meets certain exceptions. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2). If the trust is irrevocable, the trust is still a resource if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. The value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a).

As explained above, the Trust document states that it is irrevocable. Trust, Article One. Moreover, even though Ryan should be considered the true settlor of the Trust (since the Trust was established with funds that belonged to him), he is not the sole beneficiary under the Trust or the Supplemental Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200. Specifically, both trusts create contingent remainder interests in third parties (Ryan's issue and various charitable groups). POMS SI CHI01120.200(D)(4). Accordingly, the trusts are irrevocable. POMS SI CHI01120.200(C) ("[I]f the Trust names a residual beneficiary to receive the benefit of the Trust interest after a specific event, usually the death of the primary beneficiary, the Trust is irrevocable. The primary beneficiary cannot unilaterally revoke the Trust; he needs the consent of the residual beneficiary.").

However, pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since Ryan is a beneficiary), unless one of the exceptions in POMS SI 01120.203 applies. However, it does not appear that any of the exceptions in POMS SI 01120.203 are applicable.

In particular, the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), which requires that the trust be established for the *benefit of an individual* by a parent, grandparent, legal guardian or court, would be unavailable. We have been advised by the Office of Program Law that this provision should be interpreted to require that the trust be established for the *sole benefit* of the individual during his or her lifetime. *See* POMS PS 01825.016(D), *PS 05-033 SSI-Illinois-Review of the Brian V~Irrevocable OBRA Pay Back Trust* (termination clause that created contingent interests in third parties rendered the exception under Section 1917(d)(4)(A) of the Act unavailable). Here, however, the Termination provision in Article Three creates contingent interests that could benefit third parties *during the lifetime* of the claimant. Specifically, if the trustee decides to terminate the Trust because it disqualifies Ryan from public benefits, the trust assets might go to Ryan's issue.

Because of this contingent interests in third parties, the Trust would not be considered for the sole benefit of Ryan during his lifetime, and thus the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), as well as any other exceptions, would be unavailable. Therefore, the Trust should be considered a resource to Ryan under POMS SI 01120.201(D)(2). For the same reason, the Supplemental Trust would also be considered a resource.

CONCLUSION

We conclude that Minnesota law allows the transfer of UTMA funds into a trust and that Ryan's parents acted with proper legal authority in making this transfer. However, the discretionary termination provisions of the Trusts create contingent interests in third parties. Accordingly, the Trusts would not be for the sole benefit of Ryan during his lifetime, and thus the exception under Section 1917(d)(4)(A) of the Act (POMS SI 01120.203(B)(1)), as well as any other exceptions, would be unavailable. Therefore, we believe that the trusts are a resource to Ryan.

H. PS 05-121 SSI-Minnesota-Review of the Annuity Funded Burial Trust of Dorothy S~, REPLY Your Ref: S2D5G6, SI 2-1-4 MN (S~)Our Ref: 04P103

DATE: March 29, 2005

1. SYLLABUS

On March 27, 2004 an annuity policy was purchased by an SSI beneficiary from the Funeral Directors Life Insurance Company. The annuity was purchased with a single premium of $7000, and provided that the proceeds of the policy could be assigned. An irrevocable assignment of ownership was made to N~-D~ funeral home effective March 27, 2004 (the "Assignment"). The Assignment was made as consideration for performing the terms of the Funeral Pre-Arrangement Agreement (the "Agreement"), but could be cancelled without penalty within three days of that date. The Agreement authorized N~-D~ to transfer ownership of the Annuity to a trustee and to apply the proceeds in accordance with the Pre-Arrangement Agreement. The assignment of the annuity and the terms of the Agreement established an annuity funded burial trust. Standard post-January 1, 2000 trust rules do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral goods/services; the individual pre-pays for the goods and services; and the funeral provider places the funds in a trust. When these conditions are met it is determined that that funeral home has "established" the trust. Since the Assignment and Agreement establish that the conditions are met, the annuity funded burial trust is determined to be an excludable resource after the initial 3 day cancellation period. Additionally, the SSI beneficiary's equitable interest in the resulting trust is determined to have no discernable market value.

2. OPINION

You have asked whether an annuity funded burial trust is a resource for purposes of SSI for Dorothy J. S~. As discussed below, we conclude that the trust is a resource for the first three days after its creation (March 27, 2004), but thereafter is not a resource.

BACKGROUND

The relevant information that we have consists of a completed application for an annuity policy, the terms of the annuity policy, a statement for burial goods and services from N~-D~ funeral home, an irrevocable assignment of ownership of the annuity to N~-D~, and a funeral pre-arrangement agreement.

On March 27, 2004, Ms. D~ A. C~, acting under a power of attorney for Dorothy S~, purchased an annuity policy ("Annuity"), policy number MN0473919, from the Funeral Directors Life Insurance Company, for a single premium of $7000, which was paid for with a check written by Ms. S~. The policy became effective on March 27, 2004. The Annuity named Dorothy J. S~ as the proposed insured/annuitant, with the Estate of Dorothy J. S~ named as a contingent beneficiary. The policy will mature on March 27, 2021, when Ms. S~ will be 88 years old. The Annuity provided that it would make monthly payments to Ms. S~ beginning on the maturity date. The policy also provided that it could be cancelled within 30 days after the effective date of the policy (the "free look" period). Prior to the maturity date, the Annuity could be surrendered for the $7000 premium payment, minus certain fees from the insurance company. The Annuity also provided that the proceeds of the policy could be assigned.

The documents also included an irrevocable assignment of ownership of the Annuity from Ms. S~ to N~-D~ (the "Assignment"). The Assignment was made as consideration for performing the terms of the Funeral Pre-Arrangement Agreement

("Agreement"). The Assignment came into effect on March 27, 2004, and could be cancelled without penalty within three days of that date. Under the Assignment, Ms. S~ waived the right to surrender the Annuity for cash, to obtain a loan, or to change the owner (Assignment III). The Assignment did not affect the right to cancel the Annuity under the 30-day "free look" period or the Agreement's 3-day right to cancel period. Ms. S~, however, agreed to waive the "free look" period, if she was qualifying for public assistance, although she apparently did not waive the 3-day right to cancel (Assignment IX).

The Funeral Pre-Arrangement Agreement authorized the Funeral Home to transfer ownership of the Annuity to a trustee, to hold the policy and apply the proceeds in accordance with the Agreement. The Agreement provided that N~-D~ agreed to provide the funeral services provided for in the statement of goods and services in consideration for an assignment of the death benefits of the annuity. (The statement for funeral goods and services with the N~-D~ Funeral Home listed various funeral services and merchandise, and was for a total amount of $7000.) The Agreement also provided that Ms. S~ (or her next of kin or legal representative) could choose an alternate provider for her funeral goods and services.

DISCUSSION

Ms. S~, through the N~-D~ funeral home, has created an annuity funded burial trust. A trust "established" by an individual on or after January 1, 2000, generally will be considered a resource under federal law, even if it is irrevocable, to the extent that payments from the trust could be made to or for the benefit of the individual, unless the trust provides for Medicaid reimbursement. 42 U.S.C. §§ 1382b(e), 1396p(d)(4)(A); POMS SI 01120.201(D)(2)(a), SI 01120.203(B)(1). This statutory rule applies if payments can be made for the benefit of the individual "under any circumstance, no matter how unlikely or distant in the future." POMS SI 01120.201(D)(2)(b). This is the case here, since the annuity funded burial trust clearly benefits Ms. S~ by providing her with funeral services and goods, if she has a funeral.

However, these resource provisions do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral good and/or services; the individual pre-pays for the goods and services; and the funeral provider subsequently places the funds in a trust. POMS SI 01120.201(H)(1). Under these circumstances, the funeral home is considered to have "established" the trust for purposes of 42 U.S.C. § 1382b(e). Memorandum from Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development, Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No. 106-169) (August 29, 2000). In such a case, the Agency applies only the regular resource rules, and thus the trust will be a resource if it is revocable; if the individual can direct the trustee to use the trust principal for her support and maintenance; or if the individual can sell her beneficial interest in the trust. POMS SI 01120.200(A)(1), (D); SI 01120.201(H)(1).

The statutory trust resource provisions would not apply here because Ms. S~ has irrevocably contracted with a provider of funeral goods and/or services, she pre-paid for the goods and/or services; and the funeral provider, N~-D~ subsequently placed the funds in a trust. Specifically, Ms. S~ entered into an irrevocable contract with N~-D~, in that N~-D~ agreed to provide certain specified funeral goods and/or services in exchange for the annuity's death benefit, assuming Ms. S~ did not decide to change to a different provider. Ms. S~ pre-paid for the goods and/or services by irrevocably assigning ownership of her annuity, which we have previously indicated is valid in Minnesota. Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Minnesota-Review of Minnesota Life Insurance Contract from CNA and American Memorial Life Insurance Companies (March 21, 2000); Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Minnesota-Request for Review of OGC Opinion on Life Insurance Funded Burial Agreements (December 15, 1999). Lastly, N~-D~ agreed to subsequently transfer ownership of the annuity to a trust.

Turning to the regular resource rules, the trust principal will be a resource if (1) the claimant can revoke the trust and use the assets for his support and maintenance, or (2) the claimant can direct the trustee to pay him the funds or use the funds for his support and maintenance. POMS SI 01120.200(D). In addition, the claimant's interest in the Trust is a resource if it can be sold. POMS SI 01120.200(D).

With respect to revocability, Ms. S~ should be considered the true settlor of the burial trust (since the trust was established with funds that belonged to her), but she is not the sole beneficiary under the trust (which would make the trust unilaterally revocable notwithstanding any contrary language). POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200(C). Specifically, the trust creates a contingent remainder interest in the N~-D~ funeral home. Restatement (Second) of Trusts § 330 comment h (4th ed. 1987) (where transfer to a trust is made pursuant to an agreement with the creditor, the creditor will be considered a beneficiary of the trust). However, Ms. S~ also had the right to cancel her annuity under the 30-day "free look" provision, and apparently under the 3-day right to cancel as well. If either provision was exercised, the creation of the burial trust and the associated contract with N~-D~ would become void, under the Funeral Pre-Arrangement Agreement. Ms. S~ agreed to waive the 30-day "free look" period, but the burial trust would be considered revocable for the

first three days after it was created (March 27, 2004) during the 3-day right to cancel period, and thereafter became irrevocable. POMS SI CHI01120.200(D) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary").

Ms. S~ is also unable to direct that the trust be used to pay for her support and maintenance, since the sole purpose of the trust is to pay for her funeral expenses, assuming she has a funeral. Legally, Ms. S~ could sell her interest in the trust, but, because the trust is funded with an annuity policy based on Ms. S~'s life, such that the funds can only become available on her death, Ms. S~'s equitable interest in the trust has no discernable market value. Cf. POMS SI 01130.425(B)(1) (interests in pre-need burial arrangements that are funded by life insurance are assumed not to be salable). Thus, if Ms. S~'s interest in the trust is a resource ,it has no market value. POMS SI 01140.044.

CONCLUSION

For the reasons discussed above, the annuity funded burial trust created by Ms. S~ is a resource for the first three days after its creation (March 27, 2004), but thereafter is not a resource.

I. PS 04-296 (Minnesota) SSI--Review of the Scott E. N~ Irrevocable Special Needs Trust, SSN: ~ --ACTION

1. SYLLABUS

Note: This trust was established in 1992 and thus will be evaluated under the trust rules in place prior to 1/1/00. This precedent may not apply to trusts established after 1/1/00.

This case examines whether or not the special needs trust in question is a resource for SSI purposes. For SSI purposes, trust assets are a resource if 1) the individual can revoke the trust and use the assets to meet their food, clothing or shelter needs; 2) the individual can direct use of the trust principal for their support and maintenance under the terms of the trust; or 3) if beneficial interest in the trust can be sold. In this case the individual does not have the ability to do any of the three actions listed above thus the trust is not a countable resource for SSI purposes.

OPINION

You asked for our assistance in determining whether the trust agreement in question is a resource to Scott E. N~, a Supplemental Security Income ("SSI") claimant. For the following reasons, it is our opinion that the trust is not a countable resource for Scott.

FACTS

On January 30, 1992, Elynn N~ and David N~, parents of Scott N~, established a supplemental needs trust for Scott's benefit. Scott N~'s parents nominate themselves as trustees. Scott N~ Trust Agreement 1. The trust property appears to be the proceeds of a personal injury case brought on Scott's behalf.

The Trust Agreement provides that the Trustee may distribute the income and/or principal of the trust to, or for the benefit of, Scott E. N~ for the sole purpose of providing goods and services which are not provided by medical assistance or other governmental programs. Article 2, § 3. It also provides that the discretion of the Trustee as to distribution shall be binding on all persons. Article 2, § 3. The trust is irrevocable on its face. Article 2, §

2. The Trust provides that, upon the death of Scott N~, the Trust shall terminate, with the remainder being distributed to the state of Minnesota. Article 2, § 4.

DISCUSSION

1. Introduction

Under the applicable regulation, "resources" are cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. If the individual has the right, authority, or power to liquidate the property or his or her share of the property, it is considered a resource. 20 C.F.R. § 416.1201(a) (1999). Therefore, if an individual is able to obtain funds or convert property to cash to be used towards his or her support and maintenance, such funds or property are resources for purposes of determining SSI eligibility. Trust assets are a

resource if (1) the individual has access to the trust assets and can direct the use of the assets to meet his or her need for food, clothing, and shelter; (2) if he or she can revoke or terminate the trust and obtain unrestricted access to the trust assets; or (3) if beneficial interest in the trust can be sold. *See* POMS SI 01120.200(D).

Based on the documents you provided, we conclude that the assets held in trust should not be considered a countable resource under 20 C.F.R. § 416.1201.

2. Scott E. N~ does not have authority to direct the use of the trust assets.

The trust agreement expressly provides that the trustee (Scott E. N~'s parents) have discretion to direct the use of the assets for the satisfaction of Scott's supplemental needs, and that this discretion is binding on all parties. Art II, § 3. Thus, Scott cannot "direct the use of the assets." *See* POMS SI01120.200(D)(1)(a), (b).

3. Scott E. N~ cannot revoke or terminate the trust.

Scott is the grantor and the primary beneficiary of this trust. The grantor or settlor of a trust is generally the person who provides the consideration for the trust, even if another entity nominally creates the trust. 76 Am. Jur. 2d § 55; *see In re Johannes Trust*, 479 N.W. 2d 25, 29 (Mich. App. 1991). We generally regard trusts that have been established from personal injury settlements as being established by the person who received the awards. POMS SI 01120.200(B)(2). Hence, although Elynn and David N~, Scott's parents (his conservators), are named as the grantor in the trust agreement, Scott is, in fact, the grantor of the trust, since it is his personal injury settlement award that comprises the trust fund.

Although Scott E. N~ is the grantor, he cannot revoke or terminate the trust and obtain unrestricted access to the trust assets because the trust is irrevocable on its face. Art II, § 2. Although the general law of trusts recognizes an exception to the irrevocability of a trust where the grantor is also the sole beneficiary, Scott is not the sole beneficiary of the trust assets. Upon Scott's death, the trust agreement provides for distribution of the remaining trust principal and trust estate to the state of Minnesota. Art II, § 4. Thus, he cannot revoke or terminate the trust without the consent of the state of Minnesota, and we do not assume that he can obtain the state's consent.

4. Scott E. N~ cannot sell his beneficial interest in the trust.

The trust could be a resource if Scott could sell his beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(b). Here, the trust is discretionary; therefore, the trustee has no obligation to make any payments to Scott. Art II, § 3. Additionally, the trust provides that "no beneficiary shall have any power to sell, assign, or transfer...any interest in any trust property...." Art. III, § 4. Therefore, Scott cannot sell his interest in trust payments.

5. CONCLUSION

The trust includes assets set aside for Scott's supplemental needs. Scott cannot direct the use of the assets for his food, clothing, or shelter needs. He cannot terminate or revoke the trust and gain access to the trust property. And he cannot sell his beneficial interest in the trust. Therefore, the property held in the trust is not a countable resource for SSI purposes. We note that the state district court's September 30, 1991 "Amended Order" allocates $100,000 to the trust. but mentions other assets of Scott N~'s estate, including $50,000 to be invested in stock mutual funds and a $375,000 certificate of deposit. We do not have any information regarding whether those assets are a convertible resource.

Thomas W. C~
Regional Chief Counsel,

Region V
By: _____
Yusef D~
Assistant Regional Counsel

J. PS 04-205 Minnesota Trust for Bradley T~ SSN ~ Your File No. S2D5B51

DATE: November 18, 1996

1. SYLLABUS

SI 01120.200 states that a trust is a resource if the beneficiary has the right to revoke the trust and use it to meet food, shelter, or clothing needs or can direct the use of the trust principal to meet these needs. The trust, in this case, is revocable, but is not revocable and available for the beneficiary to meet food, shelter, and clothing needs until he is 18 years of age or until further order of the court. Minnesota courts have established that a minor's proceeds from a settlement may not be used to meet support and maintenance needs for the minor child. Based on the Minnesota laws outlined in the opinion, the trust is not a resource to the beneficiary until he reaches age 18.

2. OPINION

This is in reply to your August 8, 1996 inquiry concerning a trust fund established for Bradley T~ with funds from the settlement of a law suit. You asked us to review the Bradley T~ Trust Agreement to determine whether it is a countable resource for SSI purposes. For the following reasons, we believe that the Trust is not a countable resource until Bradley T~ eighteenth birthday, but that it will become one on that day.

In September 1993, a Wisconsin court authorized settlement of a law suit brought on Bradley T~ behalf by his parents. The court ordered the settlement award be deposited in a trust fund in an account bearing Bradley T~ parents' name. The court order provided that the award and any accumulation thereon were to remain on deposit until Bradley T~ reached eighteen, or until further order of the court.

Ronald and Kathleen T~, as Bradley's parents, duly signed a trust agreement with the Norwest Bank Minnesota North, establishing a trust fund for the award settlement.

SUMMARY

You asked whether the subject trust agreement would result in an irrevocable trust. The trust agreement does not create an irrevocable trust. On the contrary, the trust is revocable. Upon reaching his majority, Bradley will have unrestricted access to the trust principal.

You ask whether the court retains some degree of jurisdiction which would restrict revocability even if the trust is a revocable grantor trust. Minnesota law and the terms of the court order supersede the terms of the trust agreement. Minnesota law provides that a minor's settlement proceeds are not available until released by the court. Minn. Rev. Stat. § 540.08. The court order specifies that all funds are to remain on deposit until Bradley T~ attains the age of eighteen years or until further order of the court. We believe that Minnesota courts are not likely to order release of the funds until Bradley T~ majority. Therefore, we believe that the subject trust is not an available resource for SSI purposes until Bradley T~ reaches the age of eighteen.

DISCUSSION

A resource, for SSI purposes, includes assets that the individual owns and could convert to cash to be used for his own support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can revoke the trust and use the assets to meet her needs for food, clothing, and shelter. POMS SI 01120.105.A.1, 01120.200(D)(1)-(3).

This trust agreement establishes a grantor trust, where the grantor, Bradley T~, through his guardians and parents, is also the sole beneficiary of the trust. As Bradley T~ parents, Ronald and Kathleen T~ were acting on his behalf, Bradley is considered the actual settlor of the trust. *See* Minn. Rev. Stat. §§ 527.21-527.44. Furthermore, trusts established from personal injury settlements are established by the person who received the award. POMS SI 01120.200J.3.a. Thus, Bradley T~ is the grantor and sole beneficiary of this trust.

A grantor generally may be the sole beneficiary of a trust, and in such a case, may compel the termination of the trust. *Restatement (Second) of Trusts*, § 339 (1959). This principle applies even if the terms of the trust indicate that the trust is irrevocable. Comment a to § 339. We have previously advised that because of the absence of any statutory law in Minnesota prohibiting the grantor from being sole beneficiary, this general trust principle applies in Minnesota. *See Six-State Synopsis of Trust Laws*, OGC-V (P~) to P~-W~, ARC, SSA-V (2/26/92).

Moreover, this trust agreement explicitly states that the grantor reserved the right to amend or revoke the agreement. Thus the trust agreement, standing alone, creates a revocable grantor trust that would, in most circumstances, be considered a resource for SSI purposes. Nonetheless, despite the revocable trust agreement, the trust cannot be a resource for SSI purposes until Bradley reaches his majority.

Minnesota law provides that a minor's settlement proceeds in a court-ordered trust are not available until released by the court. Minn. Rev. Stat. § 540.08. We have previously advised that section 540.08 precludes considering a minor's funds in an account established under this section as a resource, because Minnesota courts apparently would not release these funds for the minor's support and maintenance. *Trust Accessibility--Minnesota-Nathan Landis Trust*, OGC-V (Goldstein) to Battistelli, ARC, SSA-VIII, at 3 (5/7/96); *Blocked Account in Minnesota as SSI Resource--Minnesota--Joseph Carl Thompson*, OGC-V (M~) to P~-W~, ARC, SSA-V, at 3 (5/29/91); *Trust For Minor As A Resource Where Termination Authorized At Age 18--Minnesota--Pao G. Y~*, OGC-V (M~) to P~, ARC, SSA-V, at 3 (6/17/92).

In *Kahle v. Archambeault*, Court File No. 86-19270 (Minn., Dist. Ct. 2/4/91) (copy attached), a Minnesota district court denied a mother's petition to release funds in an account established for the minor pursuant to a personal injury lawsuit. The court stated that such settlement proceeds are owned by the injured child. They are intended to provide compensation for the disability, disfigurement, pain and suffering sustained by the child. The funds are not assets which are available in order to satisfy day to day living expenses which are the responsibility of the child's parents. Indeed, Minn. Stat. § 540.08 mandates court supervision over the settlement proceeds in order to guarantee their availability when the child reaches the age of majority. *Blocked Account in Minnesota as SSI Resource--Minnesota--Joseph Carl Thompson*, OGC-V (M~) to P~-W~, ARC, SSA-V, at 3 (5/29/91).

Therefore, although the trust agreement establishes a revocable grantor trust, the trust funds are not available as a resource until Bradley reaches eighteen. Until that time, section 540.08 provides that these funds are not available unless released by the court. The court order also specifies that the funds are not accessible without court approval until Bradley's majority. Given that Minnesota courts are not likely to release the funds, any presumed access to the fund based on the provisions of the trust agreement is nullified by Minnesota law as well as the actual terms of the court order.

Once Bradley reaches eighteen, however, he will have access to the trust fund, without court supervision, since he is both the grantor and sole beneficiary of this revocable trust. At this point, because the trust fund is a revocable grantor trust, the fund should be considered a resource for SSI purposes. If upon further inquiry into the matter you have additional questions, please let us know if we can be of assistance.

Sincerely,

Thomas W. C~
Acting Regional Chief Counsel, Region V
Social Security Administration

By: /s/
Myriam M~
Assistant Regional Counsel

K. PS 04-158 Minnesota Trust for Sandra W~; SSN: ~ Your Reference No.: S2D5G3

DATE: June 25, 1997

1. SYLLABUS

The trust assets in "The New Hope Trust" and "The W~ Family Supplemental Needs Trust" were funded with a Disability Insurance Benefits back payment received by the claimant who is also the beneficiary of the trust during her lifetime. However, the trust agreement states that any residual trust assets left after the claimant's death are to be held in a charitable trust for "persons with disabilities in Cass County." Since the claimant is not the sole, identifiable beneficiary of the trust agreements, the trust is irrevocable and should not be considered a resource to the claimant.

2. OPINION

You have asked for our assistance in determining whether the trust agreements in question are revocable and would permit Sandra W~ (Ms. W~), a Supplemental Security Income (SSI) claimant, unrestricted access to the trust principal, which she could use for her support and maintenance. For the following reasons, it is our opinion that the trust agreements are irrevocable and that the trust funds are not a countable resource.

FACTS

On December 27, 1995, Ms. W~ brother, Robert L. W~, Jr. (Mr. W~) executed two trust agreements, "The New Hope Trust" and "The W~ Family Supplemental Needs Trust," in which he described himself as both settlor and trustee, for the sole benefit of Ms. W~ and for the purpose of establishing a "supplemental needs trust" which would provide "reasonable living expenses for maintaining [Ms. W~] good health, safety and welfare when, in the discretion of the trustee, such requisites are not being provided by any federal, state, county or local public agency, office or department of the State of Minnesota, or of any other state, or of the United States." Article 2 § 1 in both trust agreements. By their terms, the trust agreements are irrevocable. Article 7 of both trust agreements.

The trust agreements further provide that, upon the death of Ms. W~, the trustee may use the trust to pay "final bills" to cover the expenses of her last illness and funeral, administrative expenses related to the trust, and reasonable attorney's and accountant's fees. Article 3 § 1 of both trust agreements. Also upon Ms. W~ death, the trust agreements direct the trustee to distribute the trust funds first, to pay any reimbursement claims made by Minnesota Medical Assistance and/or by any other governmental agencies, and then, any "residue" of the trust shall continue to be held pursuant to the terms of this trust and distributed in accordance with the purposes and limitations stated in Article 2, Sections 1, 2, 6, 7, and 8 to persons with disabilities residing in Cass County. The trustee shall rely upon the input and advice of Cass County Social Services in determining to whom and for what purposes the distributions should be made.

Article 3 § 2 of both trust agreements. The trust agreements direct that upon final distribution of the trust funds, the trust shall terminate. *Id.*

A report of contact indicates that the trusts were funded with a Disability Insurance Benefits back payment, which Ms. W~ received in July, 1995. The report of contact further indicates that the amount placed in trust totaled $23,133.06, although copies of a bank statement and certificate of deposit attached to the trust agreements do not comport with that figure. The information that you have provided also does not indicate whether additional assets have been included in the trusts; therefore, no such additional funds will be assumed.

DISCUSSION

Under the applicable regulation, "resources" are:

cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource....

20 C.F.R. § 416.1201(a) (1996). Therefore, if an individual is able to obtain funds or convert property to cash to be used toward her support and maintenance, such funds or property are to be included as resources for purposes of determining SSI eligibility. Trust assets are a resource if the individual has access to the trust assets and can direct the use of the assets to meet her needs for food, clothing, and shelter, or if she can revoke the trust and obtain unrestricted access to the trust assets. *See* Programs Operation Manual System (POMS) SI 01120.105.A.1, 01120.200.D.1-3. We have reviewed the documents you have provided and, for the following reasons, we conclude that the trust agreements in question should not be considered a countable resource under 20 C.F.R. § 416.1201.

The grantor or settlor of a trust is generally the person who provides the consideration for the trust, even if another entity nominally creates the trust. 76 Am. Jur. 2d § 55. Therefore, although Mr. W~ named himself as "settlor" in the trust agreements, it is Ms. W~, who is, in fact, the settlor of these trust agreements since it is her money that comprises the trust fund. Assuming that Ms. W~ is the sole settlor of the trust, the next consideration is whether she is the sole, identifiable beneficiary of the trust, in which case, she would have the power to revoke the trust, even if, by their terms, the trust agreements are irrevocable. Restatement (Second) of Trusts, § 339 and comment (1959). However, if the trust specifies that any trust assets remaining at the time of the primary beneficiary's death are to be distributed to certain other individuals, then

those residual beneficiaries would render the trust irrevocable. *See* "*Zebley Trust as an SSI Resource-Wisconsin*, Shannon O~ (~)," RA V (M~) to G~, Acting Assistant Regional Counsel-POS, Social Security Administration V (07/09/93); *see also In re Schroll*, 297 N.W.2d 282 (1980) (Minnesota court held that an "irrevocable" trust could not be revoked without consent of the guardian ad litem appointed to represent the interests of residual unborn beneficiaries); *see also* Restatement (Second) of Trusts § 127 and comment (b), § 339 and comment (b) (1959); 76 Am. Jur. 2d § 95 ("a trust cannot be terminated by the consent or acts of beneficiaries where there are contingent interests in the trust which cannot be determined until the happening of certain events").

Ms. W~ is the only beneficiary of the trust during her lifetime. *See* Article 2 § 1 of both trust agreements. However, the trust agreements in question specify that, upon the death of Ms. W~, and after paying state reimbursement claims, if any, and covering expenses related to Ms. W~ last illness and funeral and costs attendant to administering the trust, if needed, any "residue" of the trust will be held in trust and distributed to "persons with disabilities residing in Cass County." Article 3 § 2.

As a preliminary matter, that the trust agreements direct the trustee to repay any Minnesota Medical Assistance or other governmental claims does not render such programs residual "beneficiaries." Instead, the Medical Assistance and other governmental programs must merely be repaid because of statutorily-imposed reimbursement requirements. *See* 42 U.S.C. 1396p(4)(B); *see also* Article 3 § 2 of both trust agreements. In other words, the trust agreements in question merely require that the trust reimburse the State for benefits already conferred on Ms. W~ during her lifetime. The money repaid is for the benefit of Ms. W~, not the State. *See* Illinois OBRA '93 Trust for Dominick J. G~, ~, OGC-V (D~) to Gerald K~, Center Director (Apr. 17, 1997) at 4 (finding that required reimbursement of State of Illinois agencies does not render these agencies to be beneficiaries).

Nor are additional beneficiaries established by the trust provisions which allow payments to be made to cover the expenses of Ms. W~ last illness and funeral, administrative expenses related to the trust, and reasonable attorney's and accountant's fees. These payments relate either to running the trust itself or again to providing goods or services for Ms. W~ benefit (including her funeral-related expenses).

The trust agreements, however, do direct that the "residue" trust assets be held in a charitable trust for the benefit of a class of residual beneficiaries, namely, "persons with disabilities residing in Cass County." Article 3 § 2 of both trust agreements. The terms of the trust agreements comply with Minnesota law, which defines a "charitable trust" as:

a fiduciary relationship with respect to property that arises as a result of a manifestation of an intention to create it, and that subjects the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.

Minn. Stat. Ann. § 501B.35 (1990); *see also Schaeffer v. Newberry*, 50 N.W.2d 477, 480 (1951). The trust agreements clearly establish the requisite intent to create a charitable trust for a "charitable purpose" by directing the trustee to hold the residue trust funds "pursuant to the terms of this trust and distributed in accordance with purposes and limitations stated in Article 2, Sections 1, 2, 6, 7, and 8..., provisions which, for the most part, require the trustee to pay or apply for the benefit of the disabled beneficiary any necessary supplemental or special needs. The residual class of beneficiaries, i.e., "persons with disabilities residing in Cass County," is sufficiently identifiable and has a reasonable relationship to the objectives referred to in the trust agreement. *City of Longcor v. City of Red Wing*, 289 N.W. 570, 574 (1940) (beneficiaries of a charitable trust are a "large shifting class of the public."); *see also Ida Koran Trust v. Commissioner*, Internal Revenue Service, 1976 W.L 887 (Minn. Tax).

That the trustee must rely on Cass County Social Services to determine "for what purposes the distributions should be made," *see* Article 3 § 2, does not mean that the residual distribution lacks a "charitable purpose" necessary for a charitable trust. To the contrary, regardless of what Cass County Social Services may ultimately deem to be the purpose of the distribution, the residual distribution must still be subject to, and consistent with, the general purposes of the trust, which is to provide a disabled beneficiary with supplemental or special needs. *See* Article 2 §§ 1, 6, 7 and 8.

Because Ms. W~, is not the sole beneficiary of the irrevocable trust agreements in question, she lacks the power or authority to revoke the trust agreements

CONCLUSION

Accordingly, we conclude that the trust assets at issue should not be considered a resource to Ms. W~ for SSI purposes because she is not the sole, identifiable beneficiary of the trust agreements.

Sincerely,

Thomas W. C~
Acting Regional Chief Counsel, Region V
Social Security Administration

By: /s/
Elizabeth F~
Assistant Regional Counsel

L. PS 03-056 SSI - Minnesota - Review of the Life Insurance Funded Burial Contract for Marville E. P~, ~

DATE: December 9, 2002

1. SYLLABUS

In this Minnesota opinion, ownership of a life insurance policy was irrevocably assigned to a funeral home. The life insurance policy was not a resource to the individual because ownership of the policy, including the right to obtain the cash surrender value, was irrevocably assigned to a person or entity other than a trust or trustee. In Minnesota, an irrevocably assigned life insurance policy is not a resource for SSI purposes if: (1) the individual did not previously name an irrevocable beneficiary of the policy; (2) the individual did not previously irrevocably assign the policy; (3) the policy permits the assignment; and (4) the individual names a particular funeral home or funeral provider in the assignment, even though he or she retains the right to change the funeral home or funeral provider.

NOTE: Minnesota law addresses revocability and sets monetary limits relative to trust-funded preneed arrangements. However, the statute [Minn. Stat. § 149A.97] did not apply in this case because the preneed arrangement was funded by a life insurance policy.

2. OPINION

You have asked us whether Marville E. P~'s life insurance policy irrevocably assigned to a funeral home is a countable resource for the purposes of SSI. We conclude that because Ms. P~ irrevocably assigned the life insurance policy to a funeral provider and waived her right to obtain any cash or income from the $5,100.00 life insurance policy, it is not a resource.

FACTS

The file contains an application for an Individual Deferred Annuity Contract from CNA Life Insurance Company (CNA) signed by Ms. P~ on April 17, 2000. The application indicates that the contribution submitted with the application was $5,100.00. The beneficiary is listed as “any funeral home as its interest may appear.” The file also contains an “Irrevocable Assignment of Life Insurance/Annuity Policy Death Benefits” also from CNA and dated April 17, 2000. The assignment identifies the Foster-Hartquist Funeral Chapel of Jasper Minnesota (Foster-Hartquist) as the assignee. The assignment indicates that its purpose is to fund the Prearranged Funeral Agreement executed on April 17, 2000. It also indicates that Ms. P~ and the funeral firm agree that Minnesota law governing trust-funded preneed burial contracts (Minn. Stat. § 149A.97) does not apply.

With the assignment, Ms. P~ expressly agreed that she had irrevocably waived the right to collect from CNA the net proceeds of the policy when it becomes a claim; the right to designate as primary beneficiary anyone other than a funeral home; the right to designate anyone other than her estate as a contingent beneficiary; the right to surrender the policy for cash; the right to obtain a loan or advance on the policy; to pledge or assign the policy as security for a loan or advance; the right to collect or receive distributions or shares of surplus, dividend deposits or additions to the policy; the right to exercise nonforfeiture rights permitted by the terms of the policy; and the right to receive any income from the policy. The assignment indicates that Ms. P~ retained the right to change the assignee to a funeral home other than the named funeral home, but that any change was subject to the current assignment. The assignment provides that it does not restrict Ms. P~, her representative or family from purchasing funeral merchandise or services on the open market or prevent the person making at need arrangements from procuring merchandise and services from another provider at any time before services have been provided by the funeral home. By signing the assignment, Ms. P~ also acknowledged that she had no right to revoke, cancel or otherwise terminate the assignment or the insurance funded Prearranged Funeral Agreement to which it related.

Finally, the file contains a "Prearranged Funeral Statement of Merchandise and Funeral Services" dated April 17, 2000. The document specifies the services and merchandise contracted for and indicates that the prices are not guaranteed. The document further indicates that the funeral services and merchandise are funded with the $5,100.00 CNA policy and with a CD at the Jasper Bank totaling $2,085.77.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his/her support and maintenance. 20 C.F.R. § 416.1201(a) (2001). If the individual has the right, authority or power to liquidate the property, it is a resource. *Id.* A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. 20 C.F.R. § 416.1230.

We have previously advised that in Minnesota, if an individual has irrevocably and currently assigned ownership of a life insurance policy (including the right to obtain the cash surrender value) to a particular individual or entity (other than a trust or trustee), the policy is not a resource. Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Minnesota-Review of Minnesota Life Insurance Contract from CNA and American Memorial Life Insurance Companies, at 2-3 (March 21, 2000) [hereinafter, CNA memo]; referencing Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Minnesota-Request for Review of OGC Opinion on Life Insurance Funded Burial Agreements, at 12 (December 15, 1999). An irrevocable assignment is not invalid if the individual reserves the right to change the assignee from one funeral provider to another funeral provider. CNA memo, supra at 2-3. For an assignment to be valid, "an intent to transfer must be manifested, and the assignor must not retain any control over the fund or power of revocation." *Guaranty State Bank of St. Paul v. Lindquist*, 304 N.W. 278, 281 (Minn. 1980) (quoting *Springer v. J.R. Clark Co.*, 46 F. Supp. 54, 58 (D. Minn. 1942) rev'd on other grounds, 138 F.2d 722 (8th Cir. 1943)). Additionally, there must be a present transfer, not an intent to transfer in the future. *Minnesota Mutual Life Ins. Co. v. Anderson*, 504 N.W.2d 284, 286 (Minn. Ct. App. 1993); Rest. (Second) Contr. § 324 & comment a, § 330 (1981).

We have also previously advised that, in Minnesota, an irrevocably assigned life insurance policy would not be a resource for SSI purposes if:

(1) the individual has not previously named an irrevocable beneficiary of the life insurance policy;

(2) the individual has not previously irrevocably assigned the life insurance policy;

(3) the life insurance policy permits the assignment; and

(4) the individual names a particular funeral home or funeral provider in the assignment, even though he or she retains the right to change the funeral home or funeral provider.

CNA memo, supra at 3.In this case, we do not have the actual insurance policy. The application, however, lists "any funeral home as its interest may appear" as the beneficiary. Thus, it does not appear that Ms. P~ has previously named an irrevocable beneficiary. We have previously cautioned that you should not assume that the actual insurance policy does not name an irrevocable beneficiary despite the irrevocable assignment indicating that Ms. P~ waived her right to name as primary beneficiary anyone other than Foster-Hartquist or another funeral home. *Id.* Because the Irrevocable Assignment document in the file indicates that the provision limiting the beneficiary designation is not applicable if a funeral firm has not been designated as the primary beneficiary it suggests that Ms. P~ might be able to name a beneficiary that is not a funeral provider. However, it is unlikely in this case that the actual policy does not name a funeral firm as the beneficiary because the insurance policy was sold as part of the same transaction in which the irrevocable assignment of the policy to Foster-Hartquist was executed and the burial contract was established. Additionally, both the application and the assignment were constructed by the same company, CNA.

At the same time Ms. P~ applied for the insurance policy, she immediately irrevocably assigned the "Policy" to the Foster-Hartquist Funeral Chapel of Jasper, Minnesota - a particular funeral provider. Thus, her assignment was "current" and not expressed as a future intent. CNA memo, supra at 3 (March 21, 2000), citing, *Minnesota Mutual Life Ins. Co. v. Anderson*, 504 N.W.2d 284, 286 (Minn. Ct. App. 1993); Rest. (Second) Contr. § 324 & comment a, § 330 (1981). It does not appear that Ms. P~ previously assigned the insurance policy to any other entity. CNA memo, supra at 3. Again, because the policy was purchased and assigned as part of the same transaction, we believe it is unlikely that any prior assignments exist. For the same reason, we

believe that the insurance policy most likely allows for the assignment to a particular funeral provider, with the option to change the provider.

With the assignment, Ms. P~ waived, inter alia, her right to obtain the cash surrender value of the policy, obtain any loan or advance against it or to collect distributions or shares of surplus, dividend deposits or additions to the policy. Accordingly, because Ms. P~ cannot use the insurance policy in any manner for her maintenance and support, it is not a resource. POMS SI 001130.300B.; *see also* CNA memo, supra at 2-3; referencing Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Minnesota-Request for Review of OGC Opinion on Life Insurance Funded Burial Agreements, at 12 (December 15, 1999).

Ms. P~ did retain the right to change the assignee to another funeral home. As we have previously advised, we believe that an assignment to a specific funeral home would be valid even if the right to reassign the policy to another funeral home has been retained. Under general legal principals, an assignment may be conditional. Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Minnesota-Request for Review of OGC Opinion on Life Insurance Funded Burial Agreements, at 6 (December 15, 1999), citing, Rest. (Second) Contr. § 331 & comment b; *see also* Rest. (Second) Contr. § 320, comment b. Here, although a different funeral provider may ultimately be the assignee, Ms. P~ cannot assign the policy to any entity other than a funeral provider. Thus, she cannot assign it to herself and use the policy for her support and maintenance. Accordingly, the life insurance policy is not a resource. 20 C.F.R. § 416.1201(a); POMS SI 001130.300B.

CONCLUSION

In sum, it is our opinion that, Ms. P~ irrevocably assigned her life insurance policy to a funeral provider and consequently, waived her right to obtain the cash surrender value, obtain a loan against or advance against or her right to receive any income from her life insurance policy, the policy, it is not a resource for the purposes of SSI.

Sincerely,

Donna L. C~
Acting Regional Chief Counsel, Region V
Social Security Administration

By: /s/
Elizabeth F~
Assistant Regional Counsel

M. PS 01-095 Review of a Supplemental Needs Trust for Xang V~; SSN ~; Your Ref. No. S2D5G3

DATE: December 12, 2000

1. SYLLABUS

The opinion concerns a Supplemental Needs Trust established in January 1994. The opinion explains that the trust is not a countable resource because the SSI beneficiary does not have the right to revoke the trust, direct the use of the trust assets or sell his interest in the trust.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked whether the assets of a Supplemental Needs Trust established for the benefit of Xang V~ should be considered a countable resource for purposes of determining his eligibility for SSI. For the reasons set forth below, we conclude that the assets in the trust should not be considered a countable resource.

FACTS

On or about January 5, 1994, Chue V~ entered into an Irrevocable Trust Agreement creating the "Xang V~ Supplemental Needs Trust." The Supplemental Needs Trust was established to provide for reasonable living expenses and other basic needs of Xang V~ when benefits from publicly funded benefit programs are not sufficient. Trust Agreement, Article 4 4.03. The Trust

Agreement provides that Chue V~ shall transfer and assign one dollar to the trustee to constitute the original assets of the trust. Trust Agreement, Article 1. However, other documents provided to us indicate that the trust was primarily funded with proceeds of payments made by the Agency to Xang pursuant to the decision in *Sullivan v. Zebley*, 493 U.S. 521 (1990).

The trustee is authorized to pay to Xang such sums of income and principal as the trustee deems necessary and advisable for Xang's supplemental needs. Trust Agreement, Article 3 3.01. If any assets remain in the trust at Xang's death, the Trust Agreement provides that the trust shall terminate and that the remaining assets shall be distributed to the State of Minnesota up to the total sum of all medical assistance that had been paid on Xang's behalf. Trust Agreement, Article 3 3.02(1). If there is any remaining balance after distribution to the State of Minnesota, the full remaining balance shall be distributed to the issue of Xang who survive Xang. Trust Agreement, Article 3 3.02(2). If Xang is not survived by any issue, the remaining balance shall be distributed to Xang's parents or, if they do not survive Xang, to the other children of Xang's parents who survive Xang. Trust Agreement, Article 3, 3.02(3), (4).

The Trust Agreement provides that the trust shall be irrevocable in all respects and that neither Chue V~ nor any other person shall have any power to modify, amend, or revoke the trust except to bring the trust's provision into full compliance as an exempt Supplemental Needs Trust. Trust Agreement, Article 2. The Trust Agreement also provides that neither trust income nor principal nor any beneficiary's interest shall be subject to alienation, assignment, garnishment, attachment, or any other claims of any creditor or other person against the beneficiary. Trust Agreement, Article 4 4.01.

DISCUSSION

A countable resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance. *See* 20 C.F.R. 416.1201(a); Program Operations Manual System ("POMS") SI 01110.100(B)(1). If the individual has the right, authority, or power to liquidate the property or his share of the property, it is considered a resource. *See* 20 C.F.R. 416.1201(a)(1); POMS SI 01110.100(B)(1). Trust assets are a resource if (i) the individual can revoke or terminate the trust and obtain unrestricted access to the trust assets; (ii) the individual has access to the trust assets and can direct the use of the trust assets to meet his need for food, clothing, and shelter; (iii) or the individual can sell his beneficial interest in the trust. *See* POMS SI 01120.105(A)(1), 01120.200(D)(1)-(3). Recent amendments to the Social Security Act change the manner in which we treat trusts created after January 1, 2000. 42 U.S.C. 1382b(e); POMS EM 0067. This trust, however, was created before that date and Xang V~'s funds were added to the trust before that date. Therefore, the new provisions do not apply in determining whether this trust is a resource.

Whether the claimant can revoke or terminate the trust or direct use of the trust assets depends upon the terms of the trust agreement and applicable state law. *See* POMS SI 01120.200(D)(2).

We have reviewed the documents you provided and conclude that the trust principal and accumulated income are not countable resources to Xang. Xang does not have the right, under the terms of the Trust Agreement or Minnesota state law, to revoke or terminate the trust and thereafter obtain unrestricted access to the trust's assets or to direct use of the trust's assets to meet his need for food, clothing, and shelter. Nor can he sell his beneficial interest in the trust.

Xang Does Not Have the Right to Revoke or Terminate the Trust

Whether a trust is revocable or terminable depends on the terms of the trust and applicable state law. *See* POMS SI 01120.200(D)(2). Here, Xang does not have the right to revoke or terminate the trust under its own terms or Minnesota state law.

First, the terms of the Trust Agreement itself do not give Xang or anyone else the right to revoke or modify the trust. To the contrary, the Trust Agreement is titled as an irrevocable trust agreement and provides that neither Chue V~ nor any other person shall have the power to modify, amend, or revoke the trust. Trust Agreement, Article 2. While the Trust Agreement provides that the trust may be modified for purposes of bringing the trust provisions into full compliance as an exempt Supplemental Needs Trust, we do not believe that Xang could revoke or modify the trust in order to gain unrestricted access to the trust's assets under this provision. Trust Agreement, Article 2. Such an action would not be consistent with the purpose of a Supplemental Needs Trust. *See* MINN. STAT. 501B.89. Thus, the Trust Agreement does not give Xang the right to revoke or modify the trust to gain unrestricted access to its assets.

Second, Xang does not have the right to revoke the Trust Agreement or otherwise modify it in order to gain access to the principal under Minnesota state law. In the absence of express language providing a right of revocation or termination, a trust

cannot be revoked or modified unless the grantor or settlor and all of the beneficiaries agree. *See In the Matter of Schroll*, 297 N.W.2d 282, 284-85 (Minn. 1980); In *re Warner's Trust*, 117 N.W.2d 224, 229-30 (Minn. 1962). Thus, Xang would only be capable of revoking the Trust Agreement if he were the sole beneficiary as well as grantor or settlor of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS 339 comment a (1959) (grantor or settlor of trust can compel termination of trust irrevocable by its terms if she is the sole beneficiary).

We believe that Xang is the actual settlor of the trust, at least with respect to the funds he contributed to the trust. The Trust Agreement provides that the trust was established with a transfer of one dollar from Chue V~, but the documents provided to us indicate that the trust was primarily funded with the proceeds of the past due benefits paid to Xang in connection with the *Zebley* decision. It is well established under general trust law that the settlor of a trust is generally considered to be the person who provides consideration for the trust, even if another entity nominally creates the trust. 76 Am. Jur. 2d 55. *See also* POMS SI 01120.200(B)(2); POMS SI 01120.200(J)(3). We believe that a court would recognize Chue V~'s contribution was merely token consideration and that the true proceeds of the trust emanated from the proceeds of the *Zebley* award. Xang would, therefore, be considered the settlor of the trust.

However, regardless of whether Xang is or is not the settlor, he is not the sole beneficiary. The Trust Agreement provides that the trustee shall make discretionary payments to Xang during his lifetime and, upon Xang's death, shall terminate the trust and distribute the remaining trust property to the State of Minnesota, up to the total amount paid for any medical assistance paid on Xang's behalf. Any remaining balance must then be paid to Xang's surviving issue. Trust Agreement, Article 3 3.02. If Xang does not have any surviving issue, the remaining assets must be distributed to Xang's parents or, if Xang's parents do not survive him, to any of their surviving issue. Trust Agreement, Article 3 3.02(3), (4).

We believe that Xang's "issue" would be considered beneficiaries regardless of whether Xang is or is not the settlor. *See Schroll,* 297 N.W.2d at 284 (court recognized that Minnesota follows the general trust rule that the prospective conveyance of a life-time beneficiary's interest to his "issue" upon his death creates a beneficial interest in those "issue."); RESTATEMENT (SECOND) OF TRUSTS 127, comment b ("[I]f the beneficial interest is limited to the settlor for life and on his death the property is to be conveyed to his children, or issue, or descendants, he is not the sole beneficiary of the trust, but an interest in remainder is created in his children, issue or descendants."); RESTATEMENT (SECOND) OF TRUSTS 127, comment c ("[I]f a beneficial interest is limited to a person other than the settlor for life and the remainder on his death is limited to his heirs or next of kin, his heirs or next of kin as well as the person himself are beneficiaries of the trust in the absence of a manifestation by the settlor of an intention to give the whole beneficial interest to him."). Similarly, Xang's parents and their surviving issue also are contingent beneficiaries whose consent would be need to revoke the trust. Accordingly, regardless of whether Xang is or is not the settlor of the trust, we believe that he would not be considered the sole beneficiary under Minnesota state law. He, therefore, cannot unilaterally revoke the trust in order to use the principal for food, clothing, or shelter.

Xang Does Not Have the Right to Direct Use of the Trust's Assets

Although Xang does not have the legal authority to revoke the trust, the trust may still be counted as a resource in determining SSI eligibility if Xang has the ability to direct the use of the trust principal. *See* POMS SI 01120.200(D)(1)(a). Such authority may be included specifically in a trust provision allowing the beneficiary to act on his own or in a provision allowing him to order actions by the trustee. *See id.* SI 01120.200(D)(1)(b). Here, the Trust Agreement includes no such provisions. Instead, the Trust Agreement gives the trustee discretion to apply to or expend trust assets and income as he deems necessary and advisable for Xang's supplemental needs. Trust Agreement, Article 3 3.01. Xang, therefore, does not have the right to direct use of the trust's assets.

Furthermore, the Trust Agreement provides that no distribution shall be made that would have the effect of replacing, reducing, or substituting for publicly funded benefits otherwise available to Xang. Trust Agreement, Article 4 4.03. When a trust instrument states an intent to supplement, rather than supplant, any government financial assistance, Minnesota courts give effect to this intent and find that the trust is not an asset that is available to the beneficiary. *See Matter of Leona C~ Trust,* 498 N.W.2d 260, 265 (Minn. App. 1993).

Xang's Interest in the Trust Has No Marketable Value

A trust can also be a resource if the individual can sell his beneficial interest in the trust. Although the trust contains a spendthrift clause which purports to limit Xang's ability to transfer his beneficial interest, *see* Trust Agreement, Article 4 4.01, the spendthrift clause would not prevent Xang from selling his interest in the trust because he is also the settlor of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS 156(1) (stating that settlor/grantor of trust who is also a beneficiary can transfer his

interest in trust even if there is a provision restraining the voluntary or involuntary transfer of his interest). Nonetheless, the trust would still not have any marketable value. Under the terms of the Trust Agreement, Xang can only has the right to receive payments at the discretion of the trustee. Thus, Xang could only sell the right to receive or have distributions made on his behalf in the sole discretion of the trustee. We assume this would have no significant value. *See Zebley* Trust as an SSI Resource - Wisconsin Bernard W~, OGC-V (M~) to John P. M~, ARC (February 23, 1993) at 4-6; RESTATEMENT (THIRD) TRUSTS 60 comment f (tentative draft no. 2, March 10, 1999).

Payments Made from the Trust May be Income

Lastly, although the trust principal is not a countable resource, disbursements from the trust under certain circumstances would be countable income for determining Xang's SSI eligibility and level of benefits. Any cash paid directly to Xang would be income and any payments to a third party for any food, clothing, or shelter received by Xang would constitute support and maintenance for SSI purposes. *See* 20 C.F.R. 416.1102; POMS SI 01120.200(E)(1)(a), (b).

CONCLUSION

Based on the documents provided to us, it is our opinion that the Supplemental Needs Trust established for the benefit of Xang V~ is not a countable resource for purposes of determining his eligibility for SSI. Xang does not have the right to revoke the trust; direct the use of its assets to meet his need for food, clothing, and shelter; or sell his beneficial interest in the trust.

N. PS 00-500 SSI-Minnesota-Review of the Kevin G. S~ Supplemental Needs Trust; SSN:~

DATE: June 21, 2000

1. SYLLABUS

This opinion provides an analysis of the subject trust under section 1613(e) of the Social Security Act (statutory trust provisions effective 1/1/00). The opinion also provides an analysis of an assignment of an annuity to the trust by the trust beneficiary. Note, however, that the opinion fails to address the potential transfer of resources issue and its implications.

2. OPINION

The Kevin G. S~ Supplemental Needs Trust is an irrevocable, discretionary trust created by Richard S~, Kevin's father, for the purpose of providing for Kevin's "care, maintenance, support, and education in addition to and over and above the benefits he otherwise receives . . . as a result of his disability from any local, state, or federal government." *See* Kevin G. S~ Supplemental Needs Trust, Article 2, Sections 1, 6, 8, Article 7, Section 1. The trust provides that, upon Kevin's death, the trustee shall reimburse the State of Minnesota for all medical assistance paid on behalf of Kevin. *See* Kevin G. S~ Supplemental Needs Trust, Article 3, Section 1. After reimbursing the State, and paying for the expenses of Kevin's last illness and funeral and all administrative expenses of the trust, the trustee is instructed to distribute the trust residue as Kevin might appoint in his last will and testament, and, if no appointment is made, then to Kevin's surviving spouse and descendants. *See* Kevin G. S~ Supplemental Needs Trust, Article 3, Sections 1-2. If Kevin has no surviving spouse or descendants, then to Richard S~, if surviving, otherwise to Mark S~ and Lynn S., or their descendents, if surviving, otherwise to the Minnesota Head Injury Association or its successor entity. *See id.*

You asked us to consider whether, under POMS SI 01120.200(G)(1)(d), a monthly annuity payment from American General Annuity Insurance Company may be irrevocably assigned by the annuitant, Kevin S~, to the Kevin G. S~ Supplemental Needs Trust, and, if so, whether Kevin effected such an assignment by way of a signed letter dated January 25, 2000. In that letter, which was also signed by Richard S~, the trustee of the Kevin G. S~ Supplemental Needs Trust, Kevin states that "[m]y decision to have the annuity check from American General Annuity directly deposited to the Kevin S~ Supplemental Needs Trust is . . . irrevocable and permanent." For the reasons discussed below, we believe that the trust is an excludable resource and that the assignment is most likely valid. Therefore, the annuity payment would not be income countable to Kevin, and his right to receive the annuity payments would not be a countable resource.

DISCUSSION

I. The Kevin G. S~ Supplemental Needs Trust Is an Excludable Resource.

Under new SSI resources law effective January 1, 2000, all trust assets in an irrevocable trust created by a claimant and the amount of any claimant assets (or the claimant's spouse's assets) added to an irrevocable trust created by a third party will be considered an SSI resource, irrespective of any limits on the trustee's discretion to make distributions, "if there are any circumstances under which payment from the trust could be made to or for the benefit of the [claimant (or the claimant's spouse)]."

42 U.S.C. 1382b(e) (2000). The foregoing law, however, does not apply (1) to trusts where, upon the death of the claimant, the State will be reimbursed for all "medical assistance" paid on behalf of the claimant, or (2) where the Commissioner determines that counting the trust assets as an SSI resource would work an "undue hardship" on the claimant. 42 U.S.C. 1382b(e)(4), (5), 1396p(4) (2000). Because the Kevin G. S~ Supplemental Needs Trust provides for reimbursement (upon Kevin's death) to the State of Minnesota for all medical assistance provided to Kevin, 42 U.S.C. 1382b(e) does not apply to the Kevin G. S~ Supplemental Needs Trust.

To determine whether the trust assets (the transferred annuity as well as any other assets that might be in the trust) are an SSI resource, we must consider whether Kevin can direct the use of the assets to meet his need for food, clothing, and shelter, or if he can terminate or revoke the trust and obtain unrestricted access to the trust assets. *See* POMS SI 01120.105(A)(1), 01120.200(D)(1)-(3). Because the trust gives the trustee absolute discretion over disbursements from the trust, *see* Kevin G. S~ Supplemental Needs Trust, Article 2, Section 1, Kevin does not have the power to direct the trust assets for his support and maintenance. Kevin also lacks the power to unilaterally terminate or revoke the trust, because the trust creates a number of contingent interests in others, including any surviving spouse or descendants of Kevin, Richard S~, Mark S~, Lynn S~, Mark and Lynn's descendants, and the Minnesota Head Injury Association, all of whom would have to consent to the termination of the trust. *See In re Schroll*, 297 N.W.2d 282, 284 (Minn. 1980); Restatement (Second) of Trusts 127, 339, 340 (1959). The trust assets are therefore an excludable resource.

II. The January 25, 2000, Letter Appears to Constitute a Valid, Irrevocable Assignment of Kevin's Annuity.

Turning to the validity of the annuity assignment, a gratuitous assignment is irrevocable if made by way of a signed writing that is delivered by the assignor. *See* Restatement 332(1)(a) cmt. b (1981); *Cooney v. Equitable Life Assur. Soc. Of United States*, 51 N.W.2d 285, 288 (Minn. 1952) (requiring delivery, intention to make a gift, and absolute disposition); *see also Minnesota Mut. Life Ins. Co. v. Anderson*, 1992 WL 89619, at *3 (Minn. Ct. App.) (valid assignment may arise from gift or contract). The signed writing may be delivered to the donee (in this case, to Richard S~ as trustee of the Kevin G. S~ Supplemental Needs Trust) or to a third person on the donee's behalf. *See* Restatement 332 cmt. b (1981). Although the assignor must fully manifest an intention to make a present transfer, "[n]o particular form of words is required to create an assignment." Minnesota Mut. Life Ins. Co., 1992 WL at *3.

On January 25, 2000, Kevin signed a letter indicating his intent to irrevocably and permanently have his annuity payment directly deposited to the Kevin G. S~ Supplemental Needs Trust. Because Richard S~, the trustee, also signed the letter as a witness, Kevin effectively delivered the writing to the donee. Kevin thus appears to have irrevocably assigned his annuity payments to the trust.

We note, however, that Kevin apparently suffers from a disabling traumatic brain injury sustained in 1976. *See* Kevin G. S~ Supplemental Needs Trust, Article 2, Section 1. Insufficient mental capacity can render a transaction either void at the outset or voidable. *See Parrish v. Peoples*, 9 N.W.2d 225, 228 (Minn. 1943) (individual must have "enough capacity to understand to a reasonable extent the nature and effect of what he [was] doing"); *Sullivan v. Brown*, 31 N.W.2d 439, 445 (Minn. 1948) (party must be capable of "fairly and reasonably understanding the matter in hand"); Restatement 12 cmts. a, c, 15, cmt. b (Where an individual has "some understanding of a particular transaction which [was] affected by mental illness or defect, the controlling consideration is whether the transaction in its result [was] one which a reasonably competent person might have made."). Although we have no information regarding the severity of Kevin's cognitive limitations (if any), and thus express no opinion on this issue, Kevin's level of cognitive functioning might be a consideration in assessing whether the assignment was revocable. In particular, if Kevin's assignment was void, there would be no assignment; if his assignment was voidable, the assignment would be revocable.

CONCLUSION

Assuming Kevin had sufficient mental capacity on the date that he signed the January 25, 2000, letter, the letter would serve to irrevocably assign his annuity payments to the Kevin G. S~ Supplemental Needs Trust. In addition, the trust assets are an excludable resource. As such, the annuity payments would not be considered income for SSI purposes under POMS SI 01120.200(G)(1)(d).

O. PS 00-362 Request to Review Minnesota Trust for Elizabeth P~

DATE: December 17, 1997

1. SYLLABUS

This trust is not a resource for SSI purposes because the grantor (the SSI recipient) is not the sole beneficiary and, therefore, does not have the legal authority to revoke the trust or direct the use of its assets for her own support and maintenance.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

This memorandum is in response to your June 10, 1997, inquiry concerning whether funds held in trust for the benefit of Elizabeth P~ (Ms. P~), a Supplemental Security Income (SSI) recipient, constitute a countable resource. We conclude that the trust funds should not be treated as a countable resource for Ms. P~.

The pertinent SSI regulations provide at 20 C.F.R. 416.1201 that:

resources means cash or other liquid assets or any real or personal property that an individual (or spouse if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right authority and or power to liquidate the property or his or her share of the property, it is considered a resource.

Trust assets are a resource to a beneficiary if she can revoke the trust and access the principal thereafter, whether or not she actually does so. Trust assets are a resource if the individual has access to the trust assets and can direct the use of those assets to meet her needs for food, clothing, and shelter. Thus, if Ms. P~ is able to obtain the funds in the trust, or if she is able to convert the funds to cash that can be used towards her support and maintenance, then such funds or property are to be counted as resources for purposes of SSI eligibility determinations. We have reviewed the documents and have determined that this trust should not be considered a countable resource under 20 C.F.R. 416.1201; and the Programs Operation Manual System (POMS) SI 01120.105, 01120.200(D)(1)-(3).

FACTS

On June 17, 1996, Ms. P~'s parents, William and Sona P~, executed a trust agreement, entitled "Revocable Supplemental Needs Trust of Elizabeth P~." William and Sona P~ described themselves as Grantors of this trust and designated the Norwest Bank Minnesota, N.A., of St. Paul, Minnesota as trustee.

The stated purpose of the trust is to supplement, but not supplant, all other financial service benefits to which Ms. P~ may become eligible, including benefits from the Social Security Administration (SSA). In 1.1, the Grantors stated that they had established this Trust Agreement (Trust) upon the authority of Minnesota Statute 501B.89, subdivision 2. The Agreement also purports to be revocable by the Grantors (1.2) and states that Ms. P~, as the beneficiary, has no right or power to amend, revoke, or terminate the agreement (1.4). The Agreement further states that Ms. P~ has no power to designate the persons who "shall possess or enjoy the trust property."

The corpus of the trust consists of $205,861.44. According to a Report of Contact between SSA and William P~, Ms. P~ received this money as the result of the settlement of an insurance claim. The amount was paid directly into the trust. Ms. P~ herself, never directly received this money, and she has never had direct access to the money in the trust.

The trust agreement further provides that on the death of Ms. P~, the trustee shall pay the state of Minnesota all amounts remaining in the trust up to the amount of unreimbursed medical assistance paid on Ms. P~'s behalf, and that if any funds are left, the trustee will pay the funeral expenses, last bills, and valid debts of Ms. P~. However, if either of the Grantors is still alive at the time the trust terminates, the entire remaining balance of the trust property shall "revert" to them. If neither of the Grantors is alive at the time the trust terminates, then the trustee is directed to distribute the entire remaining balance to Ms. P~'s heirs at law (3.14.3).

DISCUSSION

Revocability of a trust depends on the terms of the trust agreement and State law. This Trust purports to track Minnesota statute 501B.89: "Trust Provisions linked to public assistance eligibility; supplemental needs trusts"; and subdivision 2 of that statute, which is entitled "Supplemental trusts for persons with disabilities." The statute in question, provides that for purposes of subdivision 2, a supplemental needs trust must be funded by someone other than the trust beneficiary, the beneficiary's spouse, or anyone obligated to pay any sum for damages or any other purpose to or for the trust beneficiary under the terms of a settlement agreement or judgment. Here, Ms. P~ is the trust beneficiary and the person who provided the funds for the trust. As such, the trust under consideration here cannot be viewed as a "Supplemental Needs Trust" as contemplated in 501B.89 of the Minnesota Statutes. Even if one argues that the trust is funded not by Ms. P~, but by the insurer, it still would not qualify as a supplemental needs trust under the statute because the insurance company would be viewed as someone obligated to pay any sum for damages or any other purpose to Ms. P~.

The Grantor or settlor of the trust is generally the person who provides the consideration for the trust, even if another entity nominally creates the trust. 76 Am. Jur. 2d 55. Although Ms. P~'s parents (and guardians), William and Sona P~, have named themselves as the "Grantors" in the agreement, there is no evidence that they had any ownership interest in the settlement. Thus, under the facts supplied, the funds that constitute the corpus of this trust are Ms. P~'s alone and she must be considered as the true settlor or grantor of this trust. *See* 76 Am. Jur. 2d 47 (it is a basic requirement for the creation of a valid trust that the settlor have a transferable title or interest in the trust property).

Whether Ms. P~ can revoke the trust and use its funds for her support and maintenance also depends on whether she is the sole identifiable beneficiary of this trust. If Ms. P~ is both the Grantor and the sole beneficiary of the trust, she would have the power to revoke the trust despite terms in the agreement itself that state that she cannot revoke or modify it. Restatement (Second) of Trusts, 339 and comment (1959).

If, however, the trust specifies that any trust assets remaining at the time of the sole beneficiary's death are to be distributed to certain other individuals, then those residual beneficiaries would render the trust irrevocable and it would not be countable as a resource. *See Zebley* Trust as an SSI Resource Wisconsin, Shannon O~ (~)," (M~) to G~, Acting Assistant Regional Counsel-POS, Social Security Administration V (07/09/93); *see also In re Schroll*, 297 N.W. 2d 282 (1980)(Minnesota court held that an "irrevocable" trust could not be revoked without the consent of a person appointed to represent the interests of residual unborn beneficiaries); *see also* Restatement (Second) of Trusts 127 and comment (b), 339 and comment (b) 1959); 76 Am. Jur. 2d 95("a trust cannot be terminated by the consent or acts of beneficiaries where there are contingent interests in the trust which cannot be determined until the happening of certain events").

Ms. P~ is the sole beneficiary of this trust during her lifetime. Section 3.14 of the trust, however, specifies that there are three possible outcomes for the trust after her death. In our opinion, one of these creates an interest in contingent beneficiaries. Thus, the trust is not an available asset to Ms. P~ and it is not a countable resource for her. We will initially discuss the two parts of section 3.14 that do not create a contingent interest.

The first part of this section requires the trustee to pay the State of Minnesota all amounts remaining in the trust up to the total of unreimbursed medical expenses paid on behalf of Ms. P~. This provision does not make the State of Minnesota a beneficiary of the trust. The Restatement (Second) of Trusts 3(4) defines a beneficiary as "[t]he person for whom the property is held in trust." The trust funds here are being held for the benefit of Ms. P~, not the State of Minnesota. Moreover, this section of the trust agreement merely requires that the trust reimburse the state of Minnesota for benefits it has already conferred on Ms. P~ during her lifetime. Thus, the money repaid is for the benefit of the beneficiary, Ms. P~, not the State of Minnesota. *See* Illinois Trust for Dominick J. G~, ~, POGC-V (D~) to Gerald K~, Center Director (April 17, 1997) at 4 (required reimbursement to the State of Illinois or its agencies does not make the state of these agencies beneficiaries).

Section 3.14.3 also does not create a contingent remainder interest. This section specifies only that if neither parent is alive at the time of the termination of the trust, the remaining balance will be distributed to Ms. P~'s "heirs-at-law." We have

previously advised that a remainder interest in the settlor's estate fails to establish additional or contingent beneficiaries. *See* Trust as Resource - Theresa M~, SSN: ~ OGC-V (P~) (August 4, 1993); Illinois OBRA '93 Trust for Dominick G~ SSN: ~ OGC-V (D~) (April 17, 1997).

Although section, 3.14.2, can be construed in a number of ways, depending on how one defines the "Grantor" or "grantor" of this trust, we believe that it does create a contingent interest in William and Sona P~ so long as they are alive. In directing that any residual amount be delivered to William and Sona P~, the trust agreement certainly establishes identifiable residual beneficiaries with an interest in the trust. Thus, under *In re Schroll*, 297 N.W. 2d 282 (1980), the trust is not revocable by Ms. P~'s actions alone. Therefore, Ms. P~ does not have unrestricted access to the trust principal and cannot convert the funds in the trust to her personal use for support and maintenance.

Another factor that weighs heavily in favor of finding that this trust is not a countable resource to Ms. P~ is the intent for which the trust was created. When a trust instrument states an intent to supplement, rather than supplant, any government financial assistance, as this instrument does in section 3.8, most courts give effect to this intent and find that the trust is not an asset that is available to the beneficiary. *See Matter of Leona Carlisle Trust*, 498 N.W.2d 260, 265 (Minn. App. 1993). Thus, the creation of contingent beneficiaries and the intent to supplement rather than supplant public benefits available to Ms. P~, support our finding that the funds in this trust should not be considered as a countable resource to Ms. P~.

Ms. P~ cannot, at this time, convert the funds in this trust for her personal use or for her support and maintenance. Thus, the trust is not an available asset to her, nor is it a countable resource for determining eligibility for SSI benefits.

CONCLUSION

We conclude that the trust assets at issue should not be considered a resource to Ms. P~ for purposes of SSI.

P. PS 00-332 Riley L. M~ Supplemental Needs Trust, SSN ~, Your File No.: S2D5G3

DATE: May 10, 1999

1. SYLLABUS

This opinion concerns a supplemental needs trust in Minnesota. The trust is not a resource for SSI purposes because the grantor (the SSI recipient) does not have the legal authority to revoke the trust or direct the use of its assets for her own support and maintenance. A trust may be revoked if the grantor of the trust is the sole beneficiary. However, under the terms of this trust, the grantor is not the sole beneficiary. The trust provides for residual beneficiaries in the event of the grantor's death. Therefore, the grantor cannot revoke the trust. The trust also provides the trustee with sole discretion over payments made from the trust. Therefore, the grantor does not have the ability to direct the use of the trust assets. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You inquired whether the funds held pursuant to the terms of a Supplemental Needs Trust should be treated as a countable resource for purposes of SSI eligibility for Riley L. M~, the beneficiary of the trust. We have reviewed the trust agreement as well as the arguments advanced by claimant's attorney in his October 22, 1997 memorandum in support of the use of a Supplemental Needs Trust. For the following reasons, we conclude that the assets subject to the trust agreement should not be considered a countable resource for purposes of Riley L. M~'s SSI eligibility.

FACTS

On October 29, 1997, David W. N~ and Amy S. N~ executed a trust agreement entitled "Riley L. M~ Supplemental Needs Trust." Art. 6 1. *See* 42 U.S.C. 1396p(4)(B). The trust agreement names David and Amy N~ as both "Settlors" and "Trustees." Art. 1 1. Riley L. M~ (Ms. M~) is described as the beneficiary of the trust. Art. 2 1. The corpus of the trust consists of $37,871.25. The trust is funded by the proceeds of Ms. M~'s settlement of what appears to be a personal injury action. Art. 2 1. Mr. G~, Ms. M~'s attorney, indicated that the trust was established with Ms. M~'s assets. Memorandum of Law at 2, 5.

The stated purpose of the trust is to provide for Ms. M~'s "supplemental" or "special needs" which refers to Ms. M~'s "reasonable living expenses for maintaining [Ms. M~'s] good health, safety and welfare when . . . such requisites are not being

provided by any federal, state, county or local public agency, office or department of the State of Minnesota, or of any other state, or of the United States." Art. 2 1. By its terms, the trust agreement is irrevocable. Art. 7 1.

The trust agreement further provides that, upon the death of Ms. M~, the trustee shall pay to the State of Minnesota an amount equal to the total Medical Assistance paid on behalf of Ms. M~, and may pay expenses of her last illness and funeral, and all administrative expenses including reasonable attorney and accountant fees. Art. 3 1. The trust agreement further provides that the trust will terminate upon the death of Ms. M~, and contains the following clause regarding distribution:

the trustee shall distribute and deliver the residue, subject to first paying any amounts to be paid under the preceding paragraph, free of trust to the settlors or settlor if they then be living. If neither settlor is living, the trustee shall deliver the trust residue to our daughter, ABBEY M. M~. In the event ABBEY predeceases us, then her share shall be distributed to her issue by right of representation (per stirpes). In the event ABBEY shall leave no surviving issue, then it shall be distributed to such of the spouse, children, grandchildren or other descendants of RILEY L. M~ may designate and appoint in and by her Last Will and Testament. This power of appointment shall be exercisable by her alone and in all events a provision in her Will shall be required for its exercise.

Art. 3 2. The trust agreement then provides that if Ms. M~ fails to exercise the power of appointment granted by the trust agreement, the trustee shall pay and distribute any such remaining amounts to the heirs-at-law of Ms. M~ in accordance with the laws of intestate succession of the State of Minnesota. *Id.*

DISCUSSION

The pertinent SSI regulations provide at 20 C.F.R. 416.1201(a) that:

[R]esources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

Therefore, if an individual is able to obtain funds or convert property to cash to be used toward her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility. Trust assets are a resource to the individual if she has access to the trust assets and can direct the use of the assets to meet her needs for food, clothing, and shelter, or if she can revoke the trust and obtain unrestricted access to the trust assets. Programs Operation Manual System (POMS) SI 01120.200(D)(1)(a). Conversely, if the individual has no legal power to access or direct the use of the trust principal, then the trust will not be considered a resource. POMS SI 01120.200(D)(2). Whether an individual can revoke the trust or direct use of the trust assets depends on the terms of the trust agreement and applicable state law. We have reviewed the documents you have provided and, for the following reasons, we conclude that the trust agreement in question should not be considered a countable resource under 20 C.F.R. 416.1201.

Ms. M~ cannot direct the use of trust assets.

Ms. M~ does not have the authority to direct the payment of trust principal for her support and maintenance because the trust is a discretionary trust. A discretionary trust is trust in which the trustee has full discretion as to time, purpose and amount of all distributions. POMS SI 01120.200(B)(10). A trust may be a resource "in the rare instance, where [the beneficiary] has the authority under the trust to direct the use of the trust principal." POMS SI 01120.200(D)(1)(b). Ms. M~'s trust is not one of these "rare instances." The trust gives the Trustees, David W. N~ and Amy S. N~, "sole and absolute discretion" to distribute trust income or principal. Art. 2 1. Moreover, the trust requires the trustees to deny any request by any department or agency to release principal or income, and to defend in court any contest or attack to the trust estate. Art. 2 8. Therefore, Ms. M~ does not have authority to demand payment from the trust, as David and Amy N~ as trustees have exclusive authority over distribution of trust income and principal. Furthermore, the trustee's power to distribute the trust is limited. The trust prohibits David and Amy N~ from making any disbursements of income or trust principal that would effectively replace, reduce, or substitute public funds available to Riley, or render her ineligible for publicly funded benefits. Art. 2 6-8. Therefore, Ms. M~'s access to the trust principal is restricted, and the trust principal should not be considered a countable resource for this reason.

2. Ms. M~ is the grantor of the trust.

The grantor or settlor of a trust is generally the person who provides the consideration for the trust, even if another entity nominally creates the trust. 76 Am.Jur. 2d 55; POMS SI 01120.200(B)(2). Although the trust agreement names David and Amy N~ as "settlors," it is Ms. M~ who is, in fact, the settlor of this trust since it is her money that provided the consideration comprising the corpus of the trust. Based upon the documents you provided, we assume that Ms. M~ is the sole settlor of the trust.

3. Ms. M~ cannot revoke the trust because she is not the sole beneficiary

The next consideration is whether Ms. M~ is the sole, identifiable beneficiary of the trust, in which case, she would have the power to revoke the trust, even if, by its terms, the trust agreement is irrevocable. Restatement (Second) of Trusts, 339 and comment (1959). However, if the trust specifies that any trust assets remaining at the time of the primary beneficiary's death are to be distributed to certain other individuals, then the need to obtain consent form those residual beneficiaries would render the trust irrevocable. *See* "*Zebley* Trust as an SSI Resource" Wisconsin, Shannon O~ (~),: RA V (M~) to G~, Acting Assistant Regional Counsel-POS, Social Security Administration V (07/09/93); *see also In re Schroll,* 297 N.W.2d 282 (1980) (holding that an "irrevocable" trust could not be revoked without consent of the guardian ad litem appointed to represent the interests of residual unborn beneficiaries); *see also* Restatement (Second) of Trusts 127 and comment (b), 339 and comment (b) (1959); 76 Am.Jur. 2d 95 ("a trust cannot be terminated by the consent or acts of beneficiaries where there are contingent interests in the trust which cannot be determined until the happening of certain events").

A beneficiary is any person with a beneficial, or equitable ownership interest in the trust. POMS SI 01120.200(B)(4). Ms. M~ is the only beneficiary of the trust during her lifetime. Art. 2 1. Upon Ms. M~'s death, the trustee must pay state reimbursement claims, if any, and may pay expenses related to Ms. M~'s last illness and funeral and costs attendant to administering the trust. Art. 3 1. The trust agreement directs the trustees to distribute and deliver the "residue" trust assets to the settlors David and Amy N~, and if neither are living to their daughter Abbey M. M~. Art. 3 2. If Abbey M~ predeceases David and Amy N~, then the residue is to be distributed to her issue. If Abbey M~ leaves no surviving issue, then the residue is to be distributed to the spouse, children, grandchildren, or other descendants of Riley L. M~ pursuant to the terms of her Will. Art. 3 2. If Riley L. M~ fails to exercise the power of appointment, then the remaining residue passes to her "heirs-at-law."

A residual beneficiary is an individual or class of individuals who is not a current beneficiary of a trust but will receive the residual benefit of the trust contingent upon the occurrence of specified events, e.g. the death of the primary beneficiary. POMS SI 01120.200(B)(12). The trust agreement provides that the "residue" of the trust shall be distributed to identifiable beneficiaries, by name and by class. Unborn or unascertained contingent beneficiaries can be beneficiaries for purposes of revocation by consent. *See* Restatement (Second) of Trusts 127 Comment (b); Restatement 339 Comment (b); 76 Am. Jur. 95. The general principle of trust law that applies here is that if "a beneficial interest is limited to the settlor for life and on his death the property is to be conveyed to his children, or issue, or descendants, he [i.e., the settlor] is not the sole beneficiary of the trust, but an interest in the remainder is created in his children, issue or descendants." Restatement (Second) of Trusts, 127, comment b (1959) (emphasis added). There is no blanket rule that residual or contingent beneficiaries must be identified by name, and in fact, reservation of an interest in favor of descendants, issue, or children would suffice to deprive a grantor-beneficiary of the ability to revoke the trust at will in the absence of an express statement providing that the trust is revocable by the grantor. Restatement (Second) of Trusts, 127, comment b (1959); *see also* 76 Am. Jur.2d Trusts 93 (1992)(where trust is not expressly made revocable, trust may not be terminated at will where consent of unborn beneficiaries would be required); Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, RA V (K~) to ARC, Programs, 5-24-95. Although Ms. M~ is the grantor or settlor of the trust, she is not the sole beneficiary of the trust and cannot alone compel the termination of the trust. Restatement (Second) of Trusts 339 (1959). The trust agreement clearly names identifiable beneficiaries upon Ms. M~'s death. *See* Art. 3 2. Therefore, Ms. M~ cannot unilaterally revoke the trust in order to use the principal for food, clothing, or shelter. Accordingly, the trust should not be treated as a countable resource for the purpose of determining Ms. M~'s eligibility for SSI. *See* POMS SI 01120.200(d)(1)(a).

Moreover, if any of the named beneficiaries is a minor, it would be impossible for Ms. M~ to revoke the trust agreement even if all the named beneficiaries agreed. Where some of the beneficiaries are under an incapacity (are not of full age), or are not ascertained or unborn, the grantor or settlor cannot revoke the trust even though the other beneficiaries consent. *Schroll*, 297 N.W.2d at 284; *see also* 76 Am. Jur. 2d ("A trust cannot be terminated by the consent, contract, transfer, or conveyance of beneficiaries unless all beneficiaries have given their consent or joined in the contract, conveyance, or transfer, and unless all beneficiaries are of full age and otherwise sui juris" (footnotes omitted)).

CONCLUSION

For the above reasons, we believe the trust principal should not be considered a countable resource when determining Ms. M~'s eligibility for SSI.

Q. PS 00-312 Trust Accessibility Minnesota Nathan L~ Trust, SSN ~; Your File No. S2D8NG

DATE: May 7, 1996

1. SYLLABUS

This opinion involves a trust created for the SSI recipient with funds he received from the settlement of a lawsuit.

Prior to the SSI recipient's 18th birthday, the trust funds were not a resource as under Minnesota law, court approval was required to release the funds and a Minnesota court would not have released the funds for his support and maintenance.

However, the funds became a resource as of the SSI recipient's 18th birthday since he is both the grantor and the sole beneficiary of the trust.

CAUTION: Because of a change in the Social Security act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked us to review the Nathan J. L~ Trust Agreement to determine whether it is a countable resource for SSI purposes. For the following reasons, we believe that the Trust became a countable resource on Mr. L~'s eighteenth birthday.

Mr. L~, who is nineteen years old, received a cash settlement in 1989 from a class action suit. The settlement money was put in trust by order of a Minnesota federal district court. Mr. L~ is the sole beneficiary of the Trust. The Trust appointed Mr. L~'s mother as Custodian, and a Minnesota bank as Trustee. The Trust authorizes the Trustee, at the Trustee's "sole discretion," to pay for Mr. L~'s support and maintenance. The Trust gives Mr. L~ the right to terminate the Trust upon attaining age eighteen and receiving notice. If Mr. L~ does not terminate the Trust within thirty days of receiving notice, then the right to terminate the Trust lapses and the Trust continues as provided therein.

The Social Security Act provides that an unmarried individual is not eligible for SSI if his countable resources exceed $2,000. 42 U.S.C. 1382(a)(1)(B)(ii), (a)(3)(B). Resources are assets that an individual owns and could convert to cash to use for his support and maintenance. 20 C.F.R. 416.1201(a). If Mr. L~'s Trust is a countable resource, then he is ineligible for SSI.

You asked us whether the Trust was irrevocable under Minnesota state law. The Restatement (Second) of Trusts states that "[i]f the settlor [the person who creates the trust] is the sole beneficiary of a trust and is not under an incapacity, he may compel the termination of the trust, although the purposes of the trust have not been accomplished." *Id.* 339; *see also* 76 Am. Jur. 2d Trusts 91 (1975). The POMS recognizes the general rule that such settlor's trusts are revocable in many states, and are thus countable resources in those states. POMS SI 01120.200D.3. (TN 33 3-94). The issues are thus whether Mr. L~'s Trust is a settlors' trust, and whether settlor's trusts are revocable in Minnesota. *See* Trusts Established as the Result of *Zebley* Underpayments, SSI Program Branch (C~) to B~, Director, Div. of Program Requirements, at 4 (8/28/91) ("If the child is both the grantor . . . [and] the sole trust beneficiary, we believe that the answer to the question [(is the trust a resource to the child?)] will turn on State law principles regarding the validity and revocability of [settlor's trusts].").

We believe that Mr. L~'s Trust meets the definition of a settlor's trust. Mr. L~ created the Trust, through his mother, with funds he received from the settlement of a lawsuit. Since Mr. L~'s mother was acting on his behalf, Mr. L~ was the actual settlor of the Trust. *See* Minn. Rev. Stat. 527.21-527.44. Moreover, trusts established from personal injury settlements are established by the person who received the settlement award. POMS SI 01120.200J.3.a. (TN 33 3-94); Whether Trust Established By A Legally Incompetent Grantor That Solely Benefits Grantor and Those Whom The Grantor Might Appoint In Her Will Is A Revocable Trust Under Wisconsin Law And Hence A Countable SSI Resource Theresa L. D~ Wisconsin, OGC-V (S~) to L~, Acting ARC, SSA-V (3/29/95). Mr. L~ was also the sole beneficiary of the Trust. The mere fact that the Trust lists unnamed heirs as residual beneficiaries does not create additional beneficiaries. Wisconsin Trust For By Y~, OGC-V (D~) to Panama, ARC, SSA-V, at 3 (7/25/94); cf. POMS SI 01120.200D.3. (TN 33 3-94) ("Some States recognize the irrevocability of a grantor [(settlor's)] trust if

there is a named 'residual beneficiary' in the trust document . . .") (emphasis added). Therefore, it appears that Mr. L~'s Trust is a settlor's trust.

We have previously advised that settlor's trusts are revocable in Minnesota:

In *Darcy v. First Trust Company* of St. Paul, 297 N.W. 2d 282 (Minn. 1980), the Minnesota Supreme Court held that a trust can be modified where the grantor and all beneficiaries agree, despite language renouncing the ability to modify or revoke. *Id.* at 283-84. Although the court's CONCLUSION related to modification rather than termination of a trust, the court specifically indicated that the power to revoke and the power to modify are coextensive unless an express provision in the trust provides otherwise. *Id.* at 284. Consequently, we believe the court's CONCLUSION applies to revocation as well as modification.

See also Warner v. Warner, 117 N.W.2d 224, 229 (Minn. 1962) (indicating that the grantor and all beneficiaries have the power to modify trust because they have power to terminate the trust). Because, under Minnesota case law, the grantor and all beneficiaries may revoke a trust, it follows that a trust can be revoked by a grantor who is sole beneficiary.

Six-State Synopsis of Trust Laws Multistate, OGC-V (P~) to P~-W~, ARC, SSA-V, at 4 (2/26/92) (footnote omitted). Since his eighteenth birthday, therefore, Mr. L~ has had the power to terminate the Trust, because he is the both the settlor and the sole beneficiary of the Trust./ Thus, the Trust should be considered a countable resource as of Mr. L~'s eighteenth birthday.

Prior to Mr. L~'s eighteenth birthday, however, the Trust does not appear to be a countable resource under Minnesota law. Minnesota law provides that a minor's settlement proceeds in a court-ordered trust are not available until released by the court. Minn. Rev. Stat. 540.08. We have previously advised that section 540.08 prevents the Agency from counting as resources a minor's funds in an account established under its provisions, since Minnesota courts apparently would not release funds for the minor's support and maintenance (since these should be provided by the parents during minority). Blocked Account in Minnesota as SSI Resource Minnesota Joseph C. T~, OGC-V (M~) to P~-W~, ARC, SSA-V, at 3 (5/29/91); Trust For Minor As A Resource Where Termination Authorized At Age 18 Minnesota Pao G. Y~, OGC-V (M~) to Panama, ARC, SSA-V, at 3 (6/17/92). Section 540.08 is explicitly limited to minor children. Therefore, section 540.08 would not appear to impede Mr. L~'s access to the Trust after he reached majority on his eighteenth birthday./

Although we believe that this CONCLUSION controls the disposition of this case, we now address your two other specific queries. You asked whether the Trust is being violated because the Trustee was not providing for Mr. L~'s support and maintenance. The Restatement (Second) of Trusts (1959) provides that where a trustee's discretion is uncontrolled, the beneficiary may not compel the trustee to make payments from the trust. *Id.* 128 cmt. d, 156(1). Accordingly, the POMS states that a discretionary trust is generally not an available resource, POMS SI 01120.200J.2.B.a. (TN 33 3-94), and our prior memoranda are consistent, Supplemental Trust Wisconsin David E. M~, OGC-V (H~) to W~, ARC, SSA-V, at 2 (9/6/88) (citations omitted). Thus the Trustee is not required to provide for Mr. L~'s support and maintenance. However, since Mr. L~ could terminate the Trust after attaining age eighteen without the Trustee's consent, the funds are still a resource to him.

You also asked whether Mr. L~'s right, for thirty days, to terminate the trust upon attaining age eighteen, is in accordance with Minnesota state law. We previously advised that such a provision was not inconsistent with general trust law principles.

P~ Yang, at 3. While the Trust was a resource during the thirty-day "window," *id.*, Trust of Amy C~, OGC-II (*Swerdloff*) to M~, Dir., RSI/SSIB, SSA-II, at 2 (3/8/95); Counting a Trust as a Resource for SSI Nebraska Christine V~, OGC-VII (C~) to ARC, POS, SSA-VII, at 3 (11/5/93), it is unnecessary to rely upon this limited period given our CONCLUSION above. Mr. L~ could terminate the Trust at any time after age eighteen, even after the 30-day window lapsed.

Finally, we note that during our research we learned that the district court has entered an order allowing the Trustee to pay Mr. L~'s father $37,000.00 a year to care for and to transport Mr. L~. (Copy attached.) We need not determine the effect of these payments, however, since the Trust funds are deemed to have been a resource to Mr. L~ since his eighteenth birthday, rendering him ineligible for SSI.

In sum, the trust funds were not a resource to Mr. L~ prior to his eighteenth birthday since, under Minnesota law, court approval was required to release the funds, and a Minnesota court would not have released the funds for his support and maintenance. The funds became a resource as of Mr. L~'s eighteenth birthday, however, after which time he was free to revoke the trust, either by the express terms of the trust or as a matter of law (since he was both the settlor and the sole beneficiary of the trust).

R. PS 00-305 SSI-Minnesota-Review of a Trust for Dana J. K~, SSN: ~

DATE: April 24, 2000

1. SYLLABUS

This opinion concerns a trust and the SSI home exclusion. The SSI applicant inherited a one-fourth interest in a farm house with contiguous farmland. The applicant is also a beneficiary of a trust that has farm land as its only asset. The farmland held by the trust is contiguous to the inherited farm house and farmland. This was once all one farm owned by the applicant's parents. The regional attorney determined that the SSI applicant has ownership interest in the inherited farm house and farmland, and that this is not counted as a resource because it is considered an excluded home. The regional attorney also determined that the farmland held in the trust is not a countable resource. This is because the SSI applicant has ownership interest in this land because she is a beneficiary of the trust. And, the farmland held by the trust is covered by the home exclusion because this exclusion includes land that is contiguous to the home in which the recipient lives.

2. OPINION

You asked us whether a trust is a countable SSI resource to Dana K~, an SSI applicant. The trust was established by her parents, and we have been advised that the only asset owned by the trust is farmland that was part of the family farm. In addition, Ms. K~ has a one-fourth interest in additional farmland she and her siblings inherited from her parents that did not pass through the trust. Ms. K~ currently resides in the farmhouse on the property. Because Ms. K~ has an ownership interest in both parcels of land and because the land is contiguous, we conclude that it is excluded from being a countable resource as property attached to the home.

FACTS

Ms. K~'s parents, Walter J. S~ and Grace L. S~ owned a family farm in Dalbo, Minnesota. In 1994, Mr. and Mrs. S~ created the "Walter J. S~ and Grace L. S~ Irrevocable Trust Agreement for the Benefit of Their Children." The trust indicates that it was expected to include primarily real estate and exist for the benefit of their children. The S~s transferred part of the family farm land into the trust. Other parts of the land, including the farmhouse were not transferred into the trust before the S~s died. Mr. S~ died in 1995; Mrs. S~ died in 1998.

The trust names two of their children, including Ms. K~, as trustees. All four children, including Ms. K~, are beneficiaries. During the S~s' lifetimes, the trustees had full discretion to use the trust assets to provide for the beneficiaries' health, support, maintenance and education. Trust

1.1. After the death of the S~s, the trustee was directed to distribute to the beneficiaries the entire principal of the trust "other than the assets listed on Exhibit A. Trust 2.1. In addition, the trustee was directed to distribute to the beneficiaries "at least annually" the entire income of the trust.

Trust 2.1.

The trust further directs that when any assets in Exhibit A are sold, the proceeds shall be distributed to the beneficiaries. Trust 2.2. If any of the assets are not sold after ten years from the death of both settlors, the trustee was directed to distribute the assets. Trust 2.3.

Each child was given a power to appoint by will his or her trust share to such child's descendants or the settlors' descendants. Trust 2.5. Paragraph 5 of the trust includes a spendthrift clause, prohibiting any beneficiary "to sell, assign, transfer, encumber, or in any manner to anticipate or dispose of his interest in the trust estate or the income therefrom."

The letter from the attorney indicates that some of the property has been sold, but that the trust has not had any income and that no distributions have been made from the trust.

DISCUSSION

The short answer to the question presented is that the property is excluded because it comprises Ms. K~'s home. The Social Security Act excludes from countable resources "the home (including the land that appertains thereto)." 42 U.S.C. 1382b(a)(1). Our regulations make clear that the home is excluded as a resource "regardless of its value." 20 C.F.R. 416.1212(b); *see also* POMS SI 01130.100(A)(1). The local office obtained for us additional evidence, a copy of the plat of the property, which

demonstrates that all of the farmland is contiguous, even though some of it is owned by the trust and some of it is part of the inheritance estate. Because the land is contiguous and is appurtenant to the home in which Ms. K~ lives, it is all excluded from countable resources. Therefore, the property is not a countable resource.

The letter from the lawyer states that the farmhouse in which Ms. K~ lives is part of the inheritance estate. This counts as Ms. K~'s property because of her interest as an heir. *See* POMS SI 01120.215. The other property is part of the trust estate, of which Ms. K~ is a beneficiary. Because she is a beneficiary of the trust, this, too, counts as an ownership interest. *See* POMS SI 01120.200(F). Because she has an ownership interest in the inheritance estate and the trust estate, the entire property is excluded as connected to Ms. K~'s home.

Even though the property is now an excluded resource, we wish to make clear several points relevant to Ms. K~'s resource status. If the inheritance estate has any resources other than the land, or if it sells the land, the property in the inheritance estate will be Ms. K~'s countable resource. *See* POMS SI 01120.215.

The trust property (if at any time there is property other than the farmland) is not a countable resource because (1) the trustees have the discretion whether to distribute to any beneficiary and (2) the trust includes a spendthrift provision. Therefore, property retained in the trust is not a countable resource. *See* POMS SI 01120.200(D)(2).

However, the trust provides that the trustee must distribute to the beneficiaries any income to the trust and any proceeds of sale of the trust assets. If the trust property generates income or if the trust sells part of the property, Ms. K~ would have a valid claim for her share of the proceeds. That claim would be a countable resource. Additionally, the trust provides that the trustees must sell any of the trust property that remains after ten years, and they must distribute that property to the beneficiaries. At that time, the trust property (except to the extent that Ms. K~ still owns it and it is land appurtenant to her home) will be a countable resource.

Finally, if at some point Ms. K~ leaves the farm house, then the property would no longer be an excluded resource.

CONCLUSION

Because Ms. K~ has an ownership interest in the house in which she lives, all of the property connected to the house is an excluded resource. This includes land in which she has an equitable ownership interest as a beneficiary of the trust as well as land in which she has an ownership interest through her inheritance. However, if circumstances change, the property could become a resource. We suggest that any changed conditions be submitted to us for review under the state law current at that time.

S. PS 00-278 Midland Life Insurance Funded Burial Contract (LIFBC); Your Reference No. SI-2-1-4

DATE: May 16, 1997

1. SYLLABUS

Under Minnesota law, an individual can assign a life insurance policy to fund a prearrangement funeral trust, which may also be called a prearranged funeral or burial contract. Such a trust can be made irrevocable up to an amount equivalent to the current allowable SSI resource limit used for determining SSI eligibility (currently $2,000 for an individual and $3,000 for a couple) plus interest. These amounts are excluded from resources for SSI purposes. The assignment of any trust assets above this amount would be revocable and, therefore, a countable resource (unless otherwise excludable).

2. OPINION

You sent for our review a proposed memorandum regarding Midland Life Insurance Funded Burial Contract (LIFBC). While the proposed memorandum is generally correct, we propose the following language, which may be a little more concise:

Under Minnesota law, an individual can assign a life insurance policy to fund a prearrangement funeral trust, which may also be called a prearranged funeral or burial contract. Minnesota law provides that such a trust can be made irrevocable up to an amount equivalent to the current allowable SSI asset exclusion used for determining eligibility for assistance, plus the interest on that amount. Therefore, an individual can assign irrevocably up to $2000.00 for an individual and up to a combined total of $3000.00 for a couple, plus interest on those amounts. These amounts would be excluded from countable resources pursuant

to POMS SI 01130.425(B)(2). The assignment of any trust assets above this amount, however, would be revocable, and therefore those assets would be a countable resource (unless otherwise excludable).

In determining whether the individual has irrevocably assigned his or her interest in the life insurance policy you should check for:

(1) a valid insurance policy with a beneficiary designation that is not inconsistent with the irrevocable assignment under the prearrangement funeral contract.

Generally, if the policy names as the beneficiary "any funeral home as its interest may appear," or "the funeral home of choice," or the like, this should be sufficient. The designation should reflect the ability of the beneficiary or his or her personal representative or next-of-kin to designate a different funeral home at any point in time.

(2) a document showing the irrevocable transfer or assignment of the individual's interest in the life insurance policy to a funeral home.

The assignment need not name a particular funeral home, but the individual (or his or her personal representative or next-of-kin) must have the ability to designate a funeral home or change the funeral home to which the policy is assigned at any time. If the agreement does not specify that the personal representative or next-of-kin has the right to change the funeral home after the individual's death, you generally can assume that this right exists, absent evidence to the contrary. The fact that the individual retains the right to change the funeral home, however, does not make the cash surrender value of the policy a resource to the individual.

Note that the individual need not have a funeral purchase contract with any particular funeral home in order to irrevocably assign his or her interest in the life insurance policy. If the individual has entered into a funeral purchase contract with the funeral home named in the irrevocable assignment or another funeral home, this does not affect the validity of the irrevocable assignment of the insurance policy or the individual's ability to change the assignment to name a different funeral home.

Also note that the funds in the irrevocable funeral or burial contract are funds specifically set aside for burial expenses within the meaning of 20 C.F.R. 416.1231(b)(1) and 42 U.S.C. 1382b(d).

T. PS 00-169 SSI-Minnesota Sara R. C~ Supplemental Needs Trust ~ (Your File No. S2D5G3)

DATE: July 27, 1999

1. SYLLABUS

This opinion concerns whether or not a "supplemental needs trust" is considered a countable resource for SSI purposes.

A general rule of trust law asserts that if an individual is both the grantor and sole beneficiary of a trust it is considered a resource. Thus, the trust is a countable resource in determining eligibility for SSI.

2. OPINION

You requested an opinion regarding whether the funds held in a supplemental needs trust funded by a prior *Zebley* underpayment should be treated as a countable resource for the purpose of SSI eligibility for Sara R. C~, the beneficiary of the trust. We have reviewed the trust agreement and, for the following reasons, we conclude that the assets subject to the trust agreement should be considered a countable resource.

FACTS

On October 7, 1997, Sara R. C~ and Connie S~ executed a trust agreement entitled "The Sarah R. C~ Supplemental Needs Trust." The trust agreement identifies Sara C~ as the settlor, and Connie S~ as trustee. The trust was established with "certain payments which have been made to and on behalf of Sara R. C~ pursuant to a notice of award received on February 23, 1993, from the Department of Health and Human Services, or other properties, the receipt of which is hereby acknowledged." Recital 2. According to the information you provided, the trust was funded with the proceeds of a prior *Zebley* underpayment.

The trust's stated purpose is to provide for Sara's "reasonable living expenses and other needs when benefits from publicly-funded benefit programs are not sufficient to provide adequately for those needs" (Article 2, 1). The trust is intended to

prohibit disbursements that would have the effect of replacing, reducing or substituting for publicly funded benefits otherwise available to Sara, or rendering her ineligible for publicly funded benefits. The trust is intended to comply with Minn. Stat. 501B.89(3) and applicable federal law to create a "supplemental needs trust" (Article 2, 1).

The trust is silent with regard to issues of revocation or amendment, but it does provide that if it is determined that the trust disqualifies Sara from public assistance benefits then the trust property can be used for her "well-being" (Article 2, 5).

The trust terminates (1) on Sara's death; or (2) if Sara, after age 64, becomes a resident of a state institution or nursing facility for six months or more and is not reasonably expected to be discharged (Article 6, 1-2).

Upon Sara's death, the trustee is directed to first pay the State of Minnesota or other states an amount equal to the total medical assistance paid on Sara's behalf under the state plan. Article 3, 1. Thereafter, the trustee may pay last illness-related expenses and other administrative expenses. Article 3, 1. The trustee is to distribute the residue to "such of the spouse, children, grandchildren or other descendants of Sara R. C~ in such proportions and upon such terms and conditions and trusts as she may designate and appoint in and by her Last Will and Testament." Article 3, 2. Should Sara fail to exercise her power of appointment, the trustee is instructed to pay and distribute any remaining trust amounts to Sara's "heirs-at-law" in accordance with Minnesota's laws of intestate succession. Article 3, 2.

DISCUSSION

For SSI purposes, a resource includes cash or other liquid assets or any real or personal property that the individual owns and could convert to cash to be used for his own support and maintenance. 20 C.F.R. 416.1201(a). If the individual has the right, authority, or power to liquidate the property or his share of the property, it is considered a resource. 20 C.F.R. 416.1201(a)(1); *see also* POMS SI 01110.100(B).

Based on these regulations, trust property may be a resource. If an individual has the ability to revoke the trust and then use the funds to meet food, clothing, or shelter needs, the trust assets will be counted as a resource. Similarly, if the individual can direct the use of the trust principal for his or her support and maintenance under the terms of the trust, the trust property will be counted as a resource. POMS SI 01120.200(D)(1)(a). Conversely, if the individual has no power to access the principal or direct the use of the trust principal, then it will not be considered a resource. POMS SI 01120.200(D)(2)(b). Whether the claimant can revoke the trust or direct use of the trust assets depends on the terms of the trust agreement and applicable state law.

We first address whether Sara has the power to direct the use of the trust principal for her support and maintenance. Here, the trustee has sole discretion to make expenditures to fulfill the purpose of the trust (Article 2, 1). The trust does not prohibit the trustee from making disbursements for food, shelter or clothing in the event Sara becomes ineligible for publicly-funded benefits (Article 2, 5). Nonetheless, the stated purpose of the trust is to provide for Sara's reasonable living expenses and other needs when benefits from publicly-funded benefit programs are not sufficient to adequately provide for those needs (Article 2, 1). Because the trustee has sole discretion to make expenditures, and expenditures for food, shelter or clothing would be contrary to the trust purpose, Sara is not able to direct use of the trust principal for her support and maintenance.

We next consider whether or not Sara has the power to revoke the trust. As noted above, the trust is silent regarding revocation or amendment. Generally, a grantor must, by the terms of the trust, specifically reserve the power to modify or revoke the trust. Conversely, the grantor cannot revoke a trust if she did not reserve the power of revocation. Restatement (Second) of Trusts, 330 (1959). Thus, on its face, the trust is irrevocable because Sara did not reserve the power to revoke the trust.

However, the general law of trusts recognizes that where the grantor is the sole beneficiary of the trust arrangement and is not under an incapacity, she may amend or compel termination of the trust, even if she did not expressly reserve the power to do so. Restatement (Second) of Trusts, 339 (1959); 76 Am. Jur. 2d Trusts 91 (1975). The POMS provide that “[m]ost states follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of the language in the trust document to the contrary.” POMS SI 01120.200(D)(3); *see also* 01120.200(B)(8). Minnesota can be presumed to apply this general principle absent any statutes or case law to the contrary. *See* Six-State Synopsis of Trust Laws, OGC-V (P~) to Panama, ARC, SSA-V (2/26/92) (advising that all six states in our region can be presumed to apply this principle); *see also* Minn. Stat. 501B.01 et. seq.; *In re Schroll*, 297 N.W.2d 282, 284 (Minn. 1980) (although settlor could not unilaterally revoke trust where he did not reserve such power, trust could be modified where settlor and all beneficiaries agreed).

Here, the trust was created with Sara's own assets and the trust agreement identifies Sara as the settlor (grantor) of the trust. The question, then, is whether Sara, as grantor of the trust, is also its sole beneficiary.

Sara is the sole beneficiary of the trust during her lifetime (Article 2, 1). Upon Sara's death, the trust first provides for payment to the State of Minnesota in an amount equal to the total medical assistance paid by the state on Sara's behalf (Article 3, 1). Thereafter, the trust provides for payment of last illness and funeral-related expenses and administrative expenses (Article 3, 1). As we have previously advised, these provisions do not render the State of Minnesota or other creditors beneficiaries. A beneficiary is "[t]he person for whose benefit property is held in trust." Restatement (Second) of Trusts 3(4) (1959). None of the trust property is held for the "benefit" of the state or other creditors; rather, this provision requires the trust to reimburse the state and other creditors for benefits already conferred on Sara during her lifetime. *See* States Named as Beneficiary to a Trust, OGC-V (D~) to Panama (6/24/97) at 2.

The trust provides that the remaining balance of trust assets shall be distributed to "such of the spouse, children, grandchildren or other descendants of Sara R. C~" on such terms and conditions as Sara may designate and appoint in and by her Last Will and Testament.

This provision does not create residual beneficiaries. While the provision may *see*m to create a beneficial interest in certain parties that may be named in Sara's will, the interest is illusory because it is contingent upon Sara exercising her testamentary appointment power. Sara is not required to execute a will; and once executed, she has the discretion to modify or revoke her will during her lifetime. *See* Minn. Stat. 524.2-507. Thus, a trust purporting to create a remainder interest in those to be named by will does not, in effect, create residual beneficiaries. *See* Restatement (Second) of Trusts, 127; 339, comment b, illustration 2; *see also* Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, OGC-V (K~) to L~ (5/24/95) at 3-4 (hereinafter Clarification).

Should Sara fail to exercise her appointment power, any remaining trusts amounts are to be distributed to Sara's "heirs at law." Use of the term "heirs at law" does not create residual beneficiaries, because there are no identifiable residual beneficiaries either by name or class. Restatement (Second) of Trusts, 127, comment b (1959); *see also* Clarification at 4-6. Thus, where a trust purports to create an interest in favor of the grantor-beneficiary's "heirs at law" (such as the trust in this case), the general rule is that in the absence of a manifestation of a contrary intention, the inference is that the grantor-beneficiary is the sole beneficiary of the trust. Our research has revealed no Minnesota cases that run contrary to this general trust principle, and we therefore conclude that absent the manifestation of a contrary intention, the inclusion of unnamed heirs does not create additional beneficiaries of a Minnesota trust.

Here, we are not convinced that the trust language indicates a contrary intention (i.e., the intention to make Sara's "heirs at law" residual beneficiaries). The trust does limit Sara's testamentary appointment power to her "spouse, children, grandchildren or other descendants." Article 3, 2. Thus, the manner in which the trust was drafted seems to favor distribution to certain parties: should Sara exercise her appointment power, she is limited to distribution to her spouse, children and other descendants; should Sara fail to exercise her appointment, distribution under intestate succession still favors Sara's spouse and descendants. This suggests Sara may have intended to create a beneficial interest in certain heirs at law; her spouse, children and other descendants.

However, "heirs at law" according to Minnesota's intestate succession might result in distribution to parties (such as grandparents or distant cousins) other than Sara's spouse, children or other descendants. In addition, the trust terms allow Sara to exercise her appointment power in a manner that would exclude certain "heirs at law." For example, Sara could exclude distribution to her spouse and provide by will that the entire trust residual be distributed to her children. Thus, we think the trust is sufficiently ambiguous that no specific class of beneficiaries can be identified and, consequently, the intent to make Sara's unnamed heirs at law residual beneficiaries should not be inferred. As a result, Sara is the sole beneficiary of the trust.

Because Sara is both the grantor and the sole beneficiary of the Trust, we believe the general trust rule applies, and Sara "can compel termination of the trust, although the purposes of the trust have not been accomplished." Restatement (Second) of Trusts 339 (1959). Thus, Sara should have the power to revoke the trust and use the assets to meet her needs for food, clothing and shelter. As such, the Trust should be treated as a countable resource for the purpose of Sara's SSI eligibility. *See* POMS SI 01120.200(D)(1)(a).

A. PS 03-173 SSI-Minnesota-Review of the Life Insurance Funded Burial Trust for Kevin J~

DATE: August 19, 2003

1. SYLLABUS

The owner of the life insurance policy is a parent deemor who permanently and irrevocably assigned the ownership of the policy to a funeral home which subsequently transferred the policy to the Forethought Trust. Per POMS SI 01120.201(H)(1), the trust is not subject to the statutory trust provisions. Under regular resources rules, neither the claimant nor the deemor has the legal authority to revoke the trust and use the funds for claimant's support and maintenance since the funeral provider is also a beneficiary of the trust. Since the sole purpose of the trust is to fund beneficiary's funeral, and the deemor has no beneficial interest in the trust, the trust has no discernable market value. Hence, if a life insurance funded burial arrangement is considered to be an irrevocable trust with no discernable market value, then the trust is not considered as a resource to the deemor and is not a resource to the claimant.

2. OPINION

The owner of the life insurance policy is a parent deemor who permanently and irrevocably assigned the ownership of the policy to a funeral home which subsequently transferred the policy to the Forethought Trust. Per POMS SI 01120.201(H)(1), the trust is not subject to the statutory trust provisions. Under regular resources rules, neither the claimant nor the deemor has the legal authority to revoke the trust and use the funds for claimant's support and maintenance since the funeral provider is also a beneficiary of the trust. Since the sole purpose of the trust is to fund beneficiary's funeral, and the deemor has no beneficial interest in the trust, the trust has no discernable market value. Hence, if a life insurance funded burial arrangement is considered to be an irrevocable trust with no discernable market value, then the trust is not considered as a resource to the deemor and is not a resource to the claimant.

BACKGROUND

In July 2001, Mary J~, Kevin's mother, applied for and apparently received[1] a life insurance policy based on the life of Kevin (the insured), then a minor, with a face amount of $9,576.50 and an annual premium requirement of $890.73. You indicated that the premium payments have been made from Mary's personal funds. The beneficiary listed on the application is the estate of insured (Kevin), but, the application indicated that the beneficiary could be changed at any time by giving written notice to the insurance company.

On the same date as the policy application was signed, Mary also executed a Change of Policy/Certificate/Annuity Ownership to the Forethought Trust (Permanent and Irrevocable). This document purports to irrevocably assign ownership of the life insurance policy to the Wright Funeral Home in exchange for the home's promise to deliver funeral services and merchandise (presumably for Kevin, the insured).[2] The document also states that Wright Funeral Home will immediately transfer ownership of the policy to the Forethought Trust, which shall ensure payment to the Wright Funeral Home, or any subsequently designated funeral home for the provision of funeral services and merchandise. The document also states that Mary renounces her power to control the policy; waives all rights to surrender it for cash or obtain a loan against the policy; agrees to pay all premiums as they become due; and retains the right to change the designated funeral home and named beneficiary. Finally, the document is also signed by a representative of the Wright Funeral Home.

DISCUSSION

A resource includes “any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.” 20 C.F.R. § 416.1201(a). Until Kevin reaches the age of 18 (which he did on January 4, 2003), his resources are deemed to include those of his mother, Mary. 42 U.S.C. § 1382c(f)(2)(A); 20 C.F.R. § 416.1202(b); POMS SI 01330.200. Thus, it is necessary to decide whether, prior to January 4, 2003, the burial arrangement described above gives rise to a resource for Mary (which would be deemed a resource for Kevin) and whether, before or after January 4, 2003, the burial arrangement gives rise to a resource for Kevin.

Where an individual contracts with a provider of burial services, prepaying the provider for services to be performed in the future, and the provider subsequently places the funds in trust, the trust resource rules codified at 42 U.S.C. § 1382b(e) are not applicable. Memorandum from Associate General Counsel Office of Program Law to Associate Comm. For Legislative Development, *SSD, Exclusion of Certain Burial Trusts from Section 205 of Public Law Number 106-169,* at 3 (August 29, 2000)

(hereinafter *Exclusion Memo*); POMS SI 01120.201(H)(1). Instead, regular resource rules apply to determine whether the burial arrangement is a resource. *Id*.[3]

Using regular resource rules, the burial arrangement here could be characterized as a life insurance funded burial contract in that Mary prepaid the provider of burial services (Wright Funeral Home or another designated funeral home) by irrevocably assigning the life insurance policy on Kevin's life. *See* Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *SSI-Minnesota-Review of Minnesota Life Insurance Contract from CNA and American Memorial Life Insurance Companies*, at 3-5 (March 21, 2000); Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *SSI-Minnesota-Request for Review of OGC Opinion on Life Insurance Funded Burial Agreements*, at 5-6 (December 15, 1999); *see also* POMS SI 01330.425(C)(2)(b). So characterized, the burial arrangement would not be a resource as to Mary (and thus to Kevin until his 18th birthday), assuming the policy permits such assignments (and we assume that most policies would). *Id*.[4]Also, since the right to have Kevin's funeral paid for when he dies (assuming he has a funeral) would have no discernable market value, Kevin's interest in the life insurance funded burial contract would not be a resource to him. *Cf*. SI 01130.420 (B)(2) ("If a burial contract cannot be . . . sold without significant hardship, it is not a resource.").

Using regular resource rules, the burial arrangement here could also be characterized (under state law) as a trust created by Mary (the settlor) since Mary assigned the life insurance policy to the Wright Funeral Home only insofar as the funeral home (acting as an intermediary) would then transfer the policy to the Forethought Trust where it would be held for the benefit of the Wright Funeral Home, or some other funeral home. *See* Restatement (Second) Trusts §24, cmt. b ("A trust may be created although the settlor does not use the word 'trust.") (1959).

However, even characterized as a trust, the burial arrangement would not be a resource to either Mary or Kevin. As to either individual, the trust would be a resource only if the "individual (claimant, recipient, or deemor) has legal authority to revoke the trust and then use the funds to meet his [or her] food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust . . . ." SI 01120.200(D)(1)(a). The trust would also be a resource to a trust beneficiary to the extent that the beneficiary's beneficial interest has some discernable market value. Here, the trust would not be revocable, even if Mary (settlor) and Kevin (beneficiary) were to consent to its revocation, since the Wright Funeral Home is also a beneficiary of the trust[5] and would presumably not consent to a revocation. *In Re Boright*, 377 N.W.2d 9 (Minn. 1985) ("we decline to depart from the accepted rule that unless all of the beneficiaries consent, the beneficiaries cannot compel termination of the trust except in accordance with its terms."). There is also no indication that either Mary or Kevin could direct the use of trust principal for his/her support or maintenance, since the sole purpose of the trust is to fund Kevin's funeral, if he has one. Finally, Mary has no beneficial interest in the trust, and, as discussed above, Kevin's interest would have no discernable market value. Accordingly, the burial arrangement, considered as trust, would not be a resource to either Mary (and thus to Kevin before his 18th birthday) or to Kevin.

CONCLUSION

For these reasons, we conclude that neither the life insurance policy nor the life insurance funded burial trust is a resource to either Mary or Kevin J~.

Leslie B~
Regional Chief Counsel

By: _____

Todd A. D~
Assistant Regional Counsel

B. PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~

DATE: September 16, 2002

1. SYLLABUS

This opinion addresses whether a personal effect (in this case, a piano) owned by an SSI recipient, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required by her physical condition under the household goods and personal effects exclusion. This is essentially an evidentiary issue; i.e., the key is whether the fact finder in

the FO has sufficient evidence to determine that the piano is required by the individual's physical condition. Under 20 CFR 416.1216(c), certain household goods and personal effects are excluded from SSI resource counting if they are "required because of a person's physical condition. "As long as there is sufficient evidence for the fact finder to determine that the piano (or similar item) is required as treatment or therapy for the individual's physical condition, then the item could be excluded as a resource. If the fact finder cannot determine that the piano (or similar item) is required, then the current market value of the piano (or similar item) is subject to the $2,000 maximum exclusion for household goods and personal effects [20 CFR 416.1216(a)-(b)]. It should be noted that the exclusions discussed above do not appear in the Social Security Act.

2. OPINION

You asked whether a piano, owned by SSI claimant Alicia W~, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required because of her physical condition. We conclude that, although there is no caselaw or other legal authority interpreting the applicable regulation, 20 C.F.R. § 416.1216(c), the Agency may consider the piano as an excludable resource, under 20 C.F.R. § 416.1216(c), provided Ms. W~ can show that playing the piano is required as treatment or therapy for her physical condition. If the Agency finds that the piano is not so required, further development and consideration may be warranted to determine the actual current market value of the piano.

FACTS

Alicia W~ owns a baby grand piano that the Wausau Field Office reported is worth $7000. It is not clear how the valuation of $7000 was reached. For purposes of this memorandum, we assume that $7000 is likely the amount Ms. W~ paid for the piano. Ruth J~, a benefit specialist with the Aging and Disability Resource Center of Marathon County, has advised SSA that Ms. W~ tried to sell her piano by advertising it in a local newspaper and with the Wausau Conservatory of Music and by contacting several local churches. Two individuals expressed interest, but Ms. W~ received no offers to buy the piano. We do not know what price Ms. W~ asked or whether anyone would be willing to purchase the piano for less than her asking price. Ms. J~ stated, in April 2002, that a local music store sold only one comparable piano in the preceding year. The price that the music store charged was not reported. Although Ms. J~ indicated that she was providing the field office with a statement from the music store, no such statement was included in the materials forwarded to us. Ms. J~ also reported that Ms. W~ uses the piano daily and that she is the only member of her household.

Ms. W~ has a congestive heart condition and hypertension. On December 12, 2001, her physician, Arthur W~, M.D., wrote a letter stating that playing piano provided Ms. W~ with positive health benefits in terms of stress relief, which resulted in positive benefits for her hypertension. Dr. W~ further stated that being forced to sell her piano in order to receive SSI "would have a deleterious effect on her overall health."

DISCUSSION

The Social Security Act (the Act) provides that certain resources are excludable resources for SSI purposes. 42 U.S.C. § 1382b. Among the resources that may be excluded are household goods and personal effects, but only to the extent that their total value does not exceed the $2000 limit set by the Commissioner. 42 U.S.C. § 1382b(2)(A); 20 C.F.R. § 416.1216(b). The regulations define "personal effects "to include musical instruments. Thus, a portion of the value of Ms. W~'s piano could be excluded as a personal effect, provided the total value of her other personal effects and household goods is less than $2000. However, it appears that Ms. W~'s piano may be worth considerably more than that. We must determine, therefore, whether her piano may be excludable for some other reason, or whether the value of her piano can be considered less than previously assumed.

Exclusion for Items Required for Person's Physical Condition

The exclusion for household goods and personal effects that are required because of a person's physical condition does not appear in the Act. *See* 42 U.S.C. §1382b. The exclusion became a part of SSI regulations effective October 20, 1975. 40 Fed. Reg. 48911, 48916 (October 20, 1975). Neither the preamble to the final regulation published on that date nor the preamble to the proposed regulation states the rationale for the exclusion or gives any further clarification as to its application. *See* 39 Fed. Reg. 2487 (January 22, 1974); 40 Fed. Reg. at 48911. Thus, we cannot ascertain from those publications whether the Agency intended for the exclusion to apply to items such as a piano that provide "positive health benefits" in terms of an individual's physical condition. The POMS, likewise, provides no guidance in this situation. *See* POMS SI 01130.430. We were unable to find any caselaw interpreting the regulatory provision or any OGC precedential opinion on the subject. Similarly, we found no

caselaw regarding other needs-based federal entitlement programs that might be helpful in interpreting 20 C.F.R. § 416.1216(c).

The Internal Revenue Code (IRC), however, includes a personal income tax deduction for medical care expenses. 26 U.S.C. § 213(a). The definition of "medical care "includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . ." 26 U.S.C. § 213(d)(1)(A). The Internal Revenue Service (IRS) addressed the issue of whether the cost of a piano could be deducted under the IRC medical care provision in two private letter opinions. In the first, parents bought a piano so that their child, who had polio, could strengthen her finger muscles and improve her posture. Priv. Ltr. Rul. 59-03205410A (March 20, 1959), 1959 WL 59702. The IRS determined that, if the use of the piano was prescribed by a physician to mitigate the effects of the child's illness, and if the child was the only one to use the piano, a portion of the cost could be deducted as a medical care expense. *Id.* The portion of the piano's cost that could be deducted was "the minimum cost of a piano of a quality sufficient for the therapeutic purposes "subject to the ceiling of 7.5% of adjusted gross income, as provided in 26 U.S.C. § 213(a). Priv. Ltr. Rul. 59-03205410A. Another private letter ruling states that, after suffering a nervous breakdown, a taxpayer's daughter "was induced by her doctors to resume piano lessons, in view of her particular aptitude in this area, as it was hoped that this would be good therapeutic treatment and would create a motivation toward recovery." Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. The taxpayer could not find a suitable used piano, so he bought a new piano for $800. The IRS held that the taxpayer could take a medical care deduction for "an amount which does not exceed the minimum cost of a piano of a quality sufficient to effect the prescribed therapy, "subject to the limitations in 26 U.S.C. § 213. Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. To the extent, however, that the expenditure was "elaborate," i.e., beyond the need for the prescribed medical therapy, it was not deductible because it was not directly related to medical care. *Id.*

The IRC provision relied upon in these two private letter rulings is not identical to the resource exclusion provision in the Social Security Regulations. The IRC section would apply to expenditures for treatment of a mental condition as well as a physical condition, but the Social Security regulation would allow exclusion of an item only if it is required because of the SSI claimant's physical condition. Compare 26 U.S.C. § 213(d)(1)(A), 20 C.F.R. § 416.1216(c). While the Social Security regulation allows for exclusion of a resource "required because of a person's physical condition,"20 C.F.R. § 416.1216(c) (emphasis added), the IRC provision, 26 U.S.C. § 213(d)(1), allows a tax deduction for "amounts paid" for treatment (emphasis added). Although the IRC section does not address whether an expenditure is medically required, the private letter rulings provide some support for the conclusion that, in some cases, piano playing may be prescribed as part of an individual's medical treatment.

There is nothing in the Social Security Act or Social Security Regulations to direct a CONCLUSION on this issue. We think it reasonable, however, to conclude, based on the private letter rulings, that there are situations in which a doctor may reasonably require a patient to play a piano as a necessary part of treatment or therapy for the patient's physical condition. Unlike the medical care deduction provision in the IRC, the SSI exclusion for items required for a person's physical condition does not place any limitation on the value of items which can be excluded, even though some of the items listed, such as an engagement ring or a dialysis machine, could have considerable monetary value. 20 C.F.R. § 416.1216(c); *see also* POMS SI 01130.430 ("Items Excluded Regardless of Value") (emphasis added).

The letter from Ms. W~'s physician states that it is important that she enjoy the benefits of her piano because it relieves her stress and, consequently, has a positive effect on her hypertension. The doctor further states that selling the piano to receive SSI benefits would be "deleterious" to her health. In the absence of evidence casting doubt on the doctor's credibility, we think this statement may be sufficient for a fact-finder to conclude that the piano is required for Ms. W~'s physical condition. You may want to obtain clarification from the doctor, however, that he considers playing the piano a required part of Ms. W~'s treatment or therapy for her hypertension or her congestive heart condition. You may also want to verify that the "deleterious" effect of selling the piano refers to her inability to receive the therapeutic benefit of playing the piano, rather than to other factors, such as a contemplated elevation of her blood pressure because selling the piano would upset her.

If you find that playing a piano is required for Ms. W~'s physical condition and she is the only person who will use the piano, the entire value of the piano should be considered an excludable resource. If, however, you find that playing piano is not required for Ms. W~'s physical condition, it will be necessary to determine the piano's value.

Determining the Current Market Value

If you determine that the piano is not an excludable resource under 20 C.F.R. § 416.1216(c), the current market value of the piano will be subject to the $2000 maximum exclusion for household goods and personal effects. 20 C.F.R. § 416.1216(a)-(b).

Contrary to Ms. J~'s contention, the fact that Ms. W~ was unable to sell her piano does not necessarily mean that the value of the piano is zero. The piano likely has some value, even if it is not the $7000 purchase price. It is possible that the value of the piano is zero, however, if, for example, a buyer's expense to move the piano from Ms.W~'s home to a new location exceeds the price that a buyer would ordinarily pay for the piano.

The information provided to us did not indicate what price Ms. W~ was asking for the piano when she advertised it. It may be that she was simply asking a higher price than the current market value and, therefore, did not get an offer. We suggest further development to ascertain the current market value of the piano. For example, did Ms. W~ get any offers to buy the piano and, if so, what amount was offered? Ms. J~ indicated that the local music store sold one comparable piano over the past year. What was the sale price? Are there other music stores in the area that carry comparable pianos? If so, what price do they charge? Has Ms. W~'s piano been appraised? How much would a pawn shop pay for the piano, given that it could be difficult to sell quickly?

We note that POMS SI 01150.200 contains a provision that, under certain circumstances, allows for conditional SSI benefits for a limited period while an individual attempts to sell a non-liquid resource. The individual must agree to sell the resource at the current market value within a specified period and use the proceeds to refund the overpayment of conditional benefits. POMS SI 01150.200B.1. The period of conditional benefits where personal property is concerned would generally end after three months, except that there could be one three-month extension granted for good cause. SI 01150.201A. The individual must make reasonable efforts to sell the resource, taking all necessary steps to sell the resource through the local media. SI 01150.201B.1. The information provided to us does not indicate whether Ms. W~ was eligible for, or received, conditional benefits under these POMS provisions.

We also note that, even if Ms. W~ purchased the piano for $7000, and if the Agency determines that the current market value of her piano is less than $7000, it does not necessarily mean that her purchase was a transfer for less than fair market value. *See* POMS SI 01150.005A. (transfers of resources for less than fair market value after December 14, 1999 may result in a period of SSI ineligibility). Nor does the fact that Ms. W~ may not be able to sell her piano for the same price she paid mean that she paid more than the fair market value. Fair market value is the current market value of a resource at the time the resource is transferred, i.e., the going price for which it could reasonably be expected to sell at the time, on the open market in the geographic area involved. POMS SI 01150.005. If Ms. W~ bought her piano on the open market, e.g., from a merchant, the $7000 purchase price is assumed to be the fair market value at the time of the transfer. POMS SI 01140.005C.4.a. It may be that the value of the piano has depreciated since its purchase, or simply that the going price for a comparable piano was $7000 at the time of the purchase but is less now due to economic conditions. A prospective buyer might be willing to pay more for a piano bought from a merchant whose reputation is known than he would pay in a private sale by a stranger. A merchant might also be in a position to charge more because he could offer a factory guarantee or a store guarantee that a private seller like Ms. W~ cannot offer. Finally, a merchant might be in a position to wait until a buyer came along who was willing to pay a higher price. Thus, the current market value of the piano, in Ms. W~'s hands, may be less than the amount she paid for the piano, even though the original purchase was not a transfer for less than fair market value.

CONCLUSION

In summary, we conclude that, if the Agency fact-finder concludes that Ms. W~ has shown that playing piano is required as part of her treatment or therapy for her physical condition, the piano's entire value may be excluded under 20 C.F.R. § 416.1216(c). If the fact-finder concludes that playing piano is not required for Ms. W~'s physical condition, the current market value of the piano should be considered a household good or personal effect subject to the $2000 maximum exclusion for all household goods and personal effects. However, the Agency may want to give further consideration to the current market value of the piano in Ms. W~'s hands.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By:_____
Nancy L. B~
Assistant Regional Counsel

Footnotes:

[1] The materials supplied to us included only the application and an August 2001 letter from the insurance company confirming purchase of the policy.

[2] Attached to the document is a Statement of Funeral Goods and Services Selected, which was signed by a representative of the Wright Funeral Home. The total value of the merchandise and services selected is $6,351.

[3] If the provisions of 42 U.S.C. § 1382b(e) were applicable, the burial arrangement here might be considered a trust resource to Kevin since, under the deeming rules noted above, Mary's assets are deemed to be Kevin's assets, and thus, arguably, the trust was funded with Kevin's assets. Kevin also received a benefit from the trust in that, upon his death, trust assets would be used to pay for his funeral expenses. Exclusion Memo at 4 n.1. Accordingly, if 42 U.S.C. § 1382b(e) were applicable, the corpus of the trust might be considered a resource to Kevin. *Id*. (referring to 42 U.S.C. § 1382b(e)(3)(B)).

[4] The burial arrangement-whether considered as a life insurance funded burial contract or, as discussed below, as a trust-clearly resulted in a transfer for less than fair market value as to Mary (who does not benefit at all under the arrangement), but would not result in a period of ineligibility under 42 U.S.C. § 1382b(c) because that section does not apply to transfers made by a deemor (here Mary) unless the deemor is a co-owner of the resource or is an ineligible spouse. SI 01150.110(E). The POMS explains that "[f]or example, the provision does not apply to a resource transfer made by a parent who is a deemor (unless the eligible child and parent are co-owners of the resource)."

[5] The Wright Funeral Home has a beneficial interest in the trust notwithstanding the possibility that this interest might be divested in favor of another funeral home. Restatement (Second) Trusts §129, cmt. e ("The interest of the beneficiary may be subject to being divested upon the happening of a condition subsequent.") (1959).

4.19 MISSOURI

A. PS 00-475 Determination of Ownership of Inherited Real Property When Such Property is Part of an Estate and is to be Held in Trust and the Heir/Beneficiary Seeks SSI Entitlement

DATE: August 20, 1999

1. SYLLABUS

Inherited property left in trust for an SSI claimant/recipient is not a resource if the claimant/recipient cannot revoke the trust or direct the use of trust assets, even during the period that the decedent's estate has not been closed.

2. OPINION

Background

You requested a legal opinion regarding whether Opal S~ ("claimant") had a resource in the form of 150 acres bequeathed to her by her father during the time the estate remained open. Your request was occasioned by an alert letter from the Internal Revenue Service (IRS). The estate has been open for over 18 years.

The claimant was bequeathed 150 acres by her father in his July 3, 1972, will. The will, in Item 2, states: "To Russell C. C~, in trust for my daughter, Opal M. S~, the following described land located in Sullivan County, Missouri. . . ." Monies were also bequeathed to the claimant to be held in trust by Mr. C~. (Item 6). Item 10 of the will states that the trustee, or any successor, shall have at any time the full power to sell, lease, assign, convey, exchange, improve, mortgage, or otherwise encumber all or any part or parts of the property constituting the trust estate. Item 12 denies the beneficiary of the trust any right to sell or otherwise transfer or convey any interest in the trust estate or the income derived therefrom.

The estate is represented by an attorney, N. William P~. Mr. P~ stated that the only person with the authority to sell the land was the trustee. While he once believed that the other heirs could sell the property in question and receive whatever proceeds were available upon the death of claimant, he has since taken the view that the will gives only the trustee such power of sale.

Regulatory Definitions

Generally, a resource, for SSI purposes, includes assets that an individual owns and could convert to cash to be used for his or her support. See 20 C.F.R. § 416.1201. If the individual has the right, authority, or power to liquidate the property (or his or her share of the property), it is a resource. See id. Similarly, income includes anything one receives in cash or in-kind that can be used to meet one's needs for food, clothing, or shelter. 20 C.F.R. § 416.1102. Payments for one's well-being from a trust count as unearned income in accordance with 20 C.F.R. § 416.1120.

Trust Issues

In the present case, claimant's rights as the beneficiary of the trust created by her father's will are defined by the will itself. Because the will, in Items 11 and 12, precludes claimant from any access to the trust's assets or from transferring any interest in the trust's assets, these assets cannot be counted as her resources. However, any money paid directly to claimant from the trust may be counted as unearned income in accordance with 20 C.F.R. § 416.1123.

B. PS 00-468 Determination of Irrevocability of a Nebraska Trust Kyle D. S~, SSN: ~

DATE: February 23, 2000

1. SYLLABUS

The issue concerns what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

Although the laws of Nebraska have not specifically addressed it, it appears that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable.

There does not appear to be any Kansas statute or case applying the grantor trust rule in Kansas. Generally, a trust is revocable when the grantor is the sole beneficiary.

Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary.

There does not appear to be any Iowa statute or case applying the grantor trust rule in Iowa. It appears Iowa would follow general trust law regarding revocability of a trust when the grantor is the trust's sole beneficiary.

Thus, in all Region VII States, the words "child," "children," "issue," "descedents," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next of kin," or "by intestate succession," in most cases it would justify a finding that a residual beneficiary was not created and a grantor trust is revocable.

2. OPINION

You have asked for our assistance in determining the irrevocability of a trust designated as the Kyle D. S~ Special Needs Trust, ~. You also asked us revisit the question of what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

I. TRUST PROVISIONS

The Kyle D. S~ Special Needs Trust (SNT) was funded with an insurance settlement in the amount of $26,129.20, the result of litigation involving personal injury suffered by Kyle. The Trust Agreement names the County Court of Buffalo County, Nebraska, as the grantor and Kyle's aunt, Catherine L. K~, as the trustee. The Trust Agreement, executed on August 13, 1999, and signed by the County Judge and by the Trustee, describes Kyle, born October 15, 1993, as the Beneficiary who is "a disabled person within the meaning of 42 U.S.C. § 1382c(a)(3)." Trust Agreement, Article 1.

The Trust Agreement specifies that the trust is irrevocable and that "the beneficiary, his guardians or conservator, shall have no right whatsoever to alter, revoke or terminate this Trust, in whole or in part." However, "[t]he Trust may be amended by the Court with notice to the State of Nebraska, Department of Health and Human Services Finance and Support, if amendment would benefit the disabled's [sic] beneficiary." Trust Agreement, Article 4. The Trust Agreement also provides that-

[t]his Trust is established pursuant to the 1993 Omnibus Reconciliation Act[,] 469 NAC 2.009.07A5B (4) and Neb. Rev. Stat. 68-1047. This trust is not for the support of Kyle D. S~. It is the intent of the Grantor to make provisions in this Trust Agreement to provide funds necessary to Kyle D. S~'s happiness over and above the essential, primary support and services otherwise available to him. This Trust is not to replace or make unnecessary any public or private assistance that Kyle D. S~ may now or in the future qualify to receive. It is the intent to provide resources for non-support purposes including comfort over and above the essentials provided by any state or federal government agency or program. The supplemental resources provided through this Trust may include, but shall not be limited to education, personal care needs, attendants, entertainment, and other goods and services not otherwise provided by public aid or private sources, but which are reasonable and necessary for the rehabilitation and special non-support needs of the Beneficiary.

Trust Agreement, Article 2. In addition, the Trust Agreement provides that-

[w]hile it is the intention that the Trustee have broad and effective powers to carry out the provisions of this Trust Agreement, no power conferred upon any Trustee by this article, shall be exercised in such a manner that it deprives the Trust of an otherwise available tax exemption, deduction, exclusion or credit, nor to deprive the Beneficiary of any public or private assistance as described above. This Trust is intended to qualify under 42 U.S.C. § 1396p(d)(4)(A) and the Trustee shall have no power which is inconsistent with such law and its regulations, and all provisions of this Trust shall be interpreted in a manner consistent with such law.

Trust Agreement, Article 2.

Concerning the Trustee's powers, the Trust Agreement provides that—

[t]he Trustee may distribute income or principal or both, . . . [and] in its sole and absolute discretion, shall apply and distribute such part, all or none of the net income and principal of the Trust estate in such amounts and proportions as the Trustee, in the Trustee's absolute discretion, deems necessary or appropriate for Kyle D. S~'s best interest, [but only after exhausting] all other resources available . . . from all sources other than his trust including, without limitation, payments, services and programs administered, provided or sponsored by any governmental (federal, state or other), private or institutional agency, authority or provider, any rule or regulation of such agency, authority or provider to the contrary notwithstanding.

Trust Agreement, Article 2. The Trust Agreement also includes a spendthrift clause intended to prohibits creditors from attaching the assets of a trust. Trust Agreement, Article 8.

The Trust Agreement provides that the trust terminates upon Kyle's death and "any remaining undistributed income or principal . . . shall be first paid to the State of Nebraska, and to any other state who has made payments under Title XIX" on Kyle's behalf. "In the event that either principal or income remain [after the State is reimbursed], it shall be paid over and distributed pursuant to the intestacy laws of the State of Nebraska." Trust Agreement, Article 11.

II. TRUSTS AS RESOURCES

Generally, if trust principal is available to the trust beneficiary, it will be considered a resource to him for purposes of determining his eligibility to SSI benefits. Regulations define resources for SSI eligibility as follows:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual[.]

20 C.F.R. § 416.1201(a)(1). Regulations further define resources as liquid or nonliquid. Liquid resources are resources in the form of-

cash or other property which can be converted to cash within 20 days . . . . Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources[.]

Id. at § 416.1201(b).

The Commissioner has further construed the meaning of "resource," by issuing interpretive guidelines in the Program Operation Manual System (POMS). With respect to trust instruments, the POMS provides that-

if an individual (claimant, recipient or deemor) has the legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

POMS SI 01120.200D.1.a (emphasis in original). However,

[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes.

POMS SI 01120.200D.2 (emphasis in original). The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or by State law. POMS SI 01120.200D.1.a and SI 01120.200D.2. "Most States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary." POMS SI 01120.200D.3 (emphasis in original).

A trust is generally irrevocable if the grantor fails to reserve the power to revoke or modify it. Restatement (Second) of Trusts §§ 330 and 331 (1957). Nevertheless, the general law of trusts recognizes an exception to this rule when the grantor is the sole beneficiary of the trust agreement. Where the grantor is the sole beneficiary of a trust, he may amend or terminate the trust, even without having reserved the power to do so. Id. at § 339.

Although the laws of Nebraska have not specifically addressed this issue, we believe that Nebraska would follow the general rule. While the Trust Agreement at issue here names the Court as Grantor, the consideration funding the trust belonged to Kyle. Thus, Kyle is the grantor and, if Kyle is the sole beneficiary of the trust, it is revocable notwithstanding the Trust Agreement language to the contrary. However, if the grantor is not the sole beneficiary, the trust would not be revocable.

The trust herein appears to be a "Medicaid Special Needs Trust," a trust created by means other than a will, and which includes a Medicaid payback provision upon termination of the trust or the death of the individual. SSA's policy is that the Medicaid trust "affects the individual's eligibility for Medicaid only, and has no effect on the SSI income and resource determinations." POMS SI 01120.200H.1.a (emphasis in original). In addition, the POMS provide that-

[a]ccording to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt. This law may or may not apply in your State . . . .

POMS SI 01120.200H.1.b. .

Our research indicates that the purpose of including the State reimbursement provision in the SNT is to qualify the beneficiary for medical assistance from the State. If the SNT meets the exception set out in 42 U.S.C. § 1396p(d)(4)(A) and State requirements, the State does not consider the trust to be a resource and the grantor/beneficiary is eligible for medical assistance. Where there is a pre-existing Medicaid lien, several courts have held that the State may require satisfaction of the lien before any third-party settlement can be put into a SNT. In Nebraska, a Medicaid grantor SNT is considered to be void and revocable by operation of law upon filing for or receiving State public assistance unless the SNT is ordered by a court of competent jurisdiction, for good cause shown. Neb. Rev. Stat. § 68-1047. Although no court order was included in the material received, we are assuming that this requirement was met.

You ask whether the words "pursuant to the intestacy laws of the State of Nebraska" created a residual beneficiary. The Restatement (Second) of Trusts provides that at common law there was a rule of the law of real property that the owner of land could not, by a conveyance inter vivos, create a remainder interest in his heirs. An attempt to do so created a reversionary interest in himself, rather than a remainder interest in his heirs. However, there is no longer any such rule of law. There is only a question of construction. Restatement (Second) of Trusts § 127 cmt. b (1957).

If the owner manifests an intention to create a contingent interest in remainder, legal or equitable, in the persons who on his death may become his heirs, he can do so. In the absence of evidence of a contrary intent, however, the inference is that he does not intend to create a remainder interest in his heirs. The Restatement (Second) provides that if the beneficial interest is limited to the grantor for life and on his or her death the property is to be conveyed to his or her "children, or issue, or descendants" then he or she is not the sole beneficiary of the trust and a remainder interest is created in his or her children, issue, or descendants. Id. at § 127 cmt. b. Where the owner of property, however, transfers it in trust to pay the income to

himself or herself for life and upon his or her death to pay the principal to "his heirs or next of kin," in the absence of a manifestation of a contrary intention, "the inference is that he is the sole beneficiary of the trust, and that he does not intend to create any interest in the persons who may become his or her 'heirs or next of kin.'" Id.

Likewise, the inference is that the grantor is the sole beneficiary where the income is to be paid to the grantor for life and upon his or her death the principal is to be paid "as he may by deed or will appoint, and in default of appointment to his heirs or next of kin." If he or she reserves power to appoint by will alone, and in default of appointment the property is to be conveyed to his or her heirs or next of kin, the Restatement (Second) indicates that this is some indication that the grantor intended to confer an interest on his or her heirs or next of kin of which they could be deprived only by a testamentary appointment, "but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to be the sole beneficiary of the trust." Id.

Restatement (Second) presents an example similar to the trust herein. The illustration provides: "A transfers property to B in trust to pay the income to A for life and on A's death to pay the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A is the sole beneficiary of the trust." Restatement (Second) § 127 cmt. b, illus. 2. In addition, the Nebraska Supreme Court has held that an inter vivos trust which purports to convey an interest in property only after the death of the grantor is testamentary in character and passes no present interest in the property. Such a purported conveyance was found to be void because it was in effect a will, and the statutory requirements for the execution of a will had not been met. Thus, it had no validity. Young et al. v. McCoy et al., 40 N.W.2d 540, 542 (Neb. 1950). The court stated that these words were expressly limited to take effect only after the death of the grantor; thus, they were necessarily revocable words. Id.

The primary objective of the Kyle S~ trust appears to be to provide for the grantor/life beneficiary, and not to preserve the trust principal for the grantor's heirs. Examination of the trust agreement does not reveal any manifestation of intent to convey a remainder interest to the grantor's heirs. For the reasons given above, if there is no named residual beneficiary, absent additional language manifesting a contrary intent, we believe you would be justified in finding that the words "distributed pursuant to the intestacy laws of the State of Nebraska" in a grantor trust make the trust revocable despite trust language to the contrary. However, we believe a residual beneficiary would be created by words that any remainder should go to a named beneficiary or to the individual's children, issue, or descendants. In Ellengrod v. Trombla, 95 N.W.2d 635, 638 (Neb. 1959), in interpreting a will devise and the Uniform Property Act, the court said that conveyance of property to a person and his "children," "issue," "descendants" and "words of similar import" create a life interest in the person and a remainder in the life beneficiary's descendants unless a contrary intent is manifested. If no children, issue, or descendants exist presently, the remainder is contingent. Id. at 640. In Wilkins v. Rowan, 185 N.W. 437, 438-39 (Neb. 1921), the court defined "issue," "lawful issue," or "issue of the body" to include children and lineal descendants of every degree in the absence of qualifying words showing a contrary intent.

III. REVIEW OF PRIOR ADVICE

As you requested, we have reviewed our prior advice concerning the revocability of grantor trusts in Region VII. On this issue, although the laws of Nebraska have not specifically addressed it, we believe that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable. Restatement (Second) of Trusts § 339 (1957). The grantor is the sole beneficiary of a trust if he or she does not "manifest an intention to give a beneficial interest to anyone else." If the grantor "manifests an intention to create a vested or contingent interest in others, as for example, his children, or the persons who may be his heirs or next of kin on his death, he is not the sole beneficiary unless such intended interests are invalid. . . ." Id. at § 339 cmt. b. Thus, the question is whether the language of a trust creates a valid remainder interest. If no valid remainder interest is created, the grantor is the sole beneficiary of the trust, the trust is revocable, and the trust principal is a resource (see DISCUSSION above).

We found no Kansas statute or case applying the grantor trust rule in Kansas. However, Kansas law does provide that all gifts and conveyances of goods and chattels (but not land) to a trust made for the use of the person making the trust are valid and effective except as to all past, present or future creditors and a nonconsenting wife's statutory rights. Newman v. George, 755 P.2d 18, 20 (Kan. 1988). A trust is irrevocable unless the power to amend or revoke is reserved in the trust agreement. Kan. Stat. Ann. § 58-2417 (1994). Where State law is silent, Kansas courts "have often turned to the guidance of the Restatement of Trusts[.]" In the Matter of the Estate of S~, 929 P.2d 153 (Kan. 1996). Accord Neeley v. Neeley, §§§ P.2d §§§, 2000 W.L. 45835 at *1 (Kan. App.). Although it was not dispositive in the case, in Daughters of the American Revolution of Kansas, Topeka Chapter v. Washburn College, 164 P.2d 128, 132 (Kan. 1945), the Kansas Supreme Court acknowledged the Restatement rule that a trust is revocable when the grantor is the sole beneficiary. The court did not indicate that the rule was improper or would

not be followed in Kansas. We believe Kansas would follow this rule in the appropriate case. Kansas law is consistent with the Restatement (Second) in holding that the primary consideration in the construction of trusts is the intention of the grantor as evidenced by an examination of the document. In the Matter of the Estate of Sam Saroff, 625 P.2d 458, 465 (Kan. 1981). In the case of In re Watts, 162 P.2d 82, 87 (Kan. 1945), in interpreting a will, the court made "unknown heirs" parties to the litigation. "'[T]he same rules that apply to [the] construction [of wills] apply to trusts and most other written documents." In the Matter of the Estate of S~, 929 P.2d at 158, quoting In re Estate of H~, 223 P.2d 707 (Kan. 1950).

In Missouri, rights to trust income and property are determined by the trust agreement. Hillyard v. Leonard, 391 S.W.2d 211 (Mo. 1965). Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary. Couch v. Director, Missouri State Division of Family Services, 795 S.W.2d 91, 94 (Mo. App. 1990); Pilgrim Evangelical v. Lutheran Church-Missouri Synod Foundation, 661 S.W.2d 833, 838 (Mo. App. 1983). The intention of the settlor is the key to the construction of a trust. Tidrow v. Director, Missouri State Division of Family Services, 688 S.W.2d 9 (Mo. App. 1985). The term "bodily heirs" is a technical term which should be accorded its technical meaning unless a contrary meaning clearly appears from the context of the will. Central Trust Bank v. Stout, 579 S.W.2d 825 (Mo. App. 1979). "Nearest blood kin" has no settled meaning but where the testator does not indicate otherwise, the definition in the Restatement of Property will be used. Graves v. Hyer, 626 S.W.2d 661 (Mo. App. 1981). It has been held in Missouri that where one transfers property inter vivos in trust to pay the income to himself for life and on his death it is to be conveyed to his "heirs or next of kin," that he is the sole beneficiary. Stephens v. Moore, 249 S.W. 601 (Mo. 1923).

We found no Iowa statute or case applying the grantor trust rule in Iowa. We believe that Iowa would follow general trust law regarding the revocability of a trust when the grantor is the trust's sole beneficiary. Iowa's probate code defines the word "issue," for purposes of intestate succession, as including "all lawful lineal descendants of a person, whether biological or adopted, except those who are the lineal descendants of the person's living descendants." I.C.A. § 633.3.24 (Supp. 1992). The Iowa Supreme Court has indicated that "heir" is given the popular meaning of issue, children, or descendants when language of the entire will and circumstances in which the will was executed indicated that intention. Cook v. Underwood, 228 N.W. 629 (Iowa 1930). The court subsequently stated that the word "heirs" is a flexible term to which the technical meaning of the word is frequently not applied. The meaning to be given to "heirs" is a question of the testator's intent. In re Austin's Estate, 20 N.W.2d 445 (Iowa 1945). The court also stated that the word "heirs" used by a testator does not have a fixed meaning and meaning must be determined from the instrument read as a whole and in light of all relevant facts and circumstances under which the instruments were executed. Schaefer v. Merchants Nat. Bank of Cedar Rapids, Iowa, 160 N.W.2d 318, 320-21 (Iowa 1968). In a will devising the remainder of a trust estate to an old folks' home if a son died without leaving heirs, the word "heirs" meant "descendants." In re Clifton's Estate, 218 N.W. 926 (Iowa 1928).

CONCLUSION

In summary, we believe that you would be justified in finding that, in all Region VII states, the words "child," "children," "issue," "descendants," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next-of-kin," or "by intestate succession, "we believe you would be justified, in most cases, in finding that a residual beneficiary was not created and a grantor trust is revocable. Accord G.C. Opinion, Accessibility of Discretionary Support Trust Fund as a Resource for Supplemental Security Income Purposes in Nebraska Where Grantor Is also the Sole Beneficiary, dated March 17, 1997. However, if considering the document as whole indicates that the grantor had a different intention, the words "heirs," "heirs-at-law," or "next-of-kin" may make the trust irrevocable. For example, you attached a previous legal opinion concerning the Felicia Ann Bribiesca trust. See G.C. Opinion, Determination of Irrevocability of a Grantor Trust, dated June 21, 1994. You asked whether the naming of heirs in general constituted naming another beneficiary making the trust irrevocable. We affirmed that it did. We cannot conclude, however, that our response was inconsistent with the advice herein. The Bribriesca trust reveals that it was the grantor's intention that any undistributed principal and income should be distributed to Felicia's "descendants who survive." Therefore, we believe the advice given was correct.

As illustrated by the cases cited above, words such as "heirs" do not have a precise meaning and are defined inconsistently by the courts. We are not able to provide a general rule that will apply to all trusts. If the grantor's intent is not clear from a trust document, we suggest you submit the trust document for review by this office.

C. PS 00-466 Request for Iowa, Kansas, Missouri, and Nebraska State Law on Grantor Trusts; SSI Resource Issue

DATE: June 16, 1999

1. SYLLABUS

The regional attorney was asked if a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the States of Missouri, Kansas, Iowa and Nebraska.

All four states are considered creditors and not beneficiaries. Even if a trust contains a State reimbursement provision, it would be revocable if the SSI recipient was the grantor and the sole beneficiary since the state is a creditor and not a beneficiary.

CAUTION: Because of a change in the Social Security Act, this opinion may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked whether in Missouri, Kansas, Nebraska, and Iowa, a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the state. We are of the opinion that in all four states, the state would be considered a creditor. None of the states specifically address a trust which contains a state reimbursement provision; however, all four states have statutes that address reimbursement of Medicaid benefits. As you are aware, each state also follows the rule that a trust is revocable if the grantor is the sole beneficiary. See GC Opinion: Request for Interpretation of State Trust Law, dated June 29, 1992. The following is a discussion of each state's Medicaid statute.

MISSOURI

In Missouri, the statute provides as follows:

Upon the death of a person, who had been a recipient of aid, assistance, care, services, or who has had moneys expended on his behalf by the Department of Health, Department of Social Services, or the Department of Mental Health, . . . the total amount paid to the decedent or expended on his behalf . . . shall be a debt due the state . . . .

Mo. Ann. Stat. § 473.398. The statute further provides that claims consisting of moneys paid on the behalf of a recipient as defined in 42 U.S.C. § 1396 (Medicaid) shall be allowed, except if the cost of collection will exceed the amount of the claim, or the collection of the claim will adversely affect the need of the surviving spouse or dependents of the decedent to reasonable care and support from the estate. Id.

SUMMARY

The laws of each state provide the circumstances under which the state may be reimbursed by a recipient or his estate for Medicaid payments. In all states, the law provides that monies expended for Medicaid payments which are recoverable are categorized as a debt due to the applicable department, or the department may file a claim against the estate of the recipient. Consequently, we believe the state is properly considered as a creditor and not a beneficiary of the trust. Because each state's statute provides for the right to reimbursement, we do not believe it is relevant whether or not a Medicaid Trust contains a state reimbursement provision. The inclusion of such a provision in a trust would not be of any consequence where the grantor is the sole beneficiary. In all four of the Region VII states, a trust would be revocable, and thus available as a resource for SSI purposes, where the grantor is the sole beneficiary, even if the trust contained a state reimbursement provision.

D. PS 00-383 Illinois Trust for Lorraine S~

DATE: July 17, 1997

1. SYLLABUS

Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support without judicial modification of the support decree. Therefore, payments made by one parent to a trust in lieu of court ordered support payments are considered the child's income, available for the child's support and maintenance.

Caution: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You requested a legal opinion regarding a document creating a discretionary supplemental trust with SSI recipient Lorraine S~ (Lorraine) as beneficiary. You inquired whether Lorraine has unrestricted access to the trust principal for her support and maintenance, i.e., whether the trust principal is a resource for SSI purposes. You also inquired as to the validity of the Statement of Intent by which Lorraine's father agreed that support payments would be paid into the trust.

We conclude that the Statement of Intent, which sought to modify the court order of support, would be held invalid under applicable state law, and that the trust assets should be considered Lorraine's income or resources for SSI purposes, at least to the extent that the assets were derived from payments made pursuant to the Statement of Intent or from other property which had been owned by Lorraine or by her guardian on Lorraine's behalf.

Background

Pertinent Documents Other than the Declaration of Trust

Lorraine, currently twenty-one years old, is the disabled daughter of Deborah S~ (Deborah) and David S~ (David). Deborah and David were divorced in Missouri in 1995. The Judgment/Decree of Dissolution (divorce decree), entered on November 1, 1995, states that there were two children of the marriage: Lorraine, born March 15, 1976, and Lynne, born October 4, 1978. Divorce Decree at 2. The divorce decree awards child support "for the parties' minor children" in the amount of $566 per month per child to be paid by David to Deborah. It further states, "The Court hereby finds that the child LORRAINE is incapacitated and in need of parental support past the age of emancipation." Divorce Decree at 3. It incorporates all terms of a Marital Settlement Agreement (settlement agreement). Divorce Decree at 2. It also permits Deborah to remove the residency of the children to Illinois. Divorce Decree at 4.

The notarized settlement agreement, signed by David on August 15, 1995, in Missouri, and by Deborah on October 25, 1995, in Illinois, requires David to pay to Deborah $566 per month, per child "for the parties' children as and for child support for the care, support and education of the parties' minor children." Settlement agreement at 6. It further states: The parties agree and stipulate that the child LORRAINE S~ is incapacitated and is in need of parental support past the age of emancipation, and said support shall continue until her death, the death of the Respondent, or further Order of the Court. Settlement agreement at 6. Paragraph 15 provides that no modification or waiver of any of the terms will be valid unless it is made in writing and executed with the same formality as the settlement agreement. Settlement Agreement at 10.

On October 24, 1995, one day before the settlement agreement was finally executed, David signed a notarized Statement of Intent agreeing to contribute monthly to a trust to be created for Lorraine's benefit, in lieu of the court ordered child support payments.

On January 26, 1996, the Circuit Court of Kane County, Illinois appointed Deborah as Lorraine's guardian.

Declaration of Trust

On January 30, 1996, Deborah executed, in Illinois, a declaration of trust (declaration), as "Settlor and Trustee," creating the "Lorraine S~ Discretionary Supplemental Trust." The declaration recites that Deborah transferred $10.00 to the trustee which, along with any additional property received from her or any other person and all investments and reinvestments, was to constitute the trust estate. Declaration at 1.

The declaration makes clear that Deborah's intent as settlor is to provide supplemental support beyond any support which can be provided by any governmental, public, or private agency. To this end, it states that no part of the trust is to be considered owned by Lorraine, that Lorraine has no vested right or interest in the income or principal, and that no property, goods or services purchased or owned by the trust for Lorraine's use is to be considered as under Lorraine's control. 1. The declaration prohibits any expenditure for "basic food, clothing and shelter" or making any trust income or principal available to Lorraine for conversion into such items, unless all governmental and private agency benefits for which Lorraine may be eligible because of her disability have been fully exhausted. 3, § 4. The declaration also prohibits any direct payment to Lorraine and prohibits the trustee from making any distribution for Lorraine's support if such support is otherwise available through a governmental agency. 1,3.

Within this framework, the Trustee has sole discretion to distribute principal or income for Lorraine's exclusive benefit to provide for her supplemental support and maintenance, but only to the extent that such items are not otherwise available through any governmental entity or private agency. 2; 3, §§ 5-9. The declaration also contains spendthrift provisions, protecting the trust estate from the creditors' claims and prohibiting assignment of a beneficiary's interest. 3, § 3; 5, § 2.

Deborah is Trustee. If her acting as Trustee in any way jeopardizes Lorraine's entitlement to government benefits or subjects the trust to claims of reimbursement by any private or governmental body, successor trustees are named. 5.

Deborah, as settlor, has reserved the right to amend the trust "in whole or in part for whatever reason" and has given the Trustee the right to amend or reform the trust provisions the Trustee deems it necessary, due to changes in law, in order to preserve the stated intent of the trust. 3, § 10. In the event of a court determination that reimbursement is required or disqualification from, or reduction, in governmental benefits, the declaration directs the Trustee to amend or reform the trust to effect the Settlor's purpose and, if that cannot be done, to terminate the trust and distribute the trust principal and income to Deborah, "not in any fiduciary capacity, but as [Deborah's] sole and exclusive property without any preconditions or requirements on the use or application of those funds." 3, § 11. If Deborah is deceased at the termination of the trust, distribution is to be made to Lorraine's guardians, also as their sole and exclusive property and not in any fiduciary capacity, or, if no guardian to the Trustees as their sole and exclusive property and not in any fiduciary capacity. Id. If the trust is still in existence at Lorraine's death, the trust estate is to be distributed to Deborah or to her heirs, per stirpes. 4.

DISCUSSION

Resources, for SSI purposes, include assets that a person owns and can convert to cash to be used for the person's support and maintenance. See 20 C.F.R. § 416.1201(a). If the person has the right or power to liquidate property, or her share of the property, it is a resource. Id. Trust assets are considered an SSI recipient's resource if the SSI recipient has the power to revoke the trust and use the trust assets to meet his needs for food, clothing, or shelter, or if he can direct use of the trust assets for such purposes. See POMS SI 01120.200(D)(1)(a). Whether the person can revoke the trust or direct use of the trust assets depends on the terms of the declaration of trust and on applicable State law. POMS SI 01120.200(D)(2).

We deal first with the additions to the trust made pursuant to the Statement of Intent signed by Lorraine's father, David. If the support payments had been made by Lorraine's father to Deborah in compliance with the settlement agreement that the Missouri court incorporated into the divorce decree, the payments would have been considered Lorraine's income for SSI purposes. See 20 C.F.R. 416.1121(b). The Statement of Intent seeks to modify the court's support order in two ways. First, instead of making support payments directly to Deborah for Lorraine's benefit, in accordance with divorce decree, the Statement of Intent contemplates payment of the same amount to Deborah as Trustee of the discretionary trust. Second, the divorce decree required that the payments be used for Lorraine's "support." As Lorraine's guardian, Deborah has a duty to use the funds for Lorraine's support. Under the terms of the discretionary trust, however, Deborah could use the funds for supplemental costs, but she would be precluded from making disbursements for basic food, clothing and shelter, and she would have no obligation to make any disbursements at all.

The question is whether Lorraine's parents can enter into an agreement which affects Lorraine's rights and effectively modifies the order of the Missouri court. The duty of support which is applicable is that of the law of the state where the obligor is present, in this case the father's domiciliary state of Missouri. See 750 ILCS 20/7. Illinois law also recognizes a child support order issued in another state, if it is the only such order. 750 ILCS 22/207. In addition, a post-majority child support obligation entered into pursuant to a divorce settlement agreement will be recognized by Illinois courts. See In re Marriage of Leming, 590 N.E.2d 1027, 1028 (Ill. App. 1992). Thus, the support order encompassed by the Missouri court's divorce decree is controlling and would be recognized by an Illinois court.

Under Missouri law, a party cannot, by contract or agreement, alter his obligation to pay future child support. Because child support payments are for the benefit of the child, the parties cannot settle or compromise future payments without judicial modification of the support decree. Only a court has the power to alter future child support payments. Mora v. Mora, 861 S.W.2d 226, 227 (Mo. App. 1993); see also, Boland v. State of Missouri, Dept. of Social Services, 910 S.W.2d 754, 758 (Mo. App. 1995), McLaughlin v. Horrocks, 883 S.W.2d 95, 97 (Mo. App. 1994).

Illinois case law is in accord. See Blisset v. Blisset, 526 N.E.2d 125, 127 (Ill. 1988) (parents may modify an agreement for child support only by petitioning the court for modification); Miller v. Miller, 516 N.E.2d 837 (Ill. App. 1987)(mother could not consent to modification of settlement, incorporated into divorce decree, which provided that father would pay college expenses for child, even after age 18).

Although David signed the Statement of Intent prior to the date of the divorce decree, in the divorce decree the court refers only to the settlement agreement. There is no indication that the court was aware at that time, or was subsequently informed, of the Statement of Intent or the plans to create a discretionary trust. Since payment of the support into the discretionary trust amounts to a modification of the court's support order, we conclude that such modification would not be valid without court approval. Therefore, the payments made by David to the trust in lieu of the court ordered support payments should be considered Lorraine's income, available for her support and maintenance, the purpose apparently intended by the Missouri court's divorce decree.

Even if the Statement of Intent were found to be valid, we believe that the portion of the trust assets derived from the payments made pursuant to the Statement of Intent should, nevertheless, be treated as Lorraine's income for SSI purposes. We also think it reasonable to conclude, in the absence of any indication that the rest of the trust assets were derived from property belonging to someone other Lorraine, that all of the trust assets should be considered Lorraine's resource. This is especially true since the Declaration of Trust suggests that Deborah, as settlor, contributed only $10.00 to the trust.

Under Illinois law, a discretionary trust for the benefit of a disabled person is not liable to pay or reimburse the State or any public agency for financial aid or services to the disabled person, except to the extent that the trust was created by the disabled person or the trust assets are distributed to, or under the control of, the disabled person. 760 ILCS 5/15.1 (1996 Supp.). Although the exception is not applicable where the trust complies with federal Medicaid reimbursement requirements, id., the declaration in this case, while referring to the applicable Illinois statute, see 1, does not provide for Medicaid reimbursement. See POMS SI 01730.048.

Under the terms of the declaration of trust, Lorraine does not, herself, have any right to revoke the trust or direct use of the trust assets for her support. Nor is Lorraine named as the person who created the trust (settlor). However, Lorraine's mother and guardian, Deborah, has virtually total control over use of the trust assets. As settlor, Deborah retained the right to amend the trust, in whole or in part, for any reason, which amounts to the power to revoke. See Bogert, Trusts 516 (6th ed. 1987)(under a power to amend, an irrevocable trust may be made revocable).

Deborah is also Lorraine's guardian. Where a guardian holds legal title, on behalf of a sole beneficiary of a trust, to assets which are subsequently transferred into a trust, the trust beneficiary is, in effect, the settlor of the trust. See In re Estate of Hickey, 635 N.E.2d 853, 855 (Ill. App. 1994), cert. denied, 642 N.E.2d 1281 (one who furnishes consideration is the settlor of the trust). Therefore, if Lorraine is the sole beneficiary of the trust, she is the settlor, at least with regard to whatever portion of the trust res was derived from assets which were hers or which her guardian held for her benefit. As we discuss below, contributions of the support payments to the trust should be considered contributions from Lorraine.

In this case, it is not clear from the documents submitted whether Deborah created the trust in her own right or in her capacity as Lorraine's guardian; nor is it clear what portion of the trust assets were derived from property which had been owned by Lorraine or which Deborah held on Lorraine's behalf. The declaration does not indicate whether even the $10.00 that initially funded the trust was Deborah's money or Lorraine's money. Nor is there any information about additions to the trust other than the payments made by David pursuant to the Statement of Intent. If Deborah created the trust as Lorraine's guardian, or if all of the assets of the trust derived from property previously held by Lorraine or by Deborah on Lorraine's behalf as guardian, then Lorraine is the true settlor of the trust and can revoke the entire trust, or amend it to allow access for her support and maintenance. Thus, all of the trust assets would be her resources for SSI purposes.

Under the agreement between Lorraine's parents, Deborah receives the "support" payments as trustee for Lorraine. Nevertheless, those support payments are, in effect, Lorraine's income. Thus, as to the portion of the trust res traceable to those "support" payments, Lorraine is actually the settlor of the trust. Through her guardian, she has the power to revoke the trust by virtue of Deborah's retention of the unconditional power to amend the trust. If she is the sole beneficiary of the trust, Lorraine also has the power to revoke any portion of the trust for which she can be considered the settlor. See Stewart v. Merchants National Bank of Aurora, 278 N.E.2d 10, 12 (Ill. App. 1972) (trust settlor who is also the sole beneficiary can revoke the trust without the trustee's consent, even though no power of revocation was reserved when the trust was created). Thus, the portion of the trust which is derived from the "support" payments should be considered Lorraine's resource for SSI purposes.

That the declaration calls for disbursement, upon termination of the trust, to Deborah in her own right, rather than on Lorraine's behalf does not change the result. Since Deborah retained the unconditional right to amend the trust, including the right to amend the provisions for disbursement upon termination of the trust, no intent to create a remainder interest in someone other than Lorraine can be implied. Thus, Lorraine is the sole beneficiary of the trust and has the power to revoke the

portion of the trust as to which she is the settlor. Furthermore, as Lorraine's guardian, Deborah would have a fiduciary duty to use that portion of the trust assets which derived from Lorraine's assets not for her own benefit, but for Lorraine's benefit. To receive the assets of the trust in her own right would be a violation of Deborah's fiduciary duty as Lorraine's guardian.

While the declaration recites that Deborah paid $10.00 into the trust at its creation, there is no clear indication whose funds were used to create the trust, nor is there any indication as to whether there were any subsequent additions to the trust res. We think it unlikely that Deborah, who would have to provide an accounting as guardian, would combine Lorraine's property with another person's property in forming the trust res. Deborah is receiving additions to the trust from David in lieu of the court ordered support payments, additions which are actually Lorraine's property. This implies that the trust was created by Deborah as Lorraine's guardian with Lorraine's assets and that Lorraine is, therefore, the true settlor. As settlor, Lorraine would have the power, through her guardian, to revoke the trust or to compel payments from the trust for her support and maintenance. We conclude that, unless Deborah can show that she did not create the trust in her capacity as guardian and that certain trust assets were derived from sources other than Lorraine's property, all of the assets of the trust should be considered Lorraine's resources for SSI purposes.

A. PS 00-461 Eula K~ Warranty Deed; Quitclaim of a Life Estate in Missouri

DATE: March 2, 1999

1. SYLLABUS

This opinion answers the question whether an individual can legally quit claim a life estate interest in a tract of land. The opinion states that Missouri law permits an individual to lease, mortgage, or sell his or her life estate interest to a third party. The opinion further states that, under Missouri law, a quit claim deed is an appropriate vehicle for transferring a life estate. Thus, if the individual quit claims a life estate to a third party, it would not be a resource for SSI purposes.

2. OPINION

The Lebanon, Missouri Field Office has asked for legal advice on whether Ms. Eula K~ can legally convey to her children, Ellis K~ and Louise A~, her life estate interest through a quitclaim deed.

Background

According to the documentation submitted to our office, on September 4, 1964, by General Warranty Deed, Eula K~ conveyed to Ellis K~ and Louise A~, their heirs and assigns, a tract of land located in Laclede County, Missouri, reserving a life interest in herself. An unsigned Quitclaim Deed, which has been prepared for Eula K~'s signature, purports to convey to Ellis K~ and Louise A~ the life estate which Ms. K~ reserved to herself in the September 4, 1964 deed.

DISCUSSION

A life estate is an estate which is not terminable at any fixed or computable period of time and has its duration measured by the life or lives of one or more persons. Cornelius J. M~, Introduction to the Law of Real Property § 9 Life Estates at 43 (2nd ed. 1988). A life tenant possesses only the right to the beneficial use and income from the land. *Miller v. Bowen Coal & Mining Co.,* 40 S.W.2d 485, 489 (K.C. Ct. App. 1931); see *Beauchamp v. Beauchamp*, 381 S.W.2d 804, 806 (Mo. 1964). A life estate has the quality of alienability and the life tenant can convey his or her estate to a third person, mortgage it, lease it, or sell it for a term of years no greater than the duration of the life estate. Cornelius J. M~, Introduction to the Law of Real Property § 12 Characteristics of a Life Estate at 53 (2nd ed. 1988); see *Root v. Mackey*, 486 S.W.2d 449, 452 (Mo. 1972) (citations omitted); *Beauchamp v. Beauchamp*, 381 S.W.2d 804, 806 (Mo. 1964) (citations omitted); *Miller v. Bowen Coal & Mining Co.*, 40 S.W.2d 485, 489 (K.C. Ct. App. 1931) (citations omitted).

Based on the foregoing, Ms. K~ can legally convey her life estate interest to a third party.

Whether Ms. K~ can convey her life estate by way of a quitclaim deed can only be answered by defining the characteristics of a quitclaim deed. A quitclaim deed is a deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title. Black's Law Dictionary 651 (abr. 5th ed. 1983). Under Missouri law, a quitclaim deed passes the whole of a grantor's interest in the property. *Jamieson v. Jamieson*, 912 S.W.2d 602, 605 (Mo. Ct. App. 1995); see Mo. Ann. Stat. §442.460 (1986). For purposes of transferring title, a quitclaim deed is as effective as any other deed. *Id.* at 605-06 (citing *Humphrey v. Sisk*, 890 S.W.2d18 (Mo. Ct. App. 1994)).

Because a life estate can be conveyed to a third person, and because a quitclaim deed is as effective as any other deed, it is our opinion that Ms. K~ can legally quitclaim her life estate interest to Ellis K~ and Louise A~. Accordingly, such interest would not be available as a resource to Eula K~ for SSI purposes.

20 C.F.R. §416.1201(a).

B. PS 00-460 J.P. J~ Warranty Deed; Missouri Life Estate as a Resource for SSI Purposes

DATE: March 2, 1999

1. SYLLABUS

This opinion discusses whether conveyance of a tract of land in Missouri created a life estate interest or a remainder interest for the individual who conveyed the land and whether his interest is a resource for SSI purposes. The individual conveyed land to 3 persons as joint tenants in fee simple, and retained a life estate interest for himself. The individual who conveyed the land is not a joint tenant with the other persons. He has a life estate interest only, and does not have a remainder interest. He has a right to use the property and convey his life estate interest to a third party, but he does not have the right to dispose of the property itself. If he uses this property as his home, his life estate interest would not be counted as a resource because the individual's home is excludable. If he does not use this property as his home, the life estate can be considered a resource.

2. OPINION

You have asked for legal advice on issues regarding a Warranty Deed executed on December 6, 1983 by J.P. J~. Specifically you have asked: 1) Does Mr. J~ retain ownership as a joint tenant, along with the other individuals identified in the Warranty Deed?; 2) Does Mr. J~ have a life estate (or remainder) to the property without ownership rights?; 3) Are Virginia M~, Jerry J~, and Zebedee J~ the owners of the property, remaindermen, or both owners and remaindermen?; and 4) Does J.P. J~ retain ownership rights to the property while having a life remainder?

Background

In a Warranty Deed executed on December 6, 1983, J.P. J~ conveyed a tract of land located in New Madrid County, Missouri to himself for life with the remainder in fee simple to go to Virginia M~, Jerry J~ and Zebedee J~, as joint tenants and not as tenants in common.

DISCUSSION

1. With respect to your first question, we conclude that Mr. J~ is not a joint tenant with the other named individuals. As noted above, Mr. J~ conveyed to himself a life estate, and to the other named individuals a fee simple estate. A life estate is an estate which is not terminable at any fixed or computable period of time and has its duration measured by the life or lives of one or more persons. Cornelius J. M~, Introduction to the Law of Real Property § 9 Life Estates at 43 (2nd ed. 1988). On the other hand, a fee simple estate is the largest estate known to the law: it denotes the maximum legal ownership, the greatest aggregate of rights, powers, privileges and immunities which a person may have in land. *Id.* § 2 The Fee at 26. It is an estate of general inheritance and it is of potentially infinite duration. *Id.* §3 Modern Law-Creation and Characteristics of a Fee Simple at 31. In order to have a joint tenancy, the following four essential elements must exist: 1) the joint tenants must have one and the same interest (unity of interest); 2) the interests must accrue by one and the same conveyance (unity of title); 3) the interests must commence at one and the same time; and 4) the property must be held by one and the same undivided

possession (unity of possession). In the Matter of *Mattie L. Robinson v. Western Surety Company*, 791 S.W.2d 844, 848 (Mo. Ct. App. 1990). Because the interest in a life estate is by definition, less than the interest in a fee simple estate, it naturally follows that Mr. J~ is not a joint tenant with Virginia M~, Jerry J~, and Zebedee J~, all of whom received an undivided fee simple interest. As such, no further discussion is needed on this issue.

2. With respect to your second question, as noted above, Mr. J~ has a life estate instead of a remainder interest. However, in order to answer your question with respect to Mr. J~ ownership rights, we must examine the characteristics of a life estate. As previously noted, a life estate is an estate which is not terminable at any fixed or computable period of time and has its duration measured by the life or lives of one or more persons. Cornelius J. M~, Introduction to the Law of Real Property § 9 Life Estates (2nd ed. 1988). As between a life tenant and a remainderman, the life tenant alone enjoys the right to possession and enjoyment (to the exclusion of the remainderman). *Mathis, et al. v. Melton*, et al., 238 S.W. 806, 808 (Mo. 1922); Bryan M. D~, Planning with Life Estates 6 Probate and Property 38 (July/Aug. 1992). A life tenant possesses only the right to the beneficial use and income from the land. *Miller v. Bowen Coal & Mining Co.,* 40 S.W.2d 485, 489 (K.C. Ct. App. 1931); see *Beauchamp v. Beauchamp*, 381 S.W.2d 804, 806 (Mo. 1964). A life estate has the quality of alienability and the life tenant can convey his or her estate to a third person, mortgage it, lease it, or sell it for a term of years no greater than the duration of the life estate. Cornelius J. M~, Introduction to the Law of Real Property § 12 Characteristics of a Life Estate at 53 (2nd ed. 1988); see *Root v. Mackey*, 486 S.W.2d 452 (Mo. 1972) (citations omitted); *Beauchamp v. Beauchamp*, 381 S.W.2d 804, 806 (Mo. 1964) (citations omitted); *Miller v. Bowen Coal & Mining Co.,* 40 S.W.2d 485, 489 (K.C. Ct. App. 1931) (citations omitted).

Nevertheless, the life tenant has a legal duty to preserve the corpus of the estate for the remainderman in the condition in which he or she received it. *Muzzy v. Muzzy*, 261 S.W.2d 927, 931 (Mo. 1953). According to the foregoing, Mr. J~ has an interest in the property which includes the right to convey his interest to a third party, but he does not have ownership rights which permit him to dispose of the property itself.

3. In response to question number three, Virginia M~, Jerry J~, and Zebedee J~ are both owners and remaindermen. "'A gift or grant of a life estate with remainder to a named person on the death of the life tenant creates a vested remainder on the death of the testator.'" *Harlow v. Benning,* et al., 207 S.W.2d 471, 473 (Mo. 1948) (citing 33 Am. Jur., Sec. 115, p. 573; Annotation 128 A.L.R. 306). "Or to put it another way, a remainder is vested when it is limited to an ascertained person or persons with no further or other conditions imposed upon the taking effect in possession than the determination of the precedent life estate."

Id. (citing *Norman v. Horton,* 126 S.W.2d 187 (Mo. 1939)). It is characteristic of a vested remainder that the legal title comes to reside at once in an identifiable person or persons, although his or their possession may be postponed until termination of the preceding estate. *Graves v. Hyer*, 626 S.W.2d 661, 664 (Mo. Ct. App. 1981). Because the deed limited the remainder to Virginia M~, Jerry J~, and Zebedee J~, all of whom were ascertainable individuals at the time of the grant, they have a vested remainder. Consequently, the remaindermen, and not Mr. J~, are the owners of the property in issue because title to the property vested in them at once even though they are not entitled to possession until the death of J.P. J~.

4. With respect to question number four, Mr. J~ does not have a "life remainder." No such an interest exists. As pointed out above, Mr. J~ merely received a life estate in the property in question and the other three named individuals received a remainder interest in fee simple. The confusion comes because the person drafting the deed left out a comma. The Deed should read as follows: ". . . J.P. J~ for life, remainder in fee simple to Virginia M~, Jerry J~ and Zebedee J~."

In response to your ultimate question of whether Mr. J~ life estate can be considered a resource for purposes of SSI, we are of the opinion that if he uses the property as his home, his life estate interest cannot be counted as a resource. In determining the resources of an individual, the home is excluded. 20 C.F.R. § 416.1210 (a). However, assuming that Mr. J~ does not use the property in question as his home, his life estate interest can be considered as a resource. 20 C.F.R. § 416.1201(a).

4.20 MONTANA

A. PS 08-073 Revocability of M.C. Supplemental Trust

DATE: February 28, 2008

1. SYLLABUS

This decision describes a trust that meets all of the requirements for a Special Needs Trust except for the fact that it is not irrevocable because the claimant is the sole beneficiary of this self-settled trust. Notwithstanding the language of the Trust that proclaims that it is irrevocable, under Montana law this beneficiary has the power to dissolve the trust at will..

2. OPINION

Questions Presented

You have asked for an opinion on whether the Trust created for Michael C~ (M.C.) is irrevocable under Montana law, and whether the Trust is exempted from resources for SSI purposes under 42 U.S.C. § 1396p(d)(4)(A), 1917(d)(4)(A) of the Social Security Act (the Act).

Short Answer

The Trust meets the special needs exception under 42 U.S.C. § 1396p(d)(4)(A). However, the Trust is revocable under Montana law, which permits the Trust to be modified or terminated, if the Trustor and all the beneficiaries consent. Here, we believe M.C. is the sole beneficiary, as well as the grantor. Thus, the Trust is a settlor trust, and M.C. is capable of unilaterally revoking the Trust, notwithstanding any contrary Trust language. As such, the Trust's assets are a resource to M.C. Assistant Regional Commissioner, Management and Operations Support 2

Facts

On October 7, 2002, M.C.'s -/1 other created a Supplemental Needs Trust (Trust) in the state of Montana for the purpose of facilitating and managing disposition of his estate, which consisted of $34,601.80, representing an inheritance.

The purpose of the Trust is to improve the quality of life for M.C., to protect M.C., and to provide a fund to supplement, but not supplant, public benefits that may be available to M.C. *See* Article I § 1.2. The initial contributions are to consist of M.C.'s assets. *See* Article III. During M.C.'s lifetime, the Trustee can pay to, or provide for the benefit of M.C., portions of the Trust income as the Trustee may consider advisable for the needs and well-being of M.C., and which will not cause him to be ineligible for governmental financial assistance, in the event M.C. is receiving such governmental benefits. *See* Article IV § 4.2(a).

If the Trust terminates by reason of the death of M.C., then the remaining property in the Trust estate shall be distributed by the Trustee in such amount(s) from the principal or income of the Trust asset to any state Medicaid agency which provided medical assistance benefits to or on behalf of M.C. during his lifetime. In the event that M.C. had resided in one or more states from which he received Medicaid benefits, and the trust principal and income remaining at the time of M.C.'s death were not sufficient to reimburse each state in full for all medical assistance benefits paid to or on behalf of M.C., the distribution of amounts payable shall be based upon the proportionate share of each state of the total amount of Medicaid benefits paid by all states on M.C.'s behalf. *See* Article IV § 4.4(a). After a distribution of the trust assets (if any) pursuant to section 4.4(a), the Trustee shall distribute such amounts from the remaining principal Trust assets to the estate of the deceased beneficiary. *See* Article IV § 4.4(b).

The Trust document states that it shall be irrevocable, and that the Trustee hereby expressly acknowledges that no person shall have the right or power to alter, amend, revoke, or terminate this Trust, in whole or in part (except as provided in the Trust). *See* Article II. The Trust does not provide for the express termination, revocation, or modification by any person. Furthermore, M.C. is prohibited from any right to receive, demand, secure, give, assign, transfer, mortgage, borrow against, or otherwise affect all or any part of the principal or income of the Trust estate. *See* Article IV § 4.2(c).

Applicable State Law

Under Montana law, a trust is presumed revocable, unless it is expressly made irrevocable by the terms of the trust instrument. *See* Mont. Code. Ann. § 72-33-401.

If the trustor and the beneficiaries consent, the trust can be terminated, or if all the beneficiaries consent, they may compel the modification or termination of the trust. *See id.* §§ 72-33-406(1), 407(1).

If the trustor is a beneficiary of a trust created by the trustor and the trustor's interest is subject to a provision restraining the voluntary or involuntary transfer of the trustor's interest, the restraint is invalid against transferees or creditors of the trustor. The invalidity of the restraint on transfer does not affect the validity of the trust. *See id.* § 72-33-305.

Applicable Federal Law

If payments from the trust could be made to or for the benefit of the individual or the individual's spouse, that portion of the trust from which a payment could be made that is attributable to the individual is a resource, *see* 42 U. S.C. § 1396p(d)(4), unless an exception applies. If a trust qualifies as a special needs trust, it will not be counted as a resource. *See id.* § 1396p(d)(4)(A). In order to qualify as a special needs trust, three requirements must be met: (1) the trust must contain the assets of an individual under age 65 who is disabled; (2) the trust must be established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court; and (3) the trust must provide for a Medicaid reimbursement provision, that upon the death of such individual, the state will receive up to an amount equal to the total amount of medical assistance paid on behalf of the individual under that state's Medicaid plan. *See id.*

Legal Analysis

Generally, a trust established with the assets of the individual is considered a resource for SSI purposes, unless the trust meets one of the exceptions under 42 U.S.C. § 1396p(d)(4). *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201, SI 01120.203 [2]. For the special needs trust exception to apply to an individual trust, such as the one in this case, the trust must:

(1) be established with assets of a disabled individual under age 65;

(2) be established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court; and

(3) provide that the state 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.

42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1)(a). In addition, even if a trust satisfies the section 1396p(d)(4)(A) exception to counting the trust as a resource, the trust will still be a resource under the regular resource rules if: (1) the beneficiary can revoke the trust; (2) the beneficiary can compel the trustee to provide for his support and maintenance; or (3) the beneficiary is entitled to mandatory disbursements , and the beneficiary is not prohibited from anticipating, assigning or selling the right to future payments. *See* POMS SI 01120.200D. Assistant Regional Commissioner, Management and Operations Support 4

The M.C. Trust meets the requirements of 42 U.S.C. § 1397p(d)(4)(A). The Trust was established with $34,601.80, which represents an inheritance to M.C., and presumably he is under age 65. According to the information you provided, M.C.'s mother created the trust. Furthermore, no other individual besides M.C. will benefit from the Trust, during the lifetime of M.C., thus, the trust is established for the sole benefit of M.C. As a result, the first two requirements of 42 U.S.C. § 1396p(d)(4)(A) are met. The Trust has a state Medicaid payback provision and also meets the third statutory requirement. *See* Article IV § 4.4(a). However, the Trust also has to be evaluated to determine if it is a countable resource under the regular resource rules. *See* POMS SI 01120.203. A trust is a resource, if the beneficiary can revoke the trust. *See* POMS SI I 01120.200. Despite language to the contrary in the Trust document, *see* Article II, M.C. can revoke the Trust under Montana law because he is the sole beneficiary.

Generally, trusts are presumed to be revocable under Montana law, unless the trust is made irrevocable. *See* Mont. Code. Ann. § 72-33-401 ("[u]nless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the trustor"). Here, Article II of the Trust states that "the Trust shall be irrevocable, and that the Trustee hereby expressly acknowledges that no person shall have the right or power to alter, amend, revoke, or terminate this Trust, in whole or in part (except as provided in the Trust)." Thus, by the express terms of the Trust instrument, the Trust appears to be irrevocable. However, under Montana law, if the trustor and the all the beneficiaries or all the beneficiaries consent, they may compel the termination of the trust. *See id.* §§ 72-33-406(1), 407(1). This Trust is a grantor/settlor trust-i.e., M.C. is both the settlor and the sole beneficiary. *See*

POMS SI 01120.200(B). If an individual is both the grantor of a trust and the sole beneficiary, the trust is revocable, regardless of language in the trust to the contrary. *See* POMS SI 01120.200(D)(3).

The Trust instrument provides that on termination of the Trust and payment pursuant to the state Medicaid provision, the remainder of the principal of the Trust estate should go to M.C.'s estate. *See* Article § 4.4(b). However, this language is not sufficient to create a residual beneficiary. Although Montana law has not addressed the issue of whether a settlor is the sole beneficiary when he conveys property in a trust to pay income to himself for life, and on his death conveys the trust property to his estate, the Restatement (Second) of Trusts § 127, comment (b), states that a settlor is the sole beneficiary when such a transfer is made. We believe that Montana would follow the general rule expressed in the Restatement. *See* Memorandum from OGC Region VIII to ARC, SSA VIII, Validity and Accessibility of Three Trusts in Colorado; State Law in Region VIII, Regarding the Revocability of Grantor or Settlor Trusts, page 2, November 30, 1994 ("[w]e believe that courts in all of the states in Region VIII would follow the general rule expressed in the Restatement and in the POMS that a settlor trust is revocable unless there is at least one beneficiary in addition to the settlor, such as a residual beneficiary.").

Furthermore, Montana statute provides that if a person creates a trust on his own, the trust is void or invalid against creditors of that person, even if there was no intent to defraud them. *See* Mont. Code Ann. § 72-33-305. "Th[is] statute[] appear[s] to recognize that where the settlor is the sole beneficiary of a trust, he retains the right to revoke it or to use the trust property for his personal benefit, and, therefore, his creditors should be allowed to reach that property." Assistant Regional Commissioner, Management and Operations Support 5

See Memorandum from OGC Region VII to ARC, SSA VIII, Validity and Accessibility of Three Trusts in Colorado; State Law in Region VIII, Regarding the Revocability of Grantor or Settlor Trusts, page 2, November 30, 1994 (citing 76 A. Jur.2d Trusts § 129 (1992)). Since the Trust is a settlor trust, and M.C. is the grantor/settlor and the sole beneficiary of the Trust, the Trust is revocable, notwithstanding any contrary language, and the Trust assets are a resource to M.C.2

CONCLUSION

In sum, even though the Trust meets the requirements of 42 U.S.C. § 1396p(d)(4)(A), it is revocable because it is a settlor trust. M.C., as both the grantor/settlor and sole beneficiary, can revoke the Trust unilaterally.

Deana R. E~-L~
Regional Chief Counsel, Region VIII
By: _____
Carolyn C~
Assistant Regional Counsel

/_1 Presumably, M.C. is under the age of 65 and disabled as defined under the Social Security Act. Assistant Regional Commissioner, Management and Operations Support 3

/_2 The Trust would not be a resource to M.C. if it named a residual beneficiary other than his estate. While Montana permits a trust to be terminated if all the beneficiaries consent, or if the Trustor and all beneficiaries consent, *see* Mont. Code Ann. §§ 72-33-406(1), 407(1), Agency policy recognizes the irrevocability of a grantor trust where there is a named residual beneficiary in the trust document who would receive the trust interest upon the grantor's death. *See* POMS SI 0112.200(D)(3). As such, the primary beneficiary could not unilaterally revoke the trust; he would need the consent of the residual beneficiary.

4.21 NEBRASKA

A. PS 01-170 Your Request for Determination of the Revocability of a Nebraska Trust: Logan S~ Trust

DATE: May 24, 2001

1. SYLLABUS

This Nebraska trust was established after 1/1/01 and is subject to the statutory provisions of section 1613(e) of the SSACT. The trust is a revocable grantor trust despite the statements that it is irrevocable because it does not name a residual beneficiary. The balance of the trust will be paid to the beneficiary's heirs. The trust also does not meet the requirements of a supplemental needs or Medicaid pay back trust (1917(d)(4)(A)) because it provides for the payment of funeral expenses before reimbursing the State for Medicaid expenditures.

Finally, the judge's attempted restriction removing the grantor's common law and statutory right to revoke the trust and precluding the Agency from finding the trust revocable is not valid.

2. OPINION

You have asked for our assistance in determining whether a Nebraska trust designated as the "Logan J. S~ Trust" is countable as a resource. You ask whether the trust language precludes a finding that the trust is a grantor trust and, if not, whether there is a residual beneficiary to the trust, thereby making it irrevocable. For purposes of this opinion, we assume Logan is disabled as defined in 42 U.S.C. § 1382c(a)(3). For the reasons outlined below, we believe you would be justified in finding that the trust is a resource.

I. TRUST PROVISIONS

The Trust Agreement (TA) indicates that the Trustee is the Nebraska Trust Company, N.A., 201 North Dewey, North Platte, Nebraska 69103. TA at 2. The Trust Agreement, executed on January 4, 2001, and signed by G. Glenn C~, County Judge, Scotts Bluff County, Nebraska, and by Shelly S~, refers to the County Court of Scotts Bluff County as the "Grantor-Court." TA at 2, 14. The Trust Advisory Committee consists of Shelly S~, Kate D~, and Jack L. S~. TA at 2. The Trust describes Logan J. S~, born February 13, 1997, as severely disabled since birth. Id. Logan is identified as the Trust's beneficiary. TA at 2, 6.

The corpus of the Trust is derived from a court-approved medical malpractice settlement resulting from malpractice attending Logan's birth. The amount of the settlement is not shown. TA at 2. The Trust Agreement states that-

> [t]his Trust is being established at the specific provision and direction of the Grantor-Court as authorized at 42 USC 1396p(d)(4)(A) and the Social Security Programs Operations Manual System (POMS) Paragraph 01120.200, and therefore the assets directed to this Trust by the Grantor-Court should not be deemed to have been or to be available to the beneficiary. This Trust is considered a "grantor" trust for federal tax purposes. Nonetheless in consideration of the purposes and intents of the federal statute under which this Trust is established, the Grantor-Court hereby declares that this is not a grantor trust for any other purposes and that the beneficiary does not retain any common law or statutory rights to revoke this Trust except as provided under Paragraph III. "Term" below. This Trust is established under the jurisdiction, at the direction, and with the specific approval of the Grantor-Court and without transfer of ownership of the settlement proceeds to Logan J. S~ or his attorneys, legal guardian, or conservator. Accordingly, it cannot be considered a "Medicaid qualifying trust" as that term has been defined at P.L. 99-272, Section 9506 (42 U.S.C. § 1396(a)(K)).

TA at 3. The Trust Agreement provides that the Trust is an irrevocable, spendthrift, supplemental needs, discretionary trust, and it is the intention of the Grantor Court to provide benefits for Logan without interfering with or reducing the benefits he would be entitled to from any state or federal agency, including the Social Security Administration. Responsibility for the use and distribution of the corpus and income of the Trust is vested in the Nebraska Trust Company, N.A., subject to the direction, discretion, and control of the Trust Advisory Committee. TA at 4. Additions to the initial Trust corpus, including periodic annuity payments, may be made from any source and at any time. TA at 5. The Trust Advisory Committee is authorized, but not required, to provide a regular monthly amount for Logan for services he needs and may allow periodic allowances for personal spending money, as long as Logan's eligibility for disability related benefits is not impacted. TA at 6.

The Trust Agreement provides that, upon Logan's death, the Trust shall terminate and the Trustee shall be the sole administrator of the Trust property. TA at 7, 12. Upon termination of the trust, the remaining assets will be distributed as follows:

(1) First, the Trustee shall pay or make provisions for payment of the expenses of administration of the Trust, other obligations payable by the Trust, and the expenses of the funeral, burial, cremation, or other disposal of Logan J. Terkel's remains.

TA at 7-8. Second, any remaining assets shall be paid to any state or agency of a state, which has provided medical assistance or long term care assistance under a state plan under Title XIX of the Social Security Act (Medicaid) up to an amount equal to the total medical and long term care assistance paid on behalf of Logan J. S~ under the state plan.

TA at 8. If any assets remain after reimbursement of State medical assistance, the remaining assets shall be distributed by the Trustee "for the benefit of the surviving heirs of Logan J. S~, in accordance with the laws of the State in which he is residing at the time of his death" if he dies intestate. If Logan has executed a valid will, the remaining assets will be distributed in accordance with the terms of the will. TA at 8.

II. Additional Trust Related Documents

Included in the material received with the Trust Agreement was Exhibit A, a March 7, 2001 memorandum to the Trust Advisory Committee. It was signed by Rodney L. S~, Russell A. S~, and Dale A. P~ and all three declined the position on the Advisory Committee which had been held by Kate D~. All three persons had been named as possible successors to any member of the Trust Advisory Committee who was unable or unwilling to serve. TA at 8-9.

Also included was a Notice of Hearing and an Application to the County Court of Scotts Bluff County, Nebraska, indicating that the Trustee, Nebraska Trust Company, had not accepted the Trust or the members of the Trust Advisory Committee established in the Trust. The Application noted that, in accordance with the Court's order establishing the Trust, it would not become effective until the execution of the Trust by the Trustee. Because the named Trustee was geographically removed from Logan's residence, Shelly S~ (Applicant, Special Conservator, and Logan's natural mother) asked the Court to change the Trustee to Valley Bank and Trust Company. The Application states that Shelly had determined that she did not want Kate D~ as a member of the Trust Advisory Committee, and the three individuals designated in the Trust Agreement as substitutes had declined to serve as set forth in Exhibit A. Thomas T. H~, one of Shelly's attorneys, had agreed to serve on the Advisory Committee.

The Application refers to the Court's "order of January 4, 2001," in which the Court ordered the law office of Samuel K. C~, M.D., P.C., to establish a special interest-bearing trust account in the amount of $100,000.00 pending further order of the Court concerning requests by family members for reimbursement for Logan's care. Applicant Shelly S~ asks the Court to order payment of $30,000.00 from this account to Betty S~, Logan's grandmother, who had worked with Shelly to provide Logan's care. Shelly asks the Court to order the balance of this account to be paid to the Trust. The Notice of Hearing indicates that a hearing was set for March 29, 2001.

The results of that hearing are not included in the materials received. Thus, at least prior to March 29, 2001, it appears the trust had not become effective. However, we will assume for purposes of this opinion that the trust did become effective as written.

III. TRUSTS AS RESOURCES

Generally, for trusts established before January 1, 2000, if trust principal is available to the trust beneficiary, it will be considered a resource to him for purposes of determining his eligibility to SSI benefits. Regulations define resources for SSI eligibility as follows:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual[.]

20 C.F.R. § 416.1201(a)(1). Regulations further define resources as liquid or nonliquid. Liquid resources are resources in the form of cash or other property which can be converted to cash within 20 days . . . . Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as certificates of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources[.]

Id. at § 416.1201(b).

The Commissioner has further construed the meaning of "resource," by issuing interpretive guidelines in the Program Operation Manual System (POMS). With respect to trust instruments, the POMS provides that if an individual (claimant, recipient or deemor) has the legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

POMS SI 01120.200D.1.a (Feb. 28, 2001) (emphasis in original). However,

[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes.

POMS SI 01120.200D.2 (emphasis in original).

IV. DISCUSSION

The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or by State law. POMS SI 01120.200D.1.a and SI 01120.200D.2. "Most States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary." POMS SI 01120.200D.3 (emphasis in original).

A trust is generally irrevocable if the grantor fails to reserve the power to revoke or modify it. Restatement (Second) of Trusts §§ 330 and 331 (1957). Nevertheless, the general law of trusts recognizes an exception to this rule when the grantor is the sole beneficiary of the trust agreement. Where the grantor is the sole beneficiary of a trust, he may amend or terminate the trust, even without having reserved the power to do so. Id. at § 339.

Although the laws of Nebraska have not specifically addressed this issue, we believe that Nebraska would follow the general rule. While the Trust Agreement at issue here names the Court as Grantor, the consideration funding the trust belongs to Logan. Thus, Logan is the grantor and, if the trust language does not preclude revocation and Logan is the sole beneficiary of the trust, it is revocable. However, if Logan is not the sole beneficiary, the trust would not be revocable.

The Trust appears to be a "Medicaid Special Needs Trust," a trust created by means other than a will, and which includes a Medicaid payback provision upon termination of the trust or the death of the individual. The Commissioner's policy on trusts created prior to January 1, 2000, is that the Medicaid trust "affects the individual's eligibility for Medicaid only, and has no effect on the SSI income and resource determinations." POMS SI 01120.200H.1.a (emphasis in original). In addition, the POMS provide that-

[a]ccording to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt. This law may or may not apply in your state . . . .

POMS SI 01120.200H.1.b.

Section 205 of the Foster Care Independence Act of 1999 (P.L. 106-169), signed into law on December 14, 1999, provides that the corpus of a revocable trust established with the assets of an individual after January 1, 2000, will be considered a resource. 42 U.S.C. § 1382b(e)(3)(A). However, an exception from § 1382b(e)(3) was made for a "Medicaid Special Needs Trust" if it was established on or after January 1, 2000, by a parent, grandparent, legal guardian or a court, with the assets of a disabled individual under age 65, when the trust provides that the State will receive all amounts remaining in the trust upon the death of the individual. 42 U.S.C. §§ 1382b(e)(1) and (5); POMS SI 01120.203. In order to meet the exception, the state must be listed as the first payee and have priority over payment of other debts and administrative expenses. See POMS SI 01120.203B.1.f. The Office of the General Counsel's Office of Program Law has opined that, if the exception in 42 U.S.C. § 1382b(e)(5) is met, the trust cannot be considered under § 1382b(e)(3), but it does not provide a general resource exclusion for such trusts and the trust should be considered under the regular resource rules set forth in regulations to determine if it is a resource available to the individual. See Questions Related to Implementation of Section 205 of the Foster Care Independence Act of 1999 (Revocable Trusts Which Meet the Section 1917(d)(4)(A) and (C) Exceptions-REPLY by Gwen Jones K~, Deputy Associate General Counsel for Program Law (November 27, 2000) (attached).

Because the Logan J. S~ Trust does not provide that assets remaining in the trust at the beneficiary's death will go first to reimburse the State, it does not meet the exception set out in the Foster Care Independence Act. If the exception is not met, then 42 U.S.C. § 1382b(e) applies to a trust without regard to the purposes for which the trust is established, whether the trustees have or exercise any discretion under the trust, any restrictions on when or whether distributions may be made from the trust, or any restrictions on the use of distributions from the trust. 42 U.S.C. § 1382b(2)(C). If the trust is not revocable, 42 U.S.C. §§ 1382b(e)(2)(B) and (C) and § 1382b(e)(3)(B) apply and it must be determined if there are any circumstances under which payment can be made from the trust to or for the benefit of the individual. If it is revocable, it is a resource pursuant to 42 U.S.C. § 1382b(e)(3)(A). Therefore, we must consider whether the Logan J. S~ Trust is revocable or irrevocable.

On the issue of whether a trust is revocable or not, we previously advised you that, in Nebraska and the other states in Region VII, you would be justified in finding that the words "child," "children," "issue," "descendants," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next-of-kin," or "by intestate succession, "we concluded that you would be justified, in most cases, in finding that a residual beneficiary was not created and a grantor trust is revocable. See G.C. Opinion, Determination of Irrevocability of a Nebraska Trust, Kyle D. S~, dated February 23, 2000. Accord G.C. Opinion, Accessibility of Discretionary Support Trust Fund as a Resource for Supplemental Security Income Purposes in Nebraska Where Grantor Is also the Sole Beneficiary, dated March 17, 1997. However, if considering the document as whole indicates that the grantor had a different intention, the trust may be irrevocable despite use of the words "heirs," "heirs-at-law," or "next-of-kin." Our research reveals that words such as "heirs" do not have a precise meaning and are interpreted inconsistently by the courts, depending upon how the court perceives the grantor's intent.

In reviewing the language of the Logan J. T~ Trust, we believe that you would be justified in finding that the trust does not have a residual beneficiary and is a grantor-sole beneficiary trust. Therefore, the remaining issue is whether the trust's language purporting to remove the grantor-sole beneficiary's common law and statutory rights to revoke the trust, except for federal tax purposes, precludes the Agency from finding that the trust is revocable. We believe that you would be justified in finding that the county court judge's attempted restriction of the grantor-beneficiary's statutory and common law right to revoke the trust is not valid. See SI 01120.201C.2.d (no exculpatory clause precludes a trust from being considered under the Agency's rules). The trust document does not attempt to set out any authority for the county court judge to take away the grantor-beneficiary's common law or statutory rights to revoke the trust. Neither does the trust document purport to explain why the trust is a grantor trust for tax purposes but is not a grantor trust for other federal programs and purposes.

We believe you would be justified in finding that the statement that remaining assets will be distributed to surviving heirs or, if Logan has executed a will the remaining assets will be distributed in accordance with the will's terms, does not create a residual beneficiary. Further, we do not believe that this language requires you to determine if a will currently exists.

In summary, the trust does not take effect unless a Trustee has signed the trust document. The Trust Agreement does not meet the exception from application of 42 U.S.C. § 1382b(e) which requires the State to be the first payee. Despite the trust language to the contrary, the trust is a grantor-sole beneficiary trust and is revocable and a resource.

B. PS 00-468 Determination of Irrevocability of a Nebraska Trust Kyle D. S~, SSN: ~

DATE: February 23, 2000

1. SYLLABUS

The issue concerns what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

Although the laws of Nebraska have not specifically addressed it, it appears that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable.

There does not appear to be any Kansas statute or case applying the grantor trust rule in Kansas. Generally, a trust is revocable when the grantor is the sole beneficiary.

Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary.

There does not appear to be any Iowa statute or case applying the grantor trust rule in Iowa. It appears Iowa would follow general trust law regarding revocability of a trust when the grantor is the trust's sole beneficiary.

Thus, in all Region VII States, the words "child," "children," "issue," "descedents," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next of kin," or "by intestate succession," in most cases it would justify a finding that a residual beneficiary was not created and a grantor trust is revocable.

2. OPINION

You have asked for our assistance in determining the irrevocability of a trust designated as the Kyle D. S~ Special Needs Trust, ~. You also asked us revisit the question of what language is sufficient to establish that a grantor trust is irrevocable in Iowa, Kansas, Missouri, and Nebraska.

I. TRUST PROVISIONS

The Kyle D. S~ Special Needs Trust (SNT) was funded with an insurance settlement in the amount of $26,129.20, the result of litigation involving personal injury suffered by Kyle. The Trust Agreement names the County Court of Buffalo County, Nebraska, as the grantor and Kyle's aunt, Catherine L. K~, as the trustee. The Trust Agreement, executed on August 13, 1999, and signed by the County Judge and by the Trustee, describes Kyle, born October 15, 1993, as the Beneficiary who is "a disabled person within the meaning of 42 U.S.C. § 1382c(a)(3)." Trust Agreement, Article 1.

The Trust Agreement specifies that the trust is irrevocable and that "the beneficiary, his guardians or conservator, shall have no right whatsoever to alter, revoke or terminate this Trust, in whole or in part." However, "[t]he Trust may be amended by the Court with notice to the State of Nebraska, Department of Health and Human Services Finance and Support, if amendment would benefit the disabled's [sic] beneficiary." Trust Agreement, Article 4. The Trust Agreement also provides that-

[t]his Trust is established pursuant to the 1993 Omnibus Reconciliation Act[,] 469 NAC 2.009.07A5B (4) and Neb. Rev. Stat. 68-1047. This trust is not for the support of Kyle D. S~. It is the intent of the Grantor to make provisions in this Trust Agreement to provide funds necessary to Kyle D. S~'s happiness over and above the essential, primary support and services otherwise available to him. This Trust is not to replace or make unnecessary any public or private assistance that Kyle D. S~ may now or in the future qualify to receive. It is the intent to provide resources for non-support purposes including comfort over and above the essentials provided by any state or federal government agency or program. The supplemental resources provided through this Trust may include, but shall not be limited to education, personal care needs, attendants, entertainment, and other goods and services not otherwise provided by public aid or private sources, but which are reasonable and necessary for the rehabilitation and special non-support needs of the Beneficiary.

Trust Agreement, Article 2. In addition, the Trust Agreement provides that-

[w]hile it is the intention that the Trustee have broad and effective powers to carry out the provisions of this Trust Agreement, no power conferred upon any Trustee by this article, shall be exercised in such a manner that it deprives the Trust of an otherwise available tax exemption, deduction, exclusion or credit, nor to deprive the Beneficiary of any public or private assistance as described above. This Trust is intended to qualify under 42 U.S.C. § 1396p(d)(4)(A) and the Trustee shall have no power which is inconsistent with such law and its regulations, and all provisions of this Trust shall be interpreted in a manner consistent with such law.

Trust Agreement, Article 2.

Concerning the Trustee's powers, the Trust Agreement provides that—

[t]he Trustee may distribute income or principal or both, . . . [and] in its sole and absolute discretion, shall apply and distribute such part, all or none of the net income and principal of the Trust estate in such amounts and proportions as the Trustee, in the Trustee's absolute discretion, deems necessary or appropriate for Kyle D. S~'s best interest, [but only after exhausting] all other resources available . . . from all sources other than his trust including, without limitation, payments, services and programs administered, provided or sponsored by any governmental (federal, state or other), private or institutional agency, authority or provider, any rule or regulation of such agency, authority or provider to the contrary notwithstanding.

Trust Agreement, Article 2. The Trust Agreement also includes a spendthrift clause intended to prohibits creditors from attaching the assets of a trust. Trust Agreement, Article 8.

The Trust Agreement provides that the trust terminates upon Kyle's death and "any remaining undistributed income or principal . . . shall be first paid to the State of Nebraska, and to any other state who has made payments under Title XIX" on Kyle's behalf. "In the event that either principal or income remain [after the State is reimbursed], it shall be paid over and distributed pursuant to the intestacy laws of the State of Nebraska." Trust Agreement, Article 11.

II. TRUSTS AS RESOURCES

Generally, if trust principal is available to the trust beneficiary, it will be considered a resource to him for purposes of determining his eligibility to SSI benefits. Regulations define resources for SSI eligibility as follows:

(a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual[.]

20 C.F.R. § 416.1201(a)(1). Regulations further define resources as liquid or nonliquid. Liquid resources are resources in the form of-

cash or other property which can be converted to cash within 20 days . . . . Examples of resources that are ordinarily liquid are stocks, bonds, mutual fund shares, promissory notes, mortgages, life insurance policies, financial institution accounts (including savings, checking, and time deposits, also known as of deposit) and similar items. Liquid resources, other than cash, are evaluated according to the individual's equity in the resources[.]

Id. at § 416.1201(b).

The Commissioner has further construed the meaning of "resource," by issuing interpretive guidelines in the Program Operation Manual System (POMS). With respect to trust instruments, the POMS provides that-

if an individual (claimant, recipient or deemor) has the legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

POMS SI 01120.200D.1.a (emphasis in original). However,

[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes.

POMS SI 01120.200D.2 (emphasis in original). The revocability of a trust and the ability to use the trust principal is determined by the terms of the trust and/or by State law. POMS SI 01120.200D.1.a and SI 01120.200D.2. "Most States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary." POMS SI 01120.200D.3 (emphasis in original).

A trust is generally irrevocable if the grantor fails to reserve the power to revoke or modify it. Restatement (Second) of Trusts §§ 330 and 331 (1957). Nevertheless, the general law of trusts recognizes an exception to this rule when the grantor is the sole beneficiary of the trust agreement. Where the grantor is the sole beneficiary of a trust, he may amend or terminate the trust, even without having reserved the power to do so. Id. at § 339.

Although the laws of Nebraska have not specifically addressed this issue, we believe that Nebraska would follow the general rule. While the Trust Agreement at issue here names the Court as Grantor, the consideration funding the trust belonged to Kyle. Thus, Kyle is the grantor and, if Kyle is the sole beneficiary of the trust, it is revocable notwithstanding the Trust Agreement language to the contrary. However, if the grantor is not the sole beneficiary, the trust would not be revocable.

The trust herein appears to be a "Medicaid Special Needs Trust," a trust created by means other than a will, and which includes a Medicaid payback provision upon termination of the trust or the death of the individual. SSA's policy is that the Medicaid trust "affects the individual's eligibility for Medicaid only, and has no effect on the SSI income and resource determinations." POMS SI 01120.200H.1.a (emphasis in original). In addition, the POMS provide that-

[a]ccording to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt. This law may or may not apply in your State . . . .

POMS SI 01120.200H.1.b. .

Our research indicates that the purpose of including the State reimbursement provision in the SNT is to qualify the beneficiary for medical assistance from the State. If the SNT meets the exception set out in 42 U.S.C. § 1396p(d)(4)(A) and State requirements, the State does not consider the trust to be a resource and the grantor/beneficiary is eligible for medical assistance. Where there is a pre-existing Medicaid lien, several courts have held that the State may require satisfaction of the lien before any third-party settlement can be put into a SNT. In Nebraska, a Medicaid grantor SNT is considered to be void and revocable by operation of law upon filing for or receiving State public assistance unless the SNT is ordered by a court of competent jurisdiction, for good cause shown. Neb. Rev. Stat. § 68-1047. Although no court order was included in the material received, we are assuming that this requirement was met.

You ask whether the words "pursuant to the intestacy laws of the State of Nebraska" created a residual beneficiary. The Restatement (Second) of Trusts provides that at common law there was a rule of the law of real property that the owner of land could not, by a conveyance inter vivos, create a remainder interest in his heirs. An attempt to do so created a reversionary interest in himself, rather than a remainder interest in his heirs. However, there is no longer any such rule of law. There is only a question of construction. Restatement (Second) of Trusts § 127 cmt. b (1957).

If the owner manifests an intention to create a contingent interest in remainder, legal or equitable, in the persons who on his death may become his heirs, he can do so. In the absence of evidence of a contrary intent, however, the inference is that he does not intend to create a remainder interest in his heirs. The Restatement (Second) provides that if the beneficial interest is limited to the grantor for life and on his or her death the property is to be conveyed to his or her "children, or issue, or descendants" then he or she is not the sole beneficiary of the trust and a remainder interest is created in his or her children, issue, or descendants. Id. at § 127 cmt. b. Where the owner of property, however, transfers it in trust to pay the income to himself or herself for life and upon his or her death to pay the principal to "his heirs or next of kin," in the absence of a manifestation of a contrary intention, "the inference is that he is the sole beneficiary of the trust, and that he does not intend to create any interest in the persons who may become his or her 'heirs or next of kin.'" Id.

Likewise, the inference is that the grantor is the sole beneficiary where the income is to be paid to the grantor for life and upon his or her death the principal is to be paid "as he may by deed or will appoint, and in default of appointment to his heirs or next of kin." If he or she reserves power to appoint by will alone, and in default of appointment the property is to be conveyed to his or her heirs or next of kin, the Restatement (Second) indicates that this is some indication that the grantor intended to confer an interest on his or her heirs or next of kin of which they could be deprived only by a testamentary appointment, "but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to be the sole beneficiary of the trust." Id.

Restatement (Second) presents an example similar to the trust herein. The illustration provides: "A transfers property to B in trust to pay the income to A for life and on A's death to pay the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A is the sole beneficiary of the trust." Restatement (Second) § 127 cmt. b, illus. 2. In addition, the Nebraska Supreme Court has held that an inter vivos trust which purports to convey an interest in property only after the death of the grantor is testamentary in character and passes no present interest in the property. Such a purported conveyance was found to be void because it was in effect a will, and the statutory requirements for the execution of a will had not been met. Thus, it had no validity. Young et al. v. McCoy et al., 40 N.W.2d 540, 542 (Neb. 1950). The court stated that these words were expressly limited to take effect only after the death of the grantor; thus, they were necessarily revocable words. Id.

The primary objective of the Kyle S~ trust appears to be to provide for the grantor/life beneficiary, and not to preserve the trust principal for the grantor's heirs. Examination of the trust agreement does not reveal any manifestation of intent to convey a remainder interest to the grantor's heirs. For the reasons given above, if there is no named residual beneficiary, absent additional language manifesting a contrary intent, we believe you would be justified in finding that the words "distributed pursuant to the intestacy laws of the State of Nebraska" in a grantor trust make the trust revocable despite trust language to the contrary. However, we believe a residual beneficiary would be created by words that any remainder should go to a named beneficiary or to the individual's children, issue, or descendants. In Ellengrod v. Trombla, 95 N.W.2d 635, 638 (Neb. 1959), in interpreting a will devise and the Uniform Property Act, the court said that conveyance of property to a person and his "children," "issue," "descendants" and "words of similar import" create a life interest in the person and a remainder in the life beneficiary's descendants unless a contrary intent is manifested. If no children, issue, or descendants exist presently, the

remainder is contingent. Id. at 640. In Wilkins v. Rowan, 185 N.W. 437, 438-39 (Neb. 1921), the court defined "issue," "lawful issue," or "issue of the body" to include children and lineal descendants of every degree in the absence of qualifying words showing a contrary intent.

III. REVIEW OF PRIOR ADVICE

As you requested, we have reviewed our prior advice concerning the revocability of grantor trusts in Region VII. On this issue, although the laws of Nebraska have not specifically addressed it, we believe that Nebraska would follow the general rule that a trust is revocable if the grantor is the sole beneficiary, even if there is a provision making the trust irrevocable. Restatement (Second) of Trusts § 339 (1957). The grantor is the sole beneficiary of a trust if he or she does not "manifest an intention to give a beneficial interest to anyone else." If the grantor "manifests an intention to create a vested or contingent interest in others, as for example, his children, or the persons who may be his heirs or next of kin on his death, he is not the sole beneficiary unless such intended interests are invalid. . . ." Id. at § 339 cmt. b. Thus, the question is whether the language of a trust creates a valid remainder interest. If no valid remainder interest is created, the grantor is the sole beneficiary of the trust, the trust is revocable, and the trust principal is a resource (see discussion above).

We found no Kansas statute or case applying the grantor trust rule in Kansas. However, Kansas law does provide that all gifts and conveyances of goods and chattels (but not land) to a trust made for the use of the person making the trust are valid and effective except as to all past, present or future creditors and a nonconsenting wife's statutory rights. Newman v. George, 755 P.2d 18, 20 (Kan. 1988). A trust is irrevocable unless the power to amend or revoke is reserved in the trust agreement. Kan. Stat. Ann. § 58-2417 (1994). Where State law is silent, Kansas courts "have often turned to the guidance of the Restatement of Trusts[.]" In the Matter of the Estate of S~, 929 P.2d 153 (Kan. 1996). Accord Neeley v. Neeley, §§§ P.2d §§§, 2000 W.L. 45835 at *1 (Kan. App.). Although it was not dispositive in the case, in Daughters of the American Revolution of Kansas, Topeka Chapter v. Washburn College, 164 P.2d 128, 132 (Kan. 1945), the Kansas Supreme Court acknowledged the Restatement rule that a trust is revocable when the grantor is the sole beneficiary. The court did not indicate that the rule was improper or would not be followed in Kansas. We believe Kansas would follow this rule in the appropriate case. Kansas law is consistent with the Restatement (Second) in holding that the primary consideration in the construction of trusts is the intention of the grantor as evidenced by an examination of the document. In the Matter of the Estate of Sam Saroff, 625 P.2d 458, 465 (Kan. 1981). In the case of In re Watts, 162 P.2d 82, 87 (Kan. 1945), in interpreting a will, the court made "unknown heirs" parties to the litigation. "'[T]he same rules that apply to [the] construction [of wills] apply to trusts and most other written documents." In the Matter of the Estate of S~, 929 P.2d at 158, quoting In re Estate of H~, 223 P.2d 707 (Kan. 1950).

In Missouri, rights to trust income and property are determined by the trust agreement. Hillyard v. Leonard, 391 S.W.2d 211 (Mo. 1965). Missouri has explicitly adopted the rule that a trust is revocable if the grantor is the sole beneficiary. Couch v. Director, Missouri State Division of Family Services, 795 S.W.2d 91, 94 (Mo. App. 1990); Pilgrim Evangelical v. Lutheran Church-Missouri Synod Foundation, 661 S.W.2d 833, 838 (Mo. App. 1983). The intention of the settlor is the key to the construction of a trust. Tidrow v. Director, Missouri State Division of Family Services, 688 S.W.2d 9 (Mo. App. 1985). The term "bodily heirs" is a technical term which should be accorded its technical meaning unless a contrary meaning clearly appears from the context of the will. Central Trust Bank v. Stout, 579 S.W.2d 825 (Mo. App. 1979). "Nearest blood kin" has no settled meaning but where the testator does not indicate otherwise, the definition in the Restatement of Property will be used. Graves v. Hyer, 626 S.W.2d 661 (Mo. App. 1981). It has been held in Missouri that where one transfers property inter vivos in trust to pay the income to himself for life and on his death it is to be conveyed to his "heirs or next of kin," that he is the sole beneficiary. Stephens v. Moore, 249 S.W. 601 (Mo. 1923).

We found no Iowa statute or case applying the grantor trust rule in Iowa. We believe that Iowa would follow general trust law regarding the revocability of a trust when the grantor is the trust's sole beneficiary. Iowa's probate code defines the word "issue," for purposes of intestate succession, as including "all lawful lineal descendants of a person, whether biological or adopted, except those who are the lineal descendants of the person's living descendants." I.C.A. § 633.3.24 (Supp. 1992). The Iowa Supreme Court has indicated that "heir" is given the popular meaning of issue, children, or descendants when language of the entire will and circumstances in which the will was executed indicated that intention. Cook v. Underwood, 228 N.W. 629 (Iowa 1930). The court subsequently stated that the word "heirs" is a flexible term to which the technical meaning of the word is frequently not applied. The meaning to be given to "heirs" is a question of the testator's intent. In re Austin's Estate, 20 N.W.2d 445 (Iowa 1945). The court also stated that the word "heirs" used by a testator does not have a fixed meaning and meaning must be determined from the instrument read as a whole and in light of all relevant facts and circumstances under which the instruments were executed. Schaefer v. Merchants Nat. Bank of Cedar Rapids, Iowa, 160 N.W.2d 318, 320-21 (Iowa

1968). In a will devising the remainder of a trust estate to an old folks' home if a son died without leaving heirs, the word "heirs" meant "descendants." In re Clifton's Estate, 218 N.W. 926 (Iowa 1928).

CONCLUSION

In summary, we believe that you would be justified in finding that, in all Region VII states, the words "child," "children," "issue," "descendants," or "words of similar import" create a residual beneficiary and make a grantor trust irrevocable. If the grantor uses the words "heirs," "heirs-at-law," "next-of-kin," or "by intestate succession, "we believe you would be justified, in most cases, in finding that a residual beneficiary was not created and a grantor trust is revocable. Accord G.C. Opinion, Accessibility of Discretionary Support Trust Fund as a Resource for Supplemental Security Income Purposes in Nebraska Where Grantor Is also the Sole Beneficiary, dated March 17, 1997. However, if considering the document as whole indicates that the grantor had a different intention, the words "heirs," "heirs-at-law," or "next-of-kin" may make the trust irrevocable. For example, you attached a previous legal opinion concerning the Felicia Ann Bribiesca trust. See G.C. Opinion, Determination of Irrevocability of a Grantor Trust, dated June 21, 1994. You asked whether the naming of heirs in general constituted naming another beneficiary making the trust irrevocable. We affirmed that it did. We cannot conclude, however, that our response was inconsistent with the advice herein. The Bribriesca trust reveals that it was the grantor's intention that any undistributed principal and income should be distributed to Felicia's "descendants who survive." Therefore, we believe the advice given was correct.

As illustrated by the cases cited above, words such as "heirs" do not have a precise meaning and are defined inconsistently by the courts. We are not able to provide a general rule that will apply to all trusts. If the grantor's intent is not clear from a trust document, we suggest you submit the trust document for review by this office.

C. PS 00-466 Request for Iowa, Kansas, Missouri, and Nebraska State Law on Grantor Trusts; SSI Resource Issue

DATE: June 16, 1999

1. SYLLABUS

The regional attorney was asked if a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the States of Missouri, Kansas, Iowa and Nebraska.

All four states are considered creditors and not beneficiaries. Even if a trust contains a State reimbursement provision, it would be revocable if the SSI recipient was the grantor and the sole beneficiary since the state is a creditor and not a beneficiary.

CAUTION: Because of a change in the Social Security Act, this opinion may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked whether in Missouri, Kansas, Nebraska, and Iowa, a State reimbursement provision in a Medicaid Trust creates a residual beneficiary or creditor status for the state. We are of the opinion that in all four states, the state would be considered a creditor. None of the states specifically address a trust which contains a state reimbursement provision; however, all four states have statutes that address reimbursement of Medicaid benefits. As you are aware, each state also follows the rule that a trust is revocable if the grantor is the sole beneficiary. See GC Opinion: Request for Interpretation of State Trust Law, dated June 29, 1992. The following is a discussion of each state's Medicaid statute.

NEBRASKA

Section 68-1036.02 of the Nebraska Revised Statutes states that the "estate of the decedent who has received medical assistance benefits . . . shall be indebted to the Department of Health and Human Services Finance and Support for the total amount paid . . . if (a) the decedent was at least 55 years of age at the time the medical assistance was provided, or (b) the decedent resided in a medical institution and," it is determined that he or she "could not have reasonably been expected to be discharged and resume living at home." The statute further provides an exception to recovery of the payments. No debt exists where the decedent is survived by a spouse or child who is under 21 years of age or blind or totally and permanently disabled as defined by the Supplemental Security Income criteria. Id. Further, the state may waive all or part of its claim if it is

determined that recovery would not be in the "best interest of the state or would result in undue hardship." Neb. Rev. Stat. § 68-1036.02.

SUMMARY

The laws of each state provide the circumstances under which the state may be reimbursed by a recipient or his estate for Medicaid payments. In all states, the law provides that monies expended for Medicaid payments which are recoverable are categorized as a debt due to the applicable department, or the department may file a claim against the estate of the recipient. Consequently, we believe the state is properly considered as a creditor and not a beneficiary of the trust. Because each state's statute provides for the right to reimbursement, we do not believe it is relevant whether or not a Medicaid Trust contains a state reimbursement provision. The inclusion of such a provision in a trust would not be of any consequence where the grantor is the sole beneficiary. In all four of the Region VII states, a trust would be revocable, and thus available as a resource for SSI purposes, where the grantor is the sole beneficiary, even if the trust contained a state reimbursement provision.

D. PS 00-280 SSI-Nebraska-Review of a Trust for J.S. M~

DATE: January 9, 1998

1. SYLLABUS

This irrevocable trust was established on March 24, 1994 as a discretionary trust. The trustee has complete discretion as to the control of the assets in the trust and in the distribution of the principal to the benefit of the beneficiary. As the beneficiary of the trust, the SSI recipient does not have the power to revoke the trust or to use the trust principal for her support and maintenance. Therefore, the trust is not a resource for SSI purposes.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

A request for a legal opinion concerning a trust executed in Nebraska and governed by Nebraska law was forwarded to our office. The issue presented is whether the M~ Family Irrevocable Trust is a countable resource to J.S. M~ (a/k/a J. Sue M~), an SSI applicant.

The M~ Family Irrevocable Trust was created on March 21, 1994, by Floyd A. M~ and Elsie S. M~, grantors. The trust's corpus consists of three certificates of deposit, totaling $35,000, held at the Jones National Bank and Trust Company (JNBTC) in Seward, Nebraska. The trust agreement specifies that the trust is irrevocable, with the grantors having no power to alter, amend, revoke, or terminate the trust(s) created or designate persons who would possess or enjoy the trust property or income. See Trust Agreement, Article VII.

The trust agreement provides that until the death of the grantors, the trustee(s) may distribute all or none of the income and/or principal of the trust to or for the benefit of the beneficiary, J.S. M~, the grantors' daughter, for her health, education, maintenance, and support. See Trust Agreement, Article II.A. Any income earned from the trust in any calendar year which is not distributed within thirty days after the end of such year shall be accumulated and added to the principal. See Article II.A. The trust terminates upon the death of both grantors, with the remaining principal distributed to J.S. M~ or her living issue if she is deceased. See Trust Agreement, Article II.C.

The grantors named J.S. M~ as trustee. John K~, Jeffrey K~, and Mathew [sic] K~ were named as successor trustees. See Trust Agreement, Article IV.A. The trustee has the full authority to dispose of trust income and principal, as well as the authority to terminate the trust when it becomes so small as to no longer be economical and distribute the remaining principal and interest to the current beneficiaries. See Trust Agreement, Article II.H and Article V.

The trust agreement provides that any trustee may resign by giving thirty days written notice. See Trust Agreement, Article IV.B. The successor trustee must accept the office by written assignment. Once the office has been accepted, title to the trust estate vests in the successor trustee. The resigning trustee must execute all instruments and do all acts necessary to vest such title in the successor trustee. See Trust Agreement, Article IV.D.

J.S. M~ resigned as trustee of the M~ Family Irrevocable Trust on November 15, 1996. John K~ accepted his appointment as successor trustee on December 15, 1996. An August 26, 1997 Customer Information File Inquiry from JNBTC concerning the M~ Family Irrevocable Trust confirmed that the three certificates of deposit comprising the corpus of the trust were registered to John K~ as trustee. Allan R. Roth, Vice-President/Trust Officer, at JNBTC indicated that J.S. M~ did not receive any interest generated by the trust's corpus. Mr. Roth also indicated that the interest from the trust was directly deposited into Elsie S. M~'s account. J.S. M~ is neither a co-owner nor an authorized signer on the account.

A trust is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with it for the benefit of another. A trust arises as a result of a manifestation of an intention to create a fiduciary relationship. Restatement (Third) of Trusts § 2 (1996). The trust instrument in question conforms to this definition. As a preliminary matter, the trust appears to be valid and irrevocable under Nebraska law. Neb. Rev. Stat. § 30-2081 et seq. Section 30-2209(50) states that the definition of a trust includes, "any express trust, private or charitable, with additions thereto, wherever and however created." The trust was properly executed and witnessed, and Article VII of the trust agreement expressly states that it is an irrevocable trust, and that the grantors do not retain the power to alter, amend, revoke, or terminate the trust. We believe a Nebraska court would find the trust valid and irrevocable.

The trust's principal is not a countable resource to J.S. M~. When an individual possesses the legal authority to revoke the trust and use the funds to meet food, clothing, and shelter needs, or when an individual can direct the use of the trust principal for her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes. Programs Operations Manual System ("POMS") SI 01120.200D.1 (1994). As a beneficiary, J.S. M~ does not have the power to revoke the trust. She also lacks the power to invade the trust principal during her lifetime for her support and maintenance. That is solely within the power of the trustee, John K~.

Where, as here, the trust principal is not a resource, trust earnings are not income to an SSI claimant who is a trust beneficiary unless the trust directs or the trust makes payment to the beneficiary. POMS SI 01120.200F.1.a (1994). The M~ Family Irrevocable Trust is a discretionary trust in that the trustee has virtually unlimited freedom in controlling and applying the assets of the trust. Smith v. Smith, 517 N.W.2d 394, 398 (Neb. 1994). The trustee of a discretionary trust cannot be compelled to make distributions. Id. The terms of the trust agreement provide that the trustee, John K~, has complete discretion in distributing the principal and/or interest to or for the benefit of J.S. M~. Until the earnings from the trust are distributed to J.S. M~, they are not counted as income to her. At least through August 26, 1997, the date of Mr. Roth's letter, J.S. M~ has not received any interest generated from the trust which could be counted as a resource for SSI purposes.

In summary, the M~ Family Irrevocable Trust is valid and irrevocable. The principal and the undistributed earnings from the trust are not countable resources to J.S. M~ for SSI purposes.

4.22 NEVADA

A. PS 10-008 Nevada State Law on Empty Trusts

DATE: August 6, 2009

1. SYLLABUS

This guide from the San Francisco Regional Chief Counsel's office informs us that the establishment of "empty" or "dry" trusts are not valid in the state of Nevada with regard to SSI excluded trusts.

2. OPINION

OVERVIEW

You asked whether an unfunded, or “empty,” Nevada trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under Nevada law.

BACKGROUND

In general, when determining an individual's eligibility for SSI, all assets in a revocable trust established by the individual, as well as those assets in an irrevocable trust which could be paid to the individual, will be considered a resource. *See* Act § 1613, 42 U.S.C. § 1382b(e)(3); POMS SI 01120.201(D). Assets in a trust may be excluded as a resource, however, if a statutory exception applies.

Section 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A), provides for one such exception, commonly known as the Medicaid payback trust or "special needs trust." To qualify for the exception, a trust must:

1. be established with the property of an individual under age 65 who is disabled;

2. be established for the benefit of such individual by a parent, grandparent, legal guardian, or court; and

3. provide that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

Act § 1917(d)(4)(A); POMS SI 01120.203(B)(1).

Where a parent or grandparent creates such a trust, the parent or grandparent must either (1) create a "seed" trust, i.e., establish a trust using a nominal amount of his or her own funds, after which the disabled individual may transfer his or her own funds to the trust, or (2) create an empty or dry trust, if state law permits, into which the competent disabled adult's funds can be placed. POMS SI 01120.203(B)(1)(f).

Thus, if Nevada law recognizes the validity of an empty trust, trusts created in this manner may be eligible for the Medicaid payback trust exception. Conversely, if Nevada law does not recognize the validity of an empty trust, such trusts will not qualify for the exception.

DISCUSSION

Nevada has not directly addressed whether it would recognize an empty Section 1917(d)(4)(A) trust. As a general rule, however, Nevada law does not recognize empty trusts as valid. The relevant statute on this issue is clear: "A trust is created only if . . . [t]here is trust property." Nev. Rev. Stat. § 163.003 (2009); *accord Restatement (Second) of Trusts* § 74 (requiring tangible trust property for creation of trust).

Longstanding Nevada case law likewise requires that a trust contain an ascertainable subject matter. *See, e.g., Soady v. First Nat'l Bank of Nevada*, 411 P.2d 482, 484-85 (Nev. 1966) (holding that "[i]t is essential to the validity of a trust . . . that the subject matter thereof be certain"); *see also In re Schultz*, 46 B.R. 880, 884-85 (*Bankr. D.* Nev. 1985) (citing *Soady*, 411 P.2d 482, among other authority) (providing that the "general characteristics of an express trust include . . . a clearly defined trust res [property]")

CONCLUSION

Nevada law does not recognize empty trusts as valid. Consequently, such trusts would not qualify for the exception to counting set forth in Section 1917(d)(4)(A).

4.23 New Jersey

A. PS 14-042 Spendthrift Trusts – New York and New Jersey

DATE: January 8, 2014

1. SYLLABUS

This opinion addresses whether spendthrift clauses are recognized in New York and New Jersey and whether these states presume the existence of a spendthrift clause if a trust is silent as to whether it is a spendthrift trust. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. New York and New Jersey both enforce spendthrift clauses in trusts, except when the beneficiary of the trust is also the trust's grantor. In

New York, a trust is presumed to be a spendthrift trust with respect to an income interest in the trust but not for other interests. In New Jersey, a trust can be presumed to be a spendthrift trust based on evidence about the intent of the grantor.

2. OPINION

QUESTION PRESENTED

Whether New York and New Jersey recognize the validity of spendthrift clauses in trusts, and whether these states will presume the existence of a spendthrift clause if a trust is silent as to whether it is a spendthrift trust.

OPINION

Both New York and New Jersey recognize the validity of spendthrift clauses in trusts, except when the beneficiary of the trust is also the trust's grantor. In New York, a trust is presumed to be a spendthrift trust with respect to an income interest in the trust but not for other interests. In New Jersey, a trust can be presumed to be a spendthrift trust based on evidence about the intent of the grantor.

BACKGROUND

A spendthrift clause or trust prohibits both voluntary and involuntary transfers of a beneficiary's interest in trust income or principal. *See, e.g.,* Program Operations Manual System (POMS) SI 01120.200(B)(16). This protects the interest from creditors, and also prevents the beneficiary from selling her interest to a third party; for example, a beneficiary who is entitled to $100 per month from a spendthrift trust is not permitted to sell her right to receive monthly payments for one lump sum. *Id.* If a trust contains a valid spendthrift clause, so that the beneficiary cannot sell her interest, the trust will not be counted as a resource for the purposes of SSI eligibility. POMS SI 01120.200(D)(1)(a).

ANALYSIS

New York

Spendthrift Trusts Are Valid Under New York Law, Except When the Grantor Is Also the Beneficiary.

Spendthrift clauses are recognized as valid by New York law. *See In re V~ Estate*, 250 N.E.2d 343, 349 (N.Y. 1969) ("[T]he will of the testator should be given effect, and the interest of the assignor [is] deemed unassignable during the life of the trust."); *In re Estate of M~*, 723 N.Y.S.2d 349, 350 (Sur. Ct. 2001); *see also* N.Y. Est. Powers & Trusts Law § 7-1.5(a)(1). (McKinney 2013).

A spendthrift clause is not valid under New York law, however, when the beneficiary of the trust was also the trust's grantor; a beneficiary of a spendthrift trust who was also the trust's grantor will be permitted by the New York courts to sell her interest in the trust despite the spendthrift clause. *See In re Mordecai's Trust*, 201 N.Y.S.2d 899, 901-02 (Sup. Ct. 1960); *City Bank Farmers Trust Co. v. Kennard*, 1 N.Y.S.2d 369, 370-71 (Sup. Ct. 1937); *In re Blake's Will*, 235 N.Y.S. 324, 327 (App. Div. 1929); *see also* N.Y. Est. Powers & Trusts Law § 7-3.1(a) (McKinney 2013) ("A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator."). [1]

New York Law Presumes a Spendthrift Clause for Income Interests in a Trust, But Not for Other Interests.

When a trust neither prohibits nor expressly grants the beneficiary the right to sell her interest in the trust, New York law presumes a spendthrift clause with respect to any income interest in the trust. N.Y. Est. Powers & Trusts Law § 7-1.5(a)(1) (McKinney 2013); see also In re Estate of S~, 602 N.Y.S.2d 742 (Sur. 1991) ("The income interest of a beneficiary of a testamentary trust is inalienable in this state unless the instrument creating the trust provides otherwise.") [2] For interests in a trust other than income interests (e.g., a remainder interest), New York law presumes that there is no spendthrift clause unless the trust expressly includes such a provision. N.Y. Est. Powers & Trusts Law § 7-1.5(a) (McKinney 2013); *see also In re N~ Estate*, 389 N.Y.S.2d 420, 421 (App. Div. 1976) (presuming a trust includes no spendthrift clause with regard to a remainder interest).

New Jersey

Spendthrift Trusts Are Valid Under New Jersey Law, Except When the Grantor Is Also the Beneficiary.

New Jersey courts recognize spendthrift clauses as legally binding. *See In re Estate of B~*, 871 A.2d 103, 108 (N.J. Super. Ct. App. Div. 2005); *Moore v. Moore*, 44 A.2d 639, 646 (N.J. Ch. 1945) ("[T]he several attempted alienations or assignments by

beneficiaries of anticipated income payments . . . are invalid and ineffectual as such, because [they are] contrary to the [spendthrift] restrictions attached by the trustor to his gifts.").

However, where the beneficiary of a spendthrift trust was also the grantor of that trust, the spendthrift clause is unenforceable under New Jersey law. N.J. Stat. Ann. § 3B:11-1(a) (West 2013) ("The right of any creator of a trust to receive either the income or the principal of the trust . . . shall be freely alienable and shall be subject to the claims of his creditors, not-withstanding any provision to the contrary in the terms of the trust."). [3]

New Jersey Law Presumes a Spendthrift Clause Where Evidence Suggests the Grantor Intended to Restrict the Beneficiary's Ability to Sell Her Interest in the Trust.

Where a trust neither prohibits nor expressly permits a beneficiary to sell her interest in a trust, New Jersey law will presume a spendthrift clause where this appears to have been the grantor's intent. *See, e.g., Heritage Bank-North, N.A. v. Hunterdon Med. Ctr.*, 395 A.2d 552, 554 (N.J. Super. Ct. App. Div. 1978); *see also B~,* 871 A.2d at 108. Evidence of the grantor's intent to create a spendthrift trust can include the grantor's attempt to "make the trust immune from attachment by creditors" and the grantor's intent that "the beneficiary was to be protected against acts of his own improvidence." *Ampere Bank & Trust Co. v. Esterly,* 49 A.2d 769, 772 (N.J. Ch. 1946).

CONCLUSION

New York and New Jersey both enforce spendthrift clauses in trusts, except when the beneficiary of the trust is also the trust's grantor. In New York, a trust is presumed to be a spendthrift trust with respect to an income interest in the trust but not for other interests in trusts. In New Jersey, a trust can be presumed to be a spendthrift trust based on evidence about the intent of the grantor.

B. PS 01-013 New Jersey Law of Trusts

DATE: June 8, 1999

1. SYLLABUS

This opinion provides a summary of New Jersey law, when an irrevocable trust is considered revocable, whether the use of the terms "heirs," "heirs at law," or "next of kin" create a residual beneficiary of the trust and whether the State of New Jersey can be a beneficiary of a trust.

2. OPINION

You have requested an update on New Jersey trust law. In this memorandum, we discuss (1) when an "irrevocable" trust is revocable, (2) whether the use in a trust of the terms "heir," "heir at law," "next of kin," or "distributee" creates a beneficiary of the trust who must give consent prior to the revocation of a trust, (3) whether the State of New Jersey can be a beneficiary of a trust, and (4) whether changes in New Jersey trust law require an amendment to the New Jersey regional supplement to the Program Operations Manual System ("POMS") section SI R01120.200.

Revocability of an "Irrevocable" Trust

Under New Jersey law, the settlor of an otherwise irrevocable trust may revoke the trust only with the consent of all those persons who have a remainder interest in the trust. See Clark v. Judge, 84 N.J.Super. 35, 50, 200 A.2d 801, 810 (N.J. Super. Ct. Ch. Div. 1964), aff'd, 44 N.J. 550, 210 A.2d 415 (1965); *Fidelity Union Trust Co. v. Parfner*, 135 N.J. Eq. 133, 37 A.2d 675 (N.J. Ch. 1944). If the settlor is the sole beneficiary of an irrevocable trust, he or she may revoke such trust by his or her own act. *See e.g., Manice v. Howard Savings Bank,* 30 N.J. Super. 267, 270 (N.J. Super. Ct. Ch. 1954); *Doyle v. Bank of Montclair,* 9 N.J. Super. 586, 590 (N.J. Super. Ct. Ch. 1950); Fidelity Union Trust Co., 135 N.J. Eq. at 136, 37 A.2d at 677-78. The settlor is considered the sole beneficiary when the settlor is the income beneficiary during his or her life and at the settlor's death, the trust conveys the remaining property to settlor's estate, or as the settlor may appoint by deed or by will. *M~*, 30 N.J. Super. 30 N.J. Super. at 270, 104 A.2d at 75.

Next of Kin, Heir, Heir at Law, or Distributee

The settlor may or may not be the sole beneficiary of a trust in which the settlor is the income beneficiary and at the settlor's death, the trust conveys the remaining property to the settlor's "next of kin." The settlor's intent determines whether this distribution creates a reversion to the settlor or whether it creates beneficiaries in the class of people who meet the criteria of next of kin. *See Fidelity Union Trust Co.,* 135 N.J. *Eq.* at 137-8, 37 A.2d at 677-78; *D~,* 9 N.J. Super. at 589, 76 A.2d at 43. When trusts have been created primarily for a settlor's benefit or when trust assets were allowed to be used for a settlor's needs, courts have held that the settlor intended to create a reversion to himself despite naming his next of kin to receive trust assets at the settlor's death. *D~,* 9 N.J. Super. at 590, 76 A.2d at 43 *Fidelity Union Trust Co.*, 135 N.J. *Eq.* at 139, 37 A.2d 675, 678. Where the settlor's use of the term "next of kin" creates a reversionary interest in the settlor, the settlor may revoke the trust by his own act.

There is no case law stating whether the settlor's designation of his "heir," "heir at law," or "distributee" to receive trust assets creates a beneficiary of the trust who must give consent prior to the revocation of a trust.

The State of New Jersey as a Beneficiary

Generally, states may be beneficiaries to a trust. 2 Scott, Law of Trusts § 116 (3d ed. 1967 & Supp. 1985). However, the issue of whether the State of New Jersey, or one of its departments, can be a beneficiary of a trust is not discussed in state statutes and has not been determined by the courts. Though New Jersey law is not clear on this issue, the general rule on states as beneficiaries, together with an oral opinion from the New Jersey Attorney General's Office that the State of New Jersey could be a beneficiary, have led us to conclude that the State of New Jersey may be a trust beneficiary, depending on the wording of the trust.

Even though we believe that the State of New Jersey may be a beneficiary of a trust, caution must be taken when determining whether a trust actually makes the State a beneficiary or only a lien holder (creditor) of the trust's assets. The beneficiary of a trust is the equitable owner of the trust and has a fiduciary relationship with the trustee, while a creditor only has a personal claim against a debtor. 1 Scott, Law of Trusts § 12.1 (1987). The failure to expressly designate the relationship as one of trust does not necessarily negate its existence. In the *Matter of Penn Central Transportation Co.,* 486 F.2d 519, 524 (3d Cir. 1973); *see also State v. United States Steel Co.,* 12 N.J. 51, 58, 95 A.2d 740, 744 (1953). The intent and the nature of the transaction between the parties determines whether a beneficial or creditor relationship exists. *See United States Steel Co.,* 12 N.J. at 58, 95 A.2d at 744. If the intention is that the money shall be kept or used for the benefit of the payer or a third party, a trust is created, *State v. Western Union Telegraph Co.*, 17 N.J. 149, 152, 110 A.2d 115, 117 (1954). However, intent to create a debt may be shown when the receiver of the funds is obligated to pay interest on those funds. *See State v. Plainfield-Union Water Co.,* 75 N.J. Super. 571, 579, 183 A.2d 684, 688-89 (N.J. App. Div. 1962)(quoting *State v. Atlantic City Electric Co.,* 23 N.J. at 267, 128 A.2d at 866). The nature of the transaction can be determined through an explicit understanding as to the terms upon which the payee is to hold funds, but, when these are not clear, the nature of the transaction must be divined through consideration of the parties' behavior and the attendant circumstances, on a case by case basis. *See State v. Atlantic City Electric Co.,* 23 N.J. 259, 266, 128 A.2d 861, 865 (1957).

Recent Changes in New Jersey Trust Law

There have been no significant recent changes to New Jersey's trust law. However, legislation creating "payback" trusts, allowable under 42 U.S.C. § 1396p(d)(4)(A) (trust) and 1396p(d)(4)(C) (pooled trust account) of the Medicaid law, has been introduced in both legislative houses (copy of assembly bill attached). The purpose of this legislation is to facilitate the establishment of trusts to supplement or augment assistance provided by government entities to persons with severe chronic disabilities and persons who are disabled under the federal Social Security Act. 1998 N.J. A.B. 2593(1)(e). Payback trusts could be established by a court; however, it would not be necessary to have court involvement to establish such a trust. 1998 N.J. A.B. 2593(3)(b) and (c). Most significantly, this legislation provides that notwithstanding any provision or principle of law to the contrary, a beneficiary of a payback trust may not revoke or terminate the trust if the instrument that governs the trust designates the trust as irrevocable or otherwise provides that the beneficiary shall not have the authority to revoke or terminate the trust. 1998 N.J. A.B. 2593(3)(e). Though this legislation would not affect current trusts, future trusts made under its provisions would be irrevocable without exception. We will continue to track the legislation and will inform you when it is signed into law.

C. PS 01-009 SSI Resource Issue - Trust for Albert ; SSN: ~

DATE: March 24, 1999

1. SYLLABUS

The trust in this opinion is not a countable resource for SSI purposes as the SSI beneficiary does not have the authority to revoke the Trust or direct the use of its principal for his support and maintenance without the consent of other individuals named in the court order as "remaindermen".

NOTE: Because of a change in the Social Security Act, this opinion may only be valid to trusts established by an individual prior to 01/01/00.

2. OPINION

You have requested our opinion as to whether the trust established for Albert ("the Trust") is a countable resource for the purposes of his Supplemental Security Income ("SSI") eligibility. We conclude that the Trust is not a countable resource.

Terms of the Trust

The Trust was established on May 14, 1998, pursuant to an Order of the Superior Court of New Jersey, Law Division, Somerset County. The Trust Agreement states that the Trust is irrevocable.

The Trust Agreement designates Man-Sum and So-Yee as settlors of the Trust and as co-trustees, along with The Bank of New York. The court ordered that the proceeds of a medical malpractice settlement award received by Albert be deposited in the Trust.

The Trust Agreement and the court order establishing the Trust provide that the Trust may be used only to meet those needs of Albert that cannot be met through private insurance or under any government or private program of financial entitlement, services, or other benefits. The trustees are precluded from reimbursing any public or private agency for the care, support, maintenance, or education of Albert. In addition, the proceeds may not be paid to Albert or applied to his benefit for any purpose, including payment for food, clothing, or shelter, if to do so would render him ineligible for any public or private program, or reduce the benefits to which he is entitled.

The court order establishing the trust and the Trust Agreement also provide that, upon the death of Albert , the trust income and principal will be made available to reimburse the New Jersey Division of Medical Assistance and Health Services for the cost of medical assistance and then to any other public agency that has provided her with medical assistance for the cost of such assistance. The court order also states that any amount remaining will be given in equal shares to So-Yee and Man-Sum equally, or the survivor thereof. The Trust Agreement does not have a provision naming So-yee and Man-sum as remaindermen, but, rather, indicates that any amount remaining shall be paid to the estate of A~ . However, the Trust Agreement expressly provides that to the extent that there is any conflict between the terms of the agreement and the terms of the court order, the terms of the court order shall govern.

DISCUSSION

As you know, a trust is a countable resource for SSI purposes if an individual has the authority to revoke the trust or direct the use of its principal for his or her support and maintenance. POMS § SI 01120.200(D)(1)(b), (2). If a trust is irrevocable, the trust principal is not anyone's resource. POMS § SI 01120.200(D)(2). Revocability depends on the terms of trust agreement and on State law. *Id.*

Here, the Trust is irrevocable by its own terms. Accordingly, the question is whether it is also irrevocable under New Jersey law.

Where the grantor of a trust is also the sole beneficiary, most states follow the general principle of trust law that the trust is revocable regardless of contrary language contained in the trust document. POMS § SI 01120.200(D)(3). However, some states recognize the irrevocability of a grantor trust if there is a named "residual beneficiary" in the trust document who would, for example, receive the principal upon the grantor's death or the occurrence of some specific event. *Id.*

In this case, it is not clear to us whether the State of New Jersey Division of Medical Assistance and Health Services or other public agency has a remainder interest in the Trust within the meaning of New Jersey law. However, it is unnecessary to resolve

the issue here, because the Trust names So-yee and Man-sum as remaindermen. Although the provision naming these individuals as remaindermen is contained only in the court order, and not in the Trust Agreement, the agreement provides that the terms of the court order shall govern if there is a conflict between the agreement and the trust. Thus, under New Jersey law, Albert may not revoke the trust absent the consent of those individuals. *See Clark v. Judge*, 84 N.J.Super. 35, 50, 200 A.2d 801, 810 (N.J. Super. Ct. Ch. Div. 1964), aff'd, 44 N.J. 550, 210 A.2d 415 (1965).

In summary, we believe that Albert has no authority to revoke the Trust or to direct the use of its principal for his support and maintenance. POMS § SI 01120.200(D)(1)(B).

Pamela Boorman Assistant Regional Counsel

D. PS 01-002 SI Resource Issue - Trust for Albert ; SSN: ~

DATE: March 24, 1999

1. SYLLABUS

In the State of New Jersey, an otherwise irrevocable trust is revocable if the grantor of the trust is the sole beneficiary. In this case, the trust does not name a residual beneficiary. However, the court order establishing the trust provides that upon the death of the grantor/beneficiary, the individual's parents would receive the remainder. The trust also provides that in the event of a conflict between the trust and the court order, the court order should be followed. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual prior to 1/1/00.

2. OPINION

You have requested our opinion as to whether the trust established for Albert ("the Trust") is a countable resource for the purposes of his Supplemental Security Income ("SSI") eligibility. We conclude that the Trust is not a countable resource.

Terms of the Trust

The Trust was established on May 14, 1998, pursuant to an Order of the Superior Court of New Jersey, Law Division, Somerset County. The Trust Agreement states that the Trust is irrevocable.

The Trust Agreement designates Man-Sum and So-Yee as settlors of the Trust and as co-trustees, along with The Bank of New York. The court ordered that the proceeds of a medical malpractice settlement award received by Albert be deposited in the Trust.

The Trust Agreement and the court order establishing the Trust provide that the Trust may be used only to meet those needs of Albert that cannot be met through private insurance or under any government or private program of financial entitlement, services, or other benefits. The trustees are precluded from reimbursing any public or private agency for the care, support, maintenance, or education of Albert. In addition, the proceeds may not be paid to Albert or applied to his benefit for any purpose, including payment for food, clothing, or shelter, if to do so would render him ineligible for any public or private program, or reduce the benefits to which he is entitled.

The court order establishing the trust and the Trust Agreement also provide that, upon the death of Albert, the trust income and principal will be made available to reimburse the New Jersey Division of Medical Assistance and Health Services for the cost of medical assistance and then to any other public agency that has provided her with medical assistance for the cost of such assistance. The court order also states that any amount remaining will be given in equal shares to So-Yee and Man-Sum equally, or the survivor thereof. The Trust Agreement does not have a provision naming So-yee and Man-sum as remaindermen, but, rather, indicates that any amount remaining shall be paid to the estate of A~ . However, the Trust Agreement expressly provides that to the extent that there is any conflict between the terms of the agreement and the terms of the court order, the terms of the court order shall govern.

DISCUSSION

As you know, a trust is a countable resource for SSI purposes if an individual has the authority to revoke the trust or direct the use of its principal for his or her support and maintenance. POMS § SI 01120.200(D)(1)(b), (2). If a trust is irrevocable, the trust

principal is not anyone's resource. POMS § SI 01120.200(D)(2). Revocability depends on the terms of trust agreement and on State law. *Id.*

Here, the Trust is irrevocable by its own terms. Accordingly, the question is whether it is also irrevocable under New Jersey law.

Where the grantor of a trust is also the sole beneficiary, most states follow the general principle of trust law that the trust is revocable regardless of contrary language contained in the trust document. POMS § SI 01120.200(D)(3). However, some states recognize the irrevocability of a grantor trust if there is a named "residual beneficiary" in the trust document who would, for example, receive the principal upon the grantor's death or the occurrence of some specific event. *Id.*

In this case, it is not clear to us whether the State of New Jersey Division of Medical Assistance and Health Services or other public agency has a remainder interest in the Trust within the meaning of New Jersey law. However, it is unnecessary to resolve the issue here, because the Trust names So-yee and Man-sum as remaindermen. Although the provision naming these individuals as remaindermen is contained only in the court order, and not in the Trust Agreement, the agreement provides that the terms of the court order shall govern if there is a conflict between the agreement and the trust. Thus, under New Jersey law, Albert may not revoke the trust absent the consent of those individuals. *See Clark v. Judge*, 84 N.J.Super. 35, 50, 200 A.2d 801, 810 (N.J. Super. Ct. Ch. Div. 1964), aff'd, 44 N.J. 550, 210 A.2d 415 (1965).

In summary, we believe that Albert has no authority to revoke the Trust or to direct the use of its principal for his support and maintenance. POMS § SI 01120.200(D)(1)(B). Therefore, the Trust is not a countable resource for SSI purposes.

Footnotes:

[1] Other provisions may prevent the sale, however, as in the case of self-granted supplemental needs trusts. *See* N.Y. Est. Powers & Trusts Law §§ 7 1.12(a)(5)(iii), (a)(5)(v), (e)(1); *see also* 42 U.S.C. §§ 1382b(e) , 1396p(d)(4).

[2] The beneficiary may nonetheless assign any income over $10,000 per year to her spouse, issue, ancestors, brothers, sisters, uncles, aunts, nephews or nieces, and may transfer income to children or other individuals the beneficiary is legally obligated to support. N.Y. Est. Powers & Trusts Law §§ 7-1.5(b), (d) (McKinney 2013). However, the beneficiary may not sell her interest for a monetary value. *See* N.Y. Est. Powers & Trusts Law § 7-1.5(b) (providing that the beneficiary may not “receive any consideration in money or money’s worth”).

[3] New Jersey law does not include specific statutory provisions regarding assignment of funds in self-granted special needs trusts. However, as in New York, use of the funds in a given trust still may be restricted in accordance with federal law. *See* N.J. Stat. Ann. §§ 3B:11-36, 3B:11-37 (authorizing the establishment of special needs trusts in accordance with 42 U.S.C. § 1396p(d)(4)).

4.24 New York

A. PS 14-042 Spendthrift Trusts – New York and New Jersey

DATE: January 8, 2014

1. SYLLABUS

This opinion addresses whether spendthrift clauses are recognized in New York and New Jersey and whether these states presume the existence of a spendthrift clause if a trust is silent as to whether it is a spendthrift trust. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. New York and New Jersey both enforce spendthrift clauses in trusts, except when the beneficiary of the trust is also the trust’s grantor. In New York, a trust is presumed to be a spendthrift trust with respect to an income interest in the trust but not for other interests. In New Jersey, a trust can be presumed to be a spendthrift trust based on evidence about the intent of the grantor.

2. OPINION

QUESTION PRESENTED

Whether New York and New Jersey recognize the validity of spendthrift clauses in trusts, and whether these states will presume the existence of a spendthrift clause if a trust is silent as to whether it is a spendthrift trust.

OPINION

Both New York and New Jersey recognize the validity of spendthrift clauses in trusts, except when the beneficiary of the trust is also the trust's grantor. In New York, a trust is presumed to be a spendthrift trust with respect to an income interest in the trust but not for other interests. In New Jersey, a trust can be presumed to be a spendthrift trust based on evidence about the intent of the grantor.

BACKGROUND

A spendthrift clause or trust prohibits both voluntary and involuntary transfers of a beneficiary's interest in trust income or principal. *See, e.g.,* Program Operations Manual System (POMS) SI 01120.200(B)(16). This protects the interest from creditors, and also prevents the beneficiary from selling her interest to a third party; for example, a beneficiary who is entitled to $100 per month from a spendthrift trust is not permitted to sell her right to receive monthly payments for one lump sum. *Id.* If a trust contains a valid spendthrift clause, so that the beneficiary cannot sell her interest, the trust will not be counted as a resource for the purposes of SSI eligibility. POMS SI 01120.200(D)(1)(a).

ANALYSIS

New York

Spendthrift Trusts Are Valid Under New York Law, Except When the Grantor Is Also the Beneficiary.

Spendthrift clauses are recognized as valid by New York law. *See In re V~ Estate*, 250 N.E.2d 343, 349 (N.Y. 1969) ("[T]he will of the testator should be given effect, and the interest of the assignor [is] deemed unassignable during the life of the trust."); *In re Estate of M~,* 723 N.Y.S.2d 349, 350 (Sur. Ct. 2001); *see also* N.Y. Est. Powers & Trusts Law § 7-1.5(a)(1). (McKinney 2013).

A spendthrift clause is not valid under New York law, however, when the beneficiary of the trust was also the trust's grantor; a beneficiary of a spendthrift trust who was also the trust's grantor will be permitted by the New York courts to sell her interest in the trust despite the spendthrift clause. *See In re Mordecai's Trust*, 201 N.Y.S.2d 899, 901-02 (Sup. Ct. 1960); *City Bank Farmers Trust Co. v. Kennard*, 1 N.Y.S.2d 369, 370-71 (Sup. Ct. 1937); *In re Blake's Will*, 235 N.Y.S. 324, 327 (App. Div. 1929); *see also* N.Y. Est. Powers & Trusts Law § 7-3.1(a) (McKinney 2013) ("A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator."). [1]

New York Law Presumes a Spendthrift Clause for Income Interests in a Trust, But Not for Other Interests.

When a trust neither prohibits nor expressly grants the beneficiary the right to sell her interest in the trust, New York law presumes a spendthrift clause with respect to any income interest in the trust. N.Y. Est. Powers & Trusts Law § 7-1.5(a)(1) (McKinney 2013); see also In re Estate of S~, 602 N.Y.S.2d 742 (Sur. 1991) ("The income interest of a beneficiary of a testamentary trust is inalienable in this state unless the instrument creating the trust provides otherwise.") [2] For interests in a trust other than income interests (e.g., a remainder interest), New York law presumes that there is no spendthrift clause unless the trust expressly includes such a provision. N.Y. Est. Powers & Trusts Law § 7-1.5(a) (McKinney 2013); *see also In re N~ Estate*, 389 N.Y.S.2d 420, 421 (App. Div. 1976) (presuming a trust includes no spendthrift clause with regard to a remainder interest).

New Jersey

Spendthrift Trusts Are Valid Under New Jersey Law, Except When the Grantor Is Also the Beneficiary.

New Jersey courts recognize spendthrift clauses as legally binding. *See In re Estate of B~*, 871 A.2d 103, 108 (N.J. Super. Ct. App. Div. 2005); *Moore v. Moore*, 44 A.2d 639, 646 (N.J. Ch. 1945) ("[T]he several attempted alienations or assignments by beneficiaries of anticipated income payments . . . are invalid and ineffectual as such, because [they are] contrary to the [spendthrift] restrictions attached by the trustor to his gifts.").

However, where the beneficiary of a spendthrift trust was also the grantor of that trust, the spendthrift clause is unenforceable under New Jersey law. N.J. Stat. Ann. § 3B:11-1(a) (West 2013) ("The right of any creator of a trust to receive either the income or the principal of the trust . . . shall be freely alienable and shall be subject to the claims of his creditors, not-withstanding any provision to the contrary in the terms of the trust."). [3]

New Jersey Law Presumes a Spendthrift Clause Where Evidence Suggests the Grantor Intended to Restrict the Beneficiary's Ability to Sell Her Interest in the Trust. Where a trust neither prohibits nor expressly permits a beneficiary to sell her interest in a trust, New Jersey law will presume a spendthrift clause where this appears to have been the grantor's intent. *See, e.g., Heritage Bank-North, N.A. v. Hunterdon Med. Ctr.*, 395 A.2d 552, 554 (N.J. Super. Ct. App. Div. 1978); *see also B~,* 871 A.2d at 108. Evidence of the grantor's intent to create a spendthrift trust can include the grantor's attempt to "make the trust immune from attachment by creditors" and the grantor's intent that "the beneficiary was to be protected against acts of his own improvidence." *Ampere Bank & Trust Co. v. Esterly,* 49 A.2d 769, 772 (N.J. Ch. 1946).

CONCLUSION

New York and New Jersey both enforce spendthrift clauses in trusts, except when the beneficiary of the trust is also the trust's grantor. In New York, a trust is presumed to be a spendthrift trust with respect to an income interest in the trust but not for other interests in trusts. In New Jersey, a trust can be presumed to be a spendthrift trust based on evidence about the intent of the grantor.

B. PS 01-111 SSI Resource Issue - Trust for Gloria; SSN: ~

DATE: June 4, 1998

1. SYLLABUS

In New York State, a trust is irrevocable and not a resource if the SSI claimant/beneficiary cannot revoke the trust or direct the use of the trust assets for his/her support and maintenance. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00.

2. OPINION

Subject:

You have requested our opinion as to whether the trust established for Gloria (the "Trust") is a countable resource for the purposes of Gloria's Supplemental Security Income ("SSI") eligibility. We conclude that the Trust is not a countable resource.

Terms of the Trust

The Trust was established on December 4, 1997, by the Supreme Court, County of Erie, State of New York, as Grantor (the "Grantor") and Marine Midland Bank, as Trustee (the "Trustee"), for the benefit of Gloria (the "Beneficiary). The Trust was to be funded with the proceeds of the settlement of a lawsuit.

The Grantor intended to create a supplemental needs trust which conforms to the provisions of New York Estates, Powers, and Trusts Law ("EPTL") Section 7-1.12. Under the provisions of the Trust, the Trustees may pay to or apply for the Beneficiary's benefit, all or part of the income or the principal of the Trust, provided however, that the Trust assets are to be used only to supplement, not supplant, impair, or diminish, the Beneficiary's governmental benefits. Some of the Trust principal was to be used to make renovations to the Beneficiary's home and to purchase a wheelchair van for the Beneficiary.

The Beneficiary has no power to control distributions from the Trust. The Trust terminates at the death of the Beneficiary. Upon such termination, any remaining income or principal will be paid to New York State up to the total value of all medical assistance paid on behalf of the Beneficiary by New York State. Any remaining principal or income will be distributed to the Beneficiary's parents, siblings and issue. The Trust is irrevocable and may not be amended, except to ensure that the trust continues to qualify as a supplemental needs trust. The Trust provides that it shall be governed by the laws of New York.

DISCUSSION

A trust is a countable resource for SSI purposes if an individual has the authority to revoke the trust or direct the use of its principal for his support and maintenance. POMS SI 01120.200D.1.b. The revocability of the trust and the ability to direct the use of the principal depend on the terms of the trust and/or on state law. POMS SI 01120.200D.2.

Under the terms of the Trust, the Beneficiary holds no power to revoke the Trust or to direct the use of the principal of the Trust.

Under New York law, the Beneficiary holds no power to revoke the Trust. The creator of a trust may revoke an otherwise irrevocable trust if he obtains the consent of all persons having a beneficial interest in the trust property. EPTL § 7-1.9. Here, however, the Grantor is a third party and not an agent of the Beneficiary. And, even if the Beneficiary was deemed to be the actual Grantor, the Beneficiary is not the sole entity with a beneficial interest in the Trust, since the State also retains a beneficial interest in the Trust. Thus, the Beneficiary cannot terminate the Trust at will.

In summary, the Beneficiary has no authority to revoke the Trust or direct the use of its principal for his support and maintenance. POMS SI 01120.200D.1.b. Therefore, the Trust is not a countable resource for SSI purposes.

C. PS 01-016 Payment of Trust Income as SSI Resource

1. SYLLABUS

Claimant's mother created a testamentary trust for the benefit of her son. The trust provides that the trustee shall apply the monthly net income derived from the trust for the benefit of the beneficiary. The trustee has absolute discretion as to whether any distributions should be made and had chosen not to make any distributions. The trust is not a resource and monthly net income is not subject to income counting rules unless actually paid to or for the benefit of the beneficiary.

2. OPINION

You have asked whether a trust which directs the trustee to use monthly net income from the trust for claimant's benefit, can be considered as a resource to claimant even though the claimant cannot access the trust directly. For the reasons set forth below, any cash distributions of monthly trust earnings or income which if paid to Francis, would be considered as unearned income to Francis in the month when paid. Any accumulated and undistributed trust earnings or income added to the trust principal, cannot be considered a resource of Francis's for SSI purposes.

Facts

We understand the relevant facts to be as follows: The deceased mother of claimant Francis , created by last will and testament, a trust which directed the trustee in pertinent part:

[to] pay or apply the net income derived therefrom in monthly or other convenient installments to or for the benefit of my son, Francis , during his lifetime. I empower the Trustee in its sole and absolute discretion at any time and from time to time to pay or apply for the benefit of my said son such portion of the principal as it may deem advisable for the proper care, support and maintenance of my son, and the Trustee's discretion in this regard shall be conclusive and shall not be subject to judicial review.

Francis's application for SSI benefits was denied because of excess resources due in part, to the District Office's belief that since the trust "implored" the trustee to use the monthly net trust income for Francis's benefit, such income was a resource to claimant.

Relevant Statutory and Regulatory Provisions

As defined in Social Security Program Operations Manual Systems ("POMS") SI 01120.200, "trust" is a property interest involving property held by an individual (trustee) subject to a fiduciary duty to use the property for the benefit of another (the beneficiary). In this instance, Francis is the trust beneficiary.

The grantor, or person who created the trust was Francis's deceased mother, Lena. As trust beneficiary, Francis does not hold legal title to the trust property but does have an equitable ownership interest in the property.

Property held in a trust may or may not be considered a resource for SSI purposes depending upon the nature of the legal instrument creating the trust. Specifically, whether a trust is an individual's resource depends on whether that individual has legal authority to revoke the trust, and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust. If an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for their own support and maintenance, the trust principal is not the individual's resource for SSI purposes. The revocability of a trust and ability to direct the use of the trust principal depends on the terms of the trust agreement and on State law. *See* SI 01120.200.

Two types of trust instruments are recognized in New York: 1) a lifetime trust or express trust created during the grantor's lifetime; and 2) a testamentary trust, or trust created by will. N.Y. Surr. Ct. Proc. Act § 103(31) and (48) (McKinney 1999). The trust at issue in this case is a testamentary trust which became effective upon Lena's death. The trust creator or grantor can revoke or amend their trust instrument, provided certain legal formalities are met. *See* N.Y. Est. Powers & Trusts Law § 7-1.9 (McKinney 1999). With respect to Lena's testamentary trust, this trust instrument was never revoked by her prior to her death; nor does the instrument contain any language allowing for revocation by any other means.

Since Francis did not have legal authority to revoke the trust, nor did the "terms of the trust" allow him to direct the use of the trust principal for his support and maintenance, the trust principal or property held in trust, cannot be considered Francis's resource for SSI purposes. Here, distributions from the trust principal for the proper care, support and maintenance of Francis, were at the trustee's "sole and absolute discretion" which in this regard was conclusive discretion and not subject to judicial review. Significantly, as noted in your March 9, 1999 memorandum, the trustee had not used any of the trust principal for claimant's benefit and "apparently" had no intention of doing so.

The analysis, however, does not end here. Distributions from trust property may either be from the trust principal which is the property placed in trust plus any trust earnings paid into the trust and left to accumulate, or from trust earnings or income earned by the trust principal. The Utica District Office contends that the monthly net income derived from the trust should be considered as a resource to Francis, since the trust instrument appeared to require that the trustee "pay or apply the net income" derived from the trust principal in monthly or other convenient installments to or for the benefit of Francis. Trust earnings are not income to the SSI claimant or recipient who is a trust beneficiary unless the trust directs or the trustee makes payment to the beneficiary. When paid, trust earnings or income, are considered unearned income to the person legally able to use them for personal support and maintenance. Thus, any distributions of the monthly net income derived from the trust property, which if made to Francis would be considered as unearned income when paid to him. This is irrespective of whether the trust principal was or was not considered a resource. In fact, cash paid directly from the trust to an individual is always considered unearned income. Additionally, food, clothing or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of support and maintenance and are valued under the presumed maximum value ("PMV") rule. *See* SI 00835.300. However, disbursements from the trust by the trustee to a third party that result in the individual receiving items that are not food, clothing or shelter, (i.e. medical care), are not income. *Id.*

Thus under the facts you have provided, the distribution of $417.92 made to Francis in February 1999, would be considered unearned income to Francis for that month. *See* Annual Accounting of the Trust of Francis, attachment to March 30, 1999 Memorandum. Any similar and subsequent cash distributions would also be considered as unearned income. However, the accumulated and undistributed trust principal of $990,912.70, as of January 1998, would not be considered a resource of Francis's for SSI purposes.

D. PS 01-012 SSI Resource Issue - Trust Question from the Office of Mental Retardation and Developmental Disabilities

DATE: May 26, 1999

1. SYLLABUS

The Trust discussed in this opinion was created and funded from the assets of two families to purchase a house and lease it to a non-profit agency. The Trust beneficiaries will be the initial occupants of this facility. Under the terms of the Trust and New York law, the Trust is not a countable resource as the beneficiaries of the Trust hold no power to revoke or to direct the use of the principal of the Trust.

In addition, the Trust beneficiaries will use their monthly SSI benefits to pay the full value of their care at the rate established by the placing agency. Therefore, they are not receiving in-kind support and maintenance from the Trust and the presumed maximum value does not apply.

NOTE: Because of a change in the Social Security Act, this precedent may only be applicable to trust established before 1/1/00.

2. OPINION

You have requested our opinion as to whether a draft trust (the "Trust") would be irrevocable under New York law. In addition, you have asked whether, under the terms of the Trust, payments from the trust to vendors for mortgage, tax and maintenance

payments would be in-kind support and maintenance ("ISM") to the Trust beneficiaries. We conclude that the Trust is irrevocable. In addition, we conclude that there is no ISM involved.

Terms of the Trust and of the Living Arrangements

According to OMRDD, two families are creating and funding the Trust from their own assets (the "Settlors"). The Trust will purchase a house and lease it to Spaulding P.R.A.Y. Residence Corp. ("Spaulding PRAY"), a voluntary, not-for-profit agency, at a rate equal to the monthly expense for the house (including mortgage, taxes and maintenance).

The house will be certified as a Level II Congregate Care facility. The Trust beneficiaries (the "Beneficiaries") will be the initial occupants of this facility. The Beneficiaries will live in a noninstitutional care situation, as defined in 20 C.F.R. § 416.1143(a). They receive monthly SSI payments at the Congregate Care amount. The Beneficiaries will use their SSI payment to pay the full rate ($793 per month) established by Spaulding PRAY, the placing agency. The remainder of the SSI payment will go to the Beneficiaries for use as a personal needs allowance.

The house is to be held by the Trust, for the benefit of the Beneficiaries, in a manner designed not to interfere with the Beneficiaries' receipt of any governmental benefits. After the death or removal from the property of the surviving beneficiary, the Trust's interest in the property will be transferred to Spaulding PRAY or another voluntary, not-for-profit agency, to be used as a community-based residence for mentally disabled persons. The Trust is irrevocable and may not be amended, except to ensure that the trust continues to be able to carry out its stated purposes. The Trust provides that it shall be governed by the laws of New York.

DISCUSSION

A. The Trust is Irrevocable

A trust is a countable resource for SSI purposes if an individual has the authority to revoke the trust or direct the use of its principal for his support and maintenance. POMS SI 01120.200D.1.b. The revocability of the trust and the ability to direct the use of the principal depend on the terms of the trust and/or on state law. POMS SI 01120.200D.2.

Under the terms of the Trust, the Beneficiaries hold no power to revoke the Trust or to direct the use of the principal of the Trust.

Under New York law, the Beneficiaries hold no power to revoke the Trust. The creator of a trust may revoke an otherwise irrevocable trust if he obtains the consent of all persons having a beneficial interest in the trust property. New York Estates, Powers and Trusts law ("EPTL") § 7-1.9. Here, however, for each Beneficiary, one Settlor is an unrelated third party and cannot be deemed to be an agent of that Beneficiary. In addition, each Beneficiary is not the sole person with a beneficial interest in the Trust, because there are two unrelated Beneficiaries. Thus, the Beneficiaries cannot terminate the Trust at will.

In summary, the Beneficiaries have no authority to revoke the Trust or direct the use of its principal for his support and maintenance. POMS SI 01120.200D.1.b. Therefore, the Trust principal is not a countable resource for SSI purposes.

B. There Is No In-Kind Support and Maintenance

If a claimant lives in a noninstitutional care situation and pays the rate the placing agency establishes, the claimant is not receiving in-kind support and maintenance and the presumed value rule does not apply. 20 C.F.R. §416.1143(b); POMS SI 00835.790B. Here, the Beneficiaries will live in a noninstitutional care situation, as defined in 20 C.F.R. §416.1143(a). They will use their monthly SSI benefits to pay the full value of their care at the rate established by the placing agency. Thus, they are not receiving ISM and the presumed value rule does not apply. 20 C.F.R. § 416.1143(b); POMS SI 00835.790C.

Further, the not-for-profit agency will lease the house from the Trust at a rate equal to the monthly mortgage, tax and maintenance payments. Thus, tax and maintenance payments made by the Trust in its capacity as landlord would not be ISM, as defined in 20 C.F.R. §416.1130(b).

E. PS 01-004 Trust Disbursements As In-kind Support and Maintenance

DATE: August 12, 1999

1. SYLLABUS

This opinion discusses whether payments made from a trust for the trust beneficiary's food and shelter are countable as income by the SSI program. Under SSI regulations, food and shelter provided to an SSI recipient is considered as income to the recipient if paid for by another person. This income is called in-kind support and maintenance. Since the trustee holds legal title to the trust property, the trust property is not owned by the trust beneficiary. Thus, payments made from the trust on behalf of the trust beneficiary are considered payments made by another person. Consequently, payments by the trust for food and shelter are counted as income to the trust beneficiary.

2. OPINION

This is in response to your request for an opinion of whether disbursements for shelter and clothing costs from a Supplemental Needs Trust would constitute a charge of in-kind support and maintenance ("ISM"). A recent ALJ decision and subsequent protest by the Regional Commissioner has highlighted the confusion with respect to this issue. Based upon the Agency's policy as set forth in the Commissioner's regulations and POMS, as well as the common law and statutory requirements involving the creation of trusts, we believe that disbursements from trust principal, which is not a resource to a beneficiary, are properly considered ISM.

In his decision dated May 10, 1999, on Jeri - ALJ Joseph found that payments made from a trust (which was not a countable resource), for claimant's shelter and clothing costs, did not constitute ISM. In support of this conclusion, the ALJ noted that ISM is food, clothing, or shelter which is received because someone else pays for it. 20 CFR 416.1130(b). The ALJ found that in the instant situation, because the claimant's own money was being used for food, clothing, or shelter, the disbursements were not ISM. This rationale is incorrect as a matter of law. As discussed below, the trust funds are the legal property of the trustee, not the claimant, who is the trust beneficiary. Accordingly, payments are being made by "someone else," the trustee.

Agency policy with respect to disbursements from trust principal not countable as a resource, is set forth in POMS SI 01120.200(E)(1). Specifically, subsection (E)(1)(B) states that "food, clothing, or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance." This policy is supported by common law principles of trust law and statutory law.

A trust has been described as "a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." *Coleman v. Golkin, Bomback & Co., Inc.*, 562 F.2d 166, 168-69 (2d Cir. 1977) (citing Restatement of Trusts § 2). The POMS provides a simpler definition, stating that "[a] trust is a property interest whereby property is held by an individual (trustee) subject to a fiduciary duty to use the property for the benefit of another (the beneficiary)." POMS SI 01120.200(B)(1).

The grantor, also known as a settlor or trustor, is the individual who creates the trust by transferring legal title of the trust property to the trustee. *See* POMS SI 01120.200(B)(2) & (B)(3); 76 Am Jur 2d Trusts § 2; II Scott on Trusts, § 3 (4th ed. l987). The trustee holds the title of the property for the benefit of the beneficiary who acquires an equitable interest in the trust property See SI 01120.200(B)(3); N.Y. Est. Powers & Trusts L. § 7-2.1. Thus, the beneficiary of a trust has no legal title to the property, but rather the trustee has title. N.Y. Est. Powers & Trusts L. § 7-2.1 (practice commentary). Accordingly, since the trustee holds legal title to the trust property, and not the claimant/beneficiary, disbursements made from the trust, are, indeed, payments made by someone other than the claimant. Accordingly, such disbursements are properly countable as ISM.

Footnotes:

[1] Other provisions may prevent the sale, however, as in the case of self-granted supplemental needs trusts. *See* N.Y. Est. Powers & Trusts Law §§ 7 1.12(a)(5)(iii), (a)(5)(v), (e)(1); *see also* 42 U.S.C. §§ 1382b(e) , 1396p(d)(4).

[2] The beneficiary may nonetheless assign any income over $10,000 per year to her spouse, issue, ancestors, brothers, sisters, uncles, aunts, nephews or nieces, and may transfer income to children or other individuals the beneficiary is legally obligated to

support. N.Y. Est. Powers & Trusts Law §§ 7-1.5(b), (d) (McKinney 2013). However, the beneficiary may not sell her interest for a monetary value. *See* N.Y. Est. Powers & Trusts Law § 7-1.5(b) (providing that the beneficiary may not "receive any consideration in money or money's worth").

[3] New Jersey law does not include specific statutory provisions regarding assignment of funds in self-granted special needs trusts. However, as in New York, use of the funds in a given trust still may be restricted in accordance with federal law. *See* N.J. Stat. Ann. §§ 3B:11-36, 3B:11-37 (authorizing the establishment of special needs trusts in accordance with 42 U.S.C. § 1396p(d)(4)).

4.25 North Carolina

A. PS 13-035 Whether a Life Estate Constitutes an Ownership Interest – North Carolina

DATE: December 21, 2012

1. SYLLABUS

This opinion examines whether a life estate interest constitutes an "ownership interest" for determining whether the property meets our definition of a "home." The opinion states that the recipient and her husband's life estate interest in the property appears legally sufficient under North Carolina law and therefore qualifies as an "ownership interest." Since the property in question meets our definition of a home, we may apply one of the intent to return exceptions in SI 01130.1005.B, and continue to exclude the property while the recipient lives in an institution, and her husband lives on the property.

2. OPINION

QUESTION

You asked whether a life estate interest retained by an SSI recipient and her husband in property they transferred to their daughter is an "ownership interest" for determining whether the property is a "home" for SSI eligibility purposes where Recipient is institutionalized and her husband continues to live on the property.

OPINION

The life estate interest retained by the SSI recipient and her husband is an "ownership interest" for determining whether the property is a "home" for SSI eligibility purposes.

BACKGROUND

Mary (Recipient) currently receives SSI. Recipient and her husband live in North Carolina. In July 2007, Recipient and her husband conveyed their property to their daughter using a North Carolina General Warranty deed. The deed specified that Recipient and her husband conveyed their "remainder interest in the subject property" to their daughter and retained a "life estate interest in the same." Recipient now lives in an institution and her spouse still lives on the property.

DISCUSSION

Under the Social Security Act (Act), a disabled individual may receive SSI if his or her income and resources do not exceed certain limits. *See* Act § 1611(a); 20 C.F.R. § 416.202(c), (d) (2012). [1] In determining the resources of an individual (and his or her eligible spouse, if any), the Social Security Administration (Agency) generally must exclude the individual's home. *See* Act § 1613(a)(1); 20 C.F.R. §§ 416.1210(a), 416.1212(b). "A home is any property in which an individual (and spouse, if any) has an *ownership interest* and which serves as the individual's principal place of residence." 20 C.F.R. § 416.1212(a) (emphasis added). However, when an individual (and spouse, if any) moves out of his or her "home" without the intent to return, the "home" becomes a countable resource because it is no longer the individual's principal place of residence. 20 C.F.R. § 416.1212(c). "If an individual leaves his or her *home* to live in an

institution, [the Agency] still consider[s] the *home* to be the individual's principal place of residence, irrespective of the individual's intent to return, as long as the spouse . . . of the eligible individual continues to live there." *Id.* (emphasis added).

Thus, if the Agency determines property meets the regulatory definition of "home," the Agency must exclude the individual's home when the individual leaves the home if one of the exceptions to the principal-place-of-residence requirement applies. Neither the regulations cited above, nor the related Program Operations Manual System (POMS) provisions, addressed below, suggest that an "intent to return" determination turns on the type of ownership interest an SSI recipient has in property that otherwise meets the regulatory definition of "home."

We turn first to whether North Carolina permitted Recipient and her husband to create a life estate in themselves with a remainder interest to their daughter. The information provided indicates Recipient and her husband have real property in North Carolina and are North Carolina residents. Therefore, we look to North Carolina law to determine if Recipient and her husband could and did properly create a life estate in real property with a remainder interest to their daughter. *See Cannuni v. Schweiker*, 740 F.2d 260, 264 (3d Cir. 1984) (discussing significance of ownership interest in property and variance in state laws with respect to ownership). The language in the General Warranty Deed establishes that Recipient and her husband have a life estate in the property, a property interest under North Carolina law. Life estates are often created by will or by reservation in a deed conveying real property. *See e.g. Brinkley v. Day*, 362 S.E.2d 587, 589 (N.C. Ct. App. 1987); *Durham v. Creech*, 231 S.E.2d 163, 167 (N.C. Ct. App. 1977). North Carolina does not require technical words of conveyance to establish a life estate. *See B~*, 362 S.E.2d at 589. For instance, a testator can create a life estate for her daughters by providing that her home should be "retained as a house for the girls so long as they (or any one of them) desire (or desires) to live in it regularly." In re *Estate of H~*, 301 S.E.2d 720, 650, 652 (N.C. Ct. App. 1983); *see also Baggett v. Jackson*, 76 S.E. 86, 88 (N.C. 1912) (finding that grantee took an estate in remainder after the death of the husband and the wife where deed by husband and wife conveyed land in fee to wife's son but provided that "We do except our lifetime on said land."). Although the deed here is silent as to the rights retained by Recipient and her husband based on their life estate, a life estate vests the life tenant with the right to use and possess the property during his or her lifetime. *See B~*, 362 S.E.2d at 589. Recipient and her husband's life estate interest in the property appears legally sufficient under North Carolina law and therefore qualifies as an "ownership interest" under 20 C.F.R. § 416.1212(a).

POMS SI 01130.100 requires the individual to have an ownership interest in property for the Agency to consider the property a home. A life estate meets the definition of an ownership interest because a life estate in a home is a form of legal ownership. *See* POMS SI 01110.515 (A)(2). Unless a will or a deed establishes that the life estate places restrictions on the life estate owner's rights, then the owner has the right to possess, use, and obtain profits from the property and sell his or her life estate interest. *See* POMS SI 01100.515(B)(1)(a). In this case, one of the intent to return exceptions would apply here because Recipient lives in an institution and her spouse still lives on the property. *See* 20 C.F.R. § 416.1212(c); POMS SI 01130.100(B)(5).

CONCLUSION

For the foregoing reasons, we conclude Recipient and her husband have a life estate in the property and their life estate is an "ownership interest" under the home exclusion.

Mary Ann Sloan
Regional Chief Counsel
By:

_____

Arthurice Brundidge

Assistant Regional Counsel

Footnotes:

[1] Any further reference to 20 C.F.R. is to the 2012 version.

4.26 North Dakota

A. PS 03-060 Revocability of Draft Self-Settled Special Needs Trust and Pooled Trust - North Dakota

DATE: December 5, 2002

1. SYLLABUS

Given the current absence of a Regional POMS Supplement to SI 01120.200, this information should prove valuable to field offices who seek guidance on the treatment of trusts established in the State of North Dakota. In its opinion, the Denver OGC assumed the trusts met an exception outlined in SI 01120.203B.1. and SI 01120.203B.2. and then considered whether the trusts would count under the regular resource rules. OGC recognized that most States would determine that a grantor trust is revocable if the grantor is the sole beneficiary of the trust. OGC next considered whether either trust contained sufficient language necessary to establish a residual beneficiary; most States recognize the irrevocability of a grantor trust if there is a named residual beneficiary. While North Dakota law had been silent on the issue of whether the State could be considered a residual beneficiary, OGC opined that the courts would likely consider the State to be a creditor rather than a residual beneficiary. If a beneficiary is "the person for whose benefit property is held in a trust," then OGC concluded that reimbursement to the State would constitute payment of a debt; therefore, none of the property held in either trust could be considered "held for the benefit" of the State. Having concluded that the State could not be considered a residual beneficiary, OGC examined the remaining trust language to determine whether either trust could be deemed irrevocable. In both instances, the grantor called for any remaining funds following Medicaid reimbursement to go to the "estate of the beneficiary." OGC concluded that such language is not sufficient to name a residual beneficiary. Thus, each trust was found revocable and a resource for SSI purposes.

2. OPINION

You have asked whether a draft Self-Settled Special Needs Trust from the North Dakota Department of Human Services is revocable and therefore a countable resource for purposes of determining a claimant's eligibility for SSI. You also have forwarded to us a North Dakota Guardian and Protective Services (GAPS) Pooled Trust for similar consideration. For the reasons discussed below, we believe you would be justified in finding that both of these trusts are resources.

DISCUSSION

Section 205 of the Foster Care Independence Act of 1999 (P.L. 106-169), signed into law on December 14, 1999, provides that certain trusts established with the assets of an individual after January 1, 2000, will be considered a resource for supplemental security income (SSI) eligibility purposes. See 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201A.1. However, an exception from § 1382b(e)(3) was made for a "Medicaid Special Needs Trust" that (1) is established with the assets of a disabled individual under age 65; (2) is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) expressly provides that any amounts remaining in the trust upon the death of the individual will be distributed first to the State, up to an amount equal to the total medical assistance paid on behalf of the individual under a state Medicaid plan. See 42 U.S.C. §§ 1382b(e)(1) and (5); U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203B.1. We assume for purposes of this memorandum you have concluded that the draft Self-Settled Special Needs Trust from the North Dakota Department of Human Services meets all of these criteria and qualifies for the exception.

An exception from § 1382b(e)(3) also was made for a "Medicaid Pooled Trust" that meets the following criteria:

- The trust is established and maintained by a nonprofit association.
- The trust has separate accounts that are maintained for each beneficiary (but assets are pooled for investing and management purposes).
- The accounts are established solely for the benefit of the disabled individual.

- The accounts are established by the individual, a parent, grandparent, legal guardian, or a court; and
- any amounts remaining in the beneficiary's account upon the death of the beneficiary are paid to the State up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a state Medicaid plan.

See 42 U.S.C. §§ 1382b(e)(1) and (5); U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203B.2. We assume you have concluded that the GAPS Pooled Trust meets all of these criteria and qualifies for the exception.

The Office of the General Counsel's Office of Program Law has opined that, if an exception in 42 U.S.C. § 1382b(e)(5) is met, the trust cannot be considered under § 1382b(e)(3), but it does not provide a general resource exclusion for such trusts and the trust should be considered under the regular resource rules set forth in regulations to determine if it is a resource available to the individual. See "Memorandum from OGC (Jones K~) to Associate Commissioner for Program Benefits (S~), SSA, Questions Related to Implementation of Section 205 of the Foster Care Independence Act of 1999 (Revocable Trusts Which Meet the Section 1917(d)(4)(A) and (C) Exceptions) - REPLY, (November 27, 2000)" (copy attached); see also POMS SI 01120.203B.3.b. Here, the draft Self-Settled Special Needs Trust and the GAPS Pooled Trust meet the Medicaid trust exceptions; therefore, they are subject to regular resource-counting rules.

Under the regular resource rules, "[i]f an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes." POMS SI 01120.200D.2. "The revocability of a trust and the ability to direct the use of the trust principal depends on the terms of the trust agreement and/or on State law. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance, it is not a resource." Id.

Here, by its express terms, the draft Self-Settled Special Needs Trust is irrevocable. See Article I. However, "[m]ost States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is revocable regardless of language in the trust document to the contrary." POMS SI 01120.200D.3; see also Restatement (Second) of Trusts § 339 (1959). We have found no North Dakota cases or statutes that specifically address the question of the revocability of grantor or settlor trusts. We believe, however, that a North Dakota court "when faced with this question, would take the position taken by the majority of states where this question has been litigated," i.e., the general rule expressed in the Restatement and the POMS that where the settlor of a trust is also the sole beneficiary and is not incapacitated, the trust is revocable. See Memorandum, Validity and Accessibility of Three Trusts in Colorado; State Law in Region VIII Regarding the Revocability of Grantor, or Settlor, Trusts, OGC (P~) to Regional Commissioner, SSA, Region VIII (November 30, 1994). As required by statute, the draft Self-Settled Special Needs Trust and the GAPS Pooled Trust both contain a provision that if there are residual assets remaining available after the beneficiary's death, the state of North Dakota or any other state that has provided medical assistance to the beneficiary shall be reimbursed for the amount paid by the state on the beneficiary's behalf. See draft Self-Settled Special Needs Trust, Article XI.B; GAPS Pooled Trust, Article XII.12.2(b).

"Most States recognize the irrevocability of a grantor trust if there is a named 'residual beneficiary' in the trust document who would, for example, receive the principal upon the grantor's death or the occurrence of some specific event." POMS SI 01120.200D.3.

You have asked whether the State of North Dakota (specifically, the North Dakota Department of Human Services) constitutes a residual beneficiary, which would render the trusts that are the subject of this memorandum irrevocable. We have found no North Dakota cases or statutes that specifically address this question. However, "[a]ccording to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor and the reimbursement is payment of a debt." POMS SI 01120.200H.1.b. Section 3(4) of the Restatement defines a beneficiary as "[t]he person for whose benefit property is held in trust." Arguably, none of the trust property in a Medicaid trust is held for the "benefit" of the state. Rather, any amounts paid to the State after the beneficiary's death are reimbursements for amounts the State paid for the benefit of the individual. See "Memorandum from OGC (D~) to Assistant Regional Commissioner Management and Operations Support, SSA, Region V, States Named as Beneficiary to a Trust, (June 24, 1997)." We believe that a North Dakota court would take the position taken by a majority of states and find the State is not a contingent or residual beneficiary.

One further issue with regard to the revocability of these two trusts remains. Both trusts state that if funds remain after the State of North Dakota (or any other state(s)) has been completely reimbursed, the remaining residual assets shall be distributed to the estate of the beneficiary. See draft Self-Settled Special Needs Trust, Article XI.B; GAPS Pooled Trust, Article XII.12.2(c). Where a future interest is limited to the heirs of the settlor, in the absence of evidence of a contrary intent, the inference is

that the settlor does not intend to create a remainder interest in his heirs. Restatement (Second) of Trusts § 127, comment b (1959). Accordingly, a trust agreement containing language specifying that the trust will pass to the grantor-beneficiary's estate upon his or her death is legally equivalent to a trust instrument where there is no further provision regarding the disposition of the trust and is revocable. Language referring to the trust passing to the beneficiary's "estate" upon the beneficiary's death should therefore ordinarily not be viewed as creating a residual or contingent beneficiary that would make the trust irrevocable. See "Memorandum from OGC (K~) to Acting ARC, Programs, SSA, Region V, Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, (May 24, 1995)," citing Restatement, § 127, comment b, p. 273.

In sum, we believe you would be justified in finding that the draft Self-Settled Special Needs Trust and GAPS Pooled Trust are revocable; therefore, these trusts should be counted as a resource for SSI purposes.

Mary Ann S~
Regional Chief Counsel

By_____
Thomas H. K~
Assistant Regional Counsel

4.27 Northern Mariana Islands

A. PS 10-009 Northern Marianas Islands Law on Empty Trusts

DATE: August 6, 2009

1. SYLLABUS

This guide from Chief Counsel's office in the San Francisco Region tells us that the establishment of empty or dry trusts are not valid in the Northern Marianas Islands with regard to SSI excluded trusts

2. OPINION

OVERVIEW

You asked whether an unfunded, or "empty," Northern Marianas Islands trust established under Section 1917(d)(4)(A) of the Social Security Act (the Act) is a valid trust for the purpose of determining Supplemental Security Income (SSI) eligibility. As discussed below, we conclude that an empty trust is not a valid trust under Northern Marianas Islands law.

BACKGROUND

In general, when determining an individual's eligibility for SSI, all assets in a revocable trust established by the individual, as well as those assets in an irrevocable trust which could be paid to the individual, will be considered a resource. *See* Act § 1613, 42 U.S.C. § 1382b(e)(3); POMS SI 01120.201(D). Assets in a trust may be excluded as a resource, however, if a statutory exception applies.

Section 1917(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(A), provides for one such exception, commonly known as the Medicaid payback trust or "special needs trust." To qualify for the exception, a trust must:

1. be established with the property of an individual under age 65 who is disabled;

2. be established for the benefit of such individual by a parent, grandparent, legal guardian, or court; and

3. provide that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime.

Act § 1917(d)(4)(A); POMS SI 01120.203(B)(1).

Where a parent or grandparent creates such a trust, the parent or grandparent must either (1) create a "seed" trust, i.e., establish a trust using a nominal amount of his or her own funds, after which the disabled individual may transfer his or her own funds to the trust, or (2) create an empty or dry trust, if state law permits, into which the competent disabled adult's funds can be placed. POMS SI 01120.203(B)(1)(f).

Thus, if Northern Marianas Islands law recognizes the validity of an empty trust, trusts created in this manner may be eligible for the Medicaid payback trust exception. Conversely, if Northern Marianas Islands law does not recognize the validity of an empty trust, such trusts will not qualify for the exception.

DISCUSSION

Northern Mariana Islands law does not directly address whether it would recognize an empty Section 1917(d)(4)(A) trust. As a general rule, however, Northern Mariana Islands law requires that a trust contain property. *See, e.g., Estate of Roberto v. Roberto*, 2003 MP 16, ¶ 45 (N. Mar. I. 2003) (citation omitted) ("the formation of a trust occurs when a settlor . . . transfers an interest in property . . . to a trustee . . . for the benefit of an ascertainable beneficiary"); *Lifoifoi v. Lifoifoi-Aldan*, 1996 MP 14, ¶28 (N. Mar. I. 1996) (providing that the creation of a trust requires the transfer of "an interest in property").

Moreover, to the extent that there is an absence of statutory or case law on any issue, the Northern Mariana Islands will follow the *Restatements of the Law*, a well-established national legal authority promulgated by the American Law Institute. *See* 7 CMC § 3401 (providing that "[i]n all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of Commonwealth, in the absence of written law or customary law to the contrary"); *Manglona v. Commonwealth*, 2005 MP 15, ¶ 19 (N. Mar. I. 2005) (applying 7 CMC § 3401). The *Restatement (Third) of Trusts,* in turn, mandates that a trust contain property. *See Restatement (Third) of Trusts* § 2 (2007) (defining a trust as "a fiduciary relationship with respect to property") (emphasis added), and § 2 cmt. i (providing that "[a] trust cannot be created unless there is trust property in existence and ascertainable at the time of the creation of the trust"); *accord Restatement (Second) of Trusts* § 74 (requiring tangible trust property for creation of trust). Accordingly, whether under its case law or under the long-standing *Restatement* rule, a trust in the Northern Marianas Islands is required to contain property at the time of its creation.

CONCLUSION

The Northern Marianas Islands do not recognize empty trusts as valid. Consequently, such trusts would not qualify for the exception to counting set forth in Section 1917(d)(4)(A).

4.28 OHIO

A. PS 09-104 SSI - Request for Six State Legal Opinion on Spendthrift Clauses - REPL Your Reference: S2D5G6, SI 2-1-3 (Spendthrift) Our Reference: 08-0141

DATE: May 8, 2009

1. SYLLABUS

This opinion addresses whether spendthrift clauses are recognized in the six states that compose the Chicago region and whether these states allow for a settler to establish a spendthrift trust for his or her own benefit. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. All states in the Chicago region recognize a spendthrift provision in a third-party trust. Likewise, all states in the Chicago region recognize that a beneficial interest in a self-settled discretionary trust would typically not be a countable resource as it would have little, if any, market value. In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursements, regardless of whether the trust has a spendthrift provision. Due to a lack of precedent, self-settled trusts with a spendthrift provision in Indiana or Ohio should be submitted to the Regional Chief Counsel's office for evaluation.

2. OPINION

You have asked whether spendthrift clauses are recognized in the six states in the Chicago Region and, if so, whether these states allow for a settlor to establish a spendthrift trust for his or her own benefit. Each of the six states in Region V recognizes

spendthrift clauses as valid when they are established by a settlor for a third party. Therefore, the beneficiary of a third party trust could not sell the beneficial interest in that trust if it has a spendthrift provision. The validity and effect of a spendthrift provision in a self-settled trust varies somewhat from state to state. However, in all six states, the settlor's interest in a discretionary trust would not be a countable resource, regardless of any spendthrift provision, because in the laws of those states, even if the settlor can sell the interest, it would have no significant market value, since the transferee could not demand any payments. In Illinois, Michigan, Minnesota and Wisconsin, the settlor could sell the right to receive future mandatory disbursements, even if the trust includes a spendthrift clause, and the current market value of those disbursements would be a resource. In Indiana and Ohio, it appears that a spendthrift clause may effectively prevent a settlor from selling future mandatory disbursements such that the right to those future disbursements would not be a resource. However, since the law has not yet been interpreted clearly, we recommend that you send any self-settled trusts with mandatory disbursements and spendthrift provisions to our office for evaluation if they are governed by Indiana or Ohio law.

DISCUSSION

A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. POMS SI 01120.200(B)(16). If a state recognizes the validity of a spendthrift clause, the beneficial interest in the trust, or the right to payments as a beneficiary, is not a countable resource because the beneficiary may not sell his or her beneficial interest in the trust. 1_/ *Id.* In the Chicago Region, all of the states recognize the validity of a spendthrift clause where the trust is established by a settlor for a third party.

However, if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the spendthrift clause may be considered invalid. All of the states in the Chicago Region view such self-settled spendthrift trusts to be invalid with respect to creditors. However, in determining whether an interest in a trust is a resource, the focus is on whether the individual can sell his or her beneficial interest in the trust. The states vary with respect to whether a spendthrift clause would prevent a settlor from selling his or her beneficial interest in the trust. The majority of states in the region, namely Illinois, Michigan, Minnesota and Wisconsin, are likely to follow the Restatement (Third) of Trusts, which indicates that a spendthrift clause in a self-settled trust is invalid with respect to any interest retained by the settlor. RESTATEMENT (THIRD) OF TRUSTS § 58, cmt. e. Under the Restatement, the spendthrift clause would not prevent the settlor's interest from being reached by the creditors or from being sold. *Id.* However, the most a transferee could receive are the rights the settlor has under the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 60, cmts. b, f. Therefore, we would typically not consider a discretionary interest in a self-settled spendthrift trust to be a countable resource, since such an interest would have little, if any, market value. However, the right to receive mandatory disbursements from such trusts would generally be considered a resource, since the spendthrift clause would not prevent the individual from selling the interest and that interest would generally have market value.

In contrast, Indiana and Ohio law could be read to view self-settled spendthrift clauses to be invalid only with respect to the rights of creditors. Therefore, a spendthrift clause governed by the laws of those states may effectively prevent a settlor from selling his or her interest in the trust. If that is the case, then the right to both mandatory and discretionary disbursements from such trusts may not be considered a resource for SSI purposes in those states. However, we have not encountered any cases actually interpreting these provisions to prevent a settlor from selling the right to mandatory disbursements from a trust. Therefore, we recommend that self-settled trusts with spendthrift provisions that are governed by the law of Indiana and Ohio be referred for an opinion at least where the settlor has a right to mandatory disbursements.

Illinois

In Illinois, a spendthrift clause in a trust established by a third party will effectively prevent the beneficiary from selling his or her beneficial interest. 2_/ *See Danning v. Lederer*, 232 F.2d 610, 612 (7th Cir. 1956); *Hopkinson v. Swaim*, 119 N.E. 985, 990 (Ill. 1918). However, a settlor may not establish a spendthrift trust for his or her own benefit. In re *Marriage of Chapman*, 297 Ill. App. 3d 611 (Ill. App. 1998). Therefore, in a self-settled trust, the settlor could sell the right to mandatory future disbursements for their current market value, despite any spendthrift provision. However, the settlor's beneficial interest in a discretionary trust would not be a countable resource, even though the spendthrift clause would not prevent the settlor from selling the interest because the right to receive discretionary disbursements would have no significant market value. Although we were unable to find any case law which directly addressed this issue, we found that the Illinois courts have relied upon the Restatement (Third) of Trusts as persuasive authority in interpreting trusts. *See* In Re *Estate of Feinberg*, 891 N.E.2d 549 (Ill. App. 2008) (generally recognizing Restatement (Third) of Trusts as persuasive authority). Therefore, we believe that Illinois would adopt the Restatement (Third) approach --that a transferee would receive only the rights the settlor had under the trust, i.e., to receive mandatory or discretionary disbursements when the trust is self-settled and contains a spendthrift provision. *See*

RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e. Therefore, the right to receive discretionary disbursements would not be considered a countable resource, as it is unlikely the right to discretionary disbursements would have any significant market value.

Indiana

Indiana law recognizes spendthrift trusts as generally valid against both voluntary and involuntary transfers. Ind. Code § 30-4-3-2(a). When the settlor is also the beneficiary of the trust, Indiana law recognizes an exception to this rule with respect to the rights of creditors. Ind. Code § 30-4-3-2; *see also Matter of Cook*, 43 B.R. 996 (N.D. Ind. 1984) (recognizing that if a settlor is also the beneficiary of the spendthrift trust, creditors may reach the trust corpus). Because Indiana law expressly addresses only the validity of a spendthrift clause in a self-settled trust with regard to creditors' rights, it is possible that Indiana would recognize a spendthrift provision to be valid to the extent that it would prevent the settlor from selling his beneficial interest in a self-settled trust. *See* POMS PS 01825.01 (PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~) (concluding that even if the settlor could sell the interest, it would have no value because the trust was discretionary). However, the comments to the section state that it follows the rule in the Restatement (Second) of Trusts section 156, which states that a self-settled spendthrift clause is ineffective against both creditors and transferees. *See* Ind. Code § 30-4-3-2(b); *see also* RESTATEMENT (SECOND) OF TRUSTS § 156(2). If you encounter a self-settled trust governed by Indiana law with a spendthrift provision and with the right to future mandatory disbursements, we recommend that you refer the case to our office for a legal opinion, since the law is not clear at this time.

Michigan

Michigan recognizes the validity of spendthrift trusts, in general, by statute and common law. Mich. Comp. Laws Ann. § 700.2902(2); Matter of *Estate of Edgar*, 389 N.W.2d 696 (Mich. 1986). However, under Michigan law, a person cannot create a true spendthrift trust for himself. *See* In re *Hertsberg Intervivos Trust*, 578 N.W.2d 289, 291 (Mich. 1998) (adopting RESTATEMENT (SECOND) OF TRUSTS § 156). In *Hertsberg Intervivos Trust*, the Michigan Supreme Court adopted Restatement (Second) of Trusts section 156, which states that a creditor or transferee could reach the entire amount of the trust that the trustee could, in his or her discretion, pay to or for the benefit of the settlor of the trust. *See id.* at 291. However, that case involved only the rights of a creditor, and we have previously advised that we think it likely that Michigan would adopt the Restatement (Third) approach--that a transferee, unlike a creditor, would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* POMS PS 01825.025 (PS 09-062 Michigan - SSI-Review of the Annuity and Special Needs Trust for Jeri L. K~) (citing RESTATEMENT (THIRD) OF TRUSTS § 60 and cmts. e, f (2003)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource despite any spendthrift clause; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the right to discretionary disbursements would have any market value.

Minnesota

Minnesota recognizes the validity of spendthrift trusts though common law; there is no Minnesota statute which expressly deals with spendthrift provisions. *See Morrison v. Doyle*, 582 N.W.2d 237, 240 (Minn. 1998); In re *Mack*, 269 B.R. 392 (D. Minn. 2001). Under Minnesota law, cases involving enforcement of spendthrift provisions have always involved protection of the interest of a beneficiary who is not the settlor of the trust; therefore, in Minnesota, it appears that a spendthrift clause in a self-settled trust would likely be considered void and unenforceable. In re *Mack*, 269 B.R. at 399 (citing *Simmonds v. Larison*, (B.A.P. 8th Cir. 1999)). In reaching its holding in *Mack*, the court looked to the Restatement (Second) of Trusts § 156. 3_/ While there is no Minnesota case specifically adopting the Restatement (Third) of Trusts on this issue, we believe it is likely that a Minnesota court would follow the Restatement (Third) approach in determining the extent to which the settlor's interest can be transferred. *See Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571 (Minn. Ct. App. 2003) (relying upon Restatement (Third) of Trusts in determining the role of a trustee); compare In re *Syverson Trust*, 2003 WL 22016795 (Minn. Ct. App. 2003) (unpublished) (declining to adopt the Restatement (Third) of Trusts where doing so would change existing law in Minnesota, noting such change was reserved for the Minnesota Supreme Court or the legislature). Therefore, the settlor's right to mandatory disbursements would be considered a resource; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the discretionary disbursements would have any significant market value. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e.

Ohio

Ohio recognizes the validity of a spendthrift clause through statute and case law. *See* Ohio Rev. Code Ann. § 5805.01; *see also Scott v. Bank One Trust*, 577 N.E.2d 1077 (Ohio 1991). Ohio adopted the Uniform Trust Code in 2007, and the controlling provisions are applicable to spendthrift trusts created before and after 2007. *See* Ohio Rev. Code Ann. §§ 5805.01(A), 5805.06(A)(2), and 5811.03(A)(1). Ohio law recognizes the validity of spendthrift provisions in general, and states that "[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter and in section 5810.04 of the Revised Code, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary." Ohio Rev. Code Ann. § 5801.01(C). This suggests that, even in a self-settled trust, a spendthrift provision will prevent the settler from transferring his or her interest in the trust. The only exceptions to the effectiveness of a spendthrift provision relate to when a creditor or assignee of the beneficiary can reach an interest in or a distribution from the trust. Ohio law further states that whether or not a trust contains a spendthrift provision, the settlor's creditor or assignee may reach the maximum amount that can be distributed to or for the settlor's benefit. *See* Ohio Rev. Code Ann. §§ 5805.06(A)(2), 5811.03(A)(1). Indeed, the official comment notes, "[W]hether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created." *Id.* Because Ohio law allows such liberal access to the trust assets by "assignees," section 5805.06 could be read to suggest that the beneficiary of a self-settled trust could sell his beneficial interest in the trust and the purchaser could obtain the maximum amount that the trustee could distribute to or for the settlor's benefit. However, the Office of General Counsel has determined that the better reading of this provision presumes that only an assignee who is a creditor, not a purchaser for value, could reach the maximum amount the trustee could distribute for the settlor's benefit. *See* POMS 01825.039 Ohio (PS 08-159 SSI Review of the Trust and Annuity for Dustin J. E~). Therefore, it appears that spendthrift provisions in self-settled trusts governed by Ohio law may be fully valid with respect to the limitation on selling the settlor's beneficial interest in the trust. This interpretation of Ohio law would not have a significant impact where a trust is wholly discretionary. Even if the settlor could sell that interest, it would have no significant value. However, this interpretation would also mean that even the right to future mandatory disbursements could not be sold and therefore would not be a resource. This would be a significant departure from the Restatement (Third) of Trusts, as well as the Restatement (Second) of Trusts, both of which state that a spendthrift provision restraining the voluntary and involuntary alienation of the settlor's interest in the trust is invalid. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(1), RESTATEMENT (THIRD) OF TRUSTS § 58(2). In fact, Ohio adopted the comment to Uniform Trust Code provision, which specifically cites to the Restatement (Second) of Trusts § 58(2) and states that "[a] spendthrift provision is ineffective against a beneficial interest retained by the settler." Ohio Rev. Code Ann. § 5805.01, cmt.; Unif. Trust Code § 502, cmt. It would seem odd, therefore, if the Ohio code (and the uniform code) intended to deviate from the Restatement in this important way. Since the law is not entirely clear, and since there are not yet any cases interpreting the Ohio provisions, we recommend that you refer to our office any self-settled trust governed by Ohio with a spendthrift provision and provisions for mandatory disbursements.

Wisconsin

Wisconsin recognizes spendthrift trusts as valid and not subject to voluntary or involuntary alienation only where the beneficiary is a person other than the settlor. Wisc. Stat. Ann. § 701.06(1)-(2). Therefore, it appears that a spendthrift provision would not prevent a settlor from selling his beneficial interest in the trust when he is also the settlor of the trust. Wisc. Stat. Ann. § 701.06(1)-(2)._4 However, we believe that Wisconsin would likely follow the Restatement (Third) approach--that a transferee would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* In re *Walters Family Trust*, 685 N.W.2d 172 (Wis. Ct. App. 2004) (unpublished) (parties recognizing Restatement (Third) of Trusts as controlling law); *see also* POMS PS 01825.055 (PS 08-156 - Wisconsin - Review of the Trust for Brian G~) (citing to Restatement (Third) of Trusts as controlling authority in Wisconsin)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource; however, the right to discretionary disbursements would not be considered a resource, as it is unlikely the right would be of any significant market value.

CONCLUSION

In sum,

- All states in the Chicago region would recognize the validity of a spendthrift provision in a third party trust.
- In all states in the Chicago Region, the beneficial interest in a self-settled discretionary trust would not be a countable resource because even if the individual can sell the interest, it would have no significant market value.

o In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursement, regardless of whether the trust has a spendthrift provision.

o Trusts governed by Indiana or Ohio law should be referred for a legal opinion if the trust is self-settled and provides for mandatory disbursements and has a spendthrift clause.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Anne M~
Assistant Regional Counsel

/_1 The trust may still be a resource for other reasons.

/_2 In *Matter of Perkins*, 902 F.2d 1254 (7th Cir.1990), the Seventh Circuit Court of Appeals noted the following considerations in determining whether a trust under Illinois law qualifies as a spendthrift trust: "(1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust, and (3) whether the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus and termination of the trust." *See*, e.g., In re *Silldorff*, 96 B.R. 859, 864 (C.D.Ill.1989). The degree of control which a beneficiary exercises over the trust corpus is the principal consideration under Illinois law.

/_3 This provision states:(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest. (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

/_4 Wisconsin law indicates that where a settlor is a beneficiary of a trust regardless of whether it has a spendthrift provision, a creditor may, at the discretion of the court, receive payments from the income or principal of the trust to satisfy a judgment. Wisc. Stat. Ann. 701.06(6)(a).

B. PS 09-071 SSI - Ohio - Review of Special Needs Trust and Annuity for Joseph A. N~ Your Ref: S2D5G6 SI-1-3- OH Our Ref: 08-0117

DATE: March 12, 2009

1. SYLLABUS

This opinion examines whether or not a trust established on June 14, 2005, with the assets of an individual is a resource for Supplemental Security Income (SSI) purposes. This opinion also examines whether or not an annuity is irrevocably assigned to the trust. The trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act. Generally under these provisions, trusts established with the assets of the individual or the individual's spouse are considered resources for SSI purposes, unless an exception applies. The trust does not qualify for the special needs trust exception because it allows for the payment of prohibited expenses. Therefore, the trust is a countable resource. With respect to the annuity, the annuity payments are irrevocably assigned to the trust. The payments to the trust are income because the trust is a countable resource. On January 1, 2007, the trustee amended the trust so that it meets all of the criteria required to be excluded under the special needs trust exception. The trustee, however, did not provide any evidence showing a court approved the amendment as is mandated by the trust. Therefore, the initial decision to count the trust as a resource remains until such evidence is provided.

2. OPINION

You asked us review the Joseph A. N~ Special Needs Trust and annuity to determine whether (1) the trust is a resource for purposes of determining the claimant's eligibility for Supplemental Security Income (SSI); and (2) whether the annuity is irrevocably assigned to the trust. As explained below, we advise that the trust should currently be considered a resource (and the annuity payments should, therefore, be considered income). However, the trust would not be a resource for SSI purposes if the trustee can show that she received court the requisite court approval for a 2007 amendment to the trust, governing payment of taxes. In that case, the annuity would no longer be considered income.

BACKGROUND

On June 13, 2005, the Probate Court of Cuyahoga County, Ohio approved a personal injury case settlement for Joseph A. N~, a minor and SSI recipient ("Joseph Jr."). The court approved a $1,700,000.00 settlement, which included $100,000 for medical expenses; $668,960.79 to the attorney for suit expenses and attorney fees; $93,000 to Joseph Jr.'s parents, Joseph A~ ("Joseph Sr.") and Audra, for the loss of service of the minor; and the remaining $838,029.21 for Joseph Jr.'s benefit. *See* Entry Approving Settlement of a Minor's Claim, June 13, 2005 ("Settlement"). The next day, June 14, 2005, the Probate Court entered a judgment authorizing the establishment of the Joseph A. N~ Special Needs Trust (the "trust"). The order stated that the court had determined that it was in Joseph Jr.'s best interest to hold the settlement funds in trust that would allow him to receive government benefits, because he would require continuing support, assistance and supervision for the rest of his life, and the funds received from the settlement would be inadequate to care for his needs throughout his lifetime. The trust was established by Joseph Sr. as Settlor, and with Janet L. L~, an attorney, as Trustee. The trust establishes that if Ms. L~ is unable or unwilling to continue to serve as trustee, she must apply to the court for leave to resign and appointment of a successor. Trust, Art. IX.

Of the settlement money dedicated to Joseph Jr.'s benefit, the court authorized Joseph Jr.'s guardian to hold $260,000 in escrow to purchase an accessible home for Joseph Jr. Of the remaining money, $178,039.21 directly assigned and used to establish the trust, and $400,000 was used to purchase an annuity. *See* Trust Art. I; Settlement. However, the trust allows the Trustee to accept additional assets of any kind from any sources, and add those assets to the trust estate. *See* Trust, Art. I. The stated purpose of the trust is to be a special needs trust as described in 42 U.S.C. § 1396(d)(4)(A). *See* Trust, Preamble.

The distribution of the income and principal of the trust is made by the Trustee. *See* Trust, Art. III. The Trustee has the discretion to make distributions as she considers necessary and advisable, but must obtain prior approval of the court before making any such distributions. See Trust, Art. III(1). However, the Trustee is directed not to make any expenditures which would cause Joseph Jr. to become ineligible for Medicaid or other need-based benefits. *Id.* The Trustee is not obligated and may not be compelled to make any expenditures. *See* Trust, Art. III(6). To the maximum extent possible, the Trustee is directed to make direct payments to persons or entities who supply goods or services to Joseph Jr., although the Trustee may also allow Joseph Jr. a periodic allowance for spending money, "keeping in mind the effect on his eligibility for disability-related benefits." *See* Trust, Art. III.

The trust includes a spendthrift provision that indicates that Joseph Jr. "shall have no interest in either the principal or income of this Trust." Trust, Art. V. It provision also states that no beneficial interest in the principle or income of the trust, including any beneficial interest held by Joseph Jr., "shall be anticipated, assigned, or encumbered, or shall be subject to any creditor's claim or legal process" until the property has actually been distributed. *See* Trust, Art. V. The trust states that its terms are irrevocable, and may not be altered, amended, revoked or terminated by the settlor or any other person. Trust, Art. II. The only exception is that the Trustee and Joseph Jr.'s guardian may amend or revoke the trust for to carry out the trust's purpose, or accommodate any changes in the laws or regulations governing benefit programs. Trust, Art. II. However, the Trustee and guardian may do so only with prior permission of the court. *Id.*

There are two ways for the trust to be terminated. First, the trust states that because disability is a statutory prerequisite for the beneficiary of a special needs trust, Joseph Jr. himself may terminate the trust if and only if the Social Security Administration or an equivalent state agency determines that he no longer meets the statutory definition of disability. *See* Trust, Art. IV(A). The trust states that if it is determined that Joseph Jr. is no longer disabled, then the Trustee must inform him in writing of his right to terminate the trust. Trust, Art. IV(A). This right to terminate is personal to Joseph Jr., and may be exercised only by him. *Id.*

Otherwise, as long as Joseph Jr. continues to be disabled, the trust terminates upon his death. *See* Trust, Art. IV(B). Upon termination, the Trustee is directed to pay any "properly allowable" costs of administering and wrapping up the trust, but expressly excluding any payments for funeral expenses or debts owed to third parties. *See* Trust, Art. IV(B)(1).

As originally constituted in 2005, the trust stated that "[u]nless [Joseph Jr.] has made adequate alternative provisions, the Trustee shall pay out of the principal included in the gross estate of [Joseph Sr.] for estate tax purposes, any federal or state estate taxes or other inheritance tax (including interest or penalties thereon) arising by reason of [Joseph Jr.'s] death and attributable to the trust property included in the gross estate of [Joseph Sr.] for purposes of such tax." Trust, Art. IV(B)(2). However, on January 1, 2007, the Trustee signed an amendment specifically deleting the original language of Article IV(B)(2) and replacing it with language that directed the Trustee to pay any state or federal taxes due from the trust because of Joseph Jr.'s death. *See* First Amendment to Trust Agreement, January 1, 2007. The Trustee is also directed to "comply with all state

and/or federal regulations in effect at the time of [Joseph Jr.'s] death regarding notification and disbursement to the state(s)," including claims from any agency or agencies from which Joseph Jr. received Medicaid or other medical assistance pursuant to 42 U.S.C. § 1396. *See* Trust, Art. IV(B)(3). Such claims are to be paid "from the assets remaining in Trust, up to and including all amounts remaining herein if necessary[.]" Trust, Art. IV(B)(3). If the trust assets are insufficient to pay all such claims in full, the claims are to be reimbursed on a pro rata basis. *See* Trust, Art. IV(B)(3). If there are any assets remaining in the trust after the repayment of Medicaid expenses, they are to be distributed by the Trustee to Joseph Jr.'s estate. *See* Trust, Art. IV(B)(4). The trust is governed by Ohio law. *See* Trust, Art. VIII.

The remaining $400,000 of the settlement was used to purchase an annuity contract from Metropolitan Life Insurance Company ("MetLife'). MetLife Tower Resources Group is named as the owner of the annuity, and Joseph Jr. is named as the "measuring life." *See* Annuity certificate. Under a Qualified Assignment, Release and Pledge Agreement under the Internal Revenue Code, MetLife agreed to make periodic payments under the annuity contract on behalf of the defendant in the lawsuit. The trust is named as sole payee, with no successor payee other than Joseph Jr.'s estate following his death. *See* Qualified Assignment, 8. The Qualified Assignment accepts the terms of the settlement as irrevocable. *Id.* Other than the Qualified Assignment, the annuity contract provides that it is not assignable, and may not be transferred, assigned or pledged as collateral for a loan. Annuity, page 2 and endorsement. The annuity contract specifies also that "[Joseph Jr.] is not the owner of, and has no ownership rights in, this contract and may not anticipate, sell, assign, pledge, encumber, or otherwise use this contract as any form of collateral." Annuity, page 1. According to the annuity contract, the scheduled payments to the trust are as follows: a monthly payment of $1,200 from July 1, 2005, until December 1, 2016. Annuity, Page 3. If Joseph Jr. is still living on December 8, 2016, the trust will received monthly payments of $1,695.00 for life, increasing by 2% every December. Annuity, page 3. MetLife may make a lump-sum payment only if ordered to do so by the court. Annuity, Endorsement.

DISCUSSION

I. The Trust

The trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382(b)(e); POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual or the individual's spouse are considered resources for SSI purposes even if they are irrevocable. However, there is an exception for certain trusts that are established under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must be

(1) Established with the assets of a disabled individual under age 65, or the disabled individual's spouse;

(2) Established for the benefit of the individual by a parent, grandparent, legal guardian, or court; and

(3) Provide that the state will receive all amounts remaining in 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.

POMS SI 01120.203(B)(1)(a). These rules apply whether the trust is established with the individual's own assets, or with the assets of the individual's spouse. 42 U.S.C. § 1382(e)(2)(A); POMS 01120.201(B)(7). If the trust meets an exception to counting it as a resource under Section 1613(e) of the Act, if must still be evaluated under the regular resource rules. POMS SI 01120.203(B)(1)(a).

A. Special Needs Trust Exception

Assuming Joseph Jr. is found disabled, the trust meets the first two requirements for the special needs trust exception to counting it as a resource under Section 1613(e). Joseph Jr. was born in 1998, and thus is under the age of 65. The trust was established for Joseph Jr.'s benefit by his legal guardian, and was funded with proceeds from the settlement of his lawsuit. Whether the trust meets the third requirement of the special needs trust exception is more problematic.

1. The Original 2005 Trust

Under the original language of Article IV(B)(2), the trust would not meet the third requirement for the special needs trust exception. POMS SI 01120.203(B)(3)(b) explains that inheritance taxes are not permitted prior to reimbursing states for medical assistance. Because the original language of Article IV(B)(2) of the trust allowed the payment of inheritance taxes before reimbursing the state or states for Medicaid expenses, the original 2005 trust would not meet the requirements of a Medicaid payback trust.

2. The 2007 Amendment

The Trustee attempted to correct the problem in 2007 by amending the trust to delete Article IV(B)(2). If the amendment were effective, the language of the amended trust would also meet the third requirement for the special needs trust exception. Although the trust's termination clause lists fees for administering the trust estate, and also taxes due to the state or federal government because of Joseph Jr.'s death, before reimbursement of expenses for Medicaid services, the Agency permits such expenses to be paid prior to reimbursement of the state. POMS SI 01120.203(B)(3)(a). Aside from these allowable expenses, the trust's termination clause provides that the entire amount remaining in the trust may be paid to reimburse all the states that provided medical services to Joseph Jr. Expenses that are prohibited for purposes of meeting the Medicaid payback trust exception, such as funeral expenses, *see* POMS SI 01120.203(B)(3)(a)-(b), are expressly excluded until after all Medicaid services have been reimbursed.

It is not clear, however, that the amendment is effective. First, the Trustee stated that she was amending the trust pursuant to her authority under Article II of the trust. Article II, however, states that the Trustee may amend the trust only with prior approval of the court. There is nothing that indicates that the Trustee obtained the requisite approval to amend the trust. Second, the amendment purports to be retroactive. Generally, an amendment or modification of a trust's terms has only a prospective effect. *See* RESTATEMENT (THIRD) OF PROPERTY, § 12.1, Reporter's Notes 7 on cmt. f (contrasting modification and reformation); RESTATEMENT (THIRD) OF TRUSTS, § 62, Reporter's Notes. However, under Ohio law, a court can reform a trust retroactively to conform the terms to the settlor's intention even if the original terms of the trust appear unambiguous, but only if the court finds clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of law or fact. OHIO REV. CODE ANN. § 5804.15. Also, a court may modify the terms of a trust, and may give that modification retroactive effect "[t]o achieve the settlor's tax objectives." OHIO REV. CODE ANN. § 5804.16. Therefore, if the court approves the amendment, as required by Article II, the amendment should be effective. The court may rule that the amendment may be applied retroactively if it finds (1) clear and convincing evidence of a mistake of law or fact, or (2) that retroactive modification is appropriate to achieve Joseph Jr.'s tax needs. OHIO REV. CODE ANN. § 5804.15-16. Therefore, if Trustee can show that she obtained court approval for the 2007 amendment, the trust would meet the requirements for the special needs trust exception.

B. Regular Resource Rules

If a court amends, modifies or reforms the trust so that it meets the special needs trust exception to counting it as a resource under Section 1613(e) of the Act, the regular resource rules would apply. *See* POMS SI 01120.200, SI 01120.203(B)(1)(a). Under the regular resource rules, a trust will be a resource if it is revocable, or if the individual can direct the use of the trust principal for his support. Also, if the individual can sell his beneficial interest in the trust, that interest is a resource. POMS SI 01120.203(D)(1)(A). The trust would not be a resource under these rules.

First, the trust specifically states that it is irrevocable. Trust, Art. III. However, there is an exception under which the Trustee, or Joseph's guardian (acting on Joseph's behalf), may amend or revoke the trust, although only to carry out the trust's purpose. Under Ohio law, an Ohio trust that otherwise meets the Medicaid payback trust provisions is considered irrevocable if it says it is irrevocable and the terms of the trust prohibit the settlor from revoking it, whether or not the settlor's estate or the settlor's heirs are name as the remainder beneficiary or beneficiaries of the trust upon the settlor's death. OHIO REV. CODE ANN. § 5804.18. The trust specifies that it is governed by Ohio law.

Here, Joseph Jr. is the settlor, to the extent his assets were used to fund the trust. *See* OHIO REV. CODE ANN. § 5801.01(5). And, under the terms of the trust, Joseph Jr.'s guardian, acting on Joseph Jr.'s behalf, can revoke the trust. *See* Trust, Art. II-III. Because the provisions at Ohio Revised Code § 5804.18 may not apply, the general rule may apply, and the court would be required to approve the termination of the trust if Joseph Jr. is both the settlor and the sole beneficiary. Ohio Rev. Code Ann. § 5604.4. However, the State of Ohio would likely be considered a trust beneficiary, whose consent would be required to revoke the trust. *See Quinchett v. Massanari*, 185 F. Supp. 845 (S.D. Ohio 2001) (finding state to be an intended beneficiary of trust where trust stated that it was "irrevocable," and state law did not require Medicaid payback trusts to be irrevocable). Therefore, it appears that Joseph Jr. lacks the authority to revoke the trust unilaterally.

The trust also allows Joseph Jr. to terminate the trust if he is found not to meet the statutory definition of disability. Under this provision, the trust will become a resource to Joseph only if and when he is found to be no longer disabled, which is beyond his control. And, in any event, if the Social Security Administration finds he is no longer disabled, he would only potentially be eligible for SSI for two months, regardless of any available resources. *See* 42 U.S.C. § 1383(a)(5).

Therefore, Joseph Jr. cannot unilaterally revoke the trust at will and obtain the assets. In addition, Joseph Jr. cannot compel the Trustee to use the trust funds for his support and maintenance. *See* Trust, Art. III(6). And finally, the trust also expressly bars Joseph Jr. from assigning any beneficial interest he may have in the trust. *See* Trust, Art. V. Therefore, the trust is not a resource under the regular resource rules.

However, certain payments from the trust may constitute income to Joseph Jr. Although it is disfavored, and the Trustee is directed to keep Joseph Jr.'s eligibility for disability benefits in mind when making distributions, the Trustee has the discretion to make payments to Joseph Jr., including a periodic allowance for spending money. See Trust, Art. III. Such payments would constitute unearned income to Joseph Jr. *See* POMS SI 01120.200(E)(1)(a). And if the Trustee contracts with third-party vendors for food or shelter for Joseph Jr., that would constitute income in the form of in-kind support and maintenance. *See* POMS SI 01120.200(E)(1)(b).

II. The annuity contract

Because the trust is currently a resource under Section 1613(e) of the Act, any payments to the trust are income. POMS SI 01120.200(G)(2)(b). However, if the trust were properly amended, modified, or reformed so that it was not a resource, the annuity payments made to the trust would not be income. Under the resource rules, a legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. *See* POMS SI 01120.200(G)(1)(d). Under the annuity, the trust is the only payee entitled to receive periodic payments under the annuity contract. *See* Annuity, Qualified Assignment. For all practical purposes, this constitutes an irrevocable assignment of periodic payments to the trust, because there is no provision for naming any successor payee while Joseph Jr. is living. The annuity certificate otherwise specifies that the annuity cannot be assigned. Therefore, only the trust has the right to receive payments, and Joseph Jr. cannot demand payment or sell his right to receive payments. Consequently, the annuity payments have been irrevocably assigned to the trust. For that reason, the annuity payments would not be income to Joseph Jr. if the trust were not a resource.

CONCLUSION

In sum, until the Trustee can show that a Court has approved the 2007 amendment, the trust is a resource for SSI purposes, and the annuity payments are income to Joseph Jr. However, if the court were to approve the amendment, and thus modify or reform the trust consistent with the language in the proposed amendment, the trust would no longer be a resource, and the annuity payments would not be income.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Julie L. B~
Assistant Regional Counsel

C. PS 08-159 SSI-Review of the Trust and Annuity for Dustin J. E~, ~ - REPLY; Your Ref: S2D5G6, SI 2-1-3 OH (E~); Our Ref: 08-0142-NC

DATE: July 28, 2008

1. SYLLABUS

This opinion evaluates a trust established for a disabled child in 1993. The trust was established by the Probate Court of Crawford County, Ohio, and funded with the proceeds from a personal injury settlement. The terms of the settlement included lump sum deposits to the trust and periodic annuity payments that are irrevocably assigned to the trust. Because the trust was established prior to January 1, 2000, it is evaluated only under regular SSI resource rules. That is, the trust principal is a countable resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. In this case, the trust is irrevocable as stated. Moreover, the individual cannot direct usage of the trust assets because a trustee-appointed Trust Advisory Committee has absolute discretion to make distributions. The periodic annuity payments are not considered countable income because the annuity payments are determined to have been irrevocably assigned under Ohio state law.

CAUTION: Due to a change in Social Security law this precedent may only be applicable for trusts established prior to January 1, 2000.

2. OPINION

You asked (1) whether the Dustin J. E~ Trust is a resource for SSI purposes, and (2) whether the periodic annuity payments are irrevocably assigned to the trust, such that they would not be income to Dustin. For the reasons discussed below, we conclude that the trust is not a resource, and that the periodic annuity payments are not income.

BACKGROUND

I. Creation and Funding of the Trust

On August 25, 1993, the Probate Court of Crawford County, Ohio approved the first of two settlements in a claim by Dustin J. E~, a minor. The Probate Court approved a $200,000 settlement, which included $87,500 to be held in trust for Dustin's benefit. On the same date as it approved the settlement, the Probate Court approved the "Trust Agreement for the Dustin J. E~ Trust" and directed that proceeds of the settlement in the amount of $87,500 be paid to Mid-American National Bank and Trust Company ("Mid-American Bank"), as Trustee of the trust.

On October 13, 1993, the Probate Court approved a second settlement, which included a lump sum of $525,000 as well as periodic payments. As part of the settlement, $100,000 was paid to Mid-American Bank, as Trustee of the trust. Also, the defendant's insurer agreed to make certain periodic payments to Mid-American Bank, as Trustee of the trust. The defendant's insurer assigned its obligation to make these payments to Jamestown Life Insurance Company.

Jamestown Life Insurance Company, in turn, purchased an annuity policy from First Colony Life Insurance Company. Jamestown Life Insurance Company is named as the Owner of the annuity, Dustin is named as the "Measuring Life," and Mid-American Bank, as Trustee of the trust, is named as the Payee. According to the annuity contract, the scheduled payments to Mid-American Bank are as follows: $2,250/month from November 1993 to October 2003; $2,450/month from November 2003 to October 2013; and $2,650/month from November 2013 to October 2023 and as long thereafter as Dustin lives.

The annuity contract further provides that the Owner (*i.e.*, Jamestown Life Insurance Company) may change the Payee, subject to the written consent of any irrevocable Payee. Also, any payments made to the Payee may not be transferred, commuted, or encumbered.

II. Trust Agreement

As noted above, the Dustin J. E~ Trust was established on August 25, 1993, with approval by the Probate Court. According to the trust agreement, Dustin is severely disabled as a result of brain injuries suffered during childbirth, and needs assistance for all his activities of daily living. The purpose of the trust is to provide for management of the funds from the settlements and to provide for Dustin's supplemental care and support. *Trust Agreement*, pp. 3, 6-7. The trust is not intended to replace, interfere with, or reduce other benefits (state, federal, or private) to which Dustin is otherwise entitled. *Trust Agreement*, pp. 3, 4-5, 7.

The trust was funded with the proceeds of Dustin's two court settlements. The trust states that additions may be made to the trust from any source at any time, and shall include the periodic payments set forth in the court approved settlement. *Trust Agreement*, p. 6.

The trust agreement names Mid-American Bank as Trustee. *Trust Agreement*, p. 1. It also names a Trust Advisory Committee, comprised of three individuals. *Trust Agreement*, pp. 1, 11. The Trust Advisory Committee is responsible for determining what discretionary distributions shall be made from the trust, and the Trustee is responsible for the investment and management of the trust estate. *Trust Agreement*, pp. 5-6, 11.

The trust states that it is irrevocable, except as provided in Paragraph III. *Trust Agreement*, p. 4. Paragraph III(B) states that, upon reaching the age of majority or any time thereafter, if a court of competent jurisdiction determines that Dustin is "fully competent and without any legal disability," he has the right to terminate the trust and withdraw its assets for 30 days after receiving written notice of this right. *Trust Agreement*, p. 10.

The Trustee and Trust Advisory Committee have authority to amend the terms of the trust, with court approval, to carry out the intention of the court and the parties in the event that the laws or regulations concerning benefit programs subsequently change. *Trust Agreement*, p. 4.

The Trust Advisory Committee has "absolute and unfettered" discretion with regard to disbursements from the trust. *Trust Agreement*, p. 7. Such disbursement from the trust principal or income shall be made upon agreement of the majority of the Trust Advisory Committee. *Trust Agreement*, p. 17. Moreover, the trust states that Dustin has no interest in either the principal or the income of the trust. *Trust Agreement*, p. 9.

The trust also contains a spendthrift provision, which states that the assets of the trust are not assignable or alienable, and are not subject to any creditor's claims. *Trust Agreement*, p. 9.

The trust terminates upon Dustin's death. After reimbursement to the Trustee and the Trust Advisory Committee for all fees and expenses, any remaining trust assets will be distributed according to the terms of a valid will, if there is one. Otherwise, the remaining assets will be distributed to Dustin's "heirs at law," in accordance with the intestacy laws of the State in which he is residing at the time of his death. *Trust Agreement*, p. 11.

III. April 2008 Probate Court Action

In response to a petition by Dustin's parents for a judgment declaring the intention and meaning of various conflicting language of the trust, the Probate Court issued a judgment entry on April 2, 2008. The court judgment indicated that Huntington National Bank succeeded Mid-American Bank as Trustee.

The court judgment also added a Medicaid payback requirement to the trust. The Probate Court noted the intent of the trust to supplement, and not to interfere with, any public or private benefits Dustin may qualify for as a result of his disabilities. Thus, the Court added a requirement that, if any funds remain in the trust at the time of Dustin's death, and if the State of Ohio has provided any Medicaid or other public program benefits to Dustin that require repayment, then repayment must be made to the State of Ohio up to the level of benefit actually received by him. With this addition, the Probate Court found that the trust meets the requirements of a Medicaid Qualifying Trust pursuant to Ohio Administrative Code § 5101:1-39-27.1(C)(3).

DISCUSSION

I. The Trust is not a Resource

Because the trust was established prior to January 1, 2000, it is evaluated only under the regular resource rules set forth in POMS SI 01120.200. Under the regular resource rules, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the current value of the individual's future interest in mandatory disbursements, if any, may be a resource if it can be sold. *See id.* Applying these rules, the trust is not a resource to Dustin.

First, Dustin cannot revoke the trust. Whether a trust can be revoked or terminated depends on the terms of the trust and the applicable state law. *See* POMS SI 01120.200(D)(2). Here, the trust agreement states that it is irrevocable, with one exception that appears unlikely to ever occur and which is, to a large extent, beyond Dustin's control. *Trust Agreement*, p. 4. Under the exception, upon reaching the age of majority or any time thereafter, Dustin has right to terminate the trust and withdraw its assets if and only if a court of competent jurisdiction determines that he is "fully competent and without any legal disability." *Trust Agreement*, p. 10. However, based on the information provided to us, it appears that Dustin's disabilities, which include severe mental retardation, are lifelong and will not improve significantly. Thus, it is unlikely that Dustin would ever be declared "fully competent and without any legal disability" by any court.

Nor would Dustin otherwise have authority to revoke the trust. Under the original terms of the trust, any amounts remaining on Dustin's death would be paid to his heirs at law, unless he established a will. Therefore, Dustin could not revoke the trust without the consent of his heirs. *See* Restatement (Third) of Trusts § 49, cmt. a(1) (2003) (presuming that language leaving assets to the grantor's heirs is intended to create a remainder interest in those heirs); *see also* Ohio Rev. Code Ann. § 5804.11 (irrevocable trust generally can be terminated if grantor and all beneficiaries agree). This provision of the trust does not appear to have been reformed or amended by the 2008 judgment by the probate court, since that judgment provided that only those provisions in the original trust that conflicted with the requirements of the state Medicaid payback trust provisions would be considered to have been reformed or amended. Furthermore, assuming the amendment to the trust is valid, the State of Ohio would also likely be considered a beneficiary of the trust, under Ohio law, whose consent would be required to revoke the trust. *See Quinchett v. Massanari*, 185 F. Supp. 2d 845 (S.D. Ohio 2001) (finding State to be an intended beneficiary of trust where trust stated it was "irrevocable," and State law did not require that Medicaid Payback trusts be irrevocable); *In re*

Rosenbaum, No. 81213, 2003 WL 1849141 (Ohio Ct. App. 2003) (denying motion to amend trust to list residual beneficiaries in order to qualify for SSI because this would effectively be establishing a will for a ward, which guardians lack authority to do under State law). Therefore, it appears that Dustin lacks the authority to revoke the trust unilaterally.

Second, Dustin cannot direct the use of the trust assets for his support and maintenance. Here, the trust states that the Trust Advisory Committee has absolute discretion to make distributions, and that William has no interest in the trust principal or income. *Trust Agreement*, pp. 7, 9. This language would preclude William from directing the use of the trust assets. Therefore, the trust principal is not a resource. And finally, the trust does not provide for any mandatory disbursements to Dustin, other than the disbursement he could demand at the age of majority if a court has declared him competent. However, it appears unlikely that he could sell this future payment, under Ohio law, since the trust has a spendthrift provision. Moreover, even if he could sell it, it would have little or no current value, given that it is highly unlikely a court will find him competent in the future.

II. The Annuity Payments Are Not Income

Under the resource rules, a legally assignable payment that is assigned to a trust that is not a resource is income unless the assignment is irrevocable. *See* POMS SI 01120.200(G)(1)(d). Here, the terms of the October 1993 settlement agreement state that the defendant's insurer would make periodic payments to Mid-American Bank, as Trustee of the trust. Similarly, the annuity contract names Mid-American Bank as the Payee. Moreover, the annuity contract provides that only the Owner of the annuity (*i.e.*, Jamestown Life Insurance Company) has the right to change the Payee. Thus, the annuity payments have been irrevocably assigned to the trust. As such, the annuity payments are not income to Dustin.

CONCLUSION

For the reasons discussed above, we conclude that the Dustin J. E~ Trust is not a resource, and that the periodic annuity payments are not income.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Cristine B~
Assistant Regional Counsel

D. PS 08-150 SSI - Ohio -- Review of Ashley E. D~ Irrevocable Special Needs Trust, ~ - REPLY; Your Reference: SI-2-1-3-OH (D~); Our Reference: 08-0138

DATE: July 8, 2008

1. SYLLABUS

This decision clarifies the issue of the extent of the Medicaid reimbursement. This Trust fails to meet the criteria of a Special Needs Trust because it would limit the amount to be reimbursed to Medicaid at the death of the beneficiary to only the Medicaid paid from the establishment of the Trust. The law requires reimbursement of all the Medicaid funds without regard to any limits on time.

2. OPINION

You asked whether the Ashley D~ Irrevocable Special Needs Trust (trust) is a resource for SSI purposes. We conclude that the trust is a resource because it does not meet the requirements for the statutory Medicaid special needs trust exception.

Background

Ashley inherited $5,000.00 from her aunt several years ago. The inheritance was held in an account in Ashley's name until she attained age 18. On June 23, 2003, Ashley's parents created the trust, depositing into the trust $5,000.00, previously held in Ashley's account, and naming Ashley as the trust beneficiary and Ashley's mother as the trustee. Agreement of Trust, Art. 1.1. The trust is governed by Ohio law. Agreement of Trust, Art. 6. The trust is expressly irrevocable. Agreement of Trust, Art. 2.1. The trust assets are to be used only for Ashley's supplemental services, as defined in the Ohio Admin. Code, § 5123:2-18-01, and are to be distributed consistent with the provisions of the trust and the Ohio Admin. Code, § 5123:2-18-01. Agreement of

Trust, Art. 3.2. Trust assets may not be used for any item or service which is provided by any private or governmental agency or organization. Agreement of Trust, Art. 3.2. The trustee is directed to purchase the supplemental services on Ashley's behalf, and the trustee is to make no cash distribution to Ashley, except as otherwise permitted under the Ohio Administrative Code. Agreement of Trust, Art. 3.5.

The trust beneficiary has no right to compel the trustee to make any distribution for maintenance support, make any payment from income or principal, or convert any part of the principal to cash. Agreement of Trust, Art. 3.3. The trust also includes a spendthrift clause, prohibiting the beneficiary from anticipating, assigning, transferring, selling, or encumbering any of the trust assets or making them subject to any creditors' claims or legal process prior to actual receipt by the beneficiary. Agreement of Trust, Art. 3.4.

The Agreement of Trust provides that, upon Ashley's death, the trust terminates and the assets remaining in the trust are to be distributed first for Medicaid payback, to the extent that Medicaid benefits were paid on Ashley's behalf by any state during the existence of the trust. Where more than one state paid Medicaid benefits on Ashley's behalf, payment is to be made to each state, based on the proportionate share of the amount of Medicaid benefits paid by that state to the total amount of Medicaid benefits paid by all states. Agreement of Trust, Art. 3.5(a). Any assets remaining after such Medicaid payback are to be distributed to Ashley's parents. Agreement of Trust, Art. 3.5(b).

The trustee has the power to amend the trust, but only to conform to subsequent changes in Federal or state law and to better effect the purposes of the trust. Agreement of Trust, Art. 4.7.

DISCUSSION

The Social Security Act (the Act) provides that an individual is not eligible for SSI if she has resources that exceed $2,000.00. *See* 42 U.S.C. § 1382(a)(1)(B)(ii), (a), (3)(B). A resource is cash or other liquid assets or real or personal property that an individual, or her spouse, owns and can convert to cash to be used for support and maintenance. 20 C.F.R. § 416.1201(a). Trust property may be a resource for SSI purposes. *See* 20 C.F.R. 42 U.S.C. § 1382b(e); Program Operations Manual System (POMS) SI 01120.200A. This trust is also subject to the statutory provision of Section 1613(e) of the Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e), POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual are considered resources for SSI purposes, even if they are irrevocable. However, there is an exception for certain trusts that comply with 42 U.S.C. § 1396p(d)(4)(A), i.e., the Medicaid special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must: (1) be established with the assets of a disabled individual under age 65; (2) be established for the benefit of the individual by a parent, grandparent, legal guardian, or court; and (3) provide that the state 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 the individual's behalf under a state Medicaid plan. POMS SI 01120.203B.1.a.

Assuming that Ashley is a disabled person under age 65, the first requirement is met because the trust was established with Ashley's funds, i.e., $5,000.00 that Ashley previously inherited from her aunt. The second requirement is also met because the trust was established for Ashley's benefit by her parents. Agreement of Trust, Preamble.

Regarding the third requirement, we note that Article 3.2 of the Agreement of Trust states that the assets shall be distributed consistent with the provisions of Ohio Admin. Code § 5123:2-18-01. That section of the Ohio Administrative Code, dealing with trusts for supplemental services for individuals with mental retardation and developmental disabilities, includes standards for distribution of trust assets both during the beneficiary's lifetime and upon the death of the beneficiary. Ohio Admin. Code § 5123:2-18-01(E). The standards for distribution upon the death of a beneficiary of a trust governed by that provision require a trustee to disburse the remaining assets of the trust in the following order: (1) for burial expenses for the beneficiary, up to a limit of $5,000.00; (2) a portion equal to at least 50% of the remaining trust assets "pursuant to the terms of the trust" to the state treasurer for deposit into a supplemental services fund for individuals with mental retardation or other developmental disabilities; and (3) the remainder pursuant to the terms of the trust and the direction of the court if a court has jurisdiction over the trust. Ohio Admin. Code § 5123:2-18-01. Thus, Section 5123:2-18-01 does not provide that the first priority for distribution at death is reimbursement for all Medicaid benefits paid by the state. We note, however, that Article 3.2 of the Agreement of Trust, which references Ohio Admin. Code § 5123:2-18-01, refers to use of the trust assets for supplemental services and, thus, it appears to pertain only to distributions from the trust during Ashley's lifetime. We also note that the same paragraph of the Agreement of Trust provides that the assets shall be distributed "consistent with the provisions of 5123:2-18-01 *and this Trust* and shall not be used for any item or service which is provided by any private or government agency or organization. Agreement of Trust, Art. 3.2 (emphasis added). The provisions for termination of the trust and distribution of the assets remaining in the trust at the beneficiary's death are contained in a separate article. Agreement of Trust, Art. 3.5.

Therefore, we think it reasonable to conclude that the more specific terms of Article 3.5 of the Agreement of Trust, rather than the general reference to Ohio Admin. Code § 5123:2-18-01 contained in the section dealing with lifetime distributions, more accurately reflect the settlor's intent regarding distribution upon termination of the trust and, therefore, the terms of Article 3.5 of the Agreement of Trust govern the distribution of the trust assets upon Ashley's death.

We conclude, however, that even under Article 3.5 of the Agreement of Trust, the trust does not meet the third requirement for the Medicaid special needs trust exception because Article 3.5 of the Agreement of Trust provides that, at Ashley's death, the trust is to terminate and the remaining assets are to be distributed first to any states that provided Medicaid benefits to Ashley during the existence of the trust. Agreement of Trust, Art. 3.5(a). Because the Agreement of Trust does not contain specific language providing for reimbursement of Medicaid payments made throughout Ashley's lifetime, rather than merely during the existence of the trust, the trust does not comply with the Medicaid special needs trust exception requirements. *See* 42 U.S.C. § 1396p(d)(4)(A) (trust must provide that Medicaid is reimbursed for "the total medical assistance paid"); POMS PS 01825.039 A., PS 08-075 SSI-Ohio: Review of Sub-Account of Nathan H~ in the Ohio Community Pooled Flexible Spending Trust (provision for reimbursement for Medicaid assistance since establishment of trust did not comply with special needs trust exception requirements); Memorandum from Regional Chief Counsel, Reg. V, Chicago to Asst. Reg. Comm'r-MOS, Chicago, Reg. V, *SSI-Ohio Review of Reconsideration Request on the Joanne F. M. Trust Agreement* at 5 (same). Therefore, the trust is a resource under the statutory trust provisions.

If the Agreement of Trust were amended to require reimbursement of all Medicaid benefits paid during Ashley's lifetime, rather than merely the Medicaid benefits paid during the existence of the trust, the trust would not be considered a resource, either under the statutory trust provisions or under the regular resource rules. Under the regular resource rules, a trust is a resource if the individual can revoke or terminate the trust and obtain unrestricted access to the trust assets, or if the individual can direct the use of the trust principal for her support and maintenance. Also, if there are mandatory disbursements, and the individual can sell the right to these payments, their current value may be a resource. POMS SI 01120.201. We conclude that the trust would not be resource to Ashley under the regular resource rules. The terms of the Agreement of Trust do not give Ashley the power to revoke this trust, as the trust is expressly irrevocable. Agreement of Trust, Art. 2.1. Under Ohio law, a trust that meets the Medicaid special needs trust exception provisions of 42 U.S.C. § 13960(d)(4) is irrevocable if the terms of the trust prohibit the grantor from revoking it, whether or not the settlor's estate or the settlor's heirs are named as the remainder beneficiary or beneficiaries of the trust upon the settlor's death. OHIO REV. CODE ANN. § 5804.18. Nor can Ashley compel the trustee to use the trust funds for her support and maintenance. Agreement of Trust, Art. 3.2 (assets to be used only for supplemental services), Art. 3.3 (beneficiary has no right to compel the Trustee to furnish maintenance support, make payments from principal or income or convert any portion of the principal into cash). Finally, regardless of whether Ashley could sell her interest in the trust, it would have no market value, because the trustee is not obligated to make any payments. Therefore, the trust would not be a resource under the regular resource rules.

CONCLUSION

We conclude that the trust is a resource for SSI purposes because it does not meet the Medicaid special needs trust exception requirements. If the Agreement of Trust were amended to require reimbursement to the states for all Medicaid payments made during Ashley's lifetime, however, the trust would not be considered a resource, although clarification as to the applicability of the Ohio Admin. Code § 5128:2-18-01 with regard to distributions at Ashley's death would be desirable.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Nancy L. B~
Assistant Regional Counsel

E. PS 08-075 SSI-Ohio: Review of Sub-Account of Nathan H~, ~, in the Ohio Community Pooled Flexible Spending Trust -- Reply Our Reference: 08-060 Your Reference: SI 2-1-3 OH (Ohio Community)

DATE: March 11, 2008

1. SYLLABUS

The opinion in this case examines whether or not the pooled trust account in question is a countable resource for SSI purposes. There is an exception to counting a pooled trust as a resource if certain criteria are met. One of the requirements is that to the extent any amounts remaining in the beneficiary's account upon the death are not retained by the trust, the trust will pay to the State the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan. The pooled trust in this case frustrates the Medicaid payback requirement in two respects. First, the trust allows for payment of unallowable taxes, fees, and expenses before Medicaid reimbursement. Second, the trust limits Medicaid reimbursement to the time period after the establishment of the individual's trust account. For these reasons the trust does qualify for the pooled trust exception and is a countable resource for SSI purposes.

2. OPINION

You asked whether the account, established for the benefit of Nathan H~ (Nathan) in the Ohio Pooled Flexible-Spending Trust is a resource for SSI purposes. We conclude that it is a resource because the terms of the trust do not meet the Medicaid payback requirements.

BACKGROUND

In March 2007, the Probate Court of Auglaize County, Ohio approved a settlement in which Nathan, a minor, was awarded $33,000.00. Entry Approving Court Settlement (Settlement). The Court ordered that, out of the settlement amount, $3,841.96 would be paid to the Treasurer of the State of Ohio for a subrogation claim for medical and other expenses and $13,741.78 would be paid for Nathan's benefit, to be structured "as set forth in the documents attached to the application." Settlement. Although the documents to which the Court referred were not submitted to us, we assume they provided that the money for Nathan's benefit be placed in trust, as you submitted an affidavit, signed by an attorney, reciting that a check for $13,741.78 was provided to the Disability Foundation to fund a flexible-spending trust for Nathan.

You submitted a copy of an Account Agreement, executed by Nathan's mother and legal guardian on December 28, 2006. The Account Agreement establishes an account for Nathan within the Ohio Community Pooled Flexible-Spending Trust and lists Nathan as a "qualified donor" and as an "individual with disabilities" who is receiving SSI. Account Agreement at 1. Nathan's mother is listed as his personal representative. Account Agreement at 2. The Agreement recites that $12,991.78 was transferred by the qualified donor. Account Agreement at 3. Section 7 acknowledges that, at Nathan's death, 25% of any funds remaining in Nathan's account will be retained by the Disability Foundation, Inc., for Disability Programs and Services. It further states that 100% of any funds remaining in the account be "retained by the Trust, for Disability Programs and Services." Account Agreement at 3.

You also submitted a copy of the Agreement of Trust (Trust Agreement) between the Disability Foundation, Inc., as Settlor and Distribution Trustee, and an Ohio bank, as Trustee, creating the Ohio Community Pooled Flexible-Spending Trust ("the Trust"), to be managed pursuant to 42 U.S.C. § 1396p(d)(4)(C), the Ohio Revised Code Annotated § 5111.151(F)(3), and the Ohio Administrative Code § 5101:1-39-27.1(c)(3)(c). Trust Agreement at § 1. The purpose of the Trust is to provide for the supplemental needs of individuals with disabilities, without supplanting benefits or services otherwise provided by local, state, or federal entities. Trust Agreement at § 1. The Trust Agreement provides for the establishment of an Account for each individual with disabilities, by completion of an account agreement. Trust Agreement at §§ 1(D), 2. The trustee is empowered to place property from the accounts in one or more common funds for investment purposes, assigning the appropriate interest in the common funds to each separate account. Trust Agreement at § 9.

Until termination of the Account, the trustee is directed to use the income and principal of the Account solely for the supplemental needs of the individual, making distributions only where the Distribution Trustee deems them advisable. Trust Agreement at § 2(A). Distributions may be made directly to the individual, to his personal representative, legal guardian, or custodian, or directly in payment of expenses incurred for supplemental needs. Trust Agreement at § 8. The Account is terminated at the death of the individual, at which time the Trustee is to pay "fees, taxes, or expenses properly chargeable to

the Account of the Individual with Disabilities" and then distribute any remaining property attributable to the Account as follows:

a. 25% is to be retained by the Trust to be used for Disability Programs and Services, as the Distribution Trustee may deem advisable;

b. 75% is to be distributed by one or both of following methods, as designated in the Account Agreement:

    a. to each State that has provided medical assistance to the individual "during the existence of the Account since the Account was established" a proportionate share of the assets remaining in the Account up to an amount equal to the total assistance paid on the disabled individual's behalf under a State Plan pursuant to 42 U.S.C. §1396 et seq., to the extent permitted by law and required by law; and/or

    b. to a separate share of the trust to be used for Disability Programs and Services;

c. If the qualified donor does not make a designation in the Account Agreement, the remaining property in the Account is distributed to a separate account to be used for Disability Programs and Services as the Distribution Trustee from time to time may deem advisable.

Trust Agreement at §2(B).

The Trust is explicitly irrevocable. Trust Agreement at § 12. The Settlor, i.e., the Disability Foundation, Inc., may amend the provisions of the Trust only to further the purposes of the trust, but the Settlor has no power to terminate the Trust, unless no Account is established. Trust Agreement at § 12. The Trust Agreement provides that the disabled individual cannot assign, anticipate, alienate, or otherwise transfer any right or interest in the Account Agreement. Trust Agreement at § 8. No right of termination or amendment is given to the disabled individual. *See* Trust Agreement at § 12.

DISCUSSION

The Social Security Act (the Act) provides that an individual is not eligible for SSI if he has resources that exceed $2,000. *See* 42 U.S.C. § 1382(a)(1)(B)(ii), (a), (3)(B). A resource is cash or other liquid assets or real or personal property that an individual, or his spouse, owns and can convert to cash to be used for support and maintenance. 20 C.F.R. § 416.1201(a). Trust property may be a resource for SSI purposes. *See* 42 U.S.C. § 1382b(e); Program Operations Manual System (POMS) SI 01120.200A. Under the Act, a trust created for the benefit of an individual with the assets of that individual on or before January 1, 2000 generally is a resource, even if the trust is irrevocable, as it is in this case, unless a statutory exception applies. *See* 42 U.S.C. §§ 1382b(e); POMS SI 01120.201D. *See* Trust Agreement § 12. There is an exception for pooled trusts, such as the trust involved here, but only if certain criteria are met. *See* 42 U.S.C. §§ 1382b(e), 1396p(d)(4)(C). Even if a trust meets an exception under the statute, however, it may still be a resource under the regular resource rules if the trust is revocable, or if the trust is irrevocable and the individual can compel the trustee to provide for his support and maintenance, or if there are mandatory disbursements and the individual could sell his beneficial interest in the trust. *See* POMS SI 01120.200A, D.

To meet the statutory pooled trust exception to counting a trust as a resource, the individual whose assets are contained in the trust must be disabled under the Act, and the following conditions must be met:

a. The trust must be established and maintained by a non-profit association;

b. The trust must have separate accounts for each beneficiary, although assets may be pooled for investment and management purposes;

c. The separate account in the trust must be established solely for the benefit of the disabled individual;

d. The separate account must be established by the individual, by the individual's parent, grandparent, or legal guardian, or by a court; and

e. The trust must provide that, on the death of the beneficiary, any funds not retained by the trust must be used to reimburse any state for Medicaid payments made for the benefit of the beneficiary during his lifetime.

42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203B.2.

Here, the Trust is irrevocable. We assume, for purposes of this memorandum, that Nathan meets the Act's SSI disability requirements. The trust was established by the Disability Foundation, Inc., which is a non-profit organization. Trust Agreement at Preamble. The trust has separate accounts for each beneficiary, although the property of those separate accounts can be pooled into a common fund for investment and management purposes. Trust Agreement at §§ 1(D), 2, 9. Therefore, the first two requirements for the pooled trust exception are met. The third and fourth requirements are also met, as Nathan's mother established the Account for Nathan, and there is no provision by which any distributions can be made during Nathan's lifetime, except for Nathan's supplemental needs. Trust Agreement at § 2(A).

The Trust Agreement, however, does not meet the fifth requirement for the pooled trust exception. As an initial matter, we note that the Trust Agreement provides for "payment of fees, taxes, or expenses properly chargeable to the Account of the Individual with Disabilities" prior to reimbursement of the State for medical assistance provided. Trust Agreement at §2(B). It is allowable, prior to reimbursement of the State, to pay State and Federal taxes due from the trust because of the death of a beneficiary, as well as reasonable fees for administration of the trust estate, such as a trust accounting to a court and completion and filing of documents or other required actions associated with terminating or wrapping up the trust account. *See* POMS SI 01120.203B.3.a. However, it is not entirely clear from the language in Section 2(B) of the Trust Agreement that payment prior to reimbursing the State for medical assistance would be limited to those payments permitted under the POMS. The term "fees, taxes, and expenses" in Section 2(B) might be interpreted to include expenses not allowable under the pooled trust exception, such as debts owed to third parties by the trust or funeral expenses, as well as taxes "chargeable to the Account" for reasons other than the individual's death. *See* POMS SI 01120.203B.3.b.

In addition, Section 2(B)(2)(a) of the Trust Agreement requires the trustee to:

> distribute to each State, which has provided medical assistance through Title XIX of the Social Security Act, to the Individual with Disabilities *during the existence of the Account since the Account was established* a proportionate share of the assets remaining in the Account of the Individual with Disabilities, up to an amount equal to the total assistance paid on his behalf by such State under a State Plan pursuant to 42 U.S.C. § 1396, *et seq.*, to the extent permitted and required by law.

Trust Agreement at § 2(b)(2)(a) (emphasis added). Thus, under the Trust Agreement, the Trustee need not reimburse a State for medical assistance supplied to the individual before the establishment of the individual's Account in the Trust. Because the Trust Agreement does not contain specific language providing that, to the extent amounts remaining in the Account are not retained by the Trust, each state will receive an amount equal to the total amount of medical assistance paid on behalf of the individual throughout his lifetime, the Trust Agreement does not comply with the Medicaid payback requirement of the pooled trust exception. *See Memorandum from Regional Chief Counsel, Reg. V, Chicago to Asst. Reg. Comm'r-MOS, Reg. V, SSI-Ohio Review of Reconsideration Request on the Joanne F. M. Trust Agreement* at 5 (provision for reimbursement for Medicaid assistance since establishment of trust did not comply with special needs trust exception requirements).

We recognize that, in this particular case, Nathan, by his Account Agreement, provided that all amounts remaining in his Account at his death should be retained by the Trust. This provision does not cure the defect, however. Because the Trust Agreement does not comply with the pooled trust exception, none of the Accounts established under that Trust Agreement can meet the exception. *See* POMS SI 01120.203B.2.g (trust must contain specific language stating Medicaid reimbursement provision). Therefore, we conclude that Nathan's Account does not meet the pooled trust exception, and, therefore, it is a resource.

CONCLUSION

The Ohio Pooled Flexible-Spending Trust does not meet the Medicaid payback provision requirement for the statutory pooled trust exception to counting a trust as a resource. Therefore, Nathan's account in the Ohio Pooled Flexible-Spending Trust is a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V

By: /s/ Nancy L. B~
Nancy L. B~
Assistant Regional Counsel

F. PS 07-161 SSI-Ohio-Review of the Rodney S. H~ Irrevocable Special Needs Trust,~ - ACTION Your Reference: S2D5G6, SI 2-1-3 OH (H~) Our Reference: 07-0268

DATE: June 26, 2007

1. SYLLABUS

This case involved a special needs trust established by court order. It involves the purchase of an annuity to fund the Trust. In order to meet the requirements of the special needs trust language was included that assures the state will be reimbursed for the medical assistance given the claimant during the time he was eligible for Supplemental Security Income. The term "minimum" was added when applied to the medical assistance reimbursement but this has no effect on the amount that Medicaid may demand. The precedent that is established is that the term "minimum" has no effect on what the state determines it is owed or will accept. There is no range of acceptable payments only what the state demands.

2. OPINION

You asked us whether Rodney S. H~ trust is a resource for SSI purposes and whether the annuity payments made to the trust are income. You specifically expressed concern about Article 3.1(b) of the Trust, which provides that the trustee will pay the "minimum" amount of the remaining principal to the state when Rodney dies. Also, you questioned whether the trustee would be required to use any annuity payments that were received after Rodney's death to satisfy the obligation owed to the state for medical assistance paid on Rodney's behalf. For the reasons discussed below, we conclude that the trust is not a resource for SSI purposes and that the annuity payments are not income. We further conclude that paying the "minimum" amount of the remaining principal to the state complies with the special needs trust exception. Finally, we conclude that the trustee would be required to use all annuity payments to satisfy the obligation owed to the state.

Background

In December 2006, the Franklin County, Ohio Probate Court approved a settlement for Rodney S. H~, a minor. The court ordered that $2,000,000 of the settlement be used to purchase annuities for the benefit of Rodney. The annuities were to produce payments of $8,239 per month, commencing March 21, 2007, and continuing for fifteen years, increasing at a rate of 2% compounded yearly. Then, starting on March 21, 2022, the monthly payments would increase to $11,089 per month, increasing at a rate of 2% compounded yearly, and continuing for life with fifteen years certain. The court ordered that, until it issued a subsequent order, no payments could be made from the annuities. Also, the court noted that the payee on each annuity would be determined by the court at a later date. The remaining proceeds from the settlement ($437.393.90) were ordered to be held by a law firm in an escrow account until further order.

After a hearing on January 17, 2007, the probate court accepted jurisdiction over the "Rodney S. H~ Irrevocable Special Needs Trust" ("Trust") created by Lisa G. W~ (Rodney's guardian and grandmother). The court ordered that the Trust be funded with the proceeds of the settlement and that all monthly payments from the annuities be deposited into a custodial account established for the Trust. The court designated the Trust as the contingent beneficiary should Rodney not survive the guaranteed payment period. The court indicated that its order was in the best interest of Rodney.

The Trust was established for the benefit of Rodney and provides that, during the term of the Trust, Rodney's interests and welfare shall be paramount. Trust, Article 2.1. The Trust named Ms. W~ as trustee of the Trust, Rodney as primary beneficiary, and the State of Ohio as residual beneficiary. Trust, Introductory Paragraph; Article 1.1. The Trust states that it is irrevocable, subject to the right of the trustee to amend it for the limited purpose of ensuring that it complies with the applicable laws governing Rodney's eligibility for assistance under available governmental programs. Trust, Article 1.3; Trust, Article 4.4. The Trust indicates that all net income of the Trust shall be added to the principal upon receipt. Trust, Article 2.1. The Trust provides that the trustee has, upon approval of the probate court, absolute discretion from time to time to distribute or apply for the benefit of Rodney portions or all of the principal as the trustee considers advisable, provided the distribution would not render Rodney ineligible for a government assistance program for which he is otherwise qualified. Trust, Article 2.1. The Trust provides that Rodney has no right to compel the trustee to make a distribution to him or for his benefit. Trust, Article 2.1. The Trust indicates that no interest in the income from or principal of the Trust shall be subject to any form of alienation or hypothecation by any beneficiary, without the express consent of the Trustee. Trust, Article 2.3.

The Trust provides that, upon Rodney's death, the trustee shall pay, in the following order:

(a) any final costs and expenses of the administration of the Trust, provided it is not contrary to the requirements for exemption of this Trust under Title 42 of the United States Code;

(b) The minimum amount of the remaining principal that under applicable law must be distributed to any state or states of the United States in respect of the amount of the total of medical assistance paid on behalf of Rodney by such state or states under any state plan established under Title 42 of the United States Code in order to qualify this Trust for exemption pursuant to Section 1396p(d)(4)(A) of such title; and(c) the balance of the Trust principal to Rodney's estate.

Trust, Article 3.1.

DISCUSSION

A. The Trust Is Not a Resource

This Trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual are considered resources for SSI purposes even if they are irrevocable. However, there is an exception for certain trusts that are established under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must be:

(1) Established with the assets of a disabled individual under age 65;

(2) Established for the benefit of the individual by a parent, grandparent, legal guardian, or court; and

(3) Provide that the state 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.

POMS SI 01120.203B1a. Assuming Rodney is found disabled, the Trust would meet the first and second requirements. Rodney, born in 2004, is under the age of 65, and the Trust was established for his benefit by his grandmother. The Trust was further funded with Rodney's assets - namely, money a W~ as a settlement of a lawsuit.

The trust also meets the third requirement for the special needs trust exception. The Trust's termination clause provides that the trustee will pay the "minimum" amount of the remaining principal to the state when Rodney dies. Due to the Trust's use of the word "minimum," we contacted the Office of Income Security Program's Trust Team for guidance. We were advised that, while use of the word "minimum" was not ideal, it nonetheless complied with the special needs trust exception. The Trust Team explained that the dollar amount requested by the state will be an absolute figure rather than a range of figures, and thus the "minimum" amount will be what the state is owed or is willing to accept. As such, the word "minimum" would not have any practical impact on the state's ability to seek full reimbursement of the amount owed.

Furthermore, the trustee would be required to use any annuity payments that were received after Rodney's death to satisfy the obligation owed to the state for medical assistance paid on Rodney's behalf. The Trust specifically provides that all income of the Trust shall be added to the principal upon receipt. Trust, Article 2.1. The court order further names the Trust as contingent beneficiary should Rodney not survive the guaranteed payment period of the annuities, and the Trust names the State of Ohio as residual beneficiary. Upon Rodney's death, the right to any income accrued but not received will be added to the principal of the Trust, and the Trust will terminate. Trust, Article 3.1. Thus, all of the annuity payments, whether accrued or received, will be added to the principal of the Trust, and the Trust will terminate. Accordingly, the trustee would be required to use any annuity payments received after Rodney's death to satisfy the obligation owed to the state for medical assistance paid on Rodney's behalf. In sum, the Trust satisfies the Medicaid Trust exception requirements, and it is not a countable resource under the statute. Therefore, the regular resource rules apply.

Under these rules, a trust will be a resource if it is revocable, or if the individual can direct the use of trust principal for his support. Also, if there are mandatory disbursements, and the individual can sell the right to these payments, their current value may be a resource. The Trust would not be a resource under these rules. First, the Trust is irrevocable. The Trust specifically states that it is irrevocable. Trust, Article 1.3. While Rodney is the true grantor of the Trust (since the Trust was established with funds that belonged to him), *see* POMS SI 01120.200(B)(2), he is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). *See* POMS SI 01120.200(D)(3). The Trust names the State of Ohio as residual beneficiary. Trust, Article 1.1. And indeed, in Ohio, the state is recognized as a residual beneficiary, provided the Trust cannot be unilaterally revoked and meets the Medicaid payback provision. *See* POMS SI CHI01120.200(D)(5)

("Effective June 25, 2004, the Social Security Administration recognizes the State as a residual beneficiary of Ohio trusts, if the language of the trust specifies that it is irrevocable, it does not appear that the trust can be unilaterally revoked, and the trust meets the Medicaid payback provisions."); *see also* Memorandum from Reg. Chief Counsel, Chicago, to Assistant Reg. Comm. - MOS, Chicago, *Ohio Treatment of the State as a Beneficiary in a Medicaid Payback Trust*, at 4-5 (March 19, 2004). Accordingly, the Trust is irrevocable.

Secondly, Rodney cannot compel the trustee to use the trust funds for his support and maintenance. Trust, Article 2.1. And finally, irrespective of whether Rodney could sell his interest in the Trust, it would have no market value, because the trustee is not obligated to make any payments. *See* Restatement (Third) of Trusts, § 60 and comments c, f. Therefore, the Trust is not a resource under the regular resource rules.

B. The Annuity Payments Are Not Income

Because the Trust is not a resource, the annuity payments made to the Trust are not income to Rodney if he has irrevocably assigned them to the Trust. POMS SI 01120.200(G)(1)(d). Although the court order states that the annuity payments will be made directly to the Trust, if Rodney could ask the court to modify the order so that the payments would be made directly to him, the annuity payments should be considered income to him. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Review of the Marital Settlement Agreement for Patricia J. H~ and Floyd A. H~ and the Patricia J. H~ Special Needs Trust*, at 3-4 (Dec. 4, 2003).

However, it appears that, as with the creation of the Trust, the court's order with respect to the annuity would have to be based on a finding that, among other things, the annuity assignment was in the best interests of Rodney. Ohio Rev. Code Ann. § 2111.50(C)(1) (2006) (all powers of the probate court shall be exercised in the best interest of the minor subject to guardianship). Indeed, the court appointed a guardian for Rodney and indicated that it had carefully considered Rodney's best interests before issuing its order. Accordingly, for Rodney to convince the court to redirect the annuity payments to him, he (or Ms. W~ his guardian) would have to show that such a change was in his best interests. *Id.* This, however, is unlikely since we are not aware of any change of circumstance since the probate court hearing that would cause the court to reconsider its finding that assigning the annuity payments to the Trust is in Rodney's best interests. Therefore, the annuity payments are, at this time, irrevocably assigned to the trust, and thus are not income under POMS SI 01120.200(G)(1).

CONCLUSION

In sum, the trust is not a resource for SSI purposes and the annuity payments are not income. Also, paying the "minimum" amount of the remaining principal to the state after Rodney's death complies with the special needs trust exception. Finally, the trustee would be required to use all annuity payments to satisfy the obligation owed to the state.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Karen S~
Assistant Regional Counsel

G. PS 07-120 SSI- Ohio Review of the Jennifer C. S~ Special Needs Trust, ~ - REPLY Your Ref: S2D5G6 SI 02-1-3 OH (S~) Our Ref: 07-0008

DATE: April 24, 2007

1. SYLLABUS

This opinion addresses whether or not the special needs trust in question is a resource for SSI purposes. The special needs trust satisfies all of the criteria found in SI 001120.203B. in order to be excluded from resource counting, however, the trust does provide for payment of taxes that would fall outside the scope of allowable expenses as outlined in SI 01120.203B.3. The trust does contain a limiting clause stating, "to the extent permitted by applicable Medicaid or SSI, regulation or policy at the time of death." The limiting clause as written is acceptable, provided that the field office properly documents the fact that the non-permissible taxes cannot be paid before the State Medicaid Agency is reimbursed. For these reasons, the trust is not a countable resource for SSI purposes.

2. OPINION

You have requested an opinion regarding whether the Jennifer C. S~ Special Needs Trust (Trust) would be a resource to Jennifer C. S~ (Jennifer) in determining her eligibility for Supplemental Security Income (SSI). For the reasons discussed below, we believe that the Trust should not be considered a resource.

Background

On December 29, 2005, the Trust was established by order of the Franklin County Ohio Probate Court (Court), Case No. 510324. *See* Trust, Art. 1.1, Trust Ex. A. Barbara J. S~ was named guardian of Jennifer's estate (Grantor) and Trustee of the Trust (Trustee). The Trust agreement named Jennifer as a beneficiary, as well as the State Medicaid plans. *See* Trust, Art. 1.2. The Trust was funded with the proceeds from a personal injury settlement that Jennifer received. *See* Trust, Art. 1.4. The Trust provides that it is to be administered to protect Jennifer's long-term interests and to provide for her supplemental care and special needs, in addition to government assistance programs for which she is qualified, and is intended to conform with the requirements of 42 U.S.C. § 1396p(d)(4)(A) and Ohio state trust law, Rev. Code §5111.151(F)(1) and O.A.C. §5101:1-39-27.1(C)(3). *See* Trust, Art. 1.3.

The Trust states that it is irrevocable. *See* Trust, Art. 1.5. The Trust, however, provides that the Trustee may amend the Trust, if, due to changes in governing law or legal interpretations concerning Jennifer's eligibility for available government assistance programs, the Trustee believes that it is in Jennifer's best interest and reasonably necessary to maintain or achieve such eligibility. *See* Trust, Art. 1.5, Art. 2.3(D). The Trust also provides that the Trustee has sole discretion to make distributions of principal to or for the benefit of Jennifer to provide supplemental services. *See* Trust, Art. 2.1. At the same time, Jennifer has no right to compel the Trustee to make a distribution of principal to her or for her benefit. *Id.* The Trust, in a spendthrift provision, further provides that no interest in the Trust is subject to any form of alienation. *See* Trust, Art. 4.3.

Unless earlier exhausted, the Trust will terminate upon Jennifer's death, at which time any amount remaining in the Trust will first be used to pay all final expenses and costs for the administration of the Trust, as well as all taxes arising as a result of her death. *See* Trust, Art. 3.4 (A), (B). Next, any remaining amount shall be paid to the states as reimbursement for medical assistance provided to Jennifer. *See* Trust, Art. 3.3. Finally, after paying any remaining obligations of the Trust, the trustee will distribute the remainder to Jennifer's estate. *See* Trust, Art. 3.5, 3.6. The Trust does not name any specific residual beneficiaries. *See* Trust, Art. 3.6.

DISCUSSION

Pursuant to 42 U.S.C. § 1382b(e) (the "statutory trust resource rules"), the principal of a trust created on or after January 1, 2000, with the assets of an individual will be considered a resource to the extent that the trust is revocable or, in the case of an irrevocable trust, to the extent that any payments from the trust could be made to or for the benefit of the individual (or the individual's spouse), with certain exceptions. *See also* POMS SI 01120.201(D). However, even if an exception applies, all trusts are still subject to the regular resource rules.

This Trust is Irrevocable

The Trust document states that it is irrevocable. *See* Trust, Art. 1.5. While Jennifer is the true grantor of the Trust (since the Trust was established with funds that belonged to her), *see* POMS SI 01120.200(B)(2), she is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). *See* POMS SI 01120.200(D)(3). In Ohio, the state is recognized as a residual beneficiary, provided the Trust cannot be unilaterally revoked and meets the Medicaid payback provision. *See* POMS SI CHI01120.200(D)(6) ("Effective June 25, 2004, the Social Security Administration recognizes the State as a residual beneficiary of Ohio trusts, if the language of the trust specifies that it is irrevocable, it does not appear that the trust can be unilaterally revoked, and the trust meets the Medicaid payback provisions."); *see also* Memorandum from Reg. Chief Counsel, Chicago, to Assistant Reg. Comm. - MOS, Chicago, *Ohio Treatment of the State as a Beneficiary in a Medicaid Payback Trust*, at 4-5 (March 19, 2004). Here, the trust states that it is irrevocable, and, as discussed below, it meets the Medicaid Payback provisions, so the state is a residual beneficiary. Accordingly, the Trust is irrevocable.

The Trust Satisfies the Medicaid Trust Exception for Individual Trusts

The statutory trust resource rules are not applicable to this irrevocable trust because an exception applies. The exception under 42 U.S.C. § 1396p(d)(4)(A) applies to a trust which: (1) is established with the assets of an individual under age 65 who is

disabled; (2) is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and (3) provides that on the death of the individual, any funds remaining in the trust will be used to reimburse the State for Medicaid payments made on behalf of the individual. *See also* 42 U.S.C. § 1382b(e)(5); POMS SI 01120.203(B)(1). These elements are satisfied here. Jennifer is under age 65 and disabled, and the Trust was established for Jennifer's benefit by her guardian. Finally, the Trust explicitly provides for reimbursement to the states for medical assistance to Jennifer, after allowing the trustee to first pay final costs for the administration of the Trust. *See* Trust, Art. 3.4(A), (B); *see* POMS SI 01120.203(B)(3)(a).

Of note, the Trust's payback provision states:

3.4 Payment of Final Administrative Costs and Taxes. Prior to reimbursing any state plan under Section 3.3 hereof, to the extent permitted by applicable Medicaid or SSI law, regulation or policy at the time of JENNIFER's death, the Trustee shall pay:

A. all final administrative costs of this trust; and

B. all taxes arising as the result of JENNIFER's death, including estate, gift, generation-skipping, and inheritance taxes, whether federal, state, or local.

All or most of the taxes described in section 3.4(B) would fall outside the scope of allowable expenses. *See* POMS SI 01120.203(B)(3). Indeed, the only permissible tax would be estate taxes due by reason of inclusion of the trust corpus in the claimant's estate. However, the Trust contains a limiting clause, "to the extent permitted by applicable Medicaid or SSI law, regulation or policy at the time of JENNIFER's death," *see* Trust, Art. 3.4(B), suggesting that payment of prohibited taxes would not be allowed under the Trust.

Ideally, references to taxes, which would be non-permissible payments, should be removed from the Trust. However prohibited, the limiting clause would be acceptable as written, provided that the Field Office documents that we have accepted the Trust based on the limiting language and that the non-permissible payments (e.g. inheritance, gift, generation-skipping taxes, and non-trust related estate taxes) cannot be paid before the State Medicaid Agency is reimbursed. Further, the beneficiary and trustee should be notified in writing to explain that, while we accept the Trust as written based on the limiting language, it is with the understanding that the non-permissible payments listed in section 3.4 may not be paid before the State Medicaid Agency is reimbursed. *See* Memorandum from Reg. Chief Counsel, Chicago, to Assistant Reg. Comm. - MOS, Chicago, *Review of Special Needs Trust and Periodic Payments for Tamara H~*, at 3-4 (March 27, 2007).

Thus, since the Trust meets the requirements of the Medicaid Trust exception under 42 U.S.C. § 1396p(d)(4)(A), it is not considered a countable resource under 42 U.S.C. § 1382b(e). However, the Trust is still subject to the regular resource rules. *See* POMS SI 01120.200(D)(1). Under these rules, a trust will be a resource if it is revocable, or if the individual can direct the use of trust principal for her support. Also, if there are mandatory disbursements, and the individual can sell the right to these payments, their current value may be a resource. But, as stated earlier, the Trust is not revocable. And, the individual cannot direct the use of Trust assets. Finally, there are no mandatory distributions. Therefore, the trust if not a resource under the regular resource rules either.

CONCLUSION

For the reasons discussed above, we conclude that the Trust is not a resource to Jennifer for SSI purposes. However, we recommend that the Agency provides written notification to the Trustee and Beneficiary, advising that we have accepted the Trust based on its limiting language and that non-permissible payments may not be paid before the State Medicaid Agency is reimbursed.

H. PS 07-091 SSI-Ohio-Review of the Anthony P. C~, Sr. Special Needs Trust for Anthony P. C~ Jr., ~ Your Reference: S2D5G6, SI-2-1-3 OH (C~) Our Reference: 06-00143

DATE: March 13, 2007

1. SYLLABUS

This opinion addresses whether or not the trust in question is considered a resource for SSI purposes. Trust assets established with funds of a third party are a resource if the individual: (1) can terminate the trust and obtain unrestricted access to the trust assets; (2) has access to the trust assets and can direct the use of the trust assets to meet his/her need for food or shelter; or

(3) can sell his/her beneficial interest in the trust. In this case, the SSI claimant does not have the authority to terminate the trust. In addition, the claimant cannot assign interest in the trust or direct use of the trust assets. For these reasons, the trust is not a resource for SSI purposes.

2. OPINION

You have asked whether the Anthony P. C~, Sr., Special Needs Trust for Anthony P. C~, Jr., (Trust) is a resource for purposes of determining Anthony P. C~, Jr's eligibility for SSI. Based on the information provided, the Trust would not be a resource to Anthony P. C~, Jr.

Background

On March 27, 2001, parents Anthony C~, Sr., (Anthony, Sr.) and Linda C~ entered into a Settlement Agreement and Full and Final Release with Golden Rule Insurance Company and United Healthcare d/b/a Healthcare. In the settlement agreement, Anthony C~, Sr. received $15,000, Linda C~ received $45,000, Children's Hospital of Cincinnati received $154,530.70, and Anthony, Sr., as Trustee of the Special Needs Trust for the benefit of Anthony P. C~, Jr. (Anthony, Jr.) received $95,000 (less legal fees of $38,000) as settlement of nonpayment of Children's Hospital of Cincinnati bills incurred on behalf of Anthony, Jr.

The C~s' attorney advised that the settlement was the result of a lawsuit filed against the insurance company on behalf of Anthony, Jr.'s parents in relation to a dispute for unpaid hospital bills for Anthony, Jr.'s care. As part of the settlement, the parents received compensation, above and beyond the unpaid bills, for the insurance company's "bad faith" in failing to pay the hospital at the time services were incurred. The attorney advised that there was no malpractice or personal injury settlement involved. Apparently, the settlement funds were for the parents only, not for Anthony, Jr., but Anthony Sr. chose to place some of the settlement funds in a trust for the benefit of Anthony, Jr.

On March 25, 2001, Golden Rule issued a check in the amount of $95,000 to Anthony, Sr., as Trustee of the Special Needs Trust for the benefits of Anthony, Jr. After attorney's fees were paid, $57,000 was placed in the Trust for the benefit of Anthony, Jr.

The Special Needs Trust for Anthony, Jr. was created on May 31, 2001, by Grantor Anthony, Sr., with Linda C~ as Trustee. The Trust provides, in Section 2, that the Trust is irrevocable and the Grantor expressly waived and surrendered the power to alter, amend, revoke, or terminate the agreement. Sections 3.1. and 3.1.1 state that any assets of the trust estate shall be held for the benefit of the Grantor's son, Anthony, Jr., (Beneficiary) and the Trustee is not to make any payments or distributions from the principal or income which cause the Beneficiary to incur a reduction or increase in the cost of benefits otherwise available to him from any local, state or federal government agency or entity or any private agency. Under Section 3.1.2, the Trustee is instructed to not make any payments or distributions of income or principal from this Trust to reimburse or supplant any local, state or federal government agency which provides necessities (e.g., food, lodging, medical care). However, the Trustee may from time to time apply amounts from the income and principal for the Beneficiary's Special Needs (defined in the Trust as cost of home, medical costs, personal items, etc., in Section 3.1.4). The Beneficiary is not considered to have access to the principal of this Trust. Section 3.1.5. Under Section 3.1.7, the Beneficiary's interest in the Trust cannot be assigned.

DISCUSSION

POMS SI 001120.00(B)(17) defines a third party trust as a trust established by someone other than the beneficiary as the grantor. This same POMS provision cautions, however, that agency decision-makers are to be "alert for situations where a trust is allegedly established by a third party, but in reality is created with the beneficiary's property," in which case the trust would be a "self-settled" or "grantor" trust, rather than a "third party" trust. *See* POMS SI 01120.200(B)(8), (B)(17); POMS SI 01120.201(A)(1) (providing that assets held in self-settled trusts established on or after 1/1/00 will generally be considered resources for SSI purposes unless an exception applies).

Here, the C~s' attorney advised that the settlement funds placed in Trust belonged to Anthony, Jr.'s parents, not to Anthony, Jr. Assuming this is true, the Trust is a third party trust and should not be considered a resource to Anthony, Jr. [1]

For purposes of SSI eligibility, "resources" are cash or other liquid assets or any other real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. 20 C.F.R. § 416.1201(a); POMS SI 01110.100(B)(1). If an individual has the right, authority, or power to liquidate the property, it is considered a resource. *Id.* Trust assets established with funds of a third party are a resource if the individual: (1) can terminate the trust and obtain unrestricted access to the trust assets; (2) has access to the trust assets and can direct the use of the trust assets to meet his need for food or shelter; or (3) can sell his beneficial interest in the trust. POMS SI 01120.200(D)(1)-(3).

Here, Anthony, Jr., does not have the right to terminate the Trust. Nor can he direct the Trustee to provide for his support and maintenance. And, he cannot assign his beneficial interest in the Trust. Accordingly, the Trust is not a resource to Anthony, Jr.

CONCLUSION

For the reasons discussed above, we conclude that the Trust is not a resource to Anthony, Jr.

[1] If you receive additional information that suggests that any funds in the Trust may be attributable to Anthony, Jr., that portion of the Trust would need to be evaluated separately. *See* POMS SI 01120.201.

I. PS 07-086 SSI - Ohio - Review of the Gwen M. F~ Special Needs Trust, ~- REPLY OGC Ref: 070177 Your Ref: SI 2-1-3 OH (F~)

DATE: March 12, 2007

1. SYLLABUS

This case represents a distinction between trust funds originating from different sources. The funds coming from a 3rd party are not countable, but the funds originating from the grantor are countable. The grantor funds did not follow the strict guidelines for the order of payment for the Medicaid reimbursement making it countable.

2. OPINION

You asked us to review a trust dated February 5, 2005, to determine whether the assets placed in trust would be a countable resource to Gwen M. F~ ("Gwen"). For the reasons discussed below, we conclude that any portion of the trust funded with Gwen's assets is a countable resource, but any portion of the trust funded with assets of a third party is not a resource.

Background

We base our opinion on our review of the trust instruments you provided to us. *The Gwen M. F~ Special Needs Trust* (hereinafter "Trust") was established by Gwen's mother, Janice F~.

On February 5, 2005, the Trust was established solely for Gwen's benefit, and provided that the agreement could be neither amended nor revoked. *See* Trust, Preamble, Article II. In addition, the Trust refers to Gwen as a "disabled individual." *See* Preamble.

The Trust gives the trustee unfettered discretion to distribute Trust assets and income. *See* Article III. The Trust further provides that the Trustee "shall not be obligated or compelled to make" distributions of the income or principal. *See* Article III(6). Thus, Gwen does not appear to have any rights of withdrawal. The Trust also contains a "spendthrift provision:" "No beneficial interest (including any beneficial interest held by GWEN M. F~) in the principal or income of this Trust shall be anticipated, assigned, or encumbered, or shall be subject to any creditor's claim or legal process, prior to its actual receipt by the Beneficiary." *See* Article V.

Article IV of the Trust provides that the Trust shall terminate upon cessation of Gwen's disability or, in the alternative, Gwen's death. Upon Gwen's death "the Trustee shall pay the attorney's fees and other properly allowable costs incurred in administering and wrapping up the Trust." Article IV(B)(1). Allowable costs are described as "accounting of the Trust to a court, completion and filing of documents, or other required actions, but not payments of GWEN's debts owed to third parties or funeral expenses." *Id.* The Trust also provides that, upon Gwen's death, "the Trustee shall pay out of the principal included in the gross estate of GWEN for estate tax purposes, any federal or state estate tax or other inheritance tax (including interest or penalties thereon) arising by reason of GWEN's death and attributable to the Trust property included in the gross estate of GWEN for purposes of such tax." Article (IV)(B)(2).

The Trust next provides that the Trustee "shall notify the appropriate agency or agencies for each state from which the Beneficiary may have received medical assistance under a State Plan pursuant to 42 U.S.C. sec 1396, *et seq.*," and pay all claims for Medicaid services rendered to Gwen from assets remaining in the Trust. *See* Article IV(B)(3). The Trust specifically excludes from this repayment provision third-party funds contributed to the Trust, which did not first pass in title to Gwen, and which were not commingled with other Trust assets. *Id.*

Any remaining assets in the Trust Estate may be used to pay for Gwen's funeral and burial expenses to the extent they were not prepaid, and then distributed to Gwen's issue, or if she was not survived by issue, to her mother, or if she was not survived by her mother, Gwen's sister Emily F~, per stirpes. Article IV(B)(4), (5).

DISCUSSION

The Trust was established on February 5, 2005, and was originally funded by $10.00 received from Janice F~, Gwen's mother. Accordingly, it appears on the surface that the Trust is a third-party Trust because it contained only assets of a third party, i.e., Gwen's mother, on creation. *See* POMS SI 01120.200(B) (17).

The information you provided shows that, as of March 2005, the Trust was valued at $2,900.00, but does not show the source of the $2,900.00. If the remainder of the principal of the Trust was funded by Gwen's own assets, then this portion of the Trust should be considered self-settled. *See* 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.200(B)(8); POMS SI 01120.201 (C)(1), (C)(2)(c), (D). This portion of the Trust must be assessed to determine whether it meets the Medicaid payback exception. *See* 42 U.S.C. §1396p(d)(2)(B).

1. To the extent that the Trust is a third party trust, it is not a resource to Gwen.

For purposes of SSI eligibility, "resources" are "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). If an individual has the right, authority or power to liquidate the property, it is considered a resource. *See* 20 C.F.R. § 416.1201(a)(1). When a trust is created for the benefit of an individual with the assets of a third party, the trust constitutes a resource if: (1) the SSI beneficiary can terminate the trust and use the assets for her support and maintenance; (2) the SSI beneficiary can direct the trustee to pay her the funds or use the funds for her support and maintenance; or (3) if the individual can sell her beneficial interest in the trust. *See* POMS SI 01120.200(D). If the Trust did not contain any of Gwen's assets, and to the extent it was a third party trust, the Trust would not be a resource under any of these tests.

First, to the extent that the Trust is a third party trust, it is clear that Gwen does not have the power to terminate the Trust and use the assets for support and maintenance. Whether a trust can be terminated by a beneficiary depends on the terms of the trust and/or applicable state law. *See* POMS SI 01120.200(D)(2). Gwen does not have the right to terminate the Trust under its own terms or the terms of Ohio state law. Article II specifically provides that the agreement shall not be revoked or terminated "by the Settlor or any other person."

Although Gwen does not have legal authority to revoke or terminate the Trust agreement, the Trust may be counted as a resource in determining SSI eligibility if she has the ability to direct the use of Trust assets. *See* POMS SI 01120.200(D)(1)(a). Such authority may be included specifically in a trust provision allowing the beneficiary to act on her own, or in a provision allowing her to order actions by the trustee. *See* POMS SI 01120.200(D)(1)(b). The Trust includes no provision allowing Gwen to direct any actions by the trustee or to act on her own behalf. Indeed, Article III specifically provides that "[i]n making any distribution, the Trustee . . . [s]hall not be obligated to or compelled to make such payments." Thus, Gwen does not have any rights of withdrawal. Instead, the Trustee has to sole discretion to make distributions and payments as she deems appropriate. According to the terms of the Trust, Gwen does not have the right to direct the use of the Trust assets to meet her food, clothing and shelter needs.

Finally, because the Trust contains a spendthrift provision, it does not appear that Gwen has the power to sell her beneficial interest in the Trust. In general, a spendthrift trust is a trust which by its terms provides that a "beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors." Restatement (Third) of Trusts § 58(1). Absent such a restraint, a beneficiary of a trust would generally be free to assign his rights to a third party in exchange for consideration. Here, the Trust provides that "No beneficial interest . . . in the principal or income of this Trust shall be anticipated, assigned, or encumbered, or shall be subject to any creditor's claim or legal process, prior to its actual receipt by the Beneficiary." *See* Article V. Thus, it is evident that Gwen does not have the power to transfer her interest in the Trust and use those proceeds for support and maintenance.

In sum, under the ordinary resource rules applicable to third party trusts, Gwen does not have the legal authority to revoke the Trust, direct the use of the Trust assets for her own support and maintenance, or transfer her interest in the Trust. Accordingly, to the extent that the Trust is a third party trust, the assets in Trust are not a countable resource for SSI purposes.

2 The Trust is a resource to the extent it was funded with Gwen's own assets because it does not qualify for the Medicaid payback exception.

If any of the assets in the Trust are attributable to Gwen, i.e., if any part of the Trust is self-settled, the same resource analysis applied to the third party portion of the analysis would apply to the self-settled amounts to determine if they are resources. Any self-settled portion of the trust would not be a resource to Gwen under the regular resource rules.

In the State of Ohio, a trust, like this one, that purports to be irrevocable can be revoked if the settler (grantor) of the trust is also the sole beneficiary. *See* POMS SI 01120.200(D)(3); POMS SI CHI 01120.200C. However, in Ohio, if a trust "names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable." POMS SI CHI 01120.200C. Here, the Trust names the state and Gwen's issue as residual beneficiaries and her mother and sister as contingent residual beneficiaries. *See* Article IV(B)(5). Thus, even if a portion of the Trust were self-settled, it remains irrevocable. *See* POMS SI CHI 01120.200D(5). Nor can Gwen direct the trustee to use any funds she has contributed for her support and maintenance. And, even if she could sell her beneficial interest, it would have no market value.

In addition to the regular rules for determining whether trusts are resources, additional statutory rules would apply to any self-settled portions of the trust. *See* 42 U.S.C. § 1382b(e) (providing that assets held in self-settled trusts established on or after January 1, 2000, will generally be considered resources for SSI purposes); POMS SI 01120.201. Trust assets that were originally Gwen's would be considered a resource unless the Trust qualifies for the Medicaid payback exception. *See* 42 U.S.C. § 1382b(e)(5); POMS SI 01120.203.

The Medicaid payback trust exception applies where the trust is: (1) established with the assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. *See* 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.201(B)(1).

Here, the first two requirements are met because Gwen is under age 65, she is apparently disabled, and the Trust was established for her benefit by her mother. We have previously advised that a parent may establish a Special Needs Trust for an adult, competent child, in Ohio, where state law recognizes the existence of a dry or empty trust. *See* Memorandum from Reg. Chief Counsel, Region V, to Ass't Reg. Comm.-MOS, Chicago, *SSI-Ohio Review of the Request for Reconsideration of the Review of the Charles C. G~ Trust* (April 22, 2005). In any event, the trust appears to have been seeded by the mother's own funds before any of Gwen's assets were added.

However, even though the first two requirements for the Medicaid payback trust exception are met, the trust does not qualify for the exception because it does not meet the third requirement-that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. Here, upon termination, the Trust does not list the State as the first payee and give it priority over payment of other debts and administrative expenses. Article IV(B). We further note that, prior to reimbursement of medical assistance to the state, the Trust allows for payment of "any federal or state estate tax or other inheritance tax (including interest or penalties thereon) arising by reason of GWEN's death and attributable to the Trust property included in the gross estate of GWEN for purposes of such tax." Article (IV)(B)(2). Generally, inheritance taxes are paid by the heir who receives estate property, and not by the estate of the deceased individual. It would be inappropriate for the Trust to provide for the payment of inheritance taxes owed by heirs of the estate or Trust prior to reimbursing the State for Medicaid payments.[1] POMS SI 01120.203(B)(3)(b); *See* Memorandum from Reg. Chief Counsel, Region V, to Ass't Reg. Comm.-MOS, Chicago, *SSI-Ohio Review of the Request for Reconsideration of the Review of the James J. S~ Trust Agreement* (November 30, 2006). Therefore, the Trust does not come within the special needs exception to counting it as a resource under the Social Security Act.

CONCLUSION

In sum, any Trust assets contributed by third parties are not resources. However, trust assets attributable to Gwen are countable resources for purposes of determining SSI eligibility because they do not meet the Medicaid payback exception.

[1] The trust also permits payment of "attorney's fees and other properly allowable costs incurred in administering and wrapping up the Trust" before the State is reimbursed. Article IV(B)(1). However, the POMS allows payment of "[r]easonable fees for administration of the trust estate . . . associated with termination and wrapping up of the trust," prior to reimbursement of medical assistance to the state. POMS SI 01120.203(B)(3)(a). Thus, this Trust provision is allowable under the Medicaid payback exception.

J. PS 07-024 SSI-Ohio-Review of Request for Reconsideration on the James J. S~ Trust Agreement, ~-Action Your Reference: S2D5G6, SI 2-1-3 OH (S~) Our Reference: 06-0054

November 30, 2006

1. SYLLABUS

This opinion concludes that a trust established with the proceeds of an inheritance is a countable resource to the SSI beneficiary because it cannot be excluded under the Medicaid payback trust exception. The trust in question meets the first requirement of a Medicaid payback trust because it was established by a court with the assets of a disabled individual under the age of 65. However, the trust fails to meet the second statutory requirement because it creates contingent interests that could benefit third parties during the lifetime of the SSI beneficiary. The trust also does not meet the third requirement to qualify under the Medicaid trust exception due to language permitting prohibited payments to be made prior to Medicaid reimbursement.

2. OPINION

The Agency previously determined that the James J.S~ Trust Agreement (hereinafter "Trust") was a resource to James J.S~, an SSI beneficiary. Mr. S~, through his attorney representative, Richard F. M~, requested reconsideration. Mr. M~ asserts that the trust is not a resource, and you asked us to address Mr. M~'s argument. For the reasons discussed below, we agree with the initial determination that the Trust is a resource.

FACTS

The John J.S~ Trust was established for the benefit of James J.S~ to hold the proceeds ($74,000.00) from an inheritance. Judge Lawrence A. B~, of the Probate Court of Franklin County, Ohio, established the Trust by order of the court on May 21, 2002. Richard F. M~, Esq., as Conservator of James J.S~, is names as the Grantor, and Mr. M~ is the Trustee. The Trust states that it "is established for the benefit of James J.S~."

Item I of the Trust provides that the inheritance property was irrevocably transferred to the Trustee and that the Trust may be revised only by court order. The Trust notes that "[r]evisions may be needed due to legislative changes, court cases, changes in health care, or other events which would cause the Conservator or Trustee to consider revisions."

Under Item II, Dispositive Provisions, section (A), the Trustee is "authorized to expend, on a monthly basis, income and principal as the Trustee deems appropriate for the needs and miscellaneous expenses of" Mr. S~, "considering all other resources and income available to him, and as approved by the" court. Item II(B) of the Trust limits the amounts which may be paid each month for Mr. S~ basic living needs so as not to exceed the monthly income eligibility standard for Medicaid or any other program for which Mr. S~ may be eligible, and the Trust directs that any other distributions must not render Mr. S~ ineligible for Medicaid nursing home benefits.

Item II(C) of the Trust directs that, should the State of Ohio fail to honor its Terms or if the purpose of the Trust is otherwise frustrated, the Trustee will distribute the Trust to beneficiaries designated in the Trust. Item II(D) of the Trust provides, in pertinent part, that, upon the death of Mr. S~, all principal and accumulated income in the Trust will be distributed as follows: (1) to pay for general expenses, to reimburse any party for advances for Mr. S~ burial, for payment of any taxes, and for payment of any administrative expenses to terminate the trust; (2) to reimburse the State of Ohio for assistance paid on Mr. S~ behalf under the Medicaid program; and (3) to an heir as designated in Mr. S~ will or according to intestacy provisions. Each of the second and third distribution is specifically subject to the previous enumerated distribution.

Item III, Definitions, section (C), defines beneficiary as including only Mr. S~. Item V, Restriction Against Alienation, states that "[i]f a beneficiary alienates or attempts to alienate any interest or right to receive payments" under the trust, then Mr. S~ interest in and right to receive the payments will cease and the payments thereafter will be applied "as determined by the Trustee in . . . [his] uncontrolled discretion to the use of any other beneficiary or beneficiaries." Furthermore, if the trust is terminated after such an attempt at alienation, the trustee will distribute the beneficiary's share to those who would be entitled to receive it as if the beneficiary had died the day before the termination.

Item VI, Termination Procedure, directs distribution of the Trust, upon termination of Medicaid or government benefits due to existence of the trust, to a charitable remainder trust which shall pay to Mr. S~ eight percent (8%) of the assets of the Trust

yearly. The charitable remainder trust also provides for Mr. S~ estate to furnish funds for payment of any estate and death taxes owing from the Trust, and for trust distribution to certain charities upon Mr. S~ death.

DISCUSSION

Pursuant to POMS SI 001120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual, unless one of the exceptions applies in POMS SI 01120.203 (listing Medicaid trust exceptions for individuals and pooled trusts, and the waiver for undue hardship). The Agency previously determined that the Trust in this case is a countable resource for Mr. S~ because the Trust does not meet an exception for self-funded Medicaid payback trusts established after January 1, 2000.

Mr. M~ argues on behalf of Mr. S~ that the relevant issue is whether the trust is revocable. Mr. M~ asserts that the trust is not a resource because Mr. S~ cannot terminate the trust. He states that Mr. S~ has never accessed or used the trust's property for his support and maintenance, and that the trust principal has been an unavailable resource to him at all times. He therefore concludes that the trust is not a countable resource. Mr. M~'s conclusion, however, is not correct. The Trust in this case is irrevocable, but, nonetheless, its principal is a countable resource to Mr. S~ because he payments can be made from the trust to Mr. S~ or for his benefit, and because the Medicaid payback trust exception does not apply.

Under the plain language of the statute, trusts established on or after January 1, 2000, with the assets of an individual are a countable resource if payments from the trust principal could be made to or for the benefit of the individual unless one of the exceptions in POMS applies, including the exception for a Medicaid payback, or "special-needs" trust. 42 U.S.C. § 1382b(e)(3)(B), (e)(5); *see also* POMS SI 01120.201(D)(2), SI 01120.203. Here, payments can be made from the trust principal to Mr. S~ or for his benefit. The Dispositive Provisions of Item II of the Trust direct that the Trustee may expend principal, as he deems appropriate, for the needs and miscellaneous expenses of Mr. S~, with consideration of all other resources available to him as approved by the Court. Monthly payments for Mr. S~ basic living needs are restricted so as to prevent Mr. S~ from surpassing the monthly income eligibility threshold set by the State of Ohio's Medicaid program. This restriction on monthly payments applies only with regards to Mr. S~ basic living needs, however, and does not appear to restrict the Trustee's general discretion to make other payments from the Trust principal for Mr. S~ other needs or miscellaneous expenses. *See* POMS SI 01120.201(D)(2)(b). Thus, the Trust specifically provides for payments from the trust principal to or for the benefit of Mr. S~, and, therefore, it would constitute a countable resource unless one of the exceptions - in particular, the Medicaid payback trust exception - of 42 U.S.C. § 1396p(d)(4) applies. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.203.

We agree, however, with the Agency's earlier determination that the Trust here does not meet the requirements to qualify for a Medicaid payback trust exception. The Medicaid trust exception for individual trusts applies where the trust is: (1) established with assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during her lifetime. 42 U.S.C.§ 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

The S~ Trust satisfies the first requirement of a Medicaid payback trust because it was established with assets of an individual under age 65, who is disabled, and a court established the Trust for his benefit. As the Agency determined, however, the Trust does not satisfy the second and third requirements under the Medicaid trust exception.

Regarding the second requirement, the Trust was not established for the sole benefit of Mr. S~ as it creates contingent interests that could benefit third parties during Mr. S~ lifetime. Regarding the third requirement, the Trust allows for payments which are prohibited under the Medicaid trust exception.

The statute provides that a trust will qualify for the Medicaid payback exception only if it is "established for the benefit" of the individual . 42 U.S.C. § 1396p(d)(4)(A). The Agency has reasonably interpreted 42 U.S.C. § 1396p(d)(4)(A) to require that the trust be established for the sole benefit of the individual during his lifetime. *See* POMS SI 01120.201(F)(2) (defining "established for the sole benefit of the individual"); Memorandum from Reg. Chief Counsel, Chicago, to Asst. Reg. Comm'r. - MOS, Chicago, SSI-Illinois-Michigan-Review of the Brian V~ Irrevocable OBRA Pay Back Trust, (Nov. 22, 2004). As Mr. M~ points out, it is not clear that the early termination provision creates a contingent interest that could benefit third parties during Mr. S~ lifetime, as the Agency previously determined. The charitable remainder trust specifies payments only to Mr. S~ during his lifetime and then to third parties after his death. In the event such a trust were established, portions of the principal made available to Mr. S~ could be a countable resource under the regular trust counting rules, but any such trust would require separate evaluation. However, the Frustration of Trust Purpose provision in Item II(C), and the Restriction Against Alienation provision in Item V do

create contingent interests that could benefit third parties during the lifetime of the claimant. The Frustration of Trust Purpose provision appears to allow the Trustee to terminate the trust and distribute the proceeds to "the beneficiaries" (apparently Mr. S~ heirs) if the State of Ohio fails to honor the trust or if the Trustee otherwise determines that its purpose has been frustrated. The Restriction Against Alienation provision directs that, upon attempted alienation of interest or right to receive payments by Mr. S~, during his lifetime, his right or interest to those payments ceases and terminates. The Trust directs that the Trustee shall then apply such payments, in his discretion, to any other beneficiary, as he determines. The provision further provides that if the trust itself is terminated, after any such attempts at alienation, the trustee will distribute the beneficiary's share to those who would be entitled to receive the share as if the beneficiary had died the day before the termination. Thus, the Trust allows for termination with distribution of assets to Mr. S~ heirs during his lifetime, or for payments to other beneficiaries during Mr. S~ lifetime upon his attempted alienation.

Mr. M~ argues that the only beneficiary of the Trust is Mr. S~. Mr. M~ urges construction of Item V of the Trust to read the phrase "any other beneficiary or beneficiaries" means "the beneficiary," i.e., Mr. S~. This is not sensible given the contrast of the two clauses in the same sentence and elsewhere in Item V. Regardless, Item II(C) of the trust unequivocally creates third party contingent interests who may benefit during Mr. S~ lifetime. Given these contingent interests in third parties, the Trust is not for the sole benefit of the Mr. S~ during his lifetime. Thus, the Trust does not meet the second requirement of a Medicaid payback trust.

The Trust also does not meet the third requirement of a Medicaid payback trust, because the Dispositive Provision of Item II, and the Termination Procedure of Item VI of the Trust, allow for prohibited payments before Medicaid is reimbursed. The statute provides that a trust is excepted only "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State [Medicaid] plan . . . ." 42 U.S.C. § 1396p(d)(4)(A) (emphasis added). POMS SI 01120.203 (B)(1)(f) explains that, "[t]o qualify for the special-needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State 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. This State must be listed as the first payee and have priority over payment of other debts and administrative expenses," subject to specific exceptions. The POMS directs that the trust at issue "must contain language substantially similar to" the above-quoted language. POMS SI 001120.203(B)(1)(f).

The Trust in this case allows for payments, prior to the reimbursement to the State for Medicaid expenses, which are not allowable expenses. Contrary to Mr. M~'s assertion, the Dispositive Provisions of Item II directs that after Mr. S~ death, the Trust shall be distributed first for payment of general expenses, for reimbursements for burial expenses, and for payment of any taxes, as well as payment for administrative expenses to terminate the trust. Yet, only taxes due from the trust and fees for trust administration may be paid prior to reimbursing the State Medicaid expenses. POMS SI 001120.203(B)(3)(a). Further, payments of debts to third parties and of funeral expenses prior to Medicaid reimbursement are specifically prohibited. POMS SI 001120.203(B)(3)(b). Mr. M~ argues that the Trustee has approved the purchase of an irrevocable burial arrangement for Mr. S~ that he claims will not be considered a resource under the statute. However, even if the Trustee makes such a purchase, the plain language of the Trust still would allow the Trustee to reimburse any party that makes advancements for Mr. S~ funeral. Given the provisions allowing prohibited payments (of any taxes, of burial fees, and of general expenses and corresponding reimbursements to third parties) prior to reimbursing Medicaid, the Trust fails to satisfy the third requirement of a Medicaid payback trust.

CONCLUSION

For the above reasons, we conclude that Trust is a countable resource and does not meet the purpose of the special needs trust exception. Specifically, the trust does not meet the requirements of a Medicaid payback trust because it is not for Mr. S~ sole benefit during his lifetime and because the trust allows inappropriate payments from the trust after Mr. S~ death before Medicaid is reimbursed. It thus is considered a resource.

K. PS 06-356 SSI-Ohio-Review of the Sub-Account of Jackie R~, ~ in the Ohio Pooled Trust-REPLY Your Reference: S2D5G6, SI 2-1-3 OH (R~) Our Reference: 06-0014

DATE: October 2, 2006

1. SYLLABUS

Trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary is considered a resource to the extent that the trust is revocable or the extent any payments can be made from the trust for the benefit of the individual. However, certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under § 1917(d)(4)(C) of the Act. In order to qualify for the Medicaid pooled trust exception, the trust must contain the assets of a disabled individual and satisfy the following conditions: 1) It must trust be established and maintained by a nonprofit association; 2) Separate accounts be maintained for each beneficiary, but assets are pooled for investing and management purposes; 3) Accounts are established solely for the benefit of the disabled individual; 4) Accounts in the trust must be established by the individual, a parent, grandparent, legal guardian, or a court; and 5) The trust must provide that to the extent 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 the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under a State Medicaid plan.

In this case, the trust contains a provision that might allow other individuals to benefit from the trust during the beneficiary's lifetime which is contrary to requirement three listed above. However, the trust contains a void clause which nullifies the offending provision which permits the trust to meet the Medicaid pooled trust exception and thus be excluded from resources for SSI purposes.

2. OPINION

You asked us whether Jackie R~sub-account in the pooled trust is a resource for SSI purposes. For the reasons discussed below, we conclude that the trust is not a resource

BACKGROUND

A trust sub-account to the Ohio Pooled Trust was established for the benefit of Jackie R~ to hold the proceeds from a personal injury settlement. The Center for Special Needs Trust Administration, Inc., is the trustee. Joinder Agreement for the Ohio Pooled Trust, Art. I, § 1.01. The trust provides that it is irrevocable and shall be established with resources, including assets and/or income, belonging solely and exclusively to the beneficiary (Jackie R~). Joinder Agreement for the Ohio Pooled Trust, introductory paragraph; Declaration of Trust Art. 1, § 1.4

The Center for Special Needs Trust Administration, Inc., is a non-profit corporation, which established the National Pooled Trust on February 5, 2002. *See* Declaration of Trust at 1. The trust defines beneficiaries as disabled individuals consistent with § 1614(a)(3) of the Social Security Act. Declaration of Trust at Art. 2, § 2.4. The purpose of the trust is to hold assets of individuals who are disabled and provide for their supplemental care and needs. Declaration of Trust at Art. 3, § 3.1; Art. 5, § 5.3.

Within the trust, individual trust accounts, called "sub-accounts," are created and managed for each beneficiary. Declaration of Trust at Art. 2, § 2.8; Art. 8, § 8.1. The funds from each sub-account are pooled for investment and management of the funds. Declaration of Trust at Art. 8, § 8.1. The trust is activated for an individual beneficiary when the trustee accepts a joinder agreement signed by a grantor, who according to the trust may be the individual with a disability, a parent, a grandparent, a guardian, a conservator, or a court. Declaration of Trust at Art. 4, § 4.2; Art. 2, §§ 2.3, 2.4. A sub-account is established upon receipt, by the trustee, of any assets transferred on behalf of a person with a disability. Declaration of Trust at Art. 4, § 4.2. Under the terms of the trust, the trustee has sole discretion to determine when payments will be made to the beneficiary. Declaration of Trust at Art. 5, §§ 5.1, 5.2. The trust states that it is irrevocable (Declaration of Trust at Art. 4, § 4.2), and spendthrift provisions provide that the beneficiary does not have the power to anticipate, assign, attach, or compel a distribution from the trust sub-account or any other part of the trust estate. Declaration of Trust at Art 3, §§ 3.1, 3.2.

Upon the death of a beneficiary, any amounts that remain in the beneficiary's trust sub-account shall be retained by the trust and, in the trustee's sole discretion used for the benefit of other beneficiaries enrolled in the pooled trust, or to add disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), who are indigent, to the trust as beneficiaries; or to provide disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), with equipment, medication, or such other services deemed suitable for such persons by the trustee.

Declaration of Trust at Art. 6; Joinder Agreement for the Ohio Pooled Trust at Art. III, § 3.2.

The trust also contains the following provision:

If the trustee has reasonable cause to believe that principal and/or income in any trust sub-account maintained for any beneficiary will be required to be used for the care of a beneficiary that has been, or would otherwise be, provided by local, state, or federal government, or an agency or department thereof, the trustee may, in its sole and absolute discretion, exercise one of the following provisions:

terminate the affected beneficiary's trust sub-account as though that beneficiary had died and treat the property in the sub-account according to the provisions in Article 6; or, continue to administer the affected beneficiary's trust sub-account under separate arrangement with the affected beneficiary or such beneficiary's legal representative.

Before making any distribution under this paragraph 7.1, the trustee should consider the tax, Medicaid, and other public benefit consequences to the beneficiary of any particular distribution. Declaration of Trust, Art. 7, § 7.1.

Any provision of the trust that may disqualify the beneficiary for government assistance shall be automatically, *ab initio*, amended, limited or void, to avoid that disqualification. Declaration of Trust, Art. 10, § 10.4.

DISCUSSION

Under the Social Security Act, trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary will be considered a resource to the extent that the trust is revocable or to the extent that any payments can be made from the trust for the benefit of the individual. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. In the present trust, the trustee has the discretion to use the income and the principal in the trust sub-account for the benefit of the beneficiary for whom the sub-account was established. *See* Declaration of Trust Art. 3, § 3.1; Art. 5, § 5.3; Art. 7, § 7. Therefore, the trust would be a resource to the beneficiary under these provisions. *See* 42 U.S.C. § 1382b(e)(3)(B).

However, certain pooled trusts are excepted from this provision if they qualify as a Medicaid payback trust under the provisions of § 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). In order to qualify for the Medicaid payback trust exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

It must be established and managed by a nonprofit association.

A separate account must be maintained for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts. Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.

The trust must provide that to the extent that 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 from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

See POMS SI 01120.203(B)(2).

The Trust Does Not Qualify For the Medicaid Payback Exception, Unless the Offending Provision is Removed from the Trust under Article 10, § 10.4.

According to the terms of the Trust,

If the trustee has reasonable cause to believe that principal and/or income in any trust sub-account maintained for any beneficiary will be required to be used for the care of a beneficiary that has been, or would otherwise be, provided by local, state, or federal government, or an agency or department thereof, the trustee may, in its sole and absolute discretion, exercise one of the following provisions:

terminate the affected beneficiary's trust sub-account as though that beneficiary had died and treat the property in the sub-account according to the provisions in Article 6; or,

continue to administer the affected beneficiary's trust sub-account under separate arrangement with the affected beneficiary or such beneficiary's legal representative.

Before making any distribution under this paragraph 7.1, the trustee should consider the tax, Medicaid, and other public benefit consequences to the beneficiary of any particular distribution.

Declaration of Trust, Art. 7, § 7.1.

Section 1917(d)(4)(C)(iii) of the Social Security Act, 42 U.S.C. § 1396(d)(4)(C), states, in relevant part, "Accounts in the trust are established solely for the benefit of individuals who are disabled . . . ." The implementing POMS provide that one should "[c]onsider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life." (emphasis in original). *See* POMS SI 01120.201(F)(2). Since terminating the beneficiary's trust sub-account under the fiction "as though that beneficiary had died" would create the possibility that other individuals could benefit from the trust during the beneficiary's lifetime, the trust fails to meet the resource exception for Medicaid payback trusts under the Social Security Act. Therefore, under this provision, a beneficiary's sub-account in the trust would be a resource to the beneficiary. *See* 42 U.S.C. § 1382b(e)(3)(B).

Exclusion of the "as though that Beneficiary had died" Provision May Allow Trust to Qualify for the Medicaid Payback Trust Exception

However, if the foregoing offending provision were removed from the trust, it appears that, based on the remaining language of the trust, the trust would qualify for the Medicaid payback trust exception. Article 10, § 10.4 provides that if any provision of the trust disqualifies a beneficiary for government assistance, that provision may be voided to avoid such disqualification. This clause appears to void the offending language, which permits the trust to meet the Medicaid payback trust exception.

If the "as though that beneficiary had died" provision (§ 7.1(a)), were removed from the trust, it seems that based on the remaining language of the trust, without any additional alternations, the trust may qualify for the Medicaid payback exception.

The trust provides that it intends to create a self-funded, irrevocable trust. Declaration of Trust at Art. 4, §§ 4.1, 4.2. The trust defines the beneficiaries of the trust as disabled individuals pursuant to section 1614(a)(3) of the Social Security Act. *See* Declaration of Trust at Art. 2, §2.4. The Center for Special Needs Trust Administration, Inc., which is the organization that proposes to establish the trust, is identified as a non-profit corporation. *See* Declaration of Trust at 1. Next, the trust maintains a separate account for each beneficiary, but pools the accounts for purposes of investment and management of funds. *See* Declaration of Trust Art. 8, § 8.1. The trust further states that the trust is established by a grantor, which is defined as the individual with a disability, parents, grandparents, guardian, or conservator of a court and the trust is established solely for the purpose of providing a service to individuals with disabilities who qualify and wish to participate. Declaration of Trust at Art. 4, § 4.2; Art. 2, §§ 2.3, 2.4. And, finally the trust provides that upon the death of a beneficiary, any amounts that remain in the beneficiary's trust sub-account shall be distributed to each state in which the beneficiary received government assistance. Any remaining assets in the beneficiary's sub-account shall be retained by the trust and, in the trustee's sole discretion used for the benefit of other beneficiaries enrolled in the pooled trust, or to add disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), who are indigent, to the trust as beneficiaries; or to provide disabled persons, as defined in 42 U.S.C. § 1382c(a)(3), with equipment, medication, or such other services deemed suitable for such persons by the trustee.

Declaration of Trust at Art. 6; Joinder Agreement for the Ohio Pooled Trust at Art. III, § 3.2. Therefore, if § 7.1(a) were excluded from the trust, it appears that the Medicaid payback exception would apply.

Furthermore, according to the regular resource rules, *see* POMS SI 01120.200(D), the trust will be considered a resource only if: (1) Ms. R~ can terminate or revoke the trust or her interest in the trust and obtain the assets; (2) Ms. R~ can compel the trustee to pay for her support and maintenance; or (3) Ms. R~ can sell her beneficial interest in the trust. *See* POMS SI 01120.200(A)(1)(a), (D)(1). Ms. R~ is the "grantor" of the trust to the extent the trust contains assets and/or income that belonged to her. *See* POMS SI 01120.200(B)(2). Generally, a grantor of a trust can revoke her contributions to the trust if she is also the sole beneficiary of the trust, even if the trust purports to be irrevocable. *See* POMS SI 01120.200(D)(3); POMS SI ATL01120.201(B), (C)(2); RESTATEMENT (THIRD) OF TRUSTS § 65 & comment a & Reporter's Note (2003). In this case, however, Ms. R~ is not the sole beneficiary of the trust, since the trust itself is a residual beneficiary of the trust sub-account, whose consent would be necessary to revoke the trust (Declaration of Trust Art. 6), and thus she could not unilaterally revoke her contributions to the trust and recover those assets to use for her support and maintenance. Declaration of Trust, Art. 4, § 4.2. Nor would Ms. R~ have the power or authority to direct the use of the trust property for her support and maintenance. Under the terms of the trust, the trustee has sole discretion to determine when payments will be made for her benefit. Declaration of Trust at Art. 5, §§ 5.1, 5.2. Finally, even if Ms. R~ could sell her beneficial interest in the trust, that interest would have little or

no value because the trustee is not required to make any payments for her benefit. *See* RESTATEMENT (THIRD) OF TRUSTS § 60 & comments e, f (Tentative Draft No. 2, Mar. 10, 1999).

CONCLUSION

For the foregoing reasons, we conclude that a sub-account in the proposed pooled trust would not be a resource. In particular, we conclude that, after application of the Art. 10, § 10.4 "void clause," the trust meets the Medicaid payback trust exception, and would not be a resource under the regular resource rules. However, the trustees should be advised that SSA regards the Art. 7, § 7.1(a) provisions of the trust as being no longer of any legal effect.

L. PS 06-113 SSI-Ohio-Review of the Agreement of Trust for Nicole R. R~, ~ -REPLY Your Reference: S2D5G6, SI-2-1-3 OH (R~)

DATE: April 10, 2006

1. SYLLABUS

A trust agreement executed on September 28,2004 created two special needs trusts for the benefit of an SSI beneficiary. The first trust (the Zoom Trust) was funded solely with the beneficiary's assets and named the parents as grantors. The second trust (the N.R.R Trust) was funded solely with the assets of a third party and also names the parents as grantors. The Zoom Trust contains a provision stating that the Trust can be terminated if it interferes with Medicaid eligibility and, at that time, the Trust assets shift to the second Trust (the N.R.R Trust). Due to language contained in the second Trust, the assets of the Zoom Trust could potentially be used for the benefit of contingent beneficiaries during the SSI beneficiary's lifetime.

Therefore, the Zoom Trust is not for the sole benefit of the beneficiary and does not qualify for the Medicaid trust exception. The second Trust, funded solely with the assets of a third party, is not subject to examination under the Medicaid trust exception policy. As such, it is excluded from resource counting since the Trust is irrevocable, contains a spendthrift clause, and the beneficiary cannot direct use of the funds to meet basic needs.

2. OPINION

You have asked whether the two trusts created by the Agreement of Trust for Nicole R. R~ (Nicole), known as "The Zoom Trust" and "The N.R. R~ Trust," are resources for purposes of determining Nicole's eligibility for SSI. For the reasons explained below, we believe that the Zoom Trust is a resource to Nicole but the N.R. R~ Trust is not a resource to her.

Background

On September 28, 2004, Theodore C. R~ and Wanda A. R~ (Nicole's parents) created the "Agreement of Trust for Nicole R. R~" (Agreement) for Nicole's benefit. Trust Preamble & Trust § 1.5. The Agreement indicates that Nicole is a disabled person under the age of 65. Trust Preamble. This Agreement created two special needs trusts for Nicole's benefit. Trust § 1.1. The first trust was named "The Zoom Trust" while the second trust was named "The N.R. R~ Trust." Trust §§ 1.1, 2.1, & 3.1. The Agreement indicates that these trusts are to be construed under Ohio law. Trust Preamble, Trust § 9.1.1.

The Zoom Trust

The Zoom Trust is a special needs trust which was funded solely from Nicole's assets. Trust § 2.1. The amount or origin of the assets is not stated in the trust agreement. Nicole's parents were named as grantors of the Trust and Nicole's father, Theodore R~, was named as the trustee of the Trust. Trust Preamble & Trust § 5.1. The Agreement provides that the Trust is revocable during the lifetime of either grantor but is not revocable by the beneficiary, Nicole. Trust §§ 1.3, 1.6.

The Trust declares that its purpose is to supplement, but not to supplant, whatever benefits and services Nicole may receive as a result of her disability from federal, state, and local government or from any other private or public profit or non-profit organizations. Trust §§ 1.2, 2.2.

The Trust provides that it may terminate during Nicole's lifetime if a court of competent jurisdiction finds that Nicole is (1) fully competent without any legal disability and (2) does not meet the requirements of the federal and state disability criteria. Trust § 2.3. The Trust also provides that it will terminate upon Nicole's death. Trust § 2.4. Upon Nicole's death, the Trust's assets would be distributed in the following order:

1. To pay for Nicole's trustee fees, attorney fees, final taxes, and other trust estate administration costs, including costs related to accounting of the trust to a court, completion of filing of documents, or other required actions associated with the termination and wrapping up of the trust;

2. To repay each state which had provided medical assistance (Medicaid) to Nicole during her lifetime; and

3. Any remaining assets would then be distributed to the grantors, or the survivors of them. If neither grantor survived, then the Trust assets would be distributed to Sarah R. R~. And if none of these beneficiaries survived Nicole, the remaining trust assets would be distributed to certain named family members, *per capita.*

Trust §§ 2.4, 2.4.1, 2.4.2.

Finally, the Agreement provides that if the Zoom Trust is terminated due to a determination that its income or principal constitutes a resource which would interfere with or prevent Nicole's Medicaid benefits, the Trustee may elect to have all, or any part, of the Trust funds converted to "The Special Needs Trust of Nicole R. R~," subject to an amendment that upon Nicole's death, the R~ trust assets would first be used repay each state which has provided Medicaid to Nicole during her lifetime. Trust § 8.3.1.

The N.R. R~ Trust

The N.R. R~ Trust is also a special needs trust but this trust was funded by a third party; the assets are not (and were never) Nicole's assets. Trust § 3.1. The Trust declares that its purpose is to supplement, but not to supplant, whatever benefits and services Nicole may receive as a result of her disability from federal, state, and local governments or from any other private or public profit or non-profit organizations. Trust § 3.2. The amount or origin of the assets is not stated in the trust agreement. Nicole's parents were both named as grantors of the Trust and Nicole's father, Theodore R~, was named as the trustee of the Trust. Trust Preamble & Trust § 5.1. The trust would be revocable during the lifetime of either grantor but is not revocable by Nicole. Trust §§ 1.3, 1.6.

The Trust provides that the trustee may, but is not required to, establish a regular monthly amount to be paid as a supplement for Nicole to provide for services she needs as a direct result of her disability. Trust § 3.2.2. The Trust further provides that Nicole would be restricted from transferring, selling, or assigning any beneficial interest (whether it be income or principal) she receives. Trust § 3.2.5.

The Trust provides that it may be terminated during Nicole's lifetime if a court of competent jurisdiction finds that Nicole is (1) fully competent without any legal disability and (2) does not meet the requirements of the federal and state disability criteria. Trust § 3.3. If so terminated, trust assets either go to Nicole or stay in the trust. The Trust also provides that it may be terminated if it is determined that the income or principal of this Trust constituted a resource which would interrupt, prevent, or interfere with Nicole's Medicaid benefits. Trust § 3.4. In the event that the Trust is terminated due to its interference with Medicaid benefits, the Trust assets would be distributed first to the Grantors, or their survivors, then to Sarah R. R~, and then to certain named family members, *per capita.* Trust §§ 3.4.1. Finally, the Trust would also terminate upon Nicole's death. Trust § 3.5. Upon Nicole's death, the Trust assets would be distributed as follows:

a. To pay for Nicole's trustee fees, attorney fees, final taxes, and other trust estate administration costs, including costs related to the accounting of the Trust to a court, completion of filing of documents, or other required actions associated with the termination and wrapping up of the trust.

b. Then to the grantors, or their survivors. If neither grantor survived, then the Trust assets would be distributed to Sarah R. R~. And if none of these beneficiaries survived Nicole, the remaining trust assets would be distributed to certain named family members, *per capita.*

Trust §§ 3.5, 3.5.2.

DISCUSSION

For the reasons explained in the following discussion, we believe the Zoom Trust is a resource to Nicole, while the N.R. R~ Trust is not a resource to her.

A. The Zoom Trust

Under federal law, a trust established by an individual after January 2000 generally will be considered a resource to her if the trust is irrevocable, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual. In that case, the value of the resource is the portion of the trust corpus which could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(2)(a). However, certain exceptions may apply.

Here, while the Trust indicates that either grantor could revoke the trust, Nicole is explicitly prohibited from revoking the Trust. Trust §§ 1.3, 1.6. Moreover, even though Nicole should be considered the true grantor of the Trust (since the Trust was established with funds that belonged to her), she is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). Trust § 2.1., POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200. Specifically, the Trust creates contingent remainder interests in certain named family members. Trust § 2.4.2, POMS SI CHI01120.200(D)(1). Accordingly, the Trust is irrevocable. POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary.").

Pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual (which is the case here, since Nicole is a beneficiary), unless the Trust meets the requirements of the Medicaid trust exception in POMS SI 01120.203(B).

The Medicaid trust exception for individual trusts applies where the trust:

a. contains the assets of an individual who is under age 65 and disabled;

b. is established for the benefit of such individual by a parent, grandparent, legal guardian, or a court; and

c. provides that, upon the death of the individual, the State will receive all amounts remaining in the trust, equal to the total medical assistance (Medicaid) paid for the individual's benefit.

POMS SI 01120.203(B).

Here, the Trust satisfies two out of the three requirements, namely requirements (1) and (3). Specifically, the Trust provides that Nicole is under 65 and disabled and that upon her death, any medical assistance agencies would be reimbursed for Medicaid benefits Nicole received during her lifetime. Trust Preamble, Trust § 2.4.1. However, due to the termination provision in Section 8, the Trust fails to satisfy the second requirement, which requires that the Trust be established *for the benefit of an individual* by a parent, grandparent, legal guardian, or court. Trust § 8.1. We have previously opined that the second requirement should be interpreted to necessitate that the trust be established for the *sole benefit* of the individual during his or her lifetime. *See* POMS PS 01825.016(D), *PS 05-033 SSI-Illinois-Review of the Brian V~ Irrevocable OBRA Pay Back Trust* (termination clause that created contingent interests in third parties rendered the exception under Section 1917(d)(4)(A) of the Act unavailable).

Here, one of the Zoom Trust termination provisions creates contingent interests that could potentially benefit third parties *during* Nicole's lifetime. Specifically, if the trustee decides to terminate the Trust because it disqualifies Nicole from Medicaid benefits, the Trust assets may be shifted into the N.R. R~ Trust, and the R~ Trust contains a termination provision that creates contingent interests in individuals other than Nicole. Trust § 3.4.1. This contingent interest in third parties causes the Zoom Trust to not be for the sole benefit of Nicole during her lifetime. Accordingly, the exception under Section 1917(d)(4)(A) of the Social Security Act (POMS SI 1120.203(B)), as well as any other exceptions, would not be available. Therefore, the Zoom Trust should be considered a resource to Nicole under POMS SI 01120.201(D)(2).

The N.R. R~ Trust

In contrast to the Zoom trust, since the N.R. R~ Trust was funded solely by assets that were not Nicole's, it is a third party trust. Trust § 3.1. Trusts established by third parties are resources if an individual (Nicole) has the legal authority to revoke the trust and then use the funds to meet her food, clothing, and shelter needs, or if the individual can direct the use of the trust principal for her support and maintenance. SI 01120.200(D)(1)(a). Additionally, if the trust provides mandatory disbursements to the beneficiary and the beneficiary is not prohibited from anticipating, assigning, or selling the right to future payments, the current value of these payments may be a resource to the beneficiary. SI 01120.200(D)(1)(a). Here, neither situation exists. The Trust provides that Nicole cannot terminate or revoke the Trust. Trust § 1.3. And only the trustee, not Nicole, is authorized to invade

the Trust principal if the net income is not sufficient to make appropriate distributions. Trust § 3.2.4. In addition, the Trust provides that the trustee may establish a regular monthly amount to be paid as a supplement for Nicole to provide for services she needs as a direct result of her disability. Trust § 3.2.2. The Trust further provides that Nicole is restricted from transferring, selling, or assigning any beneficial interest (whether it be income or principal) she receives. Trust § 3.2.5. As such, we believe that the N.R. R~ Trust should not be considered a resource to Nicole.

CONCLUSION

For the reasons discussed above, we conclude that The Zoom Trust is a resource to Nicole, but the N.R. R~ Trust is not.

M. PS 06-053 SSI-Ohio-Review of the Gift Annuity Account for Janalyn M. H~ in the Ohio Community Pooled Trust, ~ - REPLY Your Ref: S2D5G6 SI 2-1-3 OH (H~) Our Ref: 05-0174

DATE: January 30, 2006

1. SYLLABUS

The Ohio Community Pooled Trust was amended on September 16, 2005 to incorporate changes to the Master Trust that would permit all sub-accounts to be excluded from countable resources for SSI purposes. The amendments to the Master Trust Agreement bring the Trust into compliance with the Medicaid payback provisions such that the subaccounts are now excluded under provisions found at 42 U.S.C.1396p(d)(4)(c). Amendments incorporated September 16,2005 modified the original Trust. This means that the changes to the Master Trust, and the subaccounts found therein, are effective September 16,2005 and not for any time prior to execution of the amendments.

2. OPINION

In May 2005, the Agency determined that the Gift Annuity Account established for Janalyn M. H~ (Janalyn) in the Ohio Community Pooled Trust was a resource to Janalyn for purposes of determining her eligibility for Supplemental Security Income (SSI). *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't. Reg. Comm. - MOS, Chicago, *SSI - Ohio - Review of the Gift Annuity Account for Janalyn M. H~ in the Ohio Community Pooled* Trust (May 16, 2005) (hereinafter, H~ memo). We also explained that, with certain changes to the trust, Janalyn's subaccount would no longer be considered a resource.

On September 16, 2005, a new Trust Agreement was drafted which incorporated the changes discussed in the H~ memo. A representative of the Trustee now requests written confirmation that the new Trust Agreement eliminates the Agency's previous concerns and complies with the Medicaid payback trust provisions at 42 U.S.C. § 1396p(d)(4)(C). For the reasons discussed in the H~ memo, we conclude that the new Trust Agreement complies with the Medicaid payback provisions and that Janalyn's subaccount would no longer be a resource. However, as discussed below, the new Trust Agreement became effective on September 16, 2005 and Janalyn's subaccount would be a resource prior to that date.

The Restatement (Third) of Trusts distinguishes between two types of alteration of a trust document. A "'reformation' involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain - and properly restate - the true, legally effective intent of a settler with respect to the original terms of trusts they have created." *Restatement (Third) of Trusts,* § 62, Reporter's Notes. In contrast, a "modification involves a change in - a departure from - the true, original terms of the trust, whether the modification is done by a court [cites omitted] or by the beneficiaries." *Id.*

We believe that the September 2005 amendment modified, or changed, the original Trust. *Restatement (Third) of Trusts*, § 62, Reporter's Notes (defining "modification"). With its statement that the new trust Agreement is to be "generally effective as of the 25th day of August, 1998 but specifically effective with respect to the duties and responsibilities of the Trustees as of the date of this Agreement," the Dayton Foundation and the Trustees attempt to retroactively apply modified Trust terms. But such retroactive application is inconsistent with modification, which, unlike reformation, does not give effect to original intention. *See Restatement (Third) of Property*, § 12.1, Reporter's Notes 7 on Comment f (contrasting modification and reformation to explain the fact that a reformation order operates to alter the text as of the date of execution rather than as of the date of the order). Rather, because the modification is a "departure from the true original terms of the trust," the amendment here became effective upon its execution, September 16, 2005. *Restatement (Third) of Trusts*, § 62, Reporter's Notes.

CONCLUSION

We believe that the terms of the new Trust Agreement meet the Medicaid payback exception criteria. However, the new Trust Agreement would be effective as of September 16, 2005. Thus, as of that date, Janalyn's sub-account under the new Trust Agreement would not be a resource to her.

N. PS 05-160 SSI-Ohio-Review of the Gift Annuity Account for J~ M. H~ in the Ohio Community Pooled Trust, ~ Your Ref: S2D5G6 SI 2-1-3 OH (H~) Our Ref: 05-0095

DATE: May 16, 2005

1. SYLLABUS

This case involves a sub-account (Charitable Gift Annuity) created in the Ohio Community Pooled Trust in 2004 for an SSI individual. Generally, such an account would constitute a resource for SSI purposes if it is created on or after January 1, 2000 and the Master Trust allows the trustee to use the assets in the sub-account for the benefit of the individual beneficiary.

However, Section 1917(d)(4)(C) of the Social Security Act permits an exception to pooled trusts if the following conditions are met: (1) the trust must be established and managed by a non-profit corporation; (2) a separate account must be maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts; (3) accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or the disabled individual's parent, grandparent, or legal guardian, or a court; and (4) the trust must provide that to the extent that 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 from such remaining amounts an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

In the immediate case, the RCC determined that the third requirement for the exception was not met; i.e., the sub-account was not established for the sole benefit of the disabled individual. The Master Trust contains a provision that allows the beneficiary to disclaim her interest in the sub-account, at which point she would be "deemed dead." The trustee would then distribute any annuity amount and any remaining accumulated annuity amount to the State for reimbursement . Any remaining property in the sub-account would then be allocated to a separate fund of the Master Trust to be used for disability programs and services the trustee deemed advisable. The RCC opined that, given the possibility that a third party (the separate fund of the trust) could benefit from the assets in the beneficiary's sub-account during the beneficiary's lifetime, that the trust exception did not apply. Thus, the sub-account was found to be a resource for SSI purposes.

2. OPINION

You asked whether the Gift Annuity Account established for J~ M. H~ (J~) in the Ohio Community Pooled Trust (Trust) is a resource to J~ for purposes of determining her eligibility for Supplemental Security Income (SSI). For the reasons discussed below, we conclude that, pursuant to the current Trust provisions, the Gift Annuity Account constitutes a resource for purposes of determining J~'s SSI eligibility.

BACKGROUND

The Dayton Foundation, an Ohio not-for-profit corporation, established the Trust on August 25, 1998. Trust, Section 1. The purpose of the Trust is to "promote the general well-being of individuals with disabilities by providing for their supplemental needs, in addition to and not in lieu of and not to supplant benefits or services otherwise provided by any local, state or federal government, agency or department thereof." Trust, Section 1(A). The Trust defines individuals with disabilities as those who are disabled within the meaning of 42 U.S.C. § 1382c(a)(3). Trust, Section 4(H). The Trust is intended to be a pooled Medicaid payback trust established under 42 U.S.C. § 1396p(d)(4)(C). Trust, Section 1.

Within the Trust, individual sub-accounts, called "Charitable Gift Annuities" are created and maintained for each disabled beneficiary, but pooled for investment and management of the funds. Trust, Sections 2, 8, 11. The Trust is activated for an individual beneficiary when the trustee accepts a Gift Annuity Account Agreement entered into by the trustee and a qualified donor. Trust, Section 1(D). According to the Trust, a qualified donor may be the disabled individual, or a parent, grandparent, or legal guardian of the disabled individual. Trust, Section 4(K). The trustee may, but is not required to, accept property from a

qualified donor in exchange for a sub-account to be used and administered for the benefit of a disabled individual. Trust, Section 1(D).

During the disabled individual's lifetime, the trustee shall use the annuity amount and any accumulated annuity amount solely for the supplemental needs of the disabled individual, and shall use such amounts to the fullest extent possible. Trust, Sections 2(A)(1), 2(A)(2). If the disabled individual has a personal representative, the trustee shall consult with the personal representative concerning the disabled individual's supplemental needs. However, decisions concerning the use of any annuity amount or accumulated annuity amount for the supplemental needs of the disabled individual are made as the trustee deems advisable. Trust, Section 2(A)(3).

The Trustee shall not make any distributions from the Trust for the support and maintenance of a disabled SSI recipient. Gift Annuity Account Agreement, Paragraph B. The trustee has the power and authority, and full discretion, to hold, invest, reinvest, sell, convey, exchange or otherwise handle and/or dispose of Trust property as the trustee deems advisable. Trust, Sections 8(A)-(P). If the disabled individual receives SSI benefits, the trustee has the power to pay such annuity amount or accumulated annuity amount directly for reimbursement of expenses for supplemental needs incurred by or for the disabled individual. The trustee also has the power to pay such annuity amount or accumulated annuity amount to the disabled SSI recipient's personal representative or natural or legal guardian or custodian for the supplemental needs of such disabled individual. Trust, Section 10. The trustee shall not make any payments directly to a disabled SSI recipient. Gift Annuity Account Agreement, Paragraph B.

A disabled individual has no right or power to assign, anticipate, alienate or otherwise transfer any right or interest in any account or Gift Annuity Account Agreement, except as provided for in Section 9 of the Trust agreement. Trust, Section 10; Gift Annuity Account Agreement, Paragraph C(3). Section 9 of the Trust provides that any individual who has, or might acquire in the future, an interest in any account created under the Trust or Gift Annuity Account Agreement may disclaim all or any part of such interest. Trust, Section 9. "[F]or the purposes of determining the disposition of such interest, such person shall be deemed to have died on the effective date of such disclaimer." Id.

Following the death of a disabled individual who is an SSI recipient, the trustee shall distribute any annuity amount and any remaining accumulated annuity amount to the State. Trust, Section 2(B)(1); First Amendment to the Ohio Community Pooled Trust. The trustee shall allocate the remaining property of the disabled individual's account to a separate fund of the Trust to be used for disability programs and services as the trustee deems advisable. Trust, Section 2(B)(2).

On January 19, 2004, Terry H~ and Trina S~r (J~'s co-guardians) executed a Gift Annuity Account Agreement, enrolling J~ in the Ohio Community Pooled Trust. According to the Gift Annuity Account Agreement, J~'s co-guardians transferred $42,543.83 to the trustee in exchange for a Charitable Gift Annuity to be administered in a separate account of the Trust. Gift Annuity Account Agreement, para. B, Schedule A. Under the terms of the Gift Annuity Account Agreement, $184.36 per month (an annual total of $2,212.32), is to be used for J~'s supplemental needs. Gift Annuity Account Agreement, Schedule A.

DISCUSSION

A trust established on or after January 1, 2000, is a resource if it is a revocable trust established by an individual. *See* 42 U.S.C. § 1382b(e)(3)(A). Further, irrevocable trusts established by an individual on or after January 1, 2000, are resources to the extent that payments from the trust could be made to or for the benefit of the individual or his/her spouse. *See* 42 U.S.C. § 1382b(e)(3)(B). However, these rules do not apply where (1) the Commissioner determines that such rules would work an undue hardship on an individual or (2) a Medicaid trust exception applies, as described in 42 U.S.C. § 1396p(d)(4)(A) or (C). *See* 1382b(e)(4)-(5); Program Operations Manual System (POMS) SI 01120.203.

Under the three-pronged Medicaid trust exception applicable to special needs trusts, trust assets will not be considered a resource to the individual where (1) the individual is disabled and under age 65, (2) the trust was established for the individual's benefit by a parent, grandparent, legal guardian or a court, and (3) the terms of the trust provide that, upon the death of the individual, the State will be reimbursed for the total amount of medical assistance paid on the individual's behalf under a State Medicaid plan. POMS SI 01120.203B.1.a. Where the assets of an SSI claimant/recipient form only a part of the trust, these rules will apply to that portion of the trust attributable to the individual. Thus, a proration of the trust assets may be necessary. Moreover, even if the trust is not counted under the statute due to the application of the Medicaid trust exception, SSA still applies the general resource rules in 42 U.S.C. §§ 1382 and 1382b in determining whether the trust is a resource for SSI purposes.

Here, the special needs trust was established by Scott's father with Scott's father's funds ($10.00). *See* Trust Agreement, Schedule A. The Trust Agreement allowed for subsequent additions to be made to the trust. The regular resource rules apply to the initial trust contribution of $10.00 from Scott's father and any addition made to the trust that was the asset of any individual other than Scott. *See* POMS SI 01110.100B.1. If the UGMA/UTMA funds that were subsequently added to the trust are considered to be Scott's assets, then the portion of the trust attributable to the UGMA/UGTA contribution is a resource to Scott, unless the Medicaid trust exception applies.

We conclude that the UGMA/UTMA funds should be considered Scott's assets. Because we do not know when the transfer to trust was made, we cannot determine whether Scott had outright ownership of the assets when they were transferred into the trust.[1] However, this should not matter. We conclude that, even if the assets were transferred into the trust prior to date he attained the age of majority, the assets should be considered Scott's assets. POMS SI 01120.201B.2 states that an "asset" includes "any other payment or property to which the individual or individual's spouse is entitled, but does not receive or have access to because of action by . . . a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse . . .." Because the funds in question were initially deposited into investment accounts under a UGMA/UTMA, Scott would not have received the funds or had access to them before he reached the age of majority because they were held by a custodian (his father) who had legal authority to act on Scott's behalf with regard to the money. Therefore, the funds must be considered Scott's assets. *See* POMS SI 01120.201B.7. Regardless of whether the assets were Scott's outright or held by a custodian on his behalf under the UGMA/UTMA, they should be considered Scott's assets.

Because the funds that were transferred to the trust from the UGMA/UTMA investment accounts are considered Scott's assets, they constitute a resource to him upon transfer into the trust unless the Medicaid trust exception applies. Here, the Medicaid trust exception applies. The trust contains the assets of Scott, who is under age 65 and, for purposes of this memorandum, presumably disabled.[2] In addition, Scott's father established the trust for Scott's benefit. Under the Medicaid trust exception rules, the "person who established the trust" is "the individual who physically took action to establish the trust even though the trust was established with the assets of the SSI claimant/recipient." POMS SI 01120.203B.1.e. Since Scott's father "physically took action" to establish the trust, he established the trust. Moreover, the trust provides that the State will receive all amounts remaining in the trust upon Scott's death up to an amount equal to the total medical assistance paid on Scott's behalf under the State Medicaid plan. Thus, the requirements of the Medicaid trust exception for special needs trusts are met.

The Medicaid trust exception also requires that "[t]he State must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a." POMS SI 01120.203B.1.f. Scott's trust contains provisions providing that upon Scott's death, the Trustee shall "pay attorney fees and other properly allowable costs incurred in administering and wrapping up the Trust" and "any federal or state estate tax or inheritance tax" arising from Scott's death before the State is reimbursed the amount of medical assistance it paid on Scott's behalf. Trust Agreement, Article V. These provisions are consistent with POMS SI 01120.203B.3.a, which allows such payments.

Since the Medicaid trust exception applies, the statutory trust provisions regarding resources do not apply to the portion of Scott's trust attributable to the UGMA/UGTA funds. *See* 42 U.S.C. § 1382b(e)(5). However, even if this portion of Scott's trust is not counted under the statute (because the Medicaid trust exception applies), SSA will apply the regular resource rules in 42 U.S.C. §§ 1382 and 1382b, in determining whether this portion of the trust is a resource for SSI purposes.[3]

Under the regular resource rules, trust assets are a resource if (1) the individual can revoke or terminate the trust and obtain unrestricted access to the assets, (2) the individual has access to the trust assets and can direct their use to meet his needs for food, clothing, and shelter, or (3) the individual can sell his beneficial interest in the trust. POMS SI 01120.200D.

Whether a trust can be revoked or terminated depends on the terms of the trust and the applicable state law. The Trust Agreement explicitly states that Scott cannot revoke the trust. Trust Agreement, Article II. We also note, however, that the Trust Agreement permits the trustee to revoke the trust if it is in Scott's best interest. *Id.* However, because the trustee has the absolute discretion to revoke the trust, Scott cannot compel the trustee to revoke the trust and distribute the principal or income to him. Nevertheless, some trusts may be revocable, despite express language to the contrary. Grantor trusts, in which the grantor is also the sole beneficiary, may be revocable regardless of explicit language to the contrary. POMS SI 01120.200D.3. However, a grantor trust is irrevocable where there is a residual beneficiary. Here, Scott is the true grantor with regard to the portion of the trust pertaining to the UGMA/UGTA funds, but he is not the sole beneficiary. As we recently advised, we believe that, in Ohio, if the language of the trust specifies that it is irrevocable, and it does not appear that the trust can be unilaterally revoked, and it meets the Medicaid payback provisions, then the Agency can consider the state of Ohio to be a beneficiary. *See* Memorandum from Regional Chief Counsel, Chicago, to Asst. Reg. Comm.-MOS, Chicago, *Ohio Treatment of*

the State as a Beneficiary in a Medicaid Payback Trust (March 19, 2004). Because the State of Ohio can be considered a residual beneficiary, the trust is irrevocable by Scott.

Nor can Scott compel distributions from the trust. Trust Agreement, Article III. The Trust Agreement also contains a spendthrift provision that prevents him from selling his interest in the trust. Trust Agreement, Article V. For these reasons, the trust assets are not a resource to Scott for SSI purposes.[4]

CONCLUSION

We conclude that the portion of the trust attributable to the UGMA/UTMA contribution is Scott's asset, but not a resource to Scott for SSI purposes. In addition, the portion of the trust attributable to the contribution made by Scott's father does not constitute a resource to Scott for SSI purposes.

[1] UGMA/UTMA assets are not income to a minor until the custodian makes disbursements to the minor or on the minor's behalf or the minor reaches the age of majority. POMS SI 01120.205B.1.b-c. In Ohio, the age of majority is 18. According to the computer printout you provided, Scott attained age 18 in September 2003, shortly after the trust was established. Because we do not know the date on which the assets were transferred into the trust, we cannot determine whether Scott acquired legal ownership and control over the assets prior to the transfer of the assets into the trust.

[2] Scott's SSI application is currently awaiting medical review, pending receipt of this memorandum.

[3] As previously noted, the regular resource rules also apply to the portion of the trust attributable to the $10.00 contribution from Scott's father.

[4] We note that the Trust Agreement provides that the trustee may, in the trustee's sole discretion, pay Scott "amounts from the principal or income" and "a periodic allowance for spending money." Trust Agreement, Article III. To the extent that Scott receives any distributions from the trust, such distributions may be considered countable income to Scott.

O. PS 05-155 SSI - Review of the Request for Reconsideration of the Review of the Charles C. G~ Trust, SSN: ~ - Reply; Your Reference: S2D5G6, SI 2-1-3 OH (G~); Our Reference: 05-0081

DATE: April 22, 2005

1. SYLLABUS

This opinion modifies a previous opinion which concluded that the trust in question is a countable resource for SSI purposes. The original opinion concluded that the trust did not satisfy the rules in SI 01120.203 (Medicaid trust exceptions) because the trust was not established by a parent, grandparent, legal guardian, or court. However, upon further review, it was determined that the trust was established by the claimant's mother and thus is an excludable resource for SSI purposes. This opinion also revises a previous opinion by concluding that the state of Ohio would recognize the existence of a "dry" or "empty" trust for purposes of applying the Medicaid trust exceptions (see SI 01120.203).

2. OPINION

You have asked whether, in light of the arguments advanced by Charles G~'s attorney, the Charles C. G~ Trust should be considered a resource for purposes of determining Charles' eligibility for Supplemental Security Income (SSI). As discussed below, we now conclude that the principal the Trust principal is not a resource, and that Charles' interest in the Trust is a resource with no value. In addition, we partially revise an earlier opinion, Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Six State Survey on "Dry" or "Empty" Trusts*, (November 30, 2004) (hereinafter "*Six State Survey*") and now conclude that Ohio would recognize the existence of a "dry" or "empty" trust.

FACTS

The Charles C. G~ Trust (Trust) was created on July 1, 2002. Charles C. G~ is listed as the "settlor," and Candace G~, Charles' mother, is listed as the person "establishing" the Trust. Preamble and Signature Block. Article II provides that "[t]he settlor has irrevocably assigned, transferred, and delivered to the Co-Trustees the property listed in Schedule A attached hereto, the receipt of which is hereby acknowledged by the Co-Trustees, upon the express terms and conditions provided in this Agreement."

The Trust provides that Charles has the right to terminate the Trust and receive the Trust assets if he is determined to be not disabled by either the Social Security Administration or the Ohio Department of Job and Family Services. Article V(A). Otherwise, the Trust terminates upon Charles' death, and the Trust assets are to be used first, to wrap up the administration of the Trust; second, to pay any federal or state taxes; third, to reimburse the State for Medicaid services; fourth, to pay for Charles' funeral and estate expenses; and, finally, as Charles may appoint in his will, or, absent such appointment, to certain named siblings. Article V(B).

DISCUSSION

As you know, in our prior opinion on this Trust, we concluded that the Trust should be considered a resource because it did not satisfy any of the exceptions to the statutory trust resource rules as discussed in POMS SI 01120.203 (listing Medicaid trust exceptions for individual and pooled trusts, and the waiver for undue hardship). In particular, we opined that POMS SI 01120.203(B)(1) (the exception for individual trusts) would be unavailable because it appeared that Charles, a competent adult, "established" the Trust when he transferred the assets listed in Schedule A to the trustees contemporaneous with the execution of the Trust document. And, the exception under POMS SI 01120.203(B)(1), "does not apply to a trust established by the individual himself/herself." POMS SI 01120.203(B)(1)(e). However, upon further review, we now conclude that the Trust was "established" by Charles' mother, Candace G~, and that the exception under POMS SI 01120.203(B)(1) would be applicable to the Trust.

It appears that, in Ohio, a trust is valid notwithstanding the absence of a trust corpus. Ohio Rev. Code Ann. § 1335.01(b) (West 2005) ("A trust is valid regardless of the existence . . . of the corpus of the trust."). According to the legislative history, section 1335.01(b) was enacted in October 1992, to supersede the case of *Knowles v. Knowles*, 212 N.E.2d 88 (Ohio Prob. 1965), which found, in part, that a testamentary disposition could not "pour over" assets into a separate, unfunded trust document that was executed before the testator's death, because an unfunded trust document was not a valid trust. In our prior opinion, *Six State Survey*, we relied on case law that predated the 1992 statutory enactment (*First Nat'l Bank of Middletown v. Gregory*, 468 N.E.2d 739 (Ohio App. 1983)), which seemingly no longer controls. Accordingly, we revise our opinion in *Six State Survey* to conclude that Ohio would recognize an "empty" or "dry" trust as of October 1992.

Pursuant to advice received from the Team Leader of the Office of Disability and Income Security Programs (ODISP) Deeming, Income, and Resources Team, because Ohio recognizes dry or empty trusts, Candace could "establish" a trust for Charles, a competent adult, for purposes of the POMS SI 01120.203(B)(1) exception to the statutory trust resource rules. And here, the Trust indicates that Candace did "establish" the Trust (presumably by seeking an attorney and requesting that the trust document be drafted, and by agreeing to serve as a co-trustee) contemporaneous with the funding of the Trust, which was effected by Charles. *See* Preamble and Article II; POMS SI 01120.203(B)(1)(e) (The individual who established the trust is the individual "who physically took action to establish the trust, even though the trust was established with the assets of the SSI claimant/recipient."). And, as we indicated in our prior opinion on this Trust, all of the other elements of the POMS SI 01120.203(B)(1) exception seem otherwise to have been met.

Turning to the regular resource rules, the trust principal will be a resource if (1) the claimant can revoke the trust and use the assets for his support and maintenance, or (2) the claimant can direct the trustee to pay him the funds or use the funds for his support and maintenance. POMS SI 01120.200(D). In addition, the claimant's interest in a trust is a resource if it can be sold. POMS SI 01120.200(D).

Here, as we explained in our prior opinion on this Trust, Charles cannot revoke the trust (except, as discussed above, under the limited circumstances provided for in the termination clause). The Trust also provides that Charles has no right to demand income or principal from the Trust. Article VI(A). Therefore, the Trust principal is not a resource.

With respect to selling Charles' beneficial interest, the Trust provides that no interest shall be assignable. Article VI(A). However, since Charles is the settlor of the trust for state law purposes, the non-assignment provision would not prevent him from selling his interest in the trust. *See Restatement (Second) of Trusts* § 156(1) (1957); POMS SI 01120.200(B)(16). But, since disbursements are completely within the trustee's discretion, Charles' interest in the trust has no significant market value. The interest, however, is a resource since a resource is defined as an interest that an individual (1) owns (2) has the right, power or authority to convert to cash, and (3) is not legally restricted from using for his support and maintenance, POMS SI 01110.100(B)(1), even if the interest has no current market value, POMS SI 01110.100(B)(2), SI 01140.044. Accordingly, Charles' interest in the Trust should be considered a resource with no market value, even though the Trust principal is not a resource.

CONCLUSION

For the reasons discussed above, we conclude that the Trust principal is not a resource, and that Charles' interest in the Trust is a resource with no value. We also partially revise our earlier opinion, *Six State Survey*, and now conclude that Ohio would recognize the existence of a "dry" or "empty" trust for purposes of applying the POMS SI 01120.203(B)(1) exception to the statutory trust resource rules.

P. PS 04-221 SSI-Ohio-Review of the Scott E. K~ Special Needs Trust, ~ Your Reference: SI-2-1-3 OH (K~) Our Reference: 04P045

DATE: May 17, 2004

1. SYLLABUS

This opinion concerns a Medicaid payback trust established in 2003 by a parent for his son using UGMA/UTMA funds. In this case, the UGMA/UTMA funds were determined to be the assets of the son, so the trust is a grantor trust. The trust was determined to be irrevocable because the language of the trust states that it is irrevocable, it meets the Medicaid payback requirements, and SSA considers the State of Ohio to be a residual beneficiary in this type of situation. (*See also* Chicago Region's POMS issuance SI CHI 01120.200.)

2. OPINION

You asked whether a special needs trust established for the benefit of Scott K~ (Scott) is a countable resource to Scott for SSI purposes. We conclude that the portion of the trust attributable to contributions transferred to the trust from investment accounts established under the Uniform Gift to Minors Act (UGMA)/Uniform Transfers to Minors Act (UTMA) does not constitute a resource to Scott for SSI purposes. We also conclude that the portion of the trust attributable to contributions to the trust made by persons other than Scott does not constitute a resource to Scott for SSI purposes. Therefore, none of the trust assets are a countable resource to Scott for SSI purposes.

BACKGROUND

On September 2, 2003, Loren K~ (Scott's father) created a trust for Scott's benefit by executing a Trust Agreement. When he established the trust, Scott's father transferred $10.00 of his own money to the trust with himself and Fern K~ (Scott's mother) as co-trustees. It appears from the materials forwarded to us that Scott's parents previously deposited their own monies into investment accounts on Scott's behalf under the UGMA/UTMA in order to obtain more favorable tax treatment. On or before December 31, 2003, Scott's father transferred the UGMA/UTMA funds to Scott's trust. We are unable to ascertain from the materials you sent exactly when the funds were transferred.

DISCUSSION

A trust established on or after January 1, 2000, is a resource if it is a revocable trust established by an individual. *See* 42 U.S.C. § 1382b(e)(3)(A). Further, irrevocable trusts established by an individual on or after January 1, 2000, are resources to the extent that payments from the trust could be made to or for the benefit of the individual or his/her spouse. *See* 42 U.S.C. § 1382b(e)(3)(B). However, these rules do not apply where (1) the Commissioner determines that such rules would work an undue hardship on an individual or (2) a Medicaid trust exception applies, as described in 42 U.S.C. § 1396p(d)(4)(A) or (C). *See* 1382b(e)(4)-(5); Program Operations Manual System (POMS) SI 01120.203.

Under the three-pronged Medicaid trust exception applicable to special needs trusts, trust assets will not be considered a resource to the individual where (1) the individual is disabled and under age 65, (2) the trust was established for the individual's benefit by a parent, grandparent, legal guardian or a court, and (3) the terms of the trust provide that, upon the death of the individual, the State will be reimbursed for the total amount of medical assistance paid on the individual's behalf under a State Medicaid plan. POMS SI 01120.203B.1.a. Where the assets of an SSI claimant/recipient form only a part of the trust, these rules will apply to that portion of the trust attributable to the individual. Thus, a proration of the trust assets may be necessary. Moreover, even if the trust is not counted under the statute due to the application of the Medicaid trust exception, SSA still applies the general resource rules in 42 U.S.C. §§ 1382 and 1382b in determining whether the trust is a resource for SSI purposes.

Here, the special needs trust was established by Scott's father with Scott's father's funds ($10.00). *See* Trust Agreement, Schedule A. The Trust Agreement allowed for subsequent additions to be made to the trust. The regular resource rules apply to the initial trust contribution of $10.00 from Scott's father and any addition made to the trust that was the asset of any individual other than Scott. *See* POMS SI 01110.100B.1. If the UGMA/UTMA funds that were subsequently added to the trust are considered to be Scott's assets, then the portion of the trust attributable to the UGMA/UGTA contribution is a resource to Scott, unless the Medicaid trust exception applies.

We conclude that the UGMA/UTMA funds should be considered Scott's assets. Because we do not know when the transfer to trust was made, we cannot determine whether Scott had outright ownership of the assets when they were transferred into the trust.[1] However, this should not matter. We conclude that, even if the assets were transferred into the trust prior to date he attained the age of majority, the assets should be considered Scott's assets. POMS SI 01120.201B.2 states that an "asset" includes "any other payment or property to which the individual or individual's spouse is entitled, but does not receive or have access to because of action by . . . a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse . . .." Because the funds in question were initially deposited into investment accounts under a UGMA/UTMA, Scott would not have received the funds or had access to them before he reached the age of majority because they were held by a custodian (his father) who had legal authority to act on Scott's behalf with regard to the money. Therefore, the funds must be considered Scott's assets. *See* POMS SI 01120.201B.7. Regardless of whether the assets were Scott's outright or held by a custodian on his behalf under the UGMA/UTMA, they should be considered Scott's assets.

Because the funds that were transferred to the trust from the UGMA/UTMA investment accounts are considered Scott's assets, they constitute a resource to him upon transfer into the trust unless the Medicaid trust exception applies. Here, the Medicaid trust exception applies. The trust contains the assets of Scott, who is under age 65 and, for purposes of this memorandum, presumably disabled.[2] In addition, Scott's father established the trust for Scott's benefit. Under the Medicaid trust exception rules, the "person who established the trust" is "the individual who physically took action to establish the trust even though the trust was established with the assets of the SSI claimant/recipient." POMS SI 01120.203B.1.e. Since Scott's father "physically took action" to establish the trust, he established the trust. Moreover, the trust provides that the State will receive all amounts remaining in the trust upon Scott's death up to an amount equal to the total medical assistance paid on Scott's behalf under the State Medicaid plan. Thus, the requirements of the Medicaid trust exception for special needs trusts are met.

The Medicaid trust exception also requires that "[t]he State must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a." POMS SI 01120.203B.1.f. Scott's trust contains provisions providing that upon Scott's death, the Trustee shall "pay attorney fees and other properly allowable costs incurred in administering and wrapping up the Trust" and "any federal or state estate tax or inheritance tax" arising from Scott's death before the State is reimbursed the amount of medical assistance it paid on Scott's behalf. Trust Agreement, Article V. These provisions are consistent with POMS SI 01120.203B.3.a, which allows such payments.

Since the Medicaid trust exception applies, the statutory trust provisions regarding resources do not apply to the portion of Scott's trust attributable to the UGMA/UGTA funds. *See* 42 U.S.C. § 1382b(e)(5). However, even if this portion of Scott's trust is not counted under the statute (because the Medicaid trust exception applies), SSA will apply the regular resource rules in 42 U.S.C. §§ 1382 and 1382b, in determining whether this portion of the trust is a resource for SSI purposes.[3]

Under the regular resource rules, trust assets are a resource if (1) the individual can revoke or terminate the trust and obtain unrestricted access to the assets, (2) the individual has access to the trust assets and can direct their use to meet his needs for food, clothing, and shelter, or (3) the individual can sell his beneficial interest in the trust. POMS SI 01120.200D.

Whether a trust can be revoked or terminated depends on the terms of the trust and the applicable state law. The Trust Agreement explicitly states that Scott cannot revoke the trust. Trust Agreement, Article II. We also note, however, that the Trust Agreement permits the trustee to revoke the trust if it is in Scott's best interest. *Id.* However, because the trustee has the absolute discretion to revoke the trust, Scott cannot compel the trustee to revoke the trust and distribute the principal or income to him. Nevertheless, some trusts may be revocable, despite express language to the contrary. Grantor trusts, in which the grantor is also the sole beneficiary, may be revocable regardless of explicit language to the contrary. POMS SI 01120.200D.3. However, a grantor trust is irrevocable where there is a residual beneficiary. Here, Scott is the true grantor with regard to the portion of the trust pertaining to the UGMA/UGTA funds, but he is not the sole beneficiary. As we recently advised, we believe that, in Ohio, if the language of the trust specifies that it is irrevocable, and it does not appear that the trust can be unilaterally revoked, and it meets the Medicaid payback provisions, then the Agency can consider the state of Ohio to be a beneficiary. *See* Memorandum from Regional Chief Counsel, Chicago, to Asst. Reg. Comm.-MOS, Chicago, *Ohio Treatment of*

the State as a Beneficiary in a Medicaid Payback Trust (March 19, 2004). Because the State of Ohio can be considered a residual beneficiary, the trust is irrevocable by Scott.

Nor can Scott compel distributions from the trust. Trust Agreement, Article III. The Trust Agreement also contains a spendthrift provision that prevents him from selling his interest in the trust. Trust Agreement, Article V. For these reasons, the trust assets are not a resource to Scott for SSI purposes.[4]

CONCLUSION

We conclude that the portion of the trust attributable to the UGMA/UTMA contribution is Scott's asset, but not a resource to Scott for SSI purposes. In addition, the portion of the trust attributable to the contribution made by Scott's father does not constitute a resource to Scott for SSI purposes.

[1] UGMA/UTMA assets are not income to a minor until the custodian makes disbursements to the minor or on the minor's behalf or the minor reaches the age of majority. POMS SI 01120.205B.1.b-c. In Ohio, the age of majority is 18. According to the computer printout you provided, Scott attained age 18 in September 2003, shortly after the trust was established. Because we do not know the date on which the assets were transferred into the trust, we cannot determine whether Scott acquired legal ownership and control over the assets prior to the transfer of the assets into the trust.

[2] Scott's SSI application is currently awaiting medical review, pending receipt of this memorandum.

[3] As previously noted, the regular resource rules also apply to the portion of the trust attributable to the $10.00 contribution from Scott's father.

[4] We note that the Trust Agreement provides that the trustee may, in the trustee's sole discretion, pay Scott "amounts from the principal or income" and "a periodic allowance for spending money." Trust Agreement, Article III. To the extent that Scott receives any distributions from the trust, such distributions may be considered countable income to Scott.

Q. PS 04-345 SSI-Ohio-Review of the Inter Vivos Trust Agreement of Anne L. M~ for the Benefit of Catherine M~, ~Your Reference: SI-2-1-3 OH (M~)Our Reference: 04P082

DATE: September 21, 2004

1. SYLLABUS

A living trust established by her mother in October, 2002 named an SSI recipient as a beneficiary upon the death of the grantor. The SSI recipient's brother became the trustee over her funds when her mother passed away. He was responsible for distributing monthly payments composed of net earnings and principal to the SSI recipient for a period of five years following the mother's death. The trust contained a spendthrift provision preventing sale of the recipient's beneficial interest in the trust, but allowed her to direct the trustee to retain required payments for future use. Any retained payments could thereafter be requested by the recipient at any time to provide for food, clothing, or shelter. Based on SSI trust policy, it was determined that the trust was not a countable resource since the recipient could not revoke the trust, direct the trustee to make additional payments for basic needs, or sell her beneficial interest in the trust. However, because the trustee is required to make mandatory distributions from the trust, those distributions are countable unearned income even if the recipient directs the distribution to be retained. Furthermore, any distributions retained in trust would be countable resources if held in the following month since the recipient could, in that instance, direct the retained distributions to be used for food, clothing, or shelter.

2. OPINION

You asked whether an inter vivos trust agreement for the benefit of Catherine M~ (Catherine) is a countable resource to Catherine for SSI purposes. For the reasons stated below, we believe that the trust does not currently constitute a resource to Catherine for SSI purposes, but that any distributions from the trust should be counted as unearned income. Further, if Catherine exercises a clause that allows mandatory distributions to be retained in trust, that portion of trust assets would be considered a resource.

BACKGROUND

On October 12, 2002, Anne L. M~ (Catherine's mother) created the Anne L. M~ Living Trust ("the trust"). She specified that she was the grantor and that her son, Robert E. M~, was the trustee, and that the trust was revocable by her, during her lifetime, until such time as she became disabled or incapacitated. Art. 1; Art. 4, § 1. Anne L. M~ died on October 19, 2002. *See* letter, dated May 17, 2004, from Attorney Glenn A. B~ to Robert E. M~.

The trust agreement provides that, upon the death of the grantor, the trustee "may" pay all or any portion of a number of categories of expenses, including: the grantor's last medical expenses and funeral, cremation, or burial expenses; the grantor's debts, obligations, and the administrative expenses of the estate; estate taxes; and testamentary bequests. Art. 6, § 1. All trust property not so distributed is to be "divided, administered, and distributed under the ensuing Articles, beginning with Article Nine." Art 8. Article 9 provides that the remaining trust property should be divided into shares of 50 percent each for her son, Robert E. M~, and daughter, Catherine A. M~, if they survived her. Art. 9, § 1. The trust share for Robert E. M~ should be distributed to him. Art. 9, § 2a. The trust share for Catherine is to be held "in a separate trust for her exclusive benefit" and administered and distributed by the trustee as follows: "[The] trustee shall distribute monthly to or for the benefit of [Catherine] the net income derived from her trust share and approximately equal installments of principal for a period of five years after which time the trust created for her shall terminate and the Trustee shall distribute the balance of the principal, if any, together with any undistributed net income remaining in her separate share of the trust to her fee [sic] of trust." Art. 9, §§ 3, 3a.

The trust also provides that, at such times as the trustee is authorized or required to make a distribution to the beneficiary, she may direct the trustee in writing to retain such distribution in trust. Art. 9, § 4. The beneficiary can at any time request payment of trust interest or principal retained under this provision. Art. 9, §§ 4a-4c.

The trust contains a spendthrift provision. Art 14, § 9. Finally, the trust provides that the trustee is not permitted to reimburse any governmental authority which has incurred expenses for the benefit of any beneficiary. Art. 14, § 11.

In a letter to the agency, Robert E. M~ stated that, pursuant to the trust agreement, he was distributing to Catherine about $170 per month from the trust, pursuant to the terms of Article 9, and would continue to do so, as required by the trust, until five years after his mother's death or until October 2007.

Mr. M~ relies on a letter to him from Glenn A. B~, the attorney who prepared the trust, regarding Mr. M~'s ability to make distributions to Catherine. According to Mr. B~, "the distributions are strictly limited by the above provisions of Article 9 Section 3 a [sic] of the trust to the net income and approximately equal installments of principal in Catherine's share of the trust per annum payable in monthly installments over a five year period." He states that Mr. M~ has no authority to alter the amount or manner of distribution. He also discusses his view that these are binding provisions because the time to contest the trust had expired.

DISCUSSION

A resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for her support and maintenance. 20 C.F.R. § 416.1201; POMS SI 01110.100(B)(1). For trusts like this one, that are established with the funds of a third party, the trust assets are a resource if (i) the individual can revoke or terminate the trust and obtain unrestricted access to the trust assets; (ii) the individual has access to the trust assets and can direct the use of the trust assets to meet his need for food, clothing, and shelter; or (iii) the individual can sell his beneficial interest in the trust. POMS SI 01120.200(D)(1)-(3); *compare* POMS SI 01120.201 (discussing trusts established by an individual with his or her own funds after January 1, 2000).

Here, as the beneficiary of a third party trust, Catherine has no right to revoke or terminate the trust, so the trust cannot be a resource on this basis. As further discussed below, Catherine also has no right to direct the trustee to make payments to meet her need for food, clothing or shelter. Lastly, in light of the spendthrift clause, which is enforceable in Ohio, Catherine cannot sell her beneficial interest in the trust. *Scott v. Bank One Trust Company, N.A.*, 577 N.E.2d 1077, 1084 (Ohio 1991), *overruling Sherrow v. Brookover*, 189 N.E.2d 90 (Ohio 1963); POMS SI 01120.200(B)(16). Therefore, the trust should not be considered a countable resource with respect to Catherine.

With regard to the ability to direct the use of trust assets, we have carefully examined Art. 9, § 4, which provides that, at such times as the trustee is authorized or required to make a distribution to the Catherine, she may direct the trustee in writing to retain such distribution in trust. Art. 9, § 4. This section further provides that Catherine has an unrestricted right to trust income and principal. Art. 9, §§ 4a, 4b. This section of the trust agreement, which is entitled "Retention of Distributions in Trust," is

somewhat ambiguous. Read in isolation, subsections a and b could be interpreted as giving Catherine access to the trust principal and income without restriction. However, given the title of the section, the presence of a spendthrift clause in the trust, and the overall apparent intent of the trust to provide a stream of income to Catherine, we conclude that Art. 9, § 4 merely provides that Catherine can direct the trustee to retain in the trust, rather than pay to her, any distributions authorized or required to be made and to then pay them to her at a later date. In other words, Catherine only has unrestricted access to trust income and principal retained under Art. 9, § 4 - not that she has unrestricted access to the entire trust principal. Thus, Catherine lacks the ability to direct the use of trust assets. *See* POMS SI 01120.200(D)(1)(a) and (b).

Even though the trust is not a resource, because the trustee is required to make mandatory distributions of interest and principal, those distributions are unearned income even if Catherine were to direct that the distribution be retained in trust pursuant to Art. 9, § 4. POMS SI 01120.200(E)(1)(a) and G(1)(a). Further, any distributions retained in trust under Art. 9, § 4 would be a resource if held in the trust for any following month, since Catherine could then direct that the assets be distributed to meet her needs for food, clothing, or shelter. POMS SI 01120.200(D)(1).

A resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for her support and maintenance. 20 C.F.R. § 416.1201; POMS SI 01110.100(B)(1). For trusts like this one, that are established with the funds of a third party, the trust assets are a resource if (i) the individual can revoke or terminate the trust and obtain unrestricted access to the trust assets; (ii) the individual has access to the trust assets and can direct the use of the trust assets to meet his need for food, clothing, and shelter; or (iii) the individual can sell his beneficial interest in the trust. POMS SI 01120.200(D)(1)-(3); compare POMS SI 01120.201 (discussing trusts established by an individual with his or her own funds after January 1, 2000).

Here, as the beneficiary of a third party trust, Catherine has no right to revoke or terminate the trust, so the trust cannot be a resource on this basis. As further discussed below, Catherine also has no right to direct the trustee to make payments to meet her need for food, clothing or shelter. Lastly, in light of the spendthrift clause, which is enforceable in Ohio, Catherine cannot sell her beneficial interest in the trust. *Scott v. Bank One Trust Company, N.A.*, 577 N.E.2d 1077, 1084 (Ohio 1991), overruling *Sherrow v. Brookover*, 189 N.E.2d 90 (Ohio 1963); POMS SI 01120.200(B)(16). Therefore, the trust should not be considered a countable resource with respect to Catherine.

With regard to the ability to direct the use of trust assets, we have carefully examined Art. 9, § 4, which provides that, at such times as the trustee is authorized or required to make a distribution to the Catherine, she may direct the trustee in writing to retain such distribution in trust. Art. 9, § 4. This section further provides that Catherine has an unrestricted right to trust income and principal. Art. 9, §§ 4a, 4b. This section of the trust agreement, which is entitled "Retention of Distributions in Trust," is somewhat ambiguous. Read in isolation, subsections a and b could be interpreted as giving Catherine access to the trust principal and income without restriction. However, given the title of the section, the presence of a spendthrift clause in the trust, and the overall apparent intent of the trust to provide a stream of income to Catherine, we conclude that Art. 9, § 4 merely provides that Catherine can direct the trustee to retain in the trust, rather than pay to her, any distributions authorized or required to be made and to then pay them to her at a later date. In other words, Catherine only has unrestricted access to trust income and principal retained under Art. 9, § 4 - not that she has unrestricted access to the entire trust principal. Thus, Catherine lacks the ability to direct the use of trust assets. *See* POMS SI 01120.200(D)(1)(a) and (b).

Even though the trust is not a resource, because the trustee is required to make mandatory distributions of interest and principal, those distributions are unearned income even if Catherine were to direct that the distribution be retained in trust pursuant to Art. 9, § 4. POMS SI 01120.200(E)(1)(a) and G(1)(a). Further, any distributions retained in trust under Art. 9, § 4 would be a resource if held in the trust for any following month, since Catherine could then direct that the assets be distributed to meet her needs for food, clothing, or shelter. POMS SI 01120.200(D)(1).

CONCLUSION

For the foregoing reasons, we conclude that the trust currently is not a resource as to Catherine because it was funded by a third party and she cannot revoke it, direct the trustee to use it for her need for food, clothing or shelter, or assign her interest in it. However, any direct distributions to her in cash, such as the trustee has indicated that he currently pays her, are unearned income. Further, if, in the future, Catherine directs that the distributions mandated by the trust be retained in trust rather than paid to her, such retained distributions are a resource.

R. PS 04-003 SSI-Ohio-Review of the Subaccount of Mary T~, ~, in the Community Fund Management Foundation Pooled Medicaid Payback Trust Your Reference: S2D5G6 OH

DATE: September 23, 2003

1. SYLLABUS

In this case, a pooled trust is determined to be a resource because it does not meet one of the requirements for the exception in Section 1917(d)(4)(C) of the Social Security Act, i.e., that the trust must be established solely for the benefit of the disabled individual. This trust provides that, if it becomes impossible or impracticable to carry out the trust purposes with respect to all beneficiaries, the trustee may terminate the trust and distribute property as if the beneficiary had died. These terms create a contingency under which someone other than the beneficiary could benefit from the trust during the beneficiary's lifetime. Therefore it is not considered to be for the beneficiary's sole benefit, so it does not meet all the requirements for the Section 1917(d)(4)(C) exception.

2. OPINION

You asked us whether the subaccount of Mary T~ in the Community Fund Management Foundation Pooled Medicaid Payback Trust (Trust) constitutes a countable resource for Supplemental Security Income Purposes. We conclude that the Trust should be considered a resource.

BACKGROUND

In February 2002, Ms. T~ completed a Joinder Agreement and Application for Admission to Establish Trust Subaccount (Joinder Agreement). The Joinder Agreement specifies that Ms. T~'s subaccount is to be administered in accordance with the terms and conditions of the Trust. The Joinder Agreement was entered into pursuant to inter alia 42 U.S.C. § 1396p(d)(4)(C). The Joinder Agreement establishes Ms. T~ as the beneficiary. Section 8 of the Joinder Agreement, "Distributions to the Beneficiary," provides that the income and principal of the Joinder Agreement should be distributed in the Trustee's discretion pursuant to the terms of the Trust. Section 9 of the Joinder Agreement, "Distributions Upon Death of Beneficiary," provides that, upon the death of Ms. T~, distribution of the subaccount shall be made first to pay any claim made by State(s) for reimbursement of medical assistance expenditures made on behalf of Ms. T~, and second, if monies remain in the subaccount, then the subaccount should be distributed to Martin and Deborah T~, or to their survivor. Section 10 provides that the Joinder Agreement is irrevocable.

The Joinder Agreement establishes a subaccount in the Trust. The express purpose of the Trust is to provide for Ms. T~'s supplemental needs over and above those benefits she receives from the federal, state, and local governments as a result of her disability. The Trustee distributes income and the principal of the Trust for the benefit of Ms. T~ during her life or until the termination of the Trust, whichever is sooner. The Trustee has absolute discretion in making distributions to supplement other benefits received by Ms. T~. Ms. T~'s subaccount terminates upon her death. The Trust will pay the subaccount attorney's fees and other allowable costs incurred in administering and wrapping up the Trust, which exclude Ms. T~'s third-party debts and funeral expenses. The Trustee shall comply with all state and/or federal regulations in effect at the time of Ms. T~'s death regarding notification and disbursement to the State(s). After payment of any claim by any State, if Ms. T~'s probate estate is insufficient, the Trustees shall pay from the subaccount funeral expenses, attorney's fees, and other properly allowable costs. The balance of the subaccount shall be distributed as provided in Section 9 of the Joinder Agreement. If it becomes impossible or impracticable to carry out the Trusts purposes, the Trustee may terminate the Trust and distribute the Trust property as set forth therein. Trust Art. 4, H. The Trust also states that if a Trust beneficiary in any manner directly or indirectly contests or attacks this Trust or any of its provisions, any share or interest of the contesting beneficiary in the Trust estate is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had never had any interest in the Trust subaccount.

DISCUSSION

To qualify for SSI benefits, a claimant must show that her resources are below a statutory maximum. 20 C.F.R. §§ 416.202, 416.1205; 42 U.S.C. § 1382(a). Under the Social Security Act, trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary will be considered a resource to the extent that the trust is revocable, or, in the case of an irrevocable trust, to the extent that any payments can be made from the trust for the benefit of the individual. *See* 42 U.S.C. § 1382b(e)(3)(A)-(B); POMS SI 01120.201. The present Trust was created after January 1, 2000, because Ms. T~ did not transfer

her assets to the Trust until February 2003. Under the terms of the Trust, the trustee has discretion to use the entire income and the principal of the Trust subaccount for the benefit of the beneficiary for whom the subaccount was established. *See* Trust Art. III. Therefore, even if irrevocable, the Trust would be a resource to the beneficiary under these provisions. *See* 42 U.S.C. § 1382b(e)(3)(B).

Certain pooled trusts are excepted from this statutory provision if they qualify as a Medicaid payback trust under the provisions of Section 1917(d)(4)(C) of the Social Security Act. 42 U.S.C. § 1382b(e)(5); POMS SI 01120.203B2. To qualify for the Medicaid payback trust exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

1. The trust is established and maintained by a nonprofit association;

2. Separate accounts are maintained for each beneficiary, but funds are pooled for investment and management;

3. Accounts in the trust must be established solely for the benefit of the disabled individual;

4. Accounts are established by the individual, or a parent, grandparent, legal guardian, or court; and

5. The trust must provide that, to the extent that amounts remaining in the account on the beneficiary's death are not retained by the trust, the trust will pay to the State the amount remaining up to an amount equal to the total amount of the medical assistance paid on behalf of the beneficiary.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203B2a. If a trust meets the pooled trust exception to counting it under the statute, the regular resource rules apply. *See* POMS SI 01120.203B2a. (cautionary statement).

"Resources" are defined as:

> **cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.**

20 C.F.R. § 416.1201(a).

If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource.

> **20 C.F.R. § 416.1201(a)(1). A trust is a resource under these rules if the individual can: (1) revoke or terminate the trust and obtain the trust assets; (2) direct the trustee to use the assets for his or her support and maintenance; or (3) liquidate his or her beneficial interest in the trust. *See* POMS SI 01120.200D1a.**

Here, the Trust appears to meet all of the requirements except the third: It is not established for the sole benefit of the individual. The Trust provides that if it becomes impossible or impracticable to carry out the Trust purposes with respect to all beneficiaries, the trustee may terminate the Trust and distribute the Trust property as if the person had died. Trust Art. IV, H. In Ms. T~'s case, that means that after the State was repaid for any Medicaid benefits conferred on her, Martin and Deborah T~, or their survivor, would receive any remaining benefits. Thus, there are some contingent circumstances under which someone other than Ms. T~ could benefit from the Trust during her lifetime, and therefore is not considered to be for her sole benefit. *See* Memorandum from Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI-Michigan-Review of Proposed Pooled Amenities Trust Fund for Community Advocates for Persons with Developmental Disabilities* (Feb. 13, 2003). Even if this provision were deleted from the Trust, however, it still would be a resource under the regular resource rules because it is revocable.

We previously advised, in Memorandum from Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Supplemental Security Income-Ohio Trusts-1. Community Fund Management Foundation Pooled Medicaid Payback Trust Agreement. 2. Community Fund Management Foundation 1995 Master Trust Agreement* (Nov. 23, 1999), that, under a prior version of this Trust, an individual trust account in the trust may or may not be a resource to an individual under any one of the three theories above, depending on how the grantor completes the Joinder Agreement. We advised that the disabled individual may be able to revoke the trust and obtain the assets if she has not named any other beneficiaries to the trust in Section 9 of the Joinder Agreement. And depending on how the grantor completes Section 8 of the Joinder Agreement, the disabled individual may be able to direct the trustee to use the assets of the trust for her support and maintenance, or the disabled individual may be able to sell her beneficial interest in the trust. However, the trust has been amended more recently, in 2002. Although we no longer

have a draft of the prior trust document, the current amended version is problematic because, in addition to the concerns previously noted, the Trust provides that if the beneficiary in any way directly or indirectly contests or attacks the Trust or any provision of the Trust, the subaccount in the Trust is revoked and the trustee will dispose of the funds as if the account was never created. Trust Art. VII, E. Thus, Ms. T~ has the ability to revoke her Trust and recover her assets.

If this provision were removed, the Trust would otherwise appear to be irrevocable, as currently written. The Trust states that it is irrevocable, but under Ohio law, even a trust that purports to be irrevocable may be revoked where the grantor and all beneficiaries of the trust agree. Memorandum from Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Six State Synopsis of Trust Laws (Feb. 26, 1992); Mumma v. Huntington Nat'l Bank of Columbus,* 223 N.E.2d 621, 624 (Ohio App. 2d 1967); *Restatement (Third) of Trusts*, § 65 (2003); POMS SI 01120.200D3. Therefore, if Ms. T~ were both the grantor and sole beneficiary of the Trust, she could revoke the Trust and obtain the subaccount assets.

Under Ohio law, the grantor of a trust is the person who provides the consideration for or creates the trust. *See Three Bills, Inc. v. City of Parma*, 676 N.E.2d 1273, 1276 (Ohio App. 3d 1996); see gen. 76 Am. Jur. 2d § 55; POMS SI 01120.200B2. Here, Ms. T~ is the grantor of the Trust because she provided the funds for the Trust through the subaccount.

The beneficiary of a trust is the person for whose benefit the property is held in trust. 76 Am. Jur. 2d § 59; POMS SI 01120.200B4. We have previously advised that a provision mandating repayment to the State for Medicaid expenditures does not create an additional beneficiary of the trust. Memorandum from Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *States Names as Beneficiary to a Trust* (June 24, 1997). However, the Joinder Agreement also designates specific residual beneficiaries to receive any remaining assets in the Trust after the state(s) is reimbursed for Medicaid expenditures. Because Section 9 of the Joinder Agreement lists residual beneficiaries, Ms. T~ would need their consent to revoke the Trust. Therefore, Ms. T~ would not have the power to revoke the Trust if the offending provision were removed.

Even where a beneficiary does not have the power to revoke a trust, however, the trust assets may still be counted as a resource if the beneficiary has the authority to direct the use of the trust principal or if the beneficiary can sell his or her beneficial interest in the trust. POMS SI 01120.200D1b. Here, in Section 8 of the Joinder Agreement, Ms. T~ specified that the income and principal of the Trust shall be distributed in the trustee's discretion pursuant to the terms of the Trust. By having chosen this provision, Ms. T~ forfeited any ability to direct the trustee to use the assets for her support and maintenance, or to liquidate her beneficial interest in the Trust. Nor could she sell her interest in the discretionary trust. *Restatement (Third) of Trusts*, § 58 (2003).

CONCLUSION

In sum, the Trust is a resource under the statute because it is not for Ms. T~'s sole benefit during her lifetime. And even if the Trust met the exception to counting it under the statute, it would be a resource under regular resource rules because it is revocable.

KIM L. B~
REGIONAL CHIEF COUNSEL
OFFICE OF THE REGIONAL CHIEF COUNSEL

By:_____
Charles R. G~
Assistant Regional Counsel

S. PS 03-024 SSI-Ohio-Review of Reconsideration Request on the Daniel J. R~ Special Needs Trust; SSN: ~

DATE: October 18, 2002

1. SYLLABUS

In this opinion, a trust funded with the beneficiary's personal injury settlement contains Medicaid reimbursement language and states that it is irrevocable. However, it names only the beneficiary's estate as the residual beneficiary which is not sufficient to create a residual beneficiary in Ohio. Furthermore, the State of Ohio is considered a creditor with respect to the reimbursement of Medicaid funds, not a beneficiary. Under Ohio law, a trust can be revoked if the grantor and sole beneficiary are the same person. Therefore, this trust is considered a resource for SSI purposes. The beneficiary also asserted that this trust should not

be counted as a resource because the county Probate Court will not permit him to change the residual beneficiary and asserted that such a change is permitted in other Ohio jurisdictions. This opinion concludes that SSA does not need to decide if the county Probate Court made the correct decision and that the beneficiary's remedy is to appeal the Probate Court's decision in a higher court.

2. OPINION

INTRODUCTION

This is in response to your inquiry regarding whether the trust agreement designating Daniel J. R~ as a beneficiary should be considered a resource in determining his eligibility for Supplemental Security Income (SSI) benefits. For the reasons stated below, we believe that the trust is a resource.

FACTS

On November 29, 2001, the Court of Common Pleas, Probate Division in Cuyahoga County, Ohio (Probate Court) and Charles C. R~, Daniel J. R~'s father and the guardian, established "The Daniel J. R~ Special Needs Trust" (Trust). Trust at 1. The Trust was reviewed and approved by the Probate Court and an order was entered establishing the Trust. Trust at 1.

The Trust provides that Daniel J. R~ (Daniel) is now and will continue for his lifetime to be a disabled individual. Trust at 1. The Trust provides that it is established for the sole benefit of Daniel and is funded with a lump sum that Daniel received from the settlement of a personal injury lawsuit. Trust Article 1. The Trust names Charles R~ and the Court as the settlors of the Trust. Trust at 1. Charles R~ is also named as the trustee. Trust at 1. The Trust states that it is established pursuant to 42 U.S.C. § 1396p(d)(4)(A), and that the assets directed to the Trust should be deemed not available to the beneficiary for purposes of Medicaid or Supplemental Security Income programs. Trust at 2. The purpose of the Trust is to provide Daniel a system for fund management and investment and provision of services required, as well as to provide for continuing conservation and enhancement of funds by supplementing all other financial and service benefits for which Daniel might be eligible as a result of his disability. Trust Article III.

The Trust states that the trustee has sole discretion to distribute the Trust principle and income. Trust Article III(A). In making such distributions, the trustee shall take into consideration all entitlement benefits from any government agency, such as Social Security Disability and Supplemental Security Income payments, Medicare, Medicaid, and other special benefits that Daniel is receiving. Trust Article III(A)(3). The Trust states that it is irrevocable, but that the trustee and the guardian shall have authority to revoke the Trust or alter its terms, with prior Court approval, to carry out the intention of the Court and the parties or in the event that the law or regulations concerning benefit programs change or if revocation is in the best interest of Daniel. Trust Article II.

The Trust provides that upon the Daniel's death, each State which has provided medical assistance to him shall receive a proportionate share of assets remaining in the Trust up to an amount equal to the total medical assistance paid on his behalf by such state under a State plan. Trust Article III(B)(1)-(2). Any assets remaining in the Trust estate after repayment to the State(s) shall be distributed to the "estate of DANIEL J. R~." Trust Article III(B)(3).

On February 25, 2002, the Agency determined that the Trust was a countable resource to Daniel and terminated his SSI benefits. On March 27, 2002, Charles R~ moved to amend the Trust to provide different named residual beneficiaries in order to make the Trust irrevocable, so that Daniel's SSI benefits could be reinstated. However, the Probate Court overruled the motion. Pursuant to Ohio Revised Code § 2111.50(B), the Probate Court is prohibited from making or revoking a will for an incompetent ward of the court. The Probate Court concluded that by granting the requested relief, it would effectively be creating a testamentary disposition for a ward of the Court. This decision is currently being appealed to the Court of Appeals for the Eight District of Ohio.

DISCUSSION

The usual resource rules apply to The Daniel R~ Special Needs Trust

In 1999, the Social Security Act was amended to explain when some trusts would be considered resources for purposes of SSI eligibility. Pursuant to the new rules for determining SSI eligibility, a trust established on or after January 1, 2000, is a resource if it is a revocable trust established by an individual. See 42 U.S.C. § 1382b(e)(3)(A). Further, irrevocable trusts established by an individual on or after January 1, 2000, are resources to the extent that payments from the trust could be made to or for the

benefit of the individual or his/her spouse. See 42 U.S.C. § 1382b(e)(3)(B). However, these rules do not apply where (1) the Commissioner determines that such rules would work an undue hardship on an individual or (2) the trust is a Medicaid payback trust as described in 42 U.S.C. § 1396p(d)(4)(A) or (C). See 1382b(e)(4)-(5); Program Operations Manual System (POMS) SI 01120.203.

The claimant argues that the statutory rules applying to revocable and irrevocable trusts do not apply to trusts that meet the requirements of a Medicaid payback trust. The Agency would agree that the statutory trust provision would not apply to a trust that meets the Medicaid payback requirements, and qualifies as a Medicaid payback trust under 42 U.S.C. § 1382b(e)(5). We agree that these trusts are excepted from the statutory trust provisions under subsection (e) of 42 U.S.C. § 1382b. However, where the specific statutory provisions regarding certain trusts do not apply, the general resource rules with respect to the other subsections of 42 U.S.C. §§ 1382 and 1382b continue to apply in order to determine SSI eligibility. Under 42 U.S.C. § 1382(a)(1)(B), an individual's resources are counted unless excluded under the provisions of 42 U.S.C. § 1382b. Section 1382b does not state that Medicaid payback trusts are excluded resources. Rather, it states that certain trusts must be considered resources, and it excepts Medicaid payback trusts from the statutory provisions requiring certain trusts to be considered resources.

Since the statutory trust provisions do not apply, the Agency applies the regular resource rules to determine if the trust is a resource. A resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance. See 20 C.F.R. § 416.1201; POMS SI 01110.100B.1.. If the individual has the right, authority, or power to liquidate the property or his share of the property, it is considered a resource. See 20 C.F.R. § 416.1201(a)(1); POMS SI 01110.100B.1. Under general resource rules, trust assets are a resource if (i) the individual can revoke the trust and obtain unrestricted access to the trust assets; (ii) the individual has access to the trust assets and can direct the use of the trust assets to meet his need for food, clothing, and shelter; (iii) or the individual can sell his beneficial interest in the trust. See POMS SI 01120.105A.1., SI 01120.200D.1.-SI 01120.200D.3. Here, Daniel has the power to revoke the Trust even though the Trust was intended to be irrevocable.

The Daniel J. R~ Special Needs Trust is revocable

Whether a trust is revocable depends on the terms of the trust and/or on state law. See POMS SI 01120.200D.2. First, Daniel does not have the right to revoke the Trust under the terms of the Trust. Article II of the Trust specifically states that it is irrevocable and "shall not be altered, amended, revoked, or terminated by the settlor or any other person, however, that the trustee and the guardian shall have authority to revoke this Trust or amend the terms hereof, with prior Court approval, to carry out the intention of the Court and that parties hereto or in the event that the laws or regulations concerning benefit programs change hereafter or if such revocation or amendment is in the best interest of DANIEL J. R~, the Beneficiary." Trust Article II. However, because Daniel does not have the authority to terminate the Trust, and because the trustee's and the guardian's ability to terminate the trust is not unlimited and must take into consideration Daniel's eligibility for federal and state aid, we do not believe this provision renders the Trust revocable.

Second, although the Trust provides that it is irrevocable, under Ohio law, even a trust that states that it is irrevocable and that was intended to be irrevocable can be revoked if the grantor and the sole beneficiary are the same person. See *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 624 (Ohio Ct. App. 1967) (citing Restatement (Second) of Trusts § 339). The trust names the Court and Charles C. R~, Daniel's guardian, as the grantors. However, Daniel is the actual grantor because the trust was created with the funds he received from his personal injury settlement. Trust at 1-3; see 76 Am. Jur. 2d Trusts § 55; *Forsyth v. Rowe*, 629 A.2d 379, 384 (Conn. 1993); POMS SI 01120.200B.2. (a grantor of a trust is the individual who furnishes the consideration that established the trust, even if another entity nominally creates the trust); POMS SI 01120.200L.3. (claimant is grantor even though trust was nominally created by claimant's guardian where the trust's funds were obtained from a settlement of the claimant's personal injury suit). The Trust states that it was created for the benefit of Daniel, Trust at 1, and the Trust states the primary concern in creating this Trust is for the care of Daniel. See Trust at 1, Article III(A). The Trust provides that it will continue for the lifetime of Daniel, and upon Daniel's death, each State which has provided medical assistance to Daniel shall receive a proportionate share of the assets remaining in the Trust up to an amount equal to the total unreimbursed medical assistance paid on his behalf under a State Plan, and any assets remaining in the Trust after repayment to the State(s) shall be distributed by the Trustee to the estate of Daniel J. R~. Trust Article IV(B).

Daniel is the only beneficiary of the Trust during his lifetime. The next question is whether, on Daniel's death, the Trust creates an interest in any residual/contingent beneficiaries. Despite the claimant's argument to the contrary, the Agency does not view the State of Ohio as a contingent beneficiary. Daniel points out that in *v. Massanari*, 185 F.Supp.2d 845, 847 (S.D. Ohio E.D.,

August 20, 2001), the district court held that the claimant intended to create a beneficial interest in the State of Ohio by including in his special needs trust, a provision that, upon his death, any remaining trust assets be used to reimburse the State for Medicaid payments made for his benefit. The Agency is not required to follow the holding in this case, as it is a district court decision and is not precedential. Moreover, the Agency disagrees with the holding in as it would deviate from the manner in which the Agency treats Medicaid payback trusts. *See e.g. Request to Review Ohio Trust or Special Needs Trust for Katelynn G~ ~*, OGC-V (J. Martin) to Donna Y. M~, ARC-MOS (May 7, 1999) (advising that such a provision does not make the state a contingent beneficiary of the Trust). Under the district court's reasoning, individuals could qualify for SSI even though they have resources that would exclude them from the program participation requirements. The agency's position in this situation is to view the State of Ohio as a creditor, rather than a beneficiary, because the trust was created to benefit Daniel, not the State. Thus, there is no obligation on the trustee to preserve funds for the State, but rather, it may be reimbursed, from the trust, for medical assistance already provided to Daniel upon his death. Again, although the State may benefit from the performance of the Trust when Daniel dies, it was not created for the benefit of the State. The Trust names only Daniel as "the Beneficiary," and states that the Trust is "for the sole benefit of" Daniel See Trust p. 2. The Trust language also indicates that the Medicaid payback provision is the exception to the grantor's intent that creditors would not generally be able to reach trust funds. Trust at 6. Thus, the language of the Trust confirms that Daniel is the only intended beneficiary and that the state is intended only to be a creditor of the Trust. Thus, even though Daniel may have intended to make the trust irrevocable, and even though he may have intended to remain eligible for public benefits, he did not intend to create any additional beneficiaries to the Trust. Therefore, under Ohio law, he still would be able to revoke the Trust.

Next, Daniel argues that the "estate of Daniel J. R~" creates a contingent beneficiary to the Trust. However, under the rules of trust construction, this language is not sufficient to create contingent beneficial interests in third parties. *See* Restatement (Second) of Trusts § 127 comment b (1959). Indeed, the Probate Court has made clear that it does not believe it even has the authority to approve a trust that names beneficiaries who would receive trust assets after Daniel dies. Therefore, Daniel is the Trust's sole beneficiary.

The Agency should make its determination with regard to the Trust that has been entered by the Probate Court.

On February 25, 2002, the Agency determined that the Trust was revocable (because Daniel was the grantor and sole beneficiary) and thus a countable resource to Daniel, and it terminated Daniel's SSI benefits. On March 27, 2002, Charles R~ moved to amend the Trust to change "estate of" to named individuals in order to make the Trust irrevocable, so that Daniel's SSI benefits could be reinstated. However, the Probate Court denied the motion. Pursuant to the Ohio Revised Code Annotated § 2111.50(B)(3), the Probate Court has the power to create revocable trusts of property of the estate of the person, that may not extent beyond the disability or life of the person. The Probate Court stated that by granting the requested relief, it would effectively be creating a testamentary disposition for a ward of the Court.

Claimant contends that he should not be penalized because he lives in a county in which the Probate Court will not allow him to change the disposition on his assets upon his death. Claimant argues that other Probate courts in Ohio have allowed the trust to name residual beneficiaries, and the Agency has recognized such trusts as irrevocable. However the Agency need not decide if, in the present case, the Probate Court correctly interpreted Ohio law. The Probate Court had proper jurisdiction to make such decision, and the claimant's remedy, if he believes the Probate Court was in error, is to appeal such decision. And, he has apparently already done so. It is the Agency's role only to consider the Trust that is in effect. While the Probate Court has indicated that it will not name additional beneficiaries to the Trust, the Probate Court has not, to our knowledge, suggested that it would prohibit Daniel's guardian from revoking the Trust on Daniel's behalf, since he is the grantor and sole beneficiary of the Trust. Nor is there any reason to believe that Daniel's guardian, who established the Trust for his benefit while he was incompetent, could not also revoke the Trust, on his behalf, while Daniel is still incompetent.

If Daniel were not the sole beneficiary of the Trust, then the Trust likely would not be considered a resource.

If Daniel were not the sole beneficiary of the Trust, the next inquiry would be whether Daniel could direct the use of the Trust assets for personal maintenance and support under the terms of the terms of the Trust or sell the interest in the Trust and use the proceeds for support and maintenance. See POMS SI 01120.200D.1.a. The Trust states that the trustee has sole discretion to pay to Daniel or for his benefit any portion of the income or principal of the Trust that he deems necessary or advisable. Trust Article III(A). The Trust also indicates that Daniel shall have no interest in either the principal or income of the Trust, and that no interest in principal or income of this Trust shall be anticipated, assigned, or encumbered, or shall be subject to any creditor's claim or legal process, prior to its actual receipt by Daniel. Trust Article IV. Therefore, under the terms of the Trust, Daniel could not direct the use of assets, and his beneficial interest in the Trust would have no significant fair market value even

if it were sellable. See Restatement (Third) of Trusts § 60 and comment f (Tentative Draft No. 2, Mar. 10, 1999). Thus, if the Trust were irrevocable, it likely would not be a resource.

Finally, although the Trust principal would not be a resource, disbursements from the Trust, under certain circumstances, would be income for determining Daniel's SSI eligibility and level of benefits. See POMS SI 01120.201I.1. If the trustee were to authorize disbursements from the Trust consisting of cash paid directly to Daniel or payments to a third party for any food, clothing, or shelter received by Daniel, such disbursements or in-kind payments would constitute income for SSI purposes. See POMS SI 01120.200E.1.a.-SI 01120.200E.1.b. Trust disbursements resulting in Daniel's receipt of goods or services other than food, clothing, or shelter--such as medical care-- would not constitute countable income for SSI purposes. See POMS SI 01120.200E.1.c.

CONCLUSION

For the foregoing reasons, we conclude that even though Daniel has a Medicaid payback trust to which statutory trust counting provisions do not apply, the Trust is a resource under general resource rules. Daniel is the grantor and sole beneficiary, and therefore, the Trust is revocable. It follows then, that the Trust assets are a resource to Daniel.

THOMAS W. C~
REGIONAL CHIEF COUNSEL
OFFICE OF THE REGIONAL CHIEF COUNSEL

By:_____
Shefali B. B~
Assistant Regional Counsel

T. PS 02-134 SSI-Ohio-Review of the Dustin A. M~ Trust, ~

DATE: September 12, 2002

1. SYLLABUS

This opinion concerns a trust established in 1995 in Ohio on behalf of a minor with funds from a personal injury award. Although the trust was established by a court, the minor is considered the grantor because the trust was funded with the minor's own assets. The trust is revocable because the minor is the grantor and the sole beneficiary of the trust. Therefore, the trust is countable as a resource for purposes of determining eligibility for SSI. In this case, even if the trust was irrevocable, it would be considered a resource for SSI purposes because the funds in the trust are available for the beneficiary's support and maintenance.

2. OPINION

You asked for a legal opinion concerning whether Dustin A. M~'s trust is a resource to Dustin for SSI purposes. We conclude that the trust assets should be treated as a resource for Dustin.

BACKGROUND

On November 15, 1995, the Ohio Probate Court apparently approved a trust which named Dustin A. M~, a minor born February 13, 1989, as beneficiary. See Trust at 1. The trust named the Fifth Third Bank of Northwestern Ohio as trustee. The trust document states that the Court created the trust pursuant to Ohio Rev. Code Ann. 2125.03 (West 2002), and the trust is funded with proceeds and payments from a personal injury award to Dustin. See Trust at 1; see also Release and Settlement Agreement at 3-4. The stated purpose of the trust is to pay, up to the whole amount of the trust's income and/or principal, as the Court "in its discretion deems necessary, advisable or expedient[,] for the care, comfort, support, education or best interests" of the beneficiary, Dustin.

The trust provides that upon Dustin's twenty-fifth birthday, i.e., on February 13, 2014, the whole trust balance, including principal and income, shall be distributed to him and the trust shall terminate. See Trust at 7. If Dustin should die before the trust terminates, the trust will then terminate, with the balance being distributed to Dustin's estate. See Trust at 7.

DISCUSSION

In determining whether or not trust assets should be considered a resource, the pertinent SSI regulation provides that:

- resources means cash or other liquid assets or any real or personal property that an individual (or spouse if any) owns and could convert to cash to be used for his or her support and maintenance.

- (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

20 C.F.R. 416.1201(a) (2002).

For trusts, like this one, that were created prior to January 1, 2000, the trust assets are a resource to an SSI recipient if he can revoke the trust and access the principal thereafter, whether or not he actually does so. Trust assets are also a resource if the individual can direct use of trust assets to meet his needs for food, clothing, and shelter, or if the SSI recipient can sell his beneficial interest in the trust. Thus, if Dustin is able to revoke the trust, direct the trustee to use the funds in the trust for him, convert the funds to cash that can be used towards his support and maintenance, or sell his beneficial interest in the trust, then the trust is a resources for purposes of SSI eligibility determinations. See 20 C.F.R. 416.1201; Programs Operation Manual System (POMS) SI 01120.200D.1.-SI 01120.200D.3. Here, it appears that the trust would be a resource under each of these methods.

The Trust is a Resource Because Dustin Can Revoke It.

The Trust Agreement does not specify whether the trust is revocable. However, under Ohio law, a trust may be revoked, and may even be invalid, if the grantor of the trust is also the sole beneficiary of the trust. See Memorandum from OGC-V to ARC, SSA-V, Six State Synopsis of Trust Laws (Feb. 26, 1992); *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 624 (Ohio Ct. App. 1967); POMS SI 01120.200D.3.; see also Ohio Rev. Code Ann. 1335.01(A) (gifts in trust for the exclusive benefit of the person making the gift are void).

In this case Dustin is the grantor of the trust. Even though the Court created the trust, see Trust at 1, Dustin is considered the grantor since his assets from a personal injury settlement were used to establish the trust. See *Three Bills, Inc. v. City of Parma*, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996); POMS SI 01120.200B.2. (a grantor, or settlor, is the individual who provides the trust principal, or corpus, even if another entity nominally creates the trust). Further, in creating the trust, the Court acted on behalf of Dustin (through his guardian). See Trust at 1. "[A]n action by someone in his/her capacity as an agent is equivalent to an action by the ward for whom he/she acts." POMS SI 01120.020B.1., SI 01120.020C.1.

Dustin is also the sole beneficiary of the trust. The trust indicates that all of the trust assets are to be held or distributed to or for the benefit of Dustin, with all trust assets to be distributed to him when he turns twenty-five. In the event of his death prior to the trust's termination, the trust assets are to be disbursed to his estate. See Trust at 7. The provision directing distribution to Dustin's estate does not create a contingent beneficiary in anyone other than Dustin. See Restatement (Second) of Trusts, 127, comment (b) (an individual who transfers trust principal to his estate upon his death is the sole beneficiary of the trust); see also *Mumma*, 223 N.E.2d at 625.

Thus, Dustin is the sole beneficiary as well as the grantor of the trust, and, as such, he may revoke the trust. See id. at 624. Since the trust is revocable by Dustin, it is considered a recourse to him for SSI purposes. See 20 C.F.R. 416.1201; POMS SI 01120.200D.1.-SI 01120.200D.3.

The Trust Fund Also Is a Resource Because It Operates as a Conservatorship, or "Blocked," Account, Which Is Available for Dustin's Support and Maintenance.

Even if Dustin could not revoke the trust, however, it still would be a resource because the funds are available to him for his support and maintenance. Dustin's trust was created by a court, and court approval is required for distributions. Thus, this trust account functions in much the same manner as a conservatorship, or "blocked" account. See POMS SI 01120.200C.1.a., SI 01140.215A.1., SI 01140.215A.3.

When an individual's funds are held in a conservatorship account, but state law requires those funds be made available for the individual's care and maintenance, we assume, absent evidence to the contrary, that those funds are available to the individual

for his support and maintenance, even if the individual or his agent must petition a court to access the funds. See POMS SI 01120.010C.3., SI 01140.215B.1. As we have previously advised, in Ohio, a ward's estate is to be used for his support and maintenance on petition by his guardian to the probate court, and funds held in a blocked account generally are presumed to be available to the beneficiary for his support and maintenance, absent a legal restriction on the guardian's use of or access to the funds. See Memorandum from OGC-V to ARC, SSA-V, (Ohio) Guardianship/Blocked Account for Erik R~, ~ (Oct. 4, 1996); Ohio Rev. Code Ann. 2111.13(A)(2)-(3), (B); see also *Gorenflo v. Ohio Dept. of Human Servs.*, 611 N.E.2d 425, 429 (Ohio Ct. App. 1992) (guardian has duty to petition Court for disbursement of funds within its jurisdiction when required for ward's care and well-being); In re *Burns*, 79 N.E.2d 234, 235 (Ohio Ct. App. 1948) (guardian's duty includes maintenance of ward, "which must be paid out of the estate of such ward").

Under Ohio law, Dustin's mother is his "natural guardian," charged with the care and management of his estate. See Ohio Rev. Code Ann. 2111.08; see also Release and Settlement Agreement at 1 and 10. The Court's Trust Agreement states that the funds are available for Dustin's "care, comfort, support, education or best interests." See Trust at 6. The only restriction on the use of, or access to, the funds is that they must pertain to Dustin in some way. Indeed, the history of petitions for fund withdrawals in this case shows that Dustin's mother obtained reimbursement for Dustin's support and maintenance as well as for non-essential items. See POMS 01140.215B.3. Information you provided indicates that Dustin's mother has received payments from the trust fund to reimburse her for clothing and recreational items for Dustin, for home repairs, and for the purchase of a house (presumably the house in which Dustin resides). There is nothing in the file to suggest that the funds were not available for Dustin's support or maintenance, or that requests for such expenditures ever have been, or would be, denied by the Court. And, Dustin's mother has not alleged that the funds are unavailable for this purpose. Thus, Dustin's trust has been available for his support and maintenance at all times, and is therefore a countable resource for SSI purposes.

Dustin Also May Be Able to Sell His Beneficial Interest in the Trust

Although the trust contains a spendthrift provision, such a provision generally is not recognized as valid with respect to self-settled trusts, such as this one. See *Miller v. Ohio Dep't of Human Servs.*, 644 N.E.2d 619, 621 (Ohio App. 1995), citing Restatement (Second) of Trusts 156 (1959); cf. Ohio Rev. Code Ann. 1335.01(A) ("any beneficial interest reserved to the creator [of a trust] may be reached by his creditors"). Especially since Dustin will receive all remaining assets outright at age twenty-five, his beneficial interest in the trust may have a current market value. However, since the entire trust corpus is a resource because the trust is revocable, and because the funds are available for Dustin's support and maintenance, it is not necessary to determine the value, if any, of Dustin's beneficial interest in the trust.

CONCLUSION

In summary, we conclude that, because Dustin's trust is revocable, and because the trust funds are available for Dustin's support and maintenance, the trust is a resource for purposes of determining SSI eligibility.

Sincerely,

Thomas W. C~
Regional Chief Counsel

By:

_____
Sara E. Z~
Assistant Regional Counsel

U. PS 01-109 Ohio Guardianship/Blocked Account/Grantor Trust for Ruth A. H~, SSN~; Your Reference No.: S2D5G3

DATE: February 13, 2000

1. SYLLABUS

Under Ohio law, a trust, which purports to be irrevocable, may nevertheless be terminated if the grantor is the sole beneficiary, even if the purposes of the trust have not been accomplished. However, if the trust specifies that any trust assets remaining at

the time of the beneficiary's death are to be distributed to certain other individuals, then the need to obtain consent from those residual beneficiaries would render the trust irrevocable.

2. OPINION

You inquired whether the funds held in a guardianship account on behalf of a minor SSI beneficiary, Ruth A. H~ ("Ms. H~"), would constitute countable resources for purposes of SSI eligibility, the beneficiary of the account. We conclude that these funds are available for Ms. H~'s maintenance and support and are, therefore, countable resources for SSI purposes.

FACTS

On November 17, 1989, the Common Pleas Court of Logan County, Ohio Probate Division, entered an order approving settlement of a claim for personal injuries suffered by Ruth H~, who sued Simon Kenton School for personal injuries. The Court ordered that after payment of costs, attorneys fees, and a subrogation interest of the Ohio Department of Human Services, the remaining funds would be used to purchase an annuity, payable to the legal guardian of Ms. H~, under a guaranteed payout schedule commencing when she attained the age of 18. The Court ordered that the annuity "shall be payable (pursuant to the same schedule) to the estate of Ruth A~ H~ in the event she dies prior to final payment." Order at 2.

The Court acknowledged that Ms. H~, then age seven, suffered from a genetic deficiency and was, therefore, mentally retarded and physically unable to care for herself. Order at 2. Accordingly, the Court ordered that if such condition continued to exist when payments under the annuity were to commence, then the parents or other legal guardian of Ms. H~ shall apply to the Court for the appointment of a legal guardian to hold such payments "in trust" to distribute the funds "only" to provide extra and supplemental care, maintenance, support and education in addition to and over and above the benefits Ms. H~ may receive as a result of her disability from other local, state, federal or private agencies. *Id.* Further, the Court ordered that the trust shall be considered "purely discretionary, and not a basic support trust," and the trust estate "shall not be used to provide basic food, clothing, and shelter," nor be available to Ms. H~ unless all local, state, and federal benefits have been duly expended for such purpose. Order at 3. Upon the death of Ruth, the trust would expire and its assets would be distributed "within the estate of Ruth A~ H~." Id.

The corpus of the trust created pursuant to the Court's Order, would consist of an award for personal injury damages and resulting settlement between Ms. H~ and Simon Kenton School and Hardin County Board of Mental Retardation and Developmental Disabilities. Order at 1. The Court's Order approved a settlement amount which, after payment of attorney's fees and costs, totals $72,000 payable to the legal guardian of Ms. H~, in an annuity at five year intervals. Order at 2. Although the Court Order indicates that the parents or guardian of Ms. H~ shall apply to the Court for the appointment of a legal guardian to hold the annuity payments in trust, counsel for Ruth A~ H~, in a letter dated September 1, 2000, has indicated that her parents will be making the application to the Court to be appointed guardians.

DISCUSSION

The pertinent SSI regulations provide at 20 C.F.R. 416.1201(a) that:

[R]esources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

Therefore, if Ms. H~ is able to obtain funds or convert property to cash to be used toward her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility. Trust assets are a resource to the individual if she (1) has access to the trust assets and can direct the use of the assets to meet her needs for food, clothing, and shelter; or (2) if she can revoke the trust and obtain unrestricted access to the trust assets; or (3) if she can sell her beneficial interest in the trust. Programs Operation Manual System (POMS) SI 01120.200D.1.a. Conversely, if the individual has no legal power to access or direct the use of the trust principal and cannot sell her beneficial interest, then the trust will not be considered a resource. POMS SI 01120.200D.2. We have reviewed the documents you have provided and, for the following reasons, we conclude that the trust agreement in question should be considered a countable resource under 20 C.F.R. 416.1201 because Ms. H~ can revoke the trust.

Ms. H~ cannot direct the use of trust assets.

The Court Order makes clear that payments held in trust after the application to the Court for the appointment of a legal guardian, shall be held in trust. Order at 2. Payments made from the trust shall be considered "purely discretionary" and not utilized for basic support. Order at 3. Accordingly, Ms. H~ does not have the authority to direct the payment of trust principal for her support and maintenance because the trust is a discretionary trust. A discretionary trust is trust in which the trustee has full discretion as to time, purpose and amount of all distributions. POMS SI 01120.200B.10. A trust may be a resource "in the rare instance, where [the beneficiary] has the authority under the trust to direct the use of the trust principal." POMS SI 01120.200D.1.b. Ms. H~'s trust is not one of these rare instances. The trust authorizes the legal guardian to hold annuity payments made to Ms. H~ in trust, and to distribute the funds "only to supplement other benefits which may be received by Ruth A~ H~." Order at 2. Moreover, the trust shall be "purely discretionary." Order at 3. Therefore, Ms. H~ does not have authority to demand payment from the trust, as the legal guardian has discretion over distribution of trust income and principal. Furthermore, the trustee's power to distribute the trust is limited. The Court's Order indicates that trust assets "shall not be used to provide basic food, clothing, and shelter, nor be available to the beneficiary for conversion for such items" unless all other benefits, have been first duly expended. Order at 3. Therefore, Ms. H~'s access to the trust principal is restricted, and the trust principal should not be considered a countable resource for this reason.

2. Ms. H~ can revoke the trust because she is the grantor and sole beneficiary.

If Ms. H~ is the sole grantor as well as the sole, identifiable beneficiary of the trust, she would have the power to revoke the trust, even if, by its terms, the trust agreement is irrevocable.

Restatement (Second) of Trusts, 339 and comment (1959). Under Ohio law, a trust, which purports to be irrevocable, may nevertheless be terminated if the grantor is the sole beneficiary, even if the purposes of the trust have not been accomplished. *Mumma v. Huntington Nat'l. Bank of Columbus*, 223 N.E.2d 621, 625 (Ohio App. 1967)(citing Restatement of Trusts (Second), 339). However, if the trust specifies that any trust assets remaining at the time of the primary beneficiary's death are to be distributed to certain other individuals, then the need to obtain consent form those residual beneficiaries would render the trust irrevocable. *See* Memorandum from Regional Chief Counsel, Chicago, to Acting Ass't Reg. Comm.-POS, Chicago, *Zebley* Trust as an SSI Resource Wisconsin, Shannon O-B~ (~), (July 9 1993); *see also In re Schroll*, 297 N.W.2d 282 (1980) (holding that an "irrevocable" trust could not be revoked without consent of the guardian ad litem appointed to represent the interests of residual unborn beneficiaries); see also Restatement (Second) of Trusts 127 and comment (b), 339 and comment (b) (1959); 76 Am.Jur. 2d 95 ("a trust cannot be terminated by the consent or acts of beneficiaries where there are contingent interests in the trust which cannot be determined until the happening of certain events").

Under Ohio law, the grantor of a trust is the person who provides the consideration for or creates the trust. *See Three Bills, Inc. v. City of Parma*, 676 N.E.2d 1273, 1276 (Ohio App. 3d 1996); see generally 76 Am. Jur. 2d 55; POMS SI 01120.200B.2. Here, the trust is funded with proceeds Ms. H~ will receive from a settlement agreement between herself and Simon Kenton School and the Hardin County Board of Mental Retardation and Developmental Disabilities. Order at 1. Therefore, Ms. H~ is, in fact, the grantor of this trust since it is her money that provided the consideration comprising the corpus of the trust. Based upon the documents you provided, we assume that Ms. H~ is the sole settlor of the trust. Since the trust agreement is for the benefit of Ms. H~, if the trust does not create other beneficiaries, it would be considered a grantor trust, allowing Ms. H~ the power to revoke the trust.

A beneficiary is any person with a beneficial, or equitable ownership interest in the trust, or person for whose benefit the property is held in trust. 76 Am. Jur. 2d 59; POMS SI 01120.200B.4. If the grantor designates any other beneficiaries to the trust, the trust would not be a resource. A residual beneficiary is an individual or class of individuals who is not a current beneficiary of a trust but will receive the residual benefit of the trust contingent upon the occurrence of specified events, e.g. the death of the primary beneficiary. POMS SI 01120.200B.12. However, the grantor presumably does not name any additional beneficiaries if he or she designates as the residual beneficiary his or her "heirs," "next of kin," "estate," "personal representative," or the like. S*ee Mumma*, 223 N.E.2d at 625; Restatement (Second) of Trusts 127, comment b (1959).

Here, Ms. H~ is the only beneficiary of the trust during her lifetime. Upon her death, the trust expires and it assets shall be distributed within the estate of Ms. H~. Order at 3. Based upon the language of the Court's Order, the trust does not appear to name additional beneficiaries because the residual beneficiary upon Ms. H~'s death is her "estate." Order at 3. Thus, Ms. H~ appears to be both the grantor and the sole beneficiary of the trust and can, therefore, unilaterally revoke the trust in order to use the principal for food, clothing, or shelter. Accordingly, the trust should be treated as a countable resource for the purpose

of determining Ms. H~'s eligibility for SSI. *See* POMS SI 01120.200D.1.a. 3. Even if this were a Blocked account situation, the funds would be a resource to Ms. H~.

As noted above, Counsel for Ms. H~ has indicated that the money held in trust is accessible only by petition to the Court. The actual court documents do not appear to require this. The Court's Order approving settlement and creating the trust references only an application to the Court for the appointment of a legal guardian, but does not require prior court approval for withdrawals from the trust. Order at 2. However, if Counsel's assertion were true, then even if Ms. H~ attempted to revoke the trust, the money in the account might still be under court jurisdiction during the guardianship of Ms. H~. If the money were accessible only by petition to the court, it would then be a "blocked account," as described in POMS 01121.210D.1.

Some states permit a guardian or payee to access funds held on behalf of another only with the permission of the court having jurisdiction over the guardianship. This is known as a "blocked" account. The POMS states that if state law requires funds be made available for the care and maintenance of an individual, funds maintained in a "blocked account" should be assumed, absent evidence to the contrary, to be available despite the requirement that the individual petition the court to withdraw funds for support and maintenance. POMS SI 01120.010C.3.

We do not believe this is a blocked account because the Court's Order does not require prior Court approval for disbursement of funds. The Court's Order requires only that the parents or guardian of Ms. H~ apply to the Court for the appointment of a legal guardian to hold annuity payments in trust for Ms. H~. Order at 2. It does not contain language, as Counsel for Ms. H~ suggests, that prior Court approval is required before any funds are dispersed.

Moreover, we believe that even if the Court retained jurisdiction over the funds, requiring Ms. H~'s guardian to petition for access to the funds, the funds would still be a resource. We have previously advised that in Ohio, funds held by a guardian on a claimant's behalf should be presumed accessible to her, absent evidence to the contrary. Memorandum from Regional Chief Counsel to Ass't Reg. Comm.-POS, Washington, "Blocked Accounts" as SSI Resources ACTION, (August 3, 1989); *see also* Memorandum from Regional Chief Counsel to Acting Ass't Reg. Comm.-POS, Chicago, Supplemental Security Income Regional Transmittal Concerning Blocked Accounts, (November 28, 1995). Ohio law requires a guardian to provide suitable maintenance for his ward when necessary, which shall be paid out of the estate of such ward. Ohio Rev. Code Ann. 2111.13(A)(2). While 2111.13(B) seems to require the Court's permission before the guardian may make such expenditures ("No part of the ward's estate shall be used for the support, maintenance, or education of such ward unless ordered and approved by the Court."), the courts have interpreted this language to permit the court to consider the appropriateness of the expenditures at the time of the accounting. Blocked Accounts as SSI Resources; *See In the Matter of: The Guardianship of Anna V. E~*, 1985 WL 11124 (Ohio App. 1985); In *re Burns*, 79 N.E. 2d 234 (Ohio App. 1948).

Furthermore, the Court Order provides that the trust estate shall not be used to provide basic food, clothing, and shelter, nor be available to the beneficiary for conversion for such items, that limitation applies only until all local, state, and federal benefits for which Ms. H~ is eligible as a result of disability, have been expended for that purpose. Thus, the funds would be available for Ms. H~'s support and maintenance after all local, state, and federal benefits were expended. Ms. H~ has submitted no evidence that the Court has denied any such request or that it would deny such request in the future.

CONCLUSION

In short, we believe that the trust funds are a resource even if they were to remain "blocked" if Ms. H~ revoked the trust, since the funds would nonetheless be available for her support and maintenance under Ohio law. The documents appear to create only a court-approved settlement of a lawsuit, which establishes a trust. Since Ms. H~ is both the grantor and the sole beneficiary of the trust, she can revoke the trust and obtain the assets. Although Ms. H~'s attorney suggests that the court document creates a "blocked account," requiring prior Court approval to withdraw any funds, we do not believe the documents create such an account. Furthermore, even if this were a blocked account, we would presume that the Court would allow the funds to be used for Ms. H~'s support and maintenance after all local, state, and federal benefits that Ms. H~ is eligible for were duly expended.

For the above reasons, we believe the trust principal should be considered a countable resource when determining Ms. H~'s eligibility for SSI.

V. PS 01-104 SSI-Ohio-Review of Chad W. J~ Trust, SSN: ~; Your Ref.: S2D5G3

DATE: January 31, 2001

1. SYLLABUS

This opinion discusses a trust case in Ohio The trust is excludable from SSI resource counting until 7/10/04. This is because, under the trust's terms, the beneficiary cannot revoke the trust, cannot direct the trustee to use the benefits for his support and maintenance, and cannot get any value for his interest in the trust. However, the trust will be countable as a resource starting on 7/10/04 because the trust gives the beneficiary the authority to revoke the trust and use the money on that date.

Note: Because of a change in the Social Security Act, this precedent may only be applicable to a trust established prior to 1/1/00.

2. OPINION

You asked for a legal opinion concerning whether the subject trust is a countable resource to Chad W. J~ Chad), an SSI applicant. We conclude that the trust assets should not be treated as a countable resource for Chad until July 10, 2004.

BACKGROUND

The Chad W. J~ Trust Agreement was created on August 13, 1998, with one dollar held as the trust property. The trust names Chad as the grantor and beneficiary of the trust, and names Chad, Russell T. J~, and William T~ as the trustees. Russell T. J~ (Russell) is Chad's father, and is the designated "Family Trustee." William T. is the designated "Investment Trustee."

The August 1998 trust agreement states that until July 10, 2004, Chad can amend or revoke the trust only with the consent of at least one of the trustees other than himself. After July 10, 2004, Chad can amend or revoke the trust on his own, or direct the trustee to use the funds to secure any of his legal obligations. At age 30, Chad will have the power to withdraw all or part of the trust property. It also states that the trustees "shall" pay Chad "as the Trustees shall determine to be necessary or desirable for [his] maintenance, health, support and education."

Chad reserved the right to designate, by will, the residual beneficiaries to receive the trust property on his death. However, his power of appointment is limited to a class, including any spouse, descendants, his parents, his siblings, and step-brothers, and religious and charitable organizations. If he does not exercise this right, the trust passes to his lineal descendants, and if there are none, to his parents, siblings, and step-brother.

On May 10, 1999, the trust was amended, and the amendments were approved by Russell, one of the trustees. The amendment stated that Chad shall no longer serve as a trustee, and Russell shall join as a grantor. The amended trust stated that the purpose of the amendments was to make the trust agreement conform to the requirements of 42 U.S.C. 1396p(d)(4)(A) and Ohio Administrative Code 5101:1-39-271, so the assets held in trust would not be deemed to be available to Chad for purposes of benefit eligibility, and the other trustees agreed to such modification. The amended trust explained that if Chad were receiving a government need-based benefit, such as Medicaid, the distributions from the trust would be limited to those distributions necessary to meet Chad's supplemental needs, and any income not so distributed would be added to the principal of the trust. The amendments deleted the provision that allowed Chad to withdraw funds from the trust when he is 30 years old.

The amended trust stated that its primary purpose was for Chad's care, and the secondary purpose was to ensure that trust distributions did not cause him to lose his government entitlement benefits. Under the amended trust, the trustees have discretion to make distributions to supplement Chad's government benefits. The amended trust also provides that upon Chad's death, "each State which has provided medical assistance to [Chad] since the Trust was established shall receive a proportionate share of the assets remaining in the within Trust upon [Chad's] death, up to an amount equal to the total medical assistance paid on [Chad's] behalf by such State under a State plan pursuant to 42 U.S.C. 1396 et seq., to the extent permitted by law." This provision allows reimbursement upon Chad's death from the remaining trust assets to the government entities that provided assistance to Chad.

Chad's lawyer has asserted that the amended trust qualifies as an exempt asset under 42 U.S.C. 1396p(d)(4)(A) and 42 U.S.C. 1382(b) as amended by 205 of the Foster Care Independence Act of 1999.

DISCUSSION

For SSI purposes, resources are cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance. 20 C.F.R. 416.1201(a). Trust property may be such a resource for SSI purposes. Program Operations Manual System (POMS) SI 01120.200A. Specifically, trust principal constitutes a resource if an individual (1) has legal authority to revoke the trust and then use the funds to meet his food, clothing, or shelter needs, (2) can direct the use of the trust principal for his support and maintenance under the terms of the trust, or (3) can sell his beneficial interest in the trust. 20 C.F.R. 416.1201(a); POMS SI 01120.200D.1.a. As we discuss below, the trust here is not a countable resource, because none of these circumstances are present.

A. Chad Lacks The Legal Authority To Revoke The Trust.

Article II of the trust agreement, titled "Reserved Rights; Temporary Irrevocability" specifically states that Chad can amend or revoke the trust only with the written consent of at least one of the Trustees other than himself. The First Amendment of Trust Agreement, Second Paragraph, states that Chad shall not serve as a Trustee. As Chad may not revoke the trust without the consent of one of the Trustees, Chad lacks the legal authority to revoke the trust on his own under the terms of the trust. Indiana Trust for Angela R. M~ (~), RA V (K~) to M~, ARC-MOS (December 28, 1999) at 3 (copy attached) (if trustee must agree, you cannot revoke on your own).

Under Ohio law, a trust also may be revoked if the grantor of the trust is also the sole beneficiary. *See Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 624 (Ohio Ct. App. 1967) (citing Restatement (Second) of Trusts 339) (1959)). Initially, Chad was named as the grantor of this trust, and under the First Amendment of Trust Agreement, Chad's father joined as a grantor. However, Chad is not the sole beneficiary of the trust.

Article III, paragraph (c) of the trust provides that upon Chad's death, any remaining assets are to be distributed to a limited class, including Chad's "living lineal descendants." Chad's "living lineal descendants" are contingent beneficiaries, and the presence of such contingent beneficiaries preserves the irrevocability of the trust. *See The National City Bank of Cleveland v. Ford* , 299 N.E.2d 310, 314 (Ohio Ct. of Common Pleas 1973) ("If any beneficiary is unascertained or unborn termination [of a trust] cannot be forced.") (citing *Mumma*); Clarification of Regional SSA Program Circular 94-05 Concerning Trusts RA V (K~) to L~, Acting ARC POS (May 24, 1995) (a remainder interest in favor of "descendants," "children," or "issue" renders a trust irrevocable absent an express statement that the trust is revocable by the grantor). Thus, the trust agreement creates contingent beneficiaries, and we do not assume that such beneficiaries would consent to revoke the trust agreement. *See* SSI - Ohio - Review of Special Needs Trust for Kevin E. L~ (~), RA V (S~) to M~, ARC-MOS (May 10, 1999), at 4. Accordingly, Chad lacks legal authority to revoke the trust and use the trust property for his support and maintenance.

However, on July 10, 2004, he can revoke the trust at any time. Therefore, as of that date, the trust will be a resource.

A. Chad Cannot Direct The Trustees To Use The Assets For His Support And Maintenance.

Under the original trust terms, any distributions from the trust before Chad turns 30 are at the discretion of the trustee. The amended trust agreement states that the trustee may not distribute trust funds in such a way as to render Chad ineligible for his government assistance program(s) (First Amendment of Trust Agreement, First Paragraph). The stated purpose of the trust is to supplement Chad's needs which are provided for by government entitlement programs. Under the terms of the amended trust, the beneficiary cannot direct the trustee to use the assets in his account for his support and maintenance. Rather, the trustee has sole discretion to disburse such funds, and disbursements are to be made only for the beneficiary's "supplemental needs." (First Amendment of Trust Agreement, First Paragraph).

C. Chad Cannot Obtain Value For His Interest In The Trust.

If Chad is the grantor of the trust, the spendthrift provision, which would ordinarily prevent him from selling his beneficial interest, would be invalid. *See* Restatement (Second) of Trusts 156 (1959). However, we assume that Chad's interest in the trust would have little or no market value, since the trustee must make any disbursements for the beneficiary's benefit, and is prohibited from making any part of the principal or undistributed income available to the beneficiary (First Amendment of Trust Agreement, First Paragraph). *See Zebley Trust as an SSI Resource-Wisconsin*, Bernard W~ (~), RA V (M~) to M~, Acting ARC-POS (Feb. 23, 1993) at 5; Tentative Draft No. 2: Restatement (Third) of Trusts 60 and comment f (March 10, 1999).

CONCLUSION

We conclude that until July 10, 2004, the trust assets at issue here should not be considered a resource to Chad William J~ for SSI purposes because the beneficiary cannot revoke or terminate the trust, he cannot direct the trustee to use the assets for his support and maintenance, and he cannot obtain value for his interest in the trust. However, after July 10, 2004, the trust will be a resource (unless it is amended), because Chad will have the authority to revoke the trust.

W. PS 00-387 SSI-Ohio-Review of a Medicaid Trust for Silas K~ SSN: ~

DATE: July 13, 1998

1. SYLLABUS

Note: This trust was evaluated under the rules in place prior to 1/1/00 and thus this precedent may not apply to trusts established after that time.

For SSI purposes, a trust may be considered a resource if the beneficiary can direct use of the trust principal to pay for his/her support and maintenance, or if the beneficiary can revoke the trust and use the funds to pay for his/her food, clothing, and shelter needs. In this situation the SSI applicant is both the grantor and the sole beneficiary of the trust, thus creating a grantor trust (see SI 01120.200(B)8). This trust is a countable resource for SSI purposes because the SSI applicant has the ability to revoke the trust and use the assets for his support and maintenance.

2. OPINION

You asked for our opinion on whether the trust established for Silas K~, an SSI applicant, by his guardians should be considered a countable resource. For the reasons set out below, we believe that the trust is a revocable grantor trust, the contents of which should be considered a countable resource for purposes of SSI.

FACTS

Silas K~, a twenty-three year-old SSI applicant, was injured in an automobile accident in 1992. He has been "mentally disabled" since suffering severe head trauma in the accident. Mr. K~'s legal guardians, Carina E. C~ and Steven S. K~, petitioned the court to establish a special needs fund for Silas with the money he was to receive from a $110,000 settlement with one of the defendant's from his personal injury lawsuit. One of his legal guardians, Carina E. C~, is named as trustee, with the other guardian, Steven S. K~, to replace her upon her death. These individuals are also listed as grantors, acting on behalf of Silas.

This trust states that it is created pursuant to 42 U.S.C. § 1396p(d)(4)(A). This statute exempts certain types of trusts from being considered as countable resources for purposes of determining Medicaid eligibility. The Medicaid rules, however, are not the same as those governing SSI. *See* Memorandum from OGC-V (D~) to Gloria J. P~, ARC, MOS (June 24, 1997), *States Named as Beneficiary to a Trust*.

The trustee is authorized to spend, on a monthly basis, whatever is needed to pay for Silas' expenses and needs, but at no point is this amount to exceed that which would render Silas ineligible for Medicaid, or any other Ohio aid programs for which Silas may qualify. Upon Silas' death, the remaining assets of the trust will be used to reimburse the state of Ohio pursuant to 42 U.S.C. § 1396p, up to the amount paid by the state for Silas' previously incurred medical expenses. The remainder is to be distributed pursuant to the Ohio statutes of descent and distribution. The trust purports to be irrevocable and can only be amended with the authority of the Franklin City Probate Court.

DISCUSSION

For SSI purposes, a resource is any property or asset that an individual owns which he could convert to cash and could use for his own support and maintenance. *See* 20 C.F.R. § 416.1201(a). Trust principal may be a resource, if the beneficiary can direct the use of the principal to pay for his support and maintenance, or if the beneficiary can revoke the trust and subsequently use the funds to pay for his food, clothing, and shelter needs. POMS SI 01120.105(A)1, 01120.200 (D)(1)-(3).

Silas Has The Authority To Revoke The Trust.

A grantor trust is a trust in which the grantor is also the sole beneficiary of the trust. POMS SI 01120.200(B)8. We have previously advised that in Ohio, grantor trusts are revocable by the grantor, so long as he is the sole beneficiary, even where

clear language stated that the trust was irrevocable. Memorandum from OGC-V (P~) to Gloria P~, ARC (Feb. 26, 1992), *Six -State Synopsis of Trust Laws*; *see Restatement Second of Trusts* § 339; Ohio Jurisprudence Third, Trusts § 150 (1989, 1997 Supp.); *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E. 2d 621, 625 (Ohio Ct. App. 1967). An individual is considered a grantor if an agent empowered to act for him (such as a guardian) establishes the trust with funds which belong to the individual. POMS SI 01120.200(B)(2). Silas's guardians established this trust for his benefit with funds from his settlement. These funds belong to Silas. Therefore, Silas would be considered the legal grantor of this trust.

Silas is also the sole beneficiary of this trust. Item II(A) of the trust lists Silas alone as the beneficiary of the trust while Silas is alive. Item II(B) directs that, after Silas' death, the remainder of the trust is to go to the state of Ohio, but only in an amount great enough to repay the state for the medical assistance given to Silas during his lifetime. The remainder of the trust is to be distributed pursuant to the Ohio statutes of descent and distribution. Therefore, Silas is the only beneficiary of the trust.

A beneficiary "is a person for whose benefit a trust exists." POMS SI 01120.200(B)(4). The state of Ohio is not a beneficiary because the trust was not established for its benefit. It will only be reimbursed for whatever cost it incurred paying for Silas' medical expenses over the course of his lifetime. *See* Memorandum from OGC-I (K~) to Barbara B~, Deputy ARC (Aug. 21, 1995) *Grantor Trusts-General Policy and Responses to Specific Inquiries*. Also, while the trust does direct the remainder to go to the heirs of Silas to be determined by the Ohio statutes of descent and distribution, this also does not create any additional interests. Rather, Ohio courts have ruled that this provision merely creates the inference that the grantor was intended to be the sole beneficiary. *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E. 2d 621, 625 (Ohio Ct. App. 1967). Because Silas is both the grantor and the sole beneficiary of the trust, he would be able to revoke it and use the assets for his support and maintenance.

CONCLUSION

For the foregoing reasons, we conclude that the Silas K~ trust should be considered as a countable resource for SSI purposes.

Thomas W. C~
Chief Counsel, Region V
By:_____
Charles A. C~, Jr.
Law Clerk

X. PS 00-384 Ohio Special Needs Trust - Sana S. S~

DATE: May 20, 1999

1. SYLLABUS

This opinion discusses who is considered to be a residual beneficiary of a trust under Ohio law.

2. OPINION

You have requested an opinion on whether the funds held pursuant to the terms of a trust agreement should be treated as a resource of Sana S. S~, a Supplemental Security Income (SSI) recipient, for purposes of determining her eligibility for SSI. For the reasons discussed below, it is our opinion that the trust principal should not be counted as a resource.

FACTS

This case involves a trust agreement created by Sabreen F. S~, parent of Sana S. S~ (the beneficiary). The agreement directs the trustee, Thomas J. B~ (a lawyer), to make payments to or for the benefit of Sana in such amounts as Thomas J. B~, in his absolute discretion, considers advisable to provide supplemental services for Sana (Trust, Article II). In making these discretionary payments, the trustee is instructed to only make payments that will not affect Sana's eligibility for assistance. Trust, Article II, par.1. Upon Sana's death, the trust will terminate and any remaining trust assets, after the payment of any final costs and expenses of the trust, and the minimum payment that under applicable law must be distributed to any state for medical assistance, will be distributed to Sana's spouse if then living, or if none, to her children and more remote lineal descendants. Trust, Article III, Paragraph C. The trust document also contains an express irrevocability clause. Trust, Article I, Paragraph 3.

DISCUSSION

The pertinent SSI regulations provide at 20 C.F.R. 416.1201(a) that:

resources mean cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. . .

Thus, if an individual is able to obtain funds or convert property to cash to be used toward her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility determinations. Assets in a trust can be a resource if the SSI recipient can revoke the trust and obtain the assets, or if she can direct the use of the assets for support and maintenance. POMS SI 01120.200D.1.-SI 01120.200D.3. Here the beneficiary cannot direct the use of the trust property, and the trust is not revocable.

Under Ohio law, a grantor who is also the sole beneficiary may revoke a trust, despite the presence of an express irrevocability clause. *See Columbus Bar Association v. Ramez*, 290 N.E.2d 831, 836 (Ohio 1972); *Mumma v. Huntington National Bank of Columbus*, 223 N.E.2d 621, 624 (Ohio Ct. App. 1967). Thus, the inclusion of an irrevocability clause in the trust agreement is not dispositive. Rather, the question is whether Sana, as grantor of the trust, is also its sole beneficiary.

Here, Sana is not the sole beneficiary of the trust. Although Sana is the sole beneficiary during her lifetime, the assets of the trust are to be distributed to Sana's spouse if then living or to Sana's children and more remote lineal descendants upon Sana's death. The addition of these residual or contingent beneficiaries generally makes the trust irrevocable, because their consent would be necessary to revoke the trust. Restatement (Second) of Trusts, 127, comment b (1959). The trust created residual beneficiaries by naming Sana's spouse if living or her children or more remote lineal descendants, as beneficiaries upon Sana's death. *See Mumma*, 223 N.E.2d at 624-25 (citing Restatement (Second) of Trusts, 127 (grantor is not sole beneficiary if income to grantor for life and corpus upon grantor's death, to grantor's unborn children, issue or descendants)); *First National Bank v. Tenney*, 137 N.E.2d 585 (Ohio Ct. App. 1955), aff'd, 138 N.E.2d 15 (Ohio 1956).

Since the Trust language created an interest in the trust estate in Sana's spouse or descendants, a residual beneficiary other than Sana exists, in the absence of an express reservation of the power to revoke by claimant. *Mumma*, 223 N.E.2d at 624; Restatement (Second) of Trusts, 127, comment b (1959). Claimant did not reserve this power; thus, she cannot revoke the trust and the trust principal cannot be counted as a resource on that basis.

Y. PS 00-373 Ohio Special Needs Trust for Nathan S. R~, SSN: ~

DATE: September 18, 1997

1. SYLLABUS

This opinion concerns a special needs trust established in Ohio in November 1996. The trust is a resource for SSI purposes as the SSI recipient is both the grantor and the sole beneficiary of the trust and can revoke the trust and use the assets for his support and maintenance.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 1/1/00.

2. OPINION

This is in response to your inquiry regarding whether the trust agreement designating Nathan S. R~ as a beneficiary should be considered a resource in determining his eligibility for SSI benefits. For the reasons stated below, the trust should be considered a resource.

FACTS

Mr. James R. R~ (James), as court appointed guardian and natural parent of Nathan S. R~ (Nathan), petitioned the Warren County Probate Court for approval of a Special Needs Trust for the benefit of Nathan. In November 1996, the court granted the petition.

The trust agreement names James as the grantor and trustee and Nathan as the beneficiary of the trust. The trust was to be funded initially with proceeds from the settlement of a personal injury lawsuit. The trust agreement provides that the trust is irrevocable and the purpose of the trust is to provide the beneficiary with "supplemental services." The trust agreement also provides that upon the death of Nathan, the trust is terminated and the trust principal is distributed to pay any final costs and expenses related to the administration of the trust; any remaining principal to reimburse the State of Ohio for amounts paid for Nathan's medical assistance; and to distribute all remaining funds to Nathan's estate.

ANALYSIS

For purposes of SSI eligibility, a resource is defined as property that an individual owns and could convert to cash to be used for his support and maintenance. *See* 20 C.F.R. 416.1201(a).

If the person has the right, authority, or power to liquidate the property, it is considered a resource. *See* 20 C.F.R. 416.1201(a)(1). The trust principal is a resource when an individual has legal authority to revoke the trust and use the funds to satisfy his food, clothing or shelter needs. POMS SI 01120.200D.1.a. We previously advised that, even if a trust purports to be irrevocable, it nevertheless may be revoked if the individual is both the grantor and sole beneficiary of the trust. Six-State Synopsis of Trust Laws, OGC V (P~) to Gloria P~, ARC (Feb. 26, 1992)(relying on the holding in *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621 (Ohio Ct. App. 1967); see also Restatement of Second of Trusts 330; Ohio Jurisprudence 3d, Trusts 150 (1989, 1997 Supp.).

Nathan is the grantor of the trust at issue, even though the trust names James as the grantor. Where a beneficiary acting through his guardian establishes a trust with funds that actually belong to the beneficiary, the beneficiary can legally be considered the grantor of the trust. *See* POMS SI 01120.020B.1., SI 01120.020C.1., SI 01120.200J.3.a. Here, Nathan acted through James, his guardian, to establish a trust with proceeds he received from the settlement of a personal injury lawsuit. Since trusts established from personal injury settlements are considered established by the person who received the reward, Nathan is the grantor of the trust. *See* POMS SI 01120.200J.3.a.

Nathan is also the sole beneficiary of the trust. A beneficiary is "[t]he person for whose benefit property is held in trust." Restatement (Second) of Trusts, 3(4); Ohio Jurisprudence 3d, Trusts 3 (1989, 1997 Supp.). Although the trust agreement provides for distribution of the trust principal upon the death of Nathan, the trust agreement does not identify any residual beneficiaries. No additional beneficiaries are established by the provision allowing payments for administrative costs of the trust because these payments relate to running the trust or providing goods and services for Nathan's benefit. Furthermore, the trust agreement provision requiring the trustee to reimburse the state for the cost of medical assistance provided to Nathan does not make the state a beneficiary of the trust. The trust principal does not benefit the state, but merely repays the state for the costs of providing benefits to Nathan during his lifetime. *See* Illinois OBRA '93 Trust for Dominick J. G~, ~, OGC-V (D~) to Gerald K~, Center Director (Apr. 17, 1997) at 4; Supplemental Security Income-Wisconsin Trust-Michelle J. L~, OGC-V (M~) to Gloria P~ ARC-MOS (June 9, 1997); Grantor Trusts-General Policy and Responses to Specific Inquiries, OGC-I (K~) to Barbara B~, Deputy ARC (Aug. 21, 1995). Finally, the trust provision requiring that remaining funds be distributed to Nathan's estate does not create residual beneficiaries. *See* Restatement (Second) of Trusts, 127, comment (b)(an individual who transfers trust principal to his estate upon his death is the sole beneficiary of the trust); see also *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 625 (Ohio Ct. App. 1967).

CONCLUSION

The trust assets at issue should be considered a resource to Nathan for SSI purposes because, as grantor and sole beneficiary of the trust, he can revoke the trust and use the trust assets for his support and maintenance.

Z. PS 00-325 SSI - Ohio - Review of Special Needs Trust for Kevin E. L~, SSN: ~

DATE: May 10, 1999

1. SYLLABUS

This opinion concerns a special needs trust in Ohio. The trust is not a resource for SSI purposes because the SSI recipient (the grantor) does not have the legal authority to revoke the trust or direct the use of its assets for his own support and maintenance.

Under Ohio law, a trust may be revoked if the grantor of the trust is the sole beneficiary. However, under the terms of this trust, the grantor is not the sole beneficiary. The trust provides that the grantor's parents are the beneficiaries in the event of the grantor's death. The trust also provides that the Trustee has sole discretion over payments made from the trust. Therefore, the SSI recipient does not have the ability to direct the use of the trust assets. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked whether, for Supplemental Security Income ("SSI") purposes, the Special Needs Trust established for the benefit of Kevin E. L~ is a countable resource. Because Kevin E. L~ ("Kevin") does not have legal authority to revoke the trust or to direct the use of trust assets for his own support and maintenance, we have concluded that the trust principal is not a countable resource. However, any distributions or in-kind payments from the trust that are used for Kevin's support and maintenance and any cash distributions paid directly to Kevin, would be countable income for SSI purposes.

FACTS

On December 16, 1998, the Court of Common Pleas, Probate Division, Lake County, Ohio approved the Kevin E. L~ Special Needs Trust ("Trust Agreement" or "Trust"). The Trust Agreement names Linda J. P~, Kevin's parent, as Trustee, and it names Kevin as beneficiary. The Trust Agreement does not name a Grantor, but states that the Trust is to be funded initially by "all guardianship assets" including an Equitable Life Assurance Annuity Contract. While the Trust Agreement does not state to whom the Trust assets initially belonged, for the purposes of analysis we assume that the assets belonged to Kevin.

The Trust Agreement states that it is established pursuant to 42 U.S.C. 1369p(d)(4)(A) and Ohio Administrative Code 5101:1-39-271. The purpose of the Trust is to care for Kevin, provide services required by Kevin, and provide for continuing conservation and enhancement of funds to supplement all other financial and service benefits for which Kevin might be eligible as a result of his disability. The Trust Agreement states that as long as Kevin is disabled and unable to maintain and support himself, the Trustee is to seek support and maintenance for him from all available public resources, including, but not limited to, Supplemental Security Income, Medicaid, Federal Social Security Disability Insurance, and any other appropriate state or local agency.

Payments from the Trust are to be made to or for the benefit of Kevin for the provision of "supplemental services" as defined in Ohio Administrative Code 5123:2-18-01(C) for the satisfaction of Kevin's special needs. The Trustee may make expenditures so that Kevin's standard of living will be comfortable and enjoyable, but may not be obligated or compelled to make such payments. The Trustee may hold real property either as investment or as a residence for Kevin (keeping in mind the effect of such a residence on Kevin's eligibility for benefits), and the Trustee may purchase a home in the name of the Trust where Kevin may live rent free (if the Trustee has determined that he is not eligible for rent subsidy or housing assistance programs as a result of his disability and if this does not affect his level or receipt of government benefits).

Payments from the Trust are to be made in the Trustee's "sole discretion." This discretion is limited in several ways, including that the Trustee must obtain prior approval of the Probate Court and must not use the Trust income or corpus to supplant or replace public assistance benefits of any city, county, state, federal, or other governmental agency that has a legal responsibility to serve persons with disabilities. While payments from the Trust are to be made directly to persons supplying goods or services to Kevin, the Trust Agreement also permits the Trustee to periodically give Kevin spending money to the extent that his eligibility for disability related benefits is not affected.

The Trust Agreement provides that it is irrevocable, and may not be altered, amended, revoked, or terminated, but that the Trustee may amend the Trust with Court approval to carry out the intention of the parties or if the laws or regulations concerning benefit programs change. In addition, Kevin may terminate the trust and withdraw its assets in whole or in part if a court determines that Kevin is "fully competent and without any legal disability."

If the Trust is still in existence at the time of Kevin's death, (and after the Trustee has paid expenses such as Kevin's funeral expenses and has paid to the Ohio Department of Human Services up to an amount equal to the total medical assistance received), any remaining assets are to be distributed equally to Kevin's parents, Linda (the Trustee) and Jeffery L~. If Kevin's parents are deceased, the assets are to be distributed to Kevin's estate or pursuant to any valid will that Kevin has executed.

DISCUSSION

A resource, for determining whether an individual is entitled to SSI, includes cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance. 20 C.F.R. 416.1201(a) (1998). Trust property may be such a resource for SSI purposes. Program Operations Manual Systems ("POMS") SI 01120.200A. Specifically, trust principal constitutes a resource if an individual (1) has legal authority to revoke the trust and then use the funds to meet his food, clothing, or shelter needs, or (2) can direct the use of the trust principal for his support and maintenance under the terms of the trust. POMS SI 01120.200D.1.a.

A. Kevin Lacks The Legal Authority To Revoke The Trust.

Whether the Trust is revocable depends on the terms of the Trust and/or Ohio law. POMS SI 01120.200D.2. Article II of the Trust Agreement specifically states that it is irrevocable and may not be amended. Nevertheless, under Ohio law, a trust may be revoked if the grantor of the trust is also the sole beneficiary and is not under any incapacity. *Mumma v. Huntington Nat'l Bank of Columbus* , 223 N.E.2d 621, 624 (Ohio Ct. App. 1967) (citing Restatement (Second) of Trusts 339).

In light of this rule, the Trust Agreement remains irrevocable. Although we assume that the Trust was created with Kevin's own funds, and that he should be considered the Grantor of the Trust, see POMS SI 01120.200B.2., Kevin is not the sole beneficiary of the Trust. At Article III(C), the Trust Agreement provides that if the Trust is still in existence at the time of Kevin's death, (and after the Trustee has paid expenses such as Kevin's funeral expenses and has paid to the Ohio Department of Human Services up to an amount equal to the total medical assistance received), any remaining assets are to be distributed equally to Kevin's parents, Linda (the Trustee) and Jeffery L~. Thus, the Trust Agreement creates residual contingent beneficiaries, and we do not assume that such beneficiaries would consent to revoke the Trust Agreement. *See* SSI-Illinois-Review of the Caitlin N~ S~ Supplemental Care Trust SSN: ~, OGC-V (Flanagan) to Donna Y. M~, ARC-MOS (March 9, 1999), at 4. Accordingly, Kevin lacks legal authority to revoke the Trust and use the Trust property for his food, clothing, and shelter.

B. Kevin Cannot Direct The Use Of Trust Principal.

Although Kevin does not have the legal authority to revoke the Trust Agreement, the Trust may still be counted as a resource in determining SSI eligibility if Kevin has the ability to direct the use of the Trust principal. POMS SI 01120.200D.1.a. Such authority may be included specifically in a trust provision allowing the beneficiary to act on his own or in a provision allowing him to order actions by the trustee. POMS SI 01120.200D.1.b. The Trust Agreement includes no such provision. Rather, Article III of the Trust Agreement expressly provides that the Trustee has "sole discretion" over payments made from the Trust. Thus, Kevin does not have the ability to direct the use of Trust assets for his support and maintenance under the terms of the Trust Agreement.

C. Certain Disbursements Or In-Kind Payments Would Constitute Countable Income.

Finally, although the Trust principal is not a countable resource, disbursements from the Trust under certain circumstances would be countable income for determining Kevin's SSI eligibility and level of benefits. For instance, under certain circumstances, the Trust Agreement allows the Trustee to pay to Kevin spending money, or allows the Trust to hold the title to a home where Kevin could live rent-free. *See* Articles III VI. The Trust Agreement also allows payments for "supplemental services," the definition of which includes payment for food, clothing, and shelter beyond one's basic needs, and allows for payment of pocket money. *See* Ohio Admin. Code 5123:2-18-01(C). In all of these instances, however, the Trust Agreement expressly states, or at least suggests, that payments should not be made if Kevin's eligibility for benefits or the level of his benefits would be affected. *See* Articles III VI. If, despite these limitations, the Trustee were to authorize disbursements from the Trust consisting of cash paid directly to Kevin; or payments to a third party for any food, clothing, or shelter received by Kevin; or if Kevin were allowed to live in a house rent-free, such disbursements or in-kind payments would constitute income for SSI purposes. POMS SI 01120.200E.1.a. SI 01120.200E.1.b. Trust disbursements resulting in Kevin's receipt of goods or services other than food, clothing, or shelter - such as medical care - would not constitute countable income for SSI purposes. POMS SI 01120.200E.1.c.

CONCLUSION

For the foregoing reasons, we conclude that the Trust principle is not a countable resource, but that Trust disbursements under some circumstances would constitute countable income.

AA. PS 00-322 Review of an Ohio Children's Luxury Trust for Douglas A. M~, SSN: ~; Your Ref. No. S2D5G3

DATE: September 22, 2000

1. SYLLABUS

Under Ohio law, if an individual does not have the right to revoke a trust and gain unrestricted access to the trust assets, cannot direct the use of the trust assets to meet his/her needs for food, clothing, and shelter, or cannot sell his/her beneficial interest in the trust, it is not a resource for SSI purposes. However, disbursements from the trust (such as cash paid directly to the individual or payments to a third party for any food, clothing, or shelter received by the individual) are income for SSI purposes. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked whether the assets of a children's luxury trust established by Carol A. M~ should be considered a countable resource for purposes of determining the eligibility of one of her children, Douglas A. M~, for SSI. For the reasons set forth below, we conclude that the assets in the trust should not be considered a countable resource.

FACTS

On January 20, 1999, Carol A. M~ executed a trust agreement establishing The M~ Children's Luxury Trust ("the trust"). The trust was funded with a payment of $15,000, which your cover letter indicated was the proceeds of a personal injury settlement received by Douglas A. M~. The trust names Ms. M~ as the "Grantor" and the "Trustee." The trust provides that it is irrevocable and that the "Grantor" has no power to alter, amend, revoke, or terminate any trust provision or interest. Trust, Article II.

The trust states that the Trustee shall hold and administer any trust property for the benefit of Ms. M~'s children and more remote descendants. Trust, Article IV B. The Trustee is given discretion to apply to or expend for the benefit of each of Ms. M~'s children so much of the trust's net income and principal as the Trustee deems appropriate. Trust, Article IV B(1). The trust also provides that following any contribution to the trust, each of Ms. M~'s then-living children, other than Douglas, shall have the right to withdraw a proportionate share of the contribution. Trust, Article III A.

The trust states that it was Ms. M~'s intention in creating the trust to primarily benefit her son, Douglas, and secondarily to benefit her other children; that the Trustee should reasonably attempt to ensure that the trust provides Douglas with adequate income and principal, rather than trying to maximize the funds available to other beneficiaries; that the trust funds be used to provide Douglas with such care and education as will best help him develop his maximum potential, notwithstanding his handicaps; and that the trust funds should not be distributed in a manner that would disqualify Douglas from available federal or state aid or cause the trust funds to bear all or part of the cost of his treatment or assistance. Trust, Article IV B(2).

The trust further provides that it shall terminate upon the earliest of the following events: the death of the last of the Ms. M~'s children; the earliest date upon which all of the Ms. M~'s children other than Douglas have attained the age of thirty years and Douglas has either died or been determined by the Trustee to have become capable of managing his share of the trust funds; or the date on which the Trustee determines it to be in the best interests of Douglas that the trust be terminated. Trust, Article IV A. Upon the termination of the trust, the Trustee is required to divide the trust funds and distribute equal shares to Ms. M~'s then-living children and/or the lawful descendants of each of Ms. M~'s deceased children. Trust, Article IV C.

DISCUSSION

A countable resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance.

See 20 C.F.R. 416.1201(a); Program Operations Manual System ("POMS") SI 01110.100B.1. If the individual has the right, authority, or power to liquidate the property or his share of the property, it is considered a resource. *See* 20 C.F.R.. 416.1201(a)(1); POMS SI 01110.100B.1. Trust assets are a resource if (i) the individual can revoke the trust and obtain unrestricted access to the trust assets; (ii) the individual has access to the trust assets and can direct the use of the trust assets to meet his need for food, clothing, and shelter; (iii) or the individual can sell his beneficial interest in the trust. *See* POMS SI 01120.105A.1, SI 01120.200D.1- SI 01120.200D.3.

Whether the claimant can revoke the trust or direct use of the trust assets depends upon the terms of the trust agreement and applicable state law. *See id.* SI 01120.200D.2. We have reviewed the documents you provided and conclude that the trust principal and accumulated income are not countable resources to Douglas. Douglas does not have the right, under the terms of the trust agreement or Ohio state law, to terminate the trust and thereafter obtain unrestricted access to the trust's assets or to direct use of the trust's assets to meet his need for food, clothing, and shelter. Nor can he sell his beneficial interest in the trust.

Douglas Does Not Have the Right to Revoke the Trust

Whether a trust is revocable depends on the terms of the trust and applicable state law. *See* POMS SI 01120.200D.2. Here, Douglas does not have the right to revoke the trust under its own terms or Ohio state law.

First, Douglas does not have the right to revoke the trust under the terms of the trust agreement. Article II of the trust agreement specifically states that it is irrevocable and that the "Grantor" has no power to alter, amend, revoke, or terminate any trust provisions or interest under the terms of the agreement or any statute or rule of law. Trust, Article II. The trust agreement further provides that the Trustee has authority to terminate the trust if she determines it to be in the best interest of Douglas that the trust be terminated. Trust, Article IV A(3). However, because Douglas does not have control over the ability to terminate the trust, and because the Trustee's ability to terminate the trust is not unlimited and must take into consideration Douglas' eligibility for federal and state aid, we do not believe this provision renders the trust revocable.

Second, Douglas not have the right to revoke the trust under the applicable state law. Under Ohio law, a trust, even one which purports to be irrevocable, can be revoked if the grantor and the sole beneficiary are the same person. *See Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 624 (Ohio Ct. App. 1967) (citing RESTATEMENT (SECOND) OF TRUSTS 339). Although the trust names Ms. M~ as the "Grantor," Douglas is the actual grantor because the trust was created with the funds he received from his personal injury settlement. *See* POMS SI 01120.200B.2 (a grantor of a trust is the individual who furnishes the consideration that established the trust, even if another entity nominally creates the trust); POMS SI 01120.200J.3. (claimant is grantor even though trust was nominally created by claimant's guardian where the trust's funds were obtained from a settlement of the claimant's personal injury suit). Nevertheless, Douglas cannot revoke the trust because he is not the sole beneficiary. The trust provides that the Trustee may apply or expend as much of the trust's net income or principal as she deems appropriate for the benefit of each of Ms. M~'s children. Trust, Article IV, B(1). Furthermore, upon the termination of the trust, the trust provides that the Trustee shall divide its assets among each of Ms. M~'s then-living children and/or the descendants of Ms. M~'s deceased children. Trust, Article IV C. The trust thus creates present and residual beneficial interests in individuals other than Douglas. We do not assume that such beneficiaries would consent to revoke the trust agreement. Accordingly, Douglas lacks legal authority to revoke the trust and use the trust property for his need for food, clothing, and shelter.

Douglas Does Not Have the Right to Direct Use of the Trust's Assets

Although Douglas does not have the legal authority to revoke the trust agreement, the trust may still be counted as a resource in determining SSI eligibility if Douglas has the ability to direct the use of the trust principal. *See* POMS SI 01120.200D.1.a. Such authority may be included specifically in a trust provision allowing the beneficiary to act on his own or in a provision allowing him to order actions by the Trustee. *See id.* SI 01120.200D.1.b. Here, the trust agreement includes no such provision. Instead, the trust gives the Trustee discretion to apply to or expend for the benefits of each of Ms. M~'s children so much of the trust's net income and principal as the Trustee deems appropriate for any purpose. Trust, Article IV B(1). Although Ms. M~'s children do have the right to demand a portion of any contribution made to the trust, the trust specifically exempts Douglas from this right of demand. Trust, Article III A. Thus, Douglas has no right to direct use of the trust's assets to meet his need for food, clothing, or shelter.

Douglas' Interest in the Trust Has No Marketable Value

A trust can also be a resource if the individual can sell his beneficial interest in the trust. Although the trust contains a spendthrift clause which purports to limit Douglas' ability to transfer his beneficial interest, see Trust, Article VI, the spendthrift clause would not prevent Douglas from selling his interest in the trust because he is also the actual grantor of the trust. *See* RESTATEMENT (SECOND) OF TRUSTS 156(1) (stating that settlor/grantor of trust who is also a beneficiary can transfer his interest in trust even if there is a provision restraining the voluntary or involuntary transfer of his interest). However, this is a discretionary trust in which Douglas has only the right to receive payments at the discretion of the trustee. A beneficial interest in a discretionary trust should not be considered a resource. *See Zebley Trust as an SSI Resource - Wisconsin Bernard W~*, OGC-V

(M~) to John P. M~, ARC (February 23, 1993) at 4-6. Douglas could only sell the right to receive or have distributions made on his behalf in the sole discretion of the trustee. *See id.*; DRAFT RESTATEMENT (THIRD) OF TRUSTS 60. We assume this would have no significant value. *See Bernard W~* Memorandum, at 5.

Payments Made from the Trust May be Income

Lastly, although the trust principal is not a countable resource, disbursements from the trust under certain circumstances would be countable income for determining Douglas' SSI eligibility and level of benefits. If the Trustee were to authorize disbursements from the trust consisting of cash paid directly to Douglas, or payments to a third party for any food, clothing, or shelter received by Douglas, such disbursements or in-kind payments would constitute income for SSI purposes. *See* 20 C.F.R. 416.1102; POMS SI 01120.200E.1.a., SI 01120.200E.1.b.

CONCLUSION

Based on the documents provided to us, it is our opinion that the children's luxury trust established for the benefit of Douglas A. M~ and his siblings is not a countable resource for purposes of determining his eligibility for SSI. Douglas does not have the right to revoke the trust; direct the use of its assets to meet his need for food, clothing, and shelter; or sell his beneficial interest in the trust.

BB. PS 00-306 SSI-Ohio-Review of a Trust/Gift Annuity Agreement for Kenneth K~

DATE: March 5, 1999

1. SYLLABUS

Under Ohio law, an Ohio Community Pooled Trust/Gift Annuity is not a resource since the beneficiary cannot direct the trustee to make payments on his behalf for his support and maintenance, sell or otherwise transfer his interest in the trust, or revoke or terminate the trust to obtain the assets. Also, if disbursements are made pursuant to the trust agreement, those disbursements are not income to the SSI recipient. CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked whether the Ohio Community Pooled Trust/Gift Annuity was a countable resource to Mr. K~, and whether disbursements from this trust would be considered income to him for SSI purposes. We conclude that the trust assets would not be a resource because the SSI beneficiary could not direct that the trustee use the trust assets for the beneficiary's support and maintenance, sell his interest in the trust, or revoke or terminate the trust to obtain the assets. In addition, if annuity payments are made directly to third parties for "supplemental services", those payments would not be income.

Background

On September 28, 1998, Mr. K~ entered into a Gift Annuity Agreement with The Disability Foundation, Inc., that was to provide him with quarterly distributions from a Gift Annuity Account to be used only for his supplemental needs. Mr. K~ died of pancreatic cancer on October 23, 1998, before receiving any benefits from the Annuity.

In order to be a qualified beneficiary under the trust agreement, an individual must be an Individual with Disabilities within the meaning of 42 U.S.C. 1396p(d)(4)(C) and Ohio Administrative Code 5101:1-39-271(C)(7)(b). To establish a Gift Annuity Account, an individual enters into a Gift Annuity Agreement whereby he transfers property to The Disability Foundation, Inc., which acts as Trustee, in exchange for a Charitable Gift Annuity to be administered in a separate account of the trust with the Annuity Amount and any Accumulated Annuity Amount to be used solely for the supplemental needs of the beneficiary. If the beneficiary is, or becomes the recipient of Supplemental Security Income (SSI, the Trustee may not, under any circumstances, make any distributions from the trust for the support and maintenance (food, clothing or shelter) of such individual, or make any payments directly to him.

The purposes of the trust are to promote the general well-being of Individuals with Disabilities by providing for their supplemental needs, in addition to and not in lieu of benefits and services otherwise provided by any local, state or federal government, agency or department, and to enable the Trustee to promote and administer Disability Programs and Services. *See*

Agreement of Trust, 1 A. The Individual with Disabilities may not assign, alienate, encumber or otherwise transfer the Annuity Amount, or any Accumulated Annuity Amount, or any interest in the Account. *See* Gift Annuity Account Agreement, par. 3.

Upon the death of the beneficiary, any current Annuity Amount or Accumulated Annuity Amount may be used for the funeral expenses of that individual and to reimburse the State in an amount equal to the total amount of medical assistance paid on behalf of the individual by the State. Any remaining funds attributable to the Account are to be used by the Trustee for Disability Programs and Services. *See* Agreement of Trust, 1 A.

The trust provisions provide that it is irrevocable, and the settlor does not have the right or power to alter, amend or terminate the trust. *See* Agreement of Trust, 14. The Trustee has unrestricted discretion to disburse funds for the supplemental needs of the beneficiary. *See* Agreement of Trust, 2 A(3), 6. The settlor has the power to amend the provisions of the trust only to further the purposes of the trust expressed in Section 1 including, but not limited to, ensuring that the trust complies with the provisions of state and federal law. *See* Agreement of Trust, 14.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his support and maintenance. *See* 20 C.F.R. 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can revoke the trust and use the assets to meet his needs for food, clothing, and shelter, or if the individual can direct the use of the trust assets to be used for his support and maintenance. *See* POMS SI 01120.200D. An individual's beneficial interest in a trust may also be a resource if the individual can sell that interest. *See Zebley Trust as an SSI Resource-Wisconsin, Bernard W~*; OGC V (M~l) to M~, Acting ARC-POS (Feb. 23, 1993) at 5.

1. The Beneficiary Cannot Direct the Trustee to Use the Assets for His Support and Maintenance.

Under the terms of the trust, the beneficiary cannot direct the trustee to use the assets in his account for his support and maintenance. Rather, the trustee has sole discretion to disburse such funds, and disbursements are to be made only for the beneficiary's supplemental care. Gift Annuity Account Agreement, Paragraph B; Ohio Community Pooled Trust Agreement, 2, A1. In addition, if the beneficiary is eligible to receive SSI, the trustee may not disburse the funds to pay for food, clothing or shelter, or disburse funds directly to the beneficiary. Gift Annuity Account Agreement, Paragraph B.

2. The Beneficiary Cannot Liquidate His Interest In the Trust.

The trust also contains a spendthrift provision which provides that the beneficiary cannot assign, alienate, encumber or otherwise transfer the annuity amount or any interest in the account. Gift Annuity Account Agreement, Paragraph C, 3. Even if this provision were found invalid, however, the beneficiary's interest in the trust would have little or no fair market value, since the trustee is authorized to make disbursements only in his or her sole discretion, must make any disbursements for the beneficiary's benefit, and is prohibited from making any disbursements to the beneficiary directly if the beneficiary is eligible to receive SSI benefits. *See* 20 C.F.R. 416.1201.

3. The Beneficiary Cannot Terminate or Revoke the Trust.

The trust expressly provides that it is irrevocable and the settlor (The Dayton Foundation) cannot alter, amend or terminate the trust. Ohio Community Pooled Trust Agreement, 14.

Under Ohio law, a trust, which purports to be irrevocable, may nevertheless be terminated if the settlor is the sole beneficiary and is not under an incapacity, even if the purposes of the trust have not been accomplished. *Mumma v. Huntington Natl. Bank of Columbus*, 223 N.E.2d 621, 624 (10th Dist. 1967)(citing Restatement of Trusts (Second), 339). The reason behind this rule of law is that the settlor, as sole beneficiary, has the only colorable interest in the trust. *Id.* However, in the instant case, Mr. K~ is not the sole beneficiary to the trust. The trust expressly provides that if the beneficiary dies, the remaining property attributable to the account is to be distributed as follows: first, for the funeral expenses of the beneficiary; second, to the state as reimbursement for any payments made for support and maintenance of the beneficiary; and third, the remaining property to a separate fund of the trust to be used for disability programs and services as the trustee deems advisable. Ohio Community Pooled Trust Agreement, 2B. This provision, giving the trust itself a remainder interest, creates an irrevocable additional residual beneficiary. Therefore, the beneficiary does not possess the sole interest in the trust and he would not be entitled to revoke or terminate the trust.

4. Annuity Payments from the Trust Generally Would not be Income.

Under the SSI program, income is "anything you receive in cash or in kind that you can use to meet your needs for food, clothing, and shelter." 20 C.F.R. 416.1102. Things that an individual receives that cannot be used for food, clothing, or shelter will not be income. 20 C.F.R. 416.1103. Here, the trustee is required to provide funds (Mr. K~ receives an annuity from the trust) only for "supplemental needs." Trust Agreement 2(A)(1). Supplemental needs for an individual entitled to SSI cannot include items of food, clothing, or shelter. Trust Agreement 4(M). Therefore, so long as distributions are made in accordance with the Trust Agreement, those distributions will not be income for SSI purposes.

CONCLUSION

In summary, we conclude that the gift annuity account/trust assets should not be considered a resource to the individual beneficiary of the Pooled Trust, since he cannot direct the trustee to make payments on his behalf for his support and maintenance, sell or otherwise transfer his beneficial interest in the trust, or revoke or terminate the trust to obtain the assets. In addition, if disbursements are made pursuant to the Trust Agreement, then those disbursements will not be income to the SSI recipient.

CC. PS 00-281 SSI-Ohio-Review of a Trust for Christi S. M~, SSN: ~

DATE: January 12, 1999

1. SYLLABUS

Although a trust is generally irrevocable unless the settlor reserves the right to revoke it, in Ohio it is revocable where the grantor is the sole beneficiary. In this case, the trust was established by the beneficiary's mother as her agent. The trust has no remainder interests. Therefore it is a grantor trust and revocable under Ohio law.

2. OPINION

You have asked us to review the Trust Agreement established for Christi S. M~. We conclude that Ms. M~ can revoke the Trust Agreement and use the trust assets for her support and maintenance. Therefore, the trust assets are a countable resource to her.

FACTS

Ms. M~ will be twenty-one years old on August 25, 1999. On or about September 25, 1996, Ms. M~ received a settlement in a personal injury claim. That day, her attorney signed a draft for Ms. M~'s share of the settlement from his trust account payable to the Croghan Colonial Bank for Ms. M~. On October 1, 1996, the Bank issued a certificate of deposit to "Robbin J. B~ Agent for Christi S. M~." Ms. B~ is Ms. M~'s mother. On November 23, 1998, the Bank revised the title of the Certificate of Deposit to "Robbin J. B~ Trustee for Christi S. M~." Bank records indicate that ownership of the account was pursuant to a separate trust agreement dated October 1, 1996. We were not provided with an October 1, 1996, trust agreement. Instead, we were provided with a Trust Agreement dated December 12, 1996. In that Trust Agreement, Ms. B~ agreed to act as Ms. M~'s "agent." (The Trust Agreement does not appoint a trustee.) Ms. B~ agreed to expend not more than half of the trust for an automobile and insurance. If any additional disbursements were required, Ms. B~ agreed to consult Ms. M~'s father, and to either secure his agreement or obtain direction from the court. Ms. B~ agreed to hold the remaining funds for Ms. M~'s benefit until Ms. M~'s twenty-first birthday.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash that can be used for her support and maintenance. *See* 20 C.F.R. 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *See id*. Assets in trust are a resource to the beneficiary of the trust if she can revoke the trust and use the assets to meet her needs for food, clothing, and shelter. *See* POMS SI 01120D.1.- 3.

Initially, based on the documents submitted to us, Ms. B~ was Ms. M~'s agent, not her trustee. Although the document in question is captioned "Trust Agreement" and refers to monies placed in "trust," the document designates Ms. B~ as Ms. M~'s "agent." It does not appoint a trustee, and the bank initially issued the Certificate of Deposit for Ms. B~ as Ms. M~'s agent. The Restatement (Second) of Trusts 8 (1959) provides that "[a]n agency is not a trust." As Ms. M~'s agent, Ms. B~ was required to take direction from Ms. M~. Accordingly, during the period of time that Ms. B~ was Ms. M~'s agent, the settlement funds were not held in trust, and therefore were a countable resource to Ms. M~.

In any case, even if the settlement funds were held in trust, they were nonetheless always available to Ms. M~. Although a trust is generally irrevocable unless the settlor reserves the right to revoke it, Restatement (Second) of Trusts 331(2) (1959), a trust is nonetheless revocable under Ohio law where the settlor is also the sole beneficiary. Six State Synopsis of Trust Laws, Memorandum to Gloria P~, ARC-POS from OGC-V (P~) (Feb. 26, 1992), relied upon in Ohio Special Needs Trust for Nathan S. R~, Memorandum to Gloria J. P~, ARC-MOS from OGC-V (S~) (Sept. 18, 1997); Ohio Special Needs Trust for Leona D~, Memorandum to Gloria J. P~, ARC-MOS from OGC-V (R~) (Aug. 1, 1997); Ohio Trust for Glenda S. W~, Memorandum to Gloria J. P~, ARC-MOS from OGC-V (M~) (July 29, 1997). We based our previous opinions on an Ohio appellate court's holding following general principles of trust law. *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 623-24 (Ohio App. 1967) (citing Restatement (Second) of Trusts 339 (1959)); *see also* Ohio Jurisprudence 3d, Trusts 3 (1989, 1997 supp.) (indicating that grantor can terminate a trust if she is its sole beneficiary). The law regarding this issue does not appear to have changed since our previous opinions.

The trust was created by Ms. B~ as Ms. M~'s agent. "[A]n action by someone in his/her capacity as an agent is equivalent to an action by the ward for whom he/she acts." POMS SI 01120.020B.1, SI 01120.020C.1. Thus Ms. M~ is the settlor of the trust. Ms. M~ is also the trust's sole beneficiary. Thus the Trust Agreement is revocable, and as such is a countable resource.

DD. PS 00-266 Validity of an Alleged Oral Trust in Ohio SSI Resources (Sally H~, SSN # ~)

DATE: February 26, 1991

1. SYLLABUS

This opinion concerns an allegation by an SSI recipient in Ohio that funds were being held in an oral trust for another person. It was determined that the alleged oral trust was not valid because the recipient did not provide clear and convincing evidence of its validity as required under Ohio law. Therefore, the funds were counted as a resource for determining SSI eligibility.

2. OPINION

You asked us to determine whether Sally H~, a recipient of SSI benefits, is the owner of certain certificates of deposit ("CDs") or whether she holds them in trust for her sister pursuant to an alleged oral trust. Because the facts failed to show a valid oral trust, we have determined that SSA may count the CDs as a resource of Ms. H~ for SSI purposes. Our conclusion that no valid trust exists makes it unnecessary for us to consider your additional questions regarding the alleged trust arrangement in this case.

A. Facts

Our opinion is based on the following facts provided to us in the claims file and referral letter.

Sally H~ had been receiving SSI benefits for some time when SSA discovered that she held five $1,000 CDs in a bank in Nelsonville, Ohio. Ms. H~ held the CDs in only her own name, with no further limitations or specifications regarding ownership of the CDs. SSA therefore determined that, during the period Ms. H~ held the CDs, she had exceeded the resource limitation of the SSI program and had been overpaid $7,817 of SSI benefits. Ms. H~, who has been represented by an attorney since this matter arose, disputes the overpayment. She alleges that she does not own the CDs but instead holds them in trust for her sister, Emily W~, pursuant to an oral trust.

SSA obtained an affidavit and statement by Ms. H~, an affidavit by Ms. W~, and an affidavit by Ms. H~'s son, Mr. William H~ regarding the alleged oral trust. In her affidavit, Ms. W~ stated that the CDs are "not owned by Sally H~." According to Ms. W~, Ms. W~ owned the CDs for a time, and then the CDs "were transferred to Sally H~'s name for the purpose of holding them in trust to pay for my burial expenses."

In the affidavit and statement SSA secured from Ms. H~, Ms. H~ repeatedly referred to "family" discussions and understandings about the alleged oral trust in the CDs./ Although SSA asked Ms. H~ to identify the trustor/ and the trustee, she refused to name the trustor, explaining that neither she nor her attorney knew the meaning of a "trustor." Ms. H~ did state, however, that she was the third of four trustees,/ and that the trustees were responsible for using the CDs to pay the costs of Ms. W~'s funeral and burial. According to Ms. H~, the alleged trust had no specific instructions, although the trustees "always took interest payments to Emily [W~] for her disposition or instructions" and "[t]he trustees were never asked to pay the principal to Emily or anyone else." In addition, Ms. H~ stated that she had spent about $350 of interest from the CDs on her "personal

needs," excluding "reimbursements for gasoline for visiting my sister, Emily W~." Moreover, Ms. H~ explained that no party had the power to revoke the trust.

In his affidavit, Mr. H~ stated that he is the current trustee of the alleged oral trust. Mr. H~ stated that the CDs "were transferred to me from the name of my mother," that the money belongs to Ms. W~, and that he is holding it in an "informal trust" for Ms. W~.

B. DISCUSSION

The issue in the present case is whether the CDs constitute a "resource" of Ms. H~, causing her to exceed the SSI resource limitation and thus be liable for an overpayment of SSI benefits.

If Ms. H~ had access to the money in the CDs for her own support and maintenance, SSA may consider the CDs her "resource" for SSI purposes. 20 C.F.R. 416.1201(a) (1991)/; Programs Operations Manual, SI 01120.105 (hereinafter "POMS"). On the other hand, if Ms. H~ was, as she alleges, a trustee of a valid oral trust which afforded her no access to the funds, the CDs would not be considered her resource. POMS, SI 01120.105.

Although express oral trusts in personal property are recognized under Ohio law, the party claiming that an express oral trust exists has the burden of proving it by "clear and convincing evidence." *In re Hoffman's Estate*, 195 N.E.2d 106 (S.Ct. Ohio 1963); *Hoffman v. Vetter*, 192 N.E.2d 249, 252 (Ct.App. Ohio 1962). Since the evidence Ms. H~ submitted to SSA would probably fail to persuade an Ohio court by clear and convincing evidence that a valid oral trust existed, SSA is free to determine that Ms. H~ had access to the CDs and that they were, therefore, her resource.

The evidence indicates that a valid trust does not exist. Ms. H~'s several references to her family's deliberations and understandings about the CDs suggested that she was subject to familial duties with respect to the CDs, but that she was not a trustee subject to a formal trust relationship. Although Ms. H~ may have intended to honor Ms. W~'s wishes and pay Ms. W~'s burial expenses from the CDs, the fact that Ms. W~ has confidence in Ms. H~ to carry out her wishes does not, itself, create a trust, nor does it make a trustee of Ms. H~, the person in whom Ms. W~ has placed confidence. *See, e.g.*, *State v. State Journal Co.*, 106 N.W. 434, *motion den*., 110 N.W. 763, application den., 111 N.W. 118 (S.Ct.Neb. 1905). In addition, Ms. H~ was unable to specifically describe the instructions of the alleged trust, Ms. H~ and Ms. W~ disagreed as to who was the first trustee, and Mr. W~ described the arrangement as an "informal" trust. These facts further indicate that Ms. H~ was not subject to the formal obligations and requirements of a trust.

Moreover, Ms. H~ refused to name the trustor of the alleged trust. Although a lay person may not know what a "trustor" is, Ms. H~ is represented by an attorney who, if uninformed of the term "trustor," could have obtained a definition of this term in order to fully respond to SSA's inquiry. This sort of evasiveness, particularly by a represented claimant, raises the inference that no trustor exists and, thus, no valid trust exists in the instant case. *See Ulmer v. Fulton*, 195 N.E. 557, 564 (S.Ct. Ohio 1935) (all essential elements of an express trust must be present,/ including a person who intends to create a trust and who transfers property with that intent).

Perhaps the most important evidence suggesting no valid oral trust is that Ms. H~ was the registered holder of the CDs. This fact indicates that Ms. H~ was the owner, and not a trustee, of the CDs. This fact also indicates that Ms. W~ did not intend to create a trust when she transferred the CDs. Under Ohio law, a person transferring property to another party must "intend" to create a trust before a trust can be established in that property. *Id.* Ms. W~ transferred the CDs outright to Mrs. H~ (or to whoever was the first trustee of the alleged trust), she did not inform the bank of the alleged trust when she made the transfer, and the bank appears to have had no notice that an alleged trust restricted Ms. H~'s ownership of the CDs. Accordingly, the facts surrounding the transfer suggest that Ms. W~ may have intended to make a gift, rather than a transfer of funds in trust for her own benefit.

In sum, Ms. H~ failed to present "clear and convincing evidence" of an oral trust in this case. Since Ms. H~ held the CDs in her own name, the bank was entitled to assume that Ms. H~ was the only party with a claim to the CDs and to give her unrestricted access to them. See, e.g., Ohio Rev. Code. Ann. 1107.11. Accordingly, since no valid trust existed, and since Ms. H~ appears to have had unchecked access to the CDs, SSA may consider the CDs Ms. H~'s resource for SSI purposes. 20 C.F.R. 416.1201(a) (1991); POMS SI 01120.105.

EE. PS 00-263 Ohio Trust for Anthony L. H~, SSN: ~, Your Reference: S2D5G3

DATE: November 5, 1999

1. SYLLABUS

At issue is whether the trust is a resource of the beneficiary for SSI purposes. If the beneficiary has the legal authority to convert his interest in the trust into cash and then use the funds for his/her support and maintenance, the trust if a resource. This trust does not restrict the beneficiary's right to sell his/her interest in the trust. Therefore, his/her share of the trust is a resource for SSI purposes.

2. OPINION

You have asked whether the trust established for Anthony L. H~ ("Anthony") and Alisa L. H~ ("Alisa") is a countable resource for the purposes of determining Anthony's eligibility for Supplemental Security Income (SSI). We believe, for the reasons stated below, that the trust is a resource to Anthony, and Anthony's interest in that resource probably exceeds $2,000.

FACTS

The John L. H~ Trust ("the H~ trust" or "the trust") was created pursuant to the terms of the last will and testament of John L. H~ for the benefit of his son, Anthony, and his granddaughter, Alisa. Oliver E. M~ was named as trustee, with Phillip L~ named as successor trustee, to become trustee in the event of Mr. M~'s death during the operation of the trust.

Under the terms of the trust agreement, the trustee was directed to receive the remainder of the estate funds that existed after all other estate assets were distributed and debts paid. The trustee was to place this balance of estate funds into an interest-bearing account and to open a checking account for regular withdrawals. At the time the trust was created, on February 10, 1997, the corpus of the trust contained $17,022.17. From the trust funds and income, the trustee was directed to make monthly payments of $200 to Anthony and $100 to Alisa, as well as to pay any emergency expenses of Anthony and Alisa, as determined by the trustee. The trustee was also empowered to deduct an annual fee for his handling of the trust and any out of pocket expenses incurred for the benefit of Anthony and Alisa.

The trust expires five years from its creation or when the corpus and income are exhausted, whichever occurs sooner. If funds remain after five years, they are to be divided equally by Anthony and Alisa or continued in the trust if the two beneficiaries so agree. If either beneficiary dies during the operation of the trust, the trust agreement directs that his or her share vests in his or her heirs and next of kin.

DISCUSSION

For the purposes of SSI eligibility, a resource is "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. 416.1201(a). If an individual "has the right, authority or power to liquidate . . . his or her share of the property, it is considered a resource." 20 C.F.R. 416.1201(a)(1). The H~ trust is a resource, for purposes of SSI, if Anthony has the legal authority to convert his interest in the trust into cash and then use the funds to meet his needs for food, clothing, or shelter.

Significantly, the H~ trust does not contain a "spendthrift" provision. A "spendthrift trust," which is valid in Ohio (*see Scott v. Bank One Trust Company*, N.A., 577 N.E.2d 1077, 1084 (Ohio 1991), overruling *Sherrow v. Brookover*, 189 N.E.2d 90 (Ohio 1963)), is a trust in which "a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed." Restatement (Second) of Trusts 152(2). Absent such a restraint, a beneficiary of a trust is free to assign his rights, in exchange for consideration, to a third party. Because the H~ trust does not restrict Anthony's right to sell his beneficial interest in the trust, Anthony can convert his beneficial interest into cash, and his share of the trust is therefore a resource for purposes of SSI eligibility.

The precise value of Anthony's resource, however, is difficult to determine. Mr. M~, the trustee, has stated that Anthony's share of the estate trust is "approximately $11,300.00." We assume that Mr. M~ based this figure on the trust provision that Anthony receive $200 for each $100 monthly disbursement to Alisa-and that Anthony's share was therefore two-thirds of the original corpus (i.e., $11,348.11). We believe that the assignable value of Anthony's share, however, is lower than the figure cited by Mr. M~. Anthony can assign no more than he owns, and a beneficiary "owns no greater interest in the trust property than the settlor has given him." *Domo v. McCarthy*, 612 N.E.2d 706, 713 (Ohio 1993) (citation omitted). We determine the value

of a resource based on the price the item can reasonably be expected to sell for on the open market in the particular geographic area involved. 20 C.F.R. 416.1201(c)(2). For several reasons, the actual value of Anthony's resource is almost certainly lower than the trustee's figure.

First, Anthony would be selling his right to receive future payments. Because of the time value of money, a purchaser is likely to discount the amount he is willing to pay now for money that he will not receive until some future date. Second, the trust includes both mandatory and discretionary provisions. Under the terms of the trust, the trustee must distribute monthly payments to Anthony and Alisa until the trust terminates, either through the expiration of the five-year term or through the exhaustion of funds. However, the trustee also has the discretion to pay additional "emergency expenses" of the beneficiaries. If Anthony were to assign his interest to a third party, this discretionary provision would probably be applied only to Alisa (because the trustee would be unlikely to distribute emergency disbursements to an assignee if Anthony required emergency funds), and any emergency disbursements distributed to Alisa would diminish the value of Anthony's share.

Third, the trust will terminate after five years, if there is any corpus remaining, and at that time, Anthony will receive only half (not two-thirds) of any remaining assets. Fourth, Anthony's interest in monthly distributions of $200 would terminate if he were to die before the end of the five-year period. In that case, the remainder of his share would vest in his heirs and next of kin. Thus, an assignee who purchases Anthony's interest would cease receiving monthly disbursements upon Anthony's death, even if that occurred before the end of the five-year period. Finally, as the trustee pointed out, Anthony's share could be diminished by bank fees for maintaining the account or by other similar fees.

For the foregoing reasons, we believe that Anthony would be able to convert his interest in the H~ trust to cash only at a significant discount and that the value of the resource is therefore lower than the "approximately $11,300.00" identified by the trustee. Nevertheless, we believe that it is reasonable to presume that Anthony's share of the trust exceeds his $2,000 limitation for SSI eligibility under 20 C.F.R. 416.1205(c). Anthony could, of course, rebut this presumption with evidence that his interest is worth less than $2,000.

CONCLUSION

Because the H~ trust includes no spendthrift provision, we believe that it should be considered a countable resource when determining Anthony's eligibility for SSI. Further, we believe that, while the value of Anthony's interest in the trust is difficult to determine based on the information we have, it is probably less than $11,300 but greater than $2,000.

FF. PS 00-261 Ohio Special Needs Trust for Faith D. H~, SSN: ~

DATE: September 21, 1998

1. SYLLABUS

This opinion concerns a special needs trust established in 1997 in Ohio with funds from a personal injury lawsuit. The trust is countable as a resource for SSI purposes because the trust is revocable under Ohio law. The trust is revocable because the grantor is also the sole beneficiary of the trust.

2. OPINION

This is in response to your inquiry regarding whether the Ohio Special Needs Trust agreement designating Faith D. H~ as a beneficiary should be considered a resource in determining her eligibility for SSI benefits. For the reasons stated below, we believe that the trust should be considered a resource.

FACTS

Ms. Paula L. H~ (Paula), as parent and court-appointed guardian of Faith D. H~ (Faith), petitioned the Highland County Probate Court for approval of a Special Needs Trust (Trust) for the benefit of Faith. In December 1997, the court granted the petition. The trust agreement names Paula as the grantor and trustee and Faith as the beneficiary of the trust. The trust was to be funded initially with proceeds from the settlement of a personal injury lawsuit. The trust agreement provides that the trust is irrevocable and the purpose of the trust is to provide the beneficiary with "supplemental services." The trust agreement also provides that upon the death of Faith, the trust would be terminated and the trust principal distributed to pay any final costs and expenses related to the administration of the trust; any remaining principal would then reimburse the State of Ohio for

amounts paid for Faith's medical assistance; and all remaining funds would be distributed to Faith's estate. *See* Trust, Art. III, Termination.

ANALYSIS

For purposes of SSI eligibility, a resource is any property that an individual owns and could convert to cash to be used for her support and maintenance. *See* 20 C.F.R. 416.1201(a). If the person has the right, authority, or power to liquidate the property, it is considered a resource. *See* 20 C.F.R. 416.1201(a)(1). We apply State trust law to determine whether trust property is a resource. POMS SI 01120.200A. Ohio law appears to afford two alternative legal theories to determine whether the trust corpus is an available resource for SSI eligibility. Under Ohio Revised Code (O.R.C.) 1335.01, the trust is void if the grantor and the beneficiary are the same person and no other beneficiaries to the trust are named. Under Ohio common law, such a trust may be valid, but revocable. As we discuss below, in this trust the grantor and the beneficiary are the same person. Therefore, either of the two theories provides a defensible basis for considering Faith's trust to be an available resource.

1. Faith Is Both The Grantor And The Sole Beneficiary Of The Trust

Faith is the grantor of the trust at issue, even though the trust names Paula as the grantor. Where a beneficiary acting through her guardian establishes a trust with funds that actually belong to the beneficiary, the beneficiary can legally be considered the grantor of the trust. *See* POMS SI 01120.200J.3.a. Here, Faith acted through Paula, her parent and guardian, to establish a trust with proceeds Faith received from the settlement of a personal injury lawsuit. Since trusts established from personal injury settlements are considered established by the person who received the award, Faith is properly considered the sole grantor of the trust. *Id.*

Faith is also the sole beneficiary of the trust. A beneficiary is "[t]he person for whose benefit property is held in trust." Restatement (Second) of Trusts, 3(4); Ohio Jurisprudence 3d, Trusts 3 (1989, 1997 Supp.). Here, the trust makes it clear that Faith is the sole beneficiary. The trust provides that "the Trustee shall have no duty to preserve principal for or otherwise to consider the interests of any person or entity." Trust, Art. II, Sec. 1. Further, the trust agreement does not identify any residual beneficiaries who will receive trust proceeds upon terminating the trust. As we have previously advised, no additional beneficiaries are established by the provision allowing payments for administrative costs of the trust because these payments relate to running the trust or providing goods and services for Faith's benefit. *See* Ohio Special Needs Trust for Nathan S. R~, OGC-V (S~) to Gloria J. P~, ARC-MOS (September 18, 1997) at 3. Nor does the trust agreement provision requiring the trustee to reimburse the State for the cost of medical assistance provided to Faith make the State a beneficiary of the trust. The trust principal does not benefit the State, but merely repays the State for the costs of providing benefits to Faith during her lifetime. The money repaid is for the benefit of Faith, not the State. *See* Ohio Trust For Glenda S. W~, OGC-V (M~) to Gloria P~ ARC-MOS (July 29, 1997) at 3. Finally, the trust provision requiring that remaining funds be distributed to Faith's estate does not create residual beneficiaries. *See* Restatement (Second) of Trusts, 127, comment (b) (an individual who transfers trust principal to his estate upon his death is the sole beneficiary of the trust); see also *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 625 (Ohio Ct. App. 1967). Therefore, Faith is the sole beneficiary of this trust.

2. The Trust Is Void Under O.R.C. Section 1335.01

On February 26, 1992, our office issued a six-state survey regarding the validity of trusts in which the grantor and the beneficiary are the same person. *See* Six-State Synopsis of Trust Laws, OGC-V (P~) to Gloria P~-W~, ARC, POS (February 26, 1992) (Six-State Synopsis). In the survey section concerning Ohio law, we considered O.R.C. 1335.01(A), and noted that, although the statute provides that "all deeds of gifts and conveyances of real or personal property made in trust for the exclusive use of the person making the same are void," the Ohio Supreme Court had interpreted that provision and found that it only applied to debtor-creditor cases. *Id.* at 5 (citing , 195 N.E.2d 106, 108-09 (Ohio 1963)). O.R.C. 1335.01 was amended by adding O.R.C. 1335.01(C), effective October 10, 1991. *See* O.R.C. 1335.01 (Historical Note). In amending the statute, the Ohio General Assembly intended to supersede the effect of the holding of the Fifth District Court of Appeals in the decision of *Mathias v. Fantine*, 1990 WL 21446 (Ohio App. 5 Dist. Mar. 1, 1990). *Mathias* did not involve a creditor dispute, but instead involved the distribution of assets by a probate court. Neither the Mathias court nor the Ohio legislature appeared to believe O.R.C. 1335.01 was limited to debtor-creditor situations. Mr. M~ attempted to create a trust that gave himself a life interest, and a remainder interest to his son. The Mathias court found his trust instrument void, notwithstanding the remainder interest. The Ohio legislature superseded the holding in *Mathias* by declaring that the legal principle of "estate merger" did not render a trust document void as long as the trust document named additional beneficiaries to the trust.

In order to properly interpret the statute, we asked for clarification from the Ohio Attorney General, but she responded that she had no statutory authority to advise federal agencies regarding the effect of Ohio laws. *See* Supplemental Security Income - Ohio Trust- William R. Y~, OGC-V (L~) to Gloria J. P~ ARC-MOS (December 22, 1997) at 2. As a result, we proceeded with our own interpretation of the statute, and we opined that, under O.R.C. 1335.01, the trust is void if the grantor and the beneficiary are the same person, and no other beneficiaries to the trust are named. *Id.* at 3. Since the Revised Code was enacted, the Ohio Supreme Court has addressed a trust instrument that appears to uphold our interpretation of the statute that the plain language of the amended statute is that self-settled trusts are void under Ohio statutory law. In *Dumas v. Estate of Dumas*, 627 NE 2d 978 (Ohio 1994), the court upheld a trust established for the exclusive benefit of Mr. D~ and his daughters. Mr. D~'s widow challenged the transfer of assets as a creditor (they were in the midst of a divorce) and as a beneficiary of his probate estate (he died before the divorce was final). The court found the wife was not a creditor, and that, because the trust complied with O.R.C. 1335.01, it was valid and nontestamentary. D~, 627 NE 2d at 983. The reverse should also be true. If a trust does not comply with RC 1335.01, we assume the Ohio Supreme Court would find it void.

Applying O.R.C. 1335.01 to the present case, Faith's trust would be considered void because she is both the grantor and the sole beneficiary. Faith has immediate access to the trust under Ohio law, and the trust corpus is accordingly a countable resource under 20 C.F.R. 416.1201.

3. The Trust Is Revocable

The trust principal is a resource when an individual has legal authority to revoke the trust and use the funds to satisfy her food, clothing, or shelter needs. POMS SI 01120.200D.1.a. As we previously advised in our six-state survey, Ohio common law permits a grantor to terminate an otherwise irrevocable trust if she is also the sole beneficiary. Six-State Synopsis at 5, relying on *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 625 (Ohio Ct. App. 1967); *see also In re Guardianship of Lombardo*, 1998 WL 417458 (Ohio App. July 15, 1998). The grantor can terminate the trust because she is both the grantor and the sole beneficiary of the trust. *Id.; see also* Restatement of Second of Trusts 339; Ohio Jurisprudence 3d, Trusts 150 (1989, 1997 Supp.).

Under this analysis, Faith's trust would be "revocable" because she is both the grantor and the sole beneficiary. Because the trust is revocable, Faith has immediate access to the trust under Ohio law. The trust corpus is, accordingly, a countable resource under 20 C.F.R. 416.1201.

CONCLUSION

The trust assets at issue should be considered a resource to Faith for SSI purposes because, as grantor and sole beneficiary of the trust, the trust is void under O.R.C. 1335.01, or, alternatively, under Ohio common law, it is revocable. Therefore, she can revoke the trust and use the trust assets for her support and maintenance.

GG. PS 00-237 Request to Review Ohio Trust or Special Needs Trust for Katelynn G~

DATE: May 7, 1999

1. SYLLABUS

The trust in this case is not a countable resource for SSI purposes. The SSI recipient does not have the authority to direct payment from the principal of the trust for her support and maintenance. She also cannot revoke or terminate the trust to obtain the funds in the trust because there are contingent beneficiaries.

2. OPINION

You asked us to review a Supplemental needs trust established for Katelynn G~ (Katelynn), an SSI recipient. We conclude that the trust assets should not be treated as a countable resource for Katelynn.

BACKGROUND

Betsy J. G~ (Mrs. G~), Katelynn's parent and Court appointed guardian for her estate, sought leave from the Champaign County Ohio Probate Court to establish a trust for Katelynn. The trust names Mrs. G~ as the grantor and as the trustee of trust assets. Katelynn is named as the beneficiary of the trust (Article 1, Section 1). Katelynn is a minor and, according to the cover letter enclosed with the copy of the trust, is receiving SSI from the Social Security Administration. The trust was to be initially funded

with $90,000, which are assets from a personal injury settlement. The trust gives the trustee discretion whether to make disbursements for Katelynn's benefits, and to determine what the disbursements should be. However, the trustee is directed to make disbursements only for Katelynn's "supplemental services needs," which do not include food, shelter, or clothing. Art. II Section 1. In addition, the trustee may not distribute any portion of the trust if it would render Katelynn ineligible for a government assistance program. Id.

The trust continues until Katelynn dies. Art. III. At that point, the trustee is directed (1) to pay the final costs and expenses of trust administration, (2) to repay the State for any medical assistance received and (3) to distribute any remaining assets to Katelynn's parents, or if they are not living, to Katelynn's lineal descendants.

DISCUSSION

In determining whether or not trust assets should be considered a resource, the pertinent SSI regulation provides that:

resources means cash or other liquid assets or any real or personal property that an individual (or spouse if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right authority and or power to liquidate the property or his or her share of the property, it is considered a resource.

20 C.F.R. 416.1201.

Trust assets are a resource to an SSI recipient if she can revoke the trust and access the principal thereafter, whether or not she actually does so. Trust assets are also a resource if the individual can direct use of trust assets to meet her needs for food, clothing, and shelter. Thus, if Katelynn is able to direct the trustee to use the funds in the trust for her or if she is able to convert the funds to cash that can be used towards her support and maintenance, then such funds or property are to be counted as resources for purposes of SSI eligibility determinations. 20 C.F.R. 416.1201; Programs Operation Manual System (POMS) SI 01120.105, SI 01120.200D.1.-SI 01120.200D.3.

1. Katelynn cannot direct the use of the trust assets.

Here the trust states that it is irrevocable and that the funds in the trust can be used for supplemental services only. The trust also states that, upon approval of the probate court, the trustee (Mrs. G~) shall have absolute discretion to distribute the principal, though she may not distribute the principal in such a way as to render Katelynn ineligible for her government assistance program(s) (Article II, Section 1). The stated purpose of the trust is to supplement Katelynn's needs. Because the trustee, Mrs. G~, has sole and absolute discretion to use the trust funds for Katelynn's benefit, Katelynn cannot direct the use of the trust funds. Article II, Sections 1 2.

2. Katelynn cannot revoke the trust.

As a general rule, funds in irrevocable trusts are not going to be countable resources. POMS SI 01120.200D.2.b. The general law of trusts recognizes that a trust is revocable when the grantor is also the sole beneficiary of the trust. In such instances, the trust is revocable regardless of the language found in the document. Restatement (Second) of Trusts, 339 (1959). In addition, we have previously advised that Ohio appears to follow the rule that even if a trust purports to be irrevocable, it can nevertheless be revoked if the subject of the trust - Katelynn is both the settlor or grantor and the sole beneficiary of the trust. Six-State Synopsis of Trust Laws, OGC V (P~) to Gloria P~, ARC (Feb. 26, 1992)(relying on *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621 (Ohio Ct. App. 1967)); *see also* Restatement (Second) of Trusts 330; Ohio Jurisprudence 3d, Trusts 150 (1989, 1997 Supp.).

A grantor or settlor of a trust is the individual who actually furnishes the consideration that establishes the trust, even if another entity nominally creates the trust. Here, Katelynn, acting through her guardian, Mrs. G~, is the settlor or grantor of the trust. *See* Article 1, Section 1 that states Katelynn's personal injury settlement is the basis for creating and funding this trust.

Katelynn is the only beneficiary of the trust during her lifetime. Thus, the question to be answered is whether, on Katelynn's death, the trust creates an interest in any residual beneficiaries. Art. III section A requires the trustee to pay any final costs and expenses of the trust. Because this section merely repays Katelynn's debts, it does not create any interest in any other beneficiaries. Art. III section B repays the state of Ohio and/or other states of the Unites States for medical expenses paid on behalf of Katelynn. We have advised in previous opinions that such a provision does not make the State of Ohio or any other

state a beneficiary of the trust. Rather it requires, in accordance with applicable Medicaid provisions, that the remaining trust assets be used to reimburse the state(s) for benefits already conferred on Katelynn during her lifetime. The money paid to the state of Ohio or any other state, therefore, is for Katelynn's benefit and does not create any contingent interests.

Art. III section C, however, creates interests in two classes of contingent beneficiaries (parents and lineal descendants). The first class consists of Katelynn's parents (if living). This provision makes Katelynn's parents residual beneficiaries. Request To Review Minnesota Trust for Elizabeth P~, SSN: ~, OGC V (M~) to M~, ARC-MOS (December 17, 1997), at 4 (In directing that any residual amount be delivered to grantor's parents, the trust agreement established identifiable residual beneficiaries with an interest in the trust).

The creation of a remainder interest in "lineal descendants" also creates an interest in contingent beneficiaries. We have advised that the presence of such residual or contingent beneficiaries, despite the use of a class term, like the one above, preserves the irrevocability of the trust. *See* Clarification of Regional SSA Program Circular 94-05 Concerning Trusts OGC-V (K~) to L~ ARC-MOS (May 24, 1995) (it is not necessary that the residual or contingent beneficiary be specifically named, and in some cases a trust can create residual or contingent beneficiaries by reference to a class such as children, issue, or descendants). Thus, this trust is not a countable resource to Katelynn, because the trust instrument has created remainder interests in specifically named beneficiaries (her parents) and in a class (her lineal descendants).

Katelynn, then, is the settlor, but, she is not the sole beneficiary of the trust and the trust is irrevocable. Restatement (Second) of Trusts, 127, comment b (1959) (the additions of residual or contingent beneficiaries generally make the trust irrevocable). As such, Katelynn does not have the power to revoke the trust and the trust assets are not a resource for her.

CONCLUSION

In summary, we conclude that the trust assets should not be considered a resource to Katelynn. She cannot direct the trustee to make payments on her behalf for support and maintenance. She cannot sell her beneficial interest in the trusts asset. In addition, she cannot revoke or terminate the trust and obtain the assets, due to the presence of residual or contingent beneficiaries.

HH. PS 00-198 Ohio Special Needs Trust for Leona D~ SSN: ~

DATE: August 1, 1997

1. SYLLABUS

The issue is whether a special needs trust is a resource for SSI purposes when the grantor of the trust is also the sole beneficiary.

In Ohio, a grantor may terminate an otherwise irrevocable trust if he/she is the sole beneficiary. If the grantor is also the sole beneficiary, he/she can revoke the trust and use it for his/her support and maintenance. Thus, the funds in the trust are a resource for SSI purposes.

2. OPINION

You asked whether the trust designating Leona D~ as a beneficiary should be considered a resource when determining her eligibility for SSI. For the reasons below, we believe the trust should be considered a resource.

FACTS

Ms. D~, a legally competent adult, petitioned the probate court in Marion County, Ohio, through counsel, for approval of a Special Needs Trust. The trust named Ms. D~ as beneficiary and was to be funded with proceeds from the settlement of a personal injury lawsuit. On April 10, 1997, the probate court granted Ms. D~'s petition.

The trust authorizes the trustee to pay "third party providers" for Ms. D~'s "miscellaneous expenses and needs" and for "supplemental services" as approved by the Marion County Probate Court. Payment is not permissible if it would make Ms. D~ ineligible for or reduce her benefits under SSI (or other programs).

Upon Ms. D~'s death, the trustee is required to reimburse the State of Ohio, pursuant to 42 U.S.C. 1396p(d)(4)(A), for amounts paid for Ms. D~'s medical assistance. Any remaining funds are to be distributed as directed in Ms. D~'s will or under the

intestacy statutes. The trust states that its terms are irrevocable and can be amended only by the acting judge of Marion County Probate Court.

DISCUSSION

A resource, for SSI purposes, includes property an individual owns and could convert to cash for use in her support and maintenance. 20 C.F.R. 416.1201(a). A trust is a resource when the individual has legal authority to revoke it and use the funds to pay for food, clothing and shelter. POMS SI 01120.200D.1.a.

We previously advised that in Ohio, a grantor may terminate an otherwise irrevocable trust if she is the sole beneficiary. Six-State Synopsis of Trust Laws, OGC V (P~) to Gloria P~, ARC (Feb. 26, 1992). Our prior opinion relied on the general principles of trust law and on an appellate court decision, *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621 (Ohio Ct. App. 1967). *See* Restatement Second of Trusts 339; Ohio Jurisprudence 3d, Trusts 150 (1989, 1997 Supp.). The law regarding this issue does not appear to have changed since our 1992 opinion. We believe that if Ms. D~ is the grantor and the sole beneficiary of the trust, she can revoke it and use the funds to pay for her basic needs.

Ms. D~ is the grantor of the trust. The trust is funded with money she obtained through settlement of a personal injury lawsuit and was created by the court at her request. *See* POMS SI 01120.200J.3.a.

Ms. D~ is also the sole beneficiary of the trust. The trust provision requiring reimbursement of the state does not make the state a beneficiary. A beneficiary is "[t]he person for whose benefit property is held in trust." Restatement (Second) of Trusts, 3(4); Ohio Jurisprudence 3d, Trusts 3 (1989, 1997 Supp.). The settlement proceeds were placed in trust to benefit Ms. D~. Upon Ms. D~'s death, the trustee is required to reimburse the State of Ohio, pursuant to 42 U.S.C. 1396p(d)(4)(A), for amounts paid for Ms. D~'s medical assistance. This trust provision does not benefit the state, but merely repays it for the costs of providing benefits to Ms. D~ during her lifetime. *See* Illinois OBRA '93 Trust for Dominick J. G~, ~, OGC-V (D~) to Gerald K~, Center Director (Apr. 17, 1997) at 4; Supplemental Security Income-Wisconsin Trust- Michelle J. L~, OGC-V (M~) to Gloria P~ ARC-MOS (June 9, 1997); Grantor Trusts - General Policy and Responses to Specific Inquiries, OGC-I (K~) to Barbara B~, Deputy ARC (Aug. 21, 1995).

The trust provision requiring that remaining funds be distributed as directed in Ms. D~'s will or under the intestacy statutes does not create additional beneficiaries. According to the Restatement (Second) of Trusts, 127, comment (b), when an individual "transfers property in trust to pay the income to himself for life and on his death to pay the principal to his estate, or to his personal representatives," he is the sole beneficiary of the trust. This language was cited with approval in *Mumma v. Huntington Nat'l Bank of Columbus*, 223 N.E.2d 621, 625 (Ohio Ct. App. 1967). Because Ms. D~ is both the grantor and the sole beneficiary of the trust, she has the capacity to revoke it and use the proceeds for her support and maintenance.

The provision for amendment only by the probate court should not prevent Ms. D~ from revoking the trust. We see no legal basis for the court to prevent Ms. D~ from revoking a trust that was created with her money and at her request.

CONCLUSION

For the above reasons, we believe the trust principal and income should be considered a resource when determining Ms. D~'s eligibility for SSI.

II. PS 00-195 Ohio Tuition Trust for Robert D. D~

DATE: July 3, 1997

1. SYLLABUS

A contract made with the Ohio Tuition Trust Authority (OTTA) to purchase tuition credits creates a tuition trust. Ohio law provides that tuition credits already purchased with OTTA can be refunded and the contract terminated in limited circumstances. For example, if the OTTA determines the beneficiary of a trust becomes disabled and incapable of participating in higher education, the contract may be terminated and the credits refunded. A physician's statement that the beneficiary of the trust is disabled is generally sufficient to establish the disability. Also, Ohio law imposes no restrictions on the use of the money once it's refunded.

Therefore, in those limited circumstances where a contract can be terminated, the trust can be considered revocable. However, if the OTTA does not permit termination of the contract, the trust would be considered irrevocable.

2. OPINION

This is with reference to your request for advice as to whether a tuition trust account established by Douglas D~ ("D~") for the beneficiary, Robert D. D~ ("Robert"), constitutes an irrevocable trust or is a countable resource to Robert. You also asked us whether Robert or his parents would have unrestricted access to the trust principal and if the principal could be used for his support and maintenance if we determined that the trust is revocable. We have concluded that the trust is most likely revocable, and the trust assets could be subject to deeming and therefore a resource countable to Robert. In addition, we have identified no restrictions on the use of the trust assets if the trust were revoked.

Robert D~ was born on February 20, 1989. His father, Douglas, entered into a contract on June 19, 1990 with the Ohio Tuition Trust Authority ("OTTA") to purchase tuition credits, thereby creating a tuition trust naming Robert as the beneficiary. The contract designates Douglas as the individual to whom any refund would be made under the contract.

Ohio law provides that the value of tuition credits already purchased and held by the OTTA may be refunded if the contract is terminated, and provides for termination of the contract in limited circumstances. *See* Ohio Rev. Code Ann. 3334.10 (A~ 1997). The relevant provision here allows for termination of the tuition payment contract if the beneficiary becomes permanently disabled. *See id.* 3334.10(A)(1). Upon termination of the tuition payment contract due to disability, the OTTA will refund the value of the tuition credits already purchased, computed using one of two methods, to the person designated in the contract to receive the refund (here, Douglas). The statute imposes no restrictions on the use of money refunded.

The OTTA defines disability as a "limitation of an individual's learning ability that results from an injury or disease which renders the individual incapable of participating in higher education, as determined by the OTTA." The OTTA informed us that a physician's statement that a beneficiary is disabled is generally sufficient to establish disability.

The trust Douglas established is therefore revocable if Robert is "disabled" as defined by the OTTA. The medical reports you sent indicate that Robert is autistic and has a carnitine deficiency. Other information you provided shows that Robert was found entitled to Supplemental Security Income in 1993 because he met listing 112.05D. That listing requires a full scale IQ score between 60 and 70. Individuals with IQ scores in this range fall within the mild mental retardation category. *See* Amer. Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) 41 (4th ed. 1994). Such individuals can generally "acquire academic skills up to approximately the sixth-grade level" by their late teens. *Id.* Given these intellectual limitations and the additional impairments noted above, it is unlikely that Robert will progress academically beyond the sixth grade level by his late teens, when most individuals enter college. It therefore appears that he would likely be disabled as OTTA defines that term. We believe Robert's physician would provide a statement that Robert is disabled and that the OTTA would allow Douglas to terminate the tuition payment contract. Accordingly, the trust appears to be revocable, and Douglas would be entitled to a refund of the value of the tuition credits already purchased calculated by one of the two methods set forth above.

Based on the foregoing, we conclude that the trust established by Douglas for Robert is most likely revocable, and the money that would be refunded to Douglas upon termination of the contract could be subject to deeming under the applicable regulations and a countable resource to Robert. Because the contract can only be terminated (and the trust revoked) if the OTTA is satisfied that Robert is disabled unable to participate in higher education the agency should consider any evidence the D~s may provide demonstrating that the OTTA will not permit them to terminate the contract, which would, of course, make the trust irrevocable.

A. PS 10-122 SSI-Ohio- Review of Ownership Interest of Traci S~ in a Home in Ohio- REPLY Your Reference: S2D5G6, SI 2-1-5 OH Our Reference: 10-0101

DATE: July 13, 2010

1. SYLLABUS

This opinion addresses whether a quit claim deed must be signed for ownership interest to end on real property when a divorce decree has already ordered said property ownership be terminated. In this case, the claimant married in 1995 and co-owned a house with her spouse. The claimant separated from her spouse and applied for SSI in

November 2007. In May 2008, a divorce decree was issued stating that her spouse owned the house free and clear of any claim from the claimant and stipulated that she must sign a quit claim deed to the real property. Although the claimant did not sign a quit claim deed, the opinion finds that the real property is not a resource to the claimant because the divorce decree served to terminate her ownership interest.

2. OPINION

You asked us whether a house is a resource to Traci S~ for purposes of the Supplemental Security Income program, where the deed to the house currently includes Ms. S~'s name, but a May 27, 2008 divorce decree required Ms. S~ to sign a quit claim deed of the house. We believe for the reasons stated below that the house was not a resource to Ms. S~ as of the date of the divorce decree.

BACKGROUND

Traci S~ married Bert S~ in January 1995. During their marriage, Mr. and Ms. S~ owned the house in question. You explained that Ms. S~ applied for Supplemental Security Income in November 2007. The two were divorced pursuant to a Decree of Divorce ("Decree") issued by the Butler County Court of Common Pleas, Division of Domestic Relations (the "Court") on May 27, 2008. The Court ordered that Bert S~ would retain the property free and clear of any claim of Traci S~. The Court further ordered Traci S~ to sign a quit claim deed at the time of the final hearing. You stated that despite the passage of more than two years, Traci S~ has not signed a quit claim deed. You explained that Traci S~ is not living in the house and that Bert S~ is renting the house to a third party.

DISCUSSION

To be entitled to SSI, an individual must have limited income and resources. *See* 42 U.S.C. § 1382(a). The term "resource" includes real property that an individual owns and could convert to cash to be used for her support. 20 C.F.R. § 416.1201(a). The issue here is whether Traci S~ has an ownership interest in the house in question, given that she did not sign a quit claim deed, despite an order in the Decree requiring her to do so. We conclude that the property has not been a resource of Traci S~ since May 27, 2008, the date of the Decree. The decision in *Goodrich v. VanVliet,* No. 446, 1982 WL 3404 (Ohio App. 4 Dist. March 24, 1982) is instructive in this case. In *Goodrich, Burneda Goodrich* and *Alfred VanVliet* divorced, and in the divorce decree, Ms. *Goodrich* was ordered to convey real property to Mr. *VanVliet*. Ms. *Goodrich* instituted a partition action (action to separate ownership in real estate, *see* Ohio Rev. Code ch. 5307), but the trial court dismissed the case, in part, because it found that the divorce decree deprived Ms. *Goodrich* of an possessory right in the real estate. *Id.* at *1. The appeals court affirmed, finding that the divorce decree ordering Ms. *Goodrich* to convey her interest in the property terminated her interest. *Id.* Therefore, despite Traci S~'s failure to sign a quit claim deed, the Decree served to terminate her interest in the house. Therefore, it was not a resource for purposes of the SSI program as of the date of the Decree. Likewise, any rents collected from the property should not be considered as income to Ms. S~.

CONCLUSION

The house should not be considered a resource to Ms. S~ as of May 27, 2008, because her interest was terminated by a divorce decree on that date.

Sincerely,
Donna L. C~
Regional Chief Counsel Region V

By:_____
Russell C~
Assistant Regional Counsel

B. PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~

DATE: September 16, 2002

1. SYLLABUS

This opinion addresses whether a personal effect (in this case, a piano) owned by an SSI recipient, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required by her physical condition under the household goods and personal effects exclusion. This is essentially an evidentiary issue; i.e., the key is whether the fact finder in the FO has sufficient evidence to determine that the piano is required by the individual's physical condition. Under 20 CFR 416.1216(c), certain household goods and personal effects are excluded from SSI resource counting if they are "required because of a person's physical condition." As long as there is sufficient evidence for the fact finder to determine that the piano (or similar item) is required as treatment or therapy for the individual's physical condition, then the item could be excluded as a resource. If the fact finder cannot determine that the piano (or similar item) is required, then the current market value of the piano (or similar item) is subject to the $2,000 maximum exclusion for household goods and personal effects [20 CFR 416.1216(a)-(b)]. It should be noted that the exclusions discussed above do not appear in the Social Security Act.

2. OPINION

You asked whether a piano, owned by SSI claimant Alicia W~, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required because of her physical condition. We conclude that, although there is no caselaw or other legal authority interpreting the applicable regulation, 20 C.F.R. § 416.1216(c), the Agency may consider the piano as an excludable resource, under 20 C.F.R. § 416.1216(c), provided Ms. W~ can show that playing the piano is required as treatment or therapy for her physical condition. If the Agency finds that the piano is not so required, further development and consideration may be warranted to determine the actual current market value of the piano.

FACTS

Alicia W~ owns a baby grand piano that the Wausau Field Office reported is worth $7000. It is not clear how the valuation of $7000 was reached. For purposes of this memorandum, we assume that $7000 is likely the amount Ms. W~ paid for the piano. Ruth J~, a benefit specialist with the Aging and Disability Resource Center of Marathon County, has advised SSA that Ms. W~ tried to sell her piano by advertising it in a local newspaper and with the Wausau Conservatory of Music and by contacting several local churches. Two individuals expressed interest, but Ms. W~ received no offers to buy the piano. We do not know what price Ms. W~ asked or whether anyone would be willing to purchase the piano for less than her asking price. Ms. J~ stated, in April 2002, that a local music store sold only one comparable piano in the preceding year. The price that the music store charged was not reported. Although Ms. J~ indicated that she was providing the field office with a statement from the music store, no such statement was included in the materials forwarded to us. Ms. J~ also reported that Ms. W~ uses the piano daily and that she is the only member of her household.

Ms. W~ has a congestive heart condition and hypertension. On December 12, 2001, her physician, Arthur W~, M.D., wrote a letter stating that playing piano provided Ms. W~ with positive health benefits in terms of stress relief, which resulted in positive benefits for her hypertension. Dr. W~ further stated that being forced to sell her piano in order to receive SSI "would have a deleterious effect on her overall health."

DISCUSSION

The Social Security Act (the Act) provides that certain resources are excludable resources for SSI purposes. 42 U.S.C. § 1382b. Among the resources that may be excluded are household goods and personal effects, but only to the extent that their total value does not exceed the $2000 limit set by the Commissioner. 42 U.S.C. § 1382b(2)(A); 20 C.F.R. § 416.1216(b). The regulations define "personal effects" to include musical instruments. Thus, a portion of the value of Ms. W~'s piano could be excluded as a personal effect, provided the total value of her other personal effects and

household goods is less than $2000. However, it appears that Ms. W~'s piano may be worth considerably more than that. We must determine, therefore, whether her piano may be excludable for some other reason, or whether the value of her piano can be considered less than previously assumed.

Exclusion for Items Required for Person's Physical Condition

The exclusion for household goods and personal effects that are required because of a person's physical condition does not appear in the Act. *See* 42 U.S.C. §1382b. The exclusion became a part of SSI regulations effective October 20, 1975. 40 Fed. Reg. 48911, 48916 (October 20, 1975). Neither the preamble to the final regulation published on that date nor the preamble to the proposed regulation states the rationale for the exclusion or gives any further clarification as to its application. *See* 39 Fed. Reg. 2487 (January 22, 1974); 40 Fed. Reg. at 48911. Thus, we cannot ascertain from those publications whether the Agency intended for the exclusion to apply to items such as a piano that provide "positive health benefits" in terms of an individual's physical condition. The POMS, likewise, provides no guidance in this situation. *See* POMS SI 01130.430. We were unable to find any caselaw interpreting the regulatory provision or any OGC precedential opinion on the subject. Similarly, we found no caselaw regarding other needs-based federal entitlement programs that might be helpful in interpreting 20 C.F.R. § 416.1216(c).

The Internal Revenue Code (IRC), however, includes a personal income tax deduction for medical care expenses. 26 U.S.C. § 213(a). The definition of "medical care" includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . .." 26 U.S.C. § 213(d)(1)(A). The Internal Revenue Service (IRS) addressed the issue of whether the cost of a piano could be deducted under the IRC medical care provision in two private letter opinions. In the first, parents bought a piano so that their child, who had polio, could strengthen her finger muscles and improve her posture. Priv. Ltr. Rul. 59-03205410A (March 20, 1959), 1959 WL 59702. The IRS determined that, if the use of the piano was prescribed by a physician to mitigate the effects of the child's illness, and if the child was the only one to use the piano, a portion of the cost could be deducted as a medical care expense. *Id.* The portion of the piano's cost that could be deducted was "the minimum cost of a piano of a quality sufficient for the therapeutic purposes" subject to the ceiling of 7.5% of adjusted gross income, as provided in 26 U.S.C. § 213(a). Priv. Ltr. Rul. 59-03205410A. Another private letter ruling states that, after suffering a nervous breakdown, a taxpayer's daughter "was induced by her doctors to resume piano lessons, in view of her particular aptitude in this area, as it was hoped that this would be good therapeutic treatment and would create a motivation toward recovery." Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. The taxpayer could not find a suitable used piano, so he bought a new piano for $800. The IRS held that the taxpayer could take a medical care deduction for "an amount which does not exceed the minimum cost of a piano of a quality sufficient to effect the prescribed therapy," subject to the limitations in 26 U.S.C. § 213. Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. To the extent, however, that the expenditure was "elaborate," i.e., beyond the need for the prescribed medical therapy, it was not deductible because it was not directly related to medical care. *Id.*

The IRC provision relied upon in these two private letter rulings is not identical to the resource exclusion provision in the Social Security Regulations. The IRC section would apply to expenditures for treatment of a mental condition as well as a physical condition, but the Social Security regulation would allow exclusion of an item only if it is required because of the SSI claimant's physical condition. Compare 26 U.S.C. § 213(d)(1)(A), 20 C.F.R. § 416.1216(c). While the Social Security regulation allows for exclusion of a resource "required because of a person's physical condition," 20 C.F.R. § 416.1216(c) (emphasis added), the IRC provision, 26 U.S.C. § 213(d)(1), allows a tax deduction for "amounts paid" for treatment (emphasis added). Although the IRC section does not address whether an expenditure is medically required, the private letter rulings provide some support for the conclusion that, in some cases, piano playing may be prescribed as part of an individual's medical treatment.

There is nothing in the Social Security Act or Social Security Regulations to direct a conclusion on this issue. We think it reasonable, however, to conclude, based on the private letter rulings, that there are situations in which a doctor may reasonably require a patient to play a piano as a necessary part of treatment or therapy for the patient's physical condition. Unlike the medical care deduction provision in the IRC, the SSI exclusion for items required for a person's physical condition does not place any limitation on the value of items which can be excluded, even though some of the items listed, such as an engagement ring or a dialysis machine, could have considerable monetary value. 20 C.F.R. § 416.1216(c); *see also* POMS SI 01130.430 ("Items Excluded Regardless of Value") (emphasis added).

The letter from Ms. W~'s physician states that it is important that she enjoy the benefits of her piano because it relieves her stress and, consequently, has a positive effect on her hypertension. The doctor further states that selling the piano to receive SSI benefits would be "deleterious" to her health. In the absence of evidence casting doubt on the doctor's credibility, we think this statement may be sufficient for a fact-finder to conclude that the piano is required for Ms. W~'s physical condition. You may want to obtain clarification from the doctor, however, that he considers playing the piano a required part of Ms. W~'s treatment or therapy for her hypertension or her congestive heart condition. You may also want to verify that the "deleterious" effect of selling the piano refers to her inability to receive the therapeutic benefit of playing the piano, rather than to other factors, such as a contemplated elevation of her blood pressure because selling the piano would upset her.

If you find that playing a piano is required for Ms. W~'s physical condition and she is the only person who will use the piano, the entire value of the piano should be considered an excludable resource. If, however, you find that playing piano is not required for Ms. W~'s physical condition, it will be necessary to determine the piano's value.

Determining the Current Market Value

If you determine that the piano is not an excludable resource under 20 C.F.R. § 416.1216(c), the current market value of the piano will be subject to the $2000 maximum exclusion for household goods and personal effects. 20 C.F.R. § 416.1216(a)-(b). Contrary to Ms. J~'s contention, the fact that Ms. W~ was unable to sell her piano does not necessarily mean that the value of the piano is zero. The piano likely has some value, even if it is not the $7000 purchase price. It is possible that the value of the piano is zero, however, if, for example, a buyer's expense to move the piano from Ms.W~'s home to a new location exceeds the price that a buyer would ordinarily pay for the piano.

The information provided to us did not indicate what price Ms. W~ was asking for the piano when she advertised it. It may be that she was simply asking a higher price than the current market value and, therefore, did not get an offer. We suggest further development to ascertain the current market value of the piano. For example, did Ms. W~ get any offers to buy the piano and, if so, what amount was offered? Ms. J~ indicated that the local music store sold one comparable piano over the past year. What was the sale price? Are there other music stores in the area that carry comparable pianos? If so, what price do they charge? Has Ms. W~'s piano been appraised? How much would a pawn shop pay for the piano, given that it could be difficult to sell quickly?

We note that POMS SI 01150.200 contains a provision that, under certain circumstances, allows for conditional SSI benefits for a limited period while an individual attempts to sell a non-liquid resource. The individual must agree to sell the resource at the current market value within a specified period and use the proceeds to refund the overpayment of conditional benefits. POMS SI 01150.200B.1. The period of conditional benefits where personal property is concerned would generally end after three months, except that there could be one three-month extension granted for good cause. SI 01150.201A. The individual must make reasonable efforts to sell the resource, taking all necessary steps to sell the resource through the local media. SI 01150.201B.1. The information provided to us does not indicate whether Ms. W~ was eligible for, or received, conditional benefits under these POMS provisions.

We also note that, even if Ms. W~ purchased the piano for $7000, and if the Agency determines that the current market value of her piano is less than $7000, it does not necessarily mean that her purchase was a transfer for less than fair market value. *See* POMS SI 01150.005A. (transfers of resources for less than fair market value after December 14, 1999 may result in a period of SSI ineligibility). Nor does the fact that Ms. W~ may not be able to sell her piano for the same price she paid mean that she paid more than the fair market value. Fair market value is the current market value of a resource at the time the resource is transferred, i.e., the going price for which it could reasonably be expected to sell at the time, on the open market in the geographic area involved. POMS SI 01150.005. If Ms. W~ bought her piano on the open market, e.g., from a merchant, the $7000 purchase price is assumed to be the fair market value at the time of the transfer. POMS SI 01140.005C.4.a. It may be that the value of the piano has depreciated since its purchase, or simply that the going price for a comparable piano was $7000 at the time of the purchase but is less now due to economic conditions. A prospective buyer might be willing to pay more for a piano bought from a merchant whose reputation is known than he would pay in a private sale by a stranger. A merchant

might also be in a position to charge more because he could offer a factory guarantee or a store guarantee that a private seller like Ms. W~ cannot offer. Finally, a merchant might be in a position to wait until a buyer came along who was willing to pay a higher price. Thus, the current market value of the piano, in Ms. W~'s hands, may be less than the amount she paid for the piano, even though the original purchase was not a transfer for less than fair market value.

CONCLUSION

In summary, we conclude that, if the Agency fact-finder concludes that Ms. W~ has shown that playing piano is required as part of her treatment or therapy for her physical condition, the piano's entire value may be excluded under 20 C.F.R. § 416.1216(c). If the fact-finder concludes that playing piano is not required for Ms. W~'s physical condition, the current market value of the piano should be considered a household good or personal effect subject to the $2000 maximum exclusion for all household goods and personal effects. However, the Agency may want to give further consideration to the current market value of the piano in Ms. W~'s hands.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By:_____
Nancy L. B~
Assistant Regional Counsel

C. PS 00-160 Revised Opinion - Non-Home Real Property for Mary A. B~

DATE: September 30, 1996

1. SYLLABUS

This opinion concerns whether or not a non-principal residence is considered an excludable resource for SSI purposes.

Generally, property that is not the principal place of residence is not considered an excludable resource. However, if the sale of the property would cause undue hardship due to the loss of housing to a co-owner of the property, an exception would be made and the property would remain an excluded resource.

Thus, the residential property is not considered a resource for SSI purposes.

2. OPINION

The claimant, Mary A. B~, resides in Cambridge, Massachusetts but holds title to property located in Ohio. The claimant's daughter, Tonya B~, lives on the property in Ohio and pays all expenses connected with the residence. The claimant and her daughter have an informal agreement that when the property is paid for, the claimant will quit claim the property to her daughter as repayment "over several years" of past loans and for the care and maintenance of the property.

Generally, property such as in this case, that is not the principal place of residence, is not considered an excluded resource. POMS SI 01130.100A.6(a). However, if the sale of the property would cause undue hardship due to the loss of housing to a co-owner of the property, an exception would be made and the property would remain an excluded resource. POMS SI 01130.100A.6(b).

Therefore, if Mary B~'s daughter, Tonya B~, can show she is a co-owner of the property and the sale of the property would cause her undue hardship, the property remains an excluded resource. Since Tonya B~ does not hold legal title to the property (as discussed in our previous opinion letter), in order to show co-ownership she must show an equitable ownership interest. According to POMS SI 01130.100B.1(e), evidence of an "equitable" ownership interest in property can result from personal considerations or from making mortgage payments, making or paying for additions

to a shelter, or making improvements to a shelter. It appears Tonya B~ is making the mortgage payments on the property.

Furthermore, Ohio case law also recognizes that there are two kinds of ownerships, equitable and legal:

An 'equitable owner' is one who is recognized in equity as the owner of the property, because the real and beneficial use and title belong to him, although the bare legal title is invested in another.

A 'legal owner' is one in whom the legal title to real estate is vested, but subject to the rights of any equitable owner.

Levin v. Carney et al., 120 N.E. 2d 92, 96 (1954).

Mary and Tonya B~ have entered into an agreement, or executory contract, entitling Tonya B~ to an equitable ownership interest in the property due to her care and maintenance of the property and past loans made by her to Mary B~. When full payment of the property is completed, Tonya B~ acquires a completed equity which may entitle her to a conveyance of the legal title. Possession by Tonya B~ is notice to everyone of her equitable rights. B*utcher v. Kagey Lumber Co.,* 128 N.E. 2d 54, 56 (1955).

Since Tonya B~ has shown an equitable ownership interest in the property, due to her care and maintenance of the property as well as a result of personal considerations, and it would appear she would suffer undue hardship from the sale of the property since it would deprive her of her home, the property should be considered to be an excluded resource.

4.29 OREGON

A. PS 00-340 Trust Document re: Jasen R~

DATE: September 27, 2000

1. SYLLABUS

This opinion concerns an Oregon trust established in 1994. The opinion states that this trust is irrevocable.

The trust was established with the individual's funds from a damage settlement. Therefore, the individual is the grantor of the trust. The trust also states that, upon the individual's death, the trust will repay the State medical assistance agency for the care provided to the individual.

The trust further states that, upon the individual's death, remaining funds in the trust are to be distributed to Wildwood Personal Initiatives which is a nonprofit corporation. The opinion states that, under Oregon law, an entity such as a nonprofit corporation can be a beneficiary of a trust. Therefore, because the trust has a valid remainder beneficiary, the trust is irrevocable. NOTE: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You have requested a legal opinion regarding the "Jasen Frank R~ Irrevocable Supplemental Needs Trust" (hereafter "Supplemental Needs Trust") to determine whether this trust document is revocable. You indicated that you advised the Portland South SSA field office that it is a revocable grantor trust and should be included as a resource to Mr. R~. You specifically asked whether 42 U.S.C. § 1396d(4)(a) is determinative.

FACTUAL BACKGROUND

Candace R~, mother and guardian of Jasen R~, established the subject trust on December 29, 1994. The trust names Candace R~ as grantor and trustee. Jasen Frank R~ is the sole beneficiary. Ms. R~ initially funded the trust with the balance of a settlement for damages to Jasen R~ in the amount of $7,533.28. Article 5 of the trust states the intent of the trust is to "create a supplemental and emergency fund for the benefit of the beneficiary, and not to displace any assistance which might

otherwise be available to him from any public or private sources." Supplemental Needs Trust, at 1. Article 11, section 11.3 of the trust states that "[u]nder no circumstances can the beneficiary compel a distribution from the trust for any purpose." Supplemental Needs Trust, at 5.

Article 10 of the trust provides that upon the death of the beneficiary, the remaining trust property will be distributed first to any state that has provided medical assistance to the beneficiary up to the amount of monies expended on the beneficiary's behalf. Any remaining trust property will then be paid to Wildwood Personal Initiatives. Supplemental Needs Trust, at 4.

ISSUE PRESENTED

Your question is whether the Supplemental Needs Trust is revocable or irrevocable.

DISCUSSION

The Social Security Administration considers property an available resource if an individual has the right, authority or power to liquidate it. 20 C.F.R. § 416.1201(a)(1) (1997). See also POMS SI 01120.200(D)(1).

The attorney has cited 42 U.S.C. § 1396p(d)(4)(A) for the proposition that because the beneficiary's mother is named the grantor and she set up the trust, the trust is not a grantor trust. While the above statute is cited in the Social Security Act (§ 1917(d)), the agency does not extend its applicability beyond the Medicaid program. The statute is contained in Title XIX of the Social Security Act, not Title XVI which covers SSI. Because the beneficiary's mother used the beneficiary's settlement proceeds to set up the trust, it is still considered a grantor trust.

The question of whether this trust is revocable turns on the issue of its remainder beneficiary. Jasen R~ is the grantor and the sole beneficiary of the trust. Therefore, if the trust names a valid remainder beneficiary, it will be considered an irrevocable trust. Likewise, if it does not, it will be considered revocable. See Am.Jur.2d Trusts, § 96; Lucas v. Velikanje, 2 Wash.App. 888, 471 P.2d 103 (1970). The trust names Wildwood Personal Initiatives as the remainder beneficiary. Wildwood Personal Initiatives is a nonprofit corporation (Telephone call to Wildwood Personal Initiatives on October 17, 1997). A person for whose benefit property is held in trust is a beneficiary. Restatement (Second) of Trusts, § 3 (4) (1959). The term "person" includes corporations and unincorporated associations. Id., comment c. Oregon follows the Restatement of Trusts. See e.g., Jimenez v. Lee, 274 Or. 457, 547 P.2d 126 (1976). ORS 65.077(4) provides that a nonprofit corporation has the power to "take by gift, devise or bequest" ... "real or personal property or any interest in property, wherever located."

Wildwood Personal Initiatives is sufficiently definite and meets the definition of a "person" for the purposes of serving as a remainder beneficiary.

The Supplemental Needs Trust is a grantor trust. However, given that the trust does not allow the beneficiary to compel a distribution under any circumstances and that it contains a validly named remainder beneficiary, it is our opinion that the trust is irrevocable.

4.30 PENNSYLVANIA

A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~

DATE: August 27, 2003

1. SYLLABUS

Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

2. OPINION

INTRODUCTION

You requested our advice on whether under the laws of the jurisdictions within Region III, a parent or grandparent can establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. In further conversations with your staff, we were instructed to assume that the trust agreements that you wish us to consider satisfy the requirements of 42 U.S.C. '1382b(e)(5).

SUMMARY

We believe that based on court precedent, every jurisdiction within Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establishes an empty trust or a seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

BACKGROUND

To qualify for supplemental security income (SSI), an individual must not have resources that total more than $2,000. 20 C.F.R. ' 416.1205 (2003). In addition, as a general rule, a trust established with the assets of an individual (or spouse) will be considered a resource for SSI eligibility purposes. 42 U.S.C. '1382b(e)(3). There is, however, an exception to these resource provisions. Under 42 U.S.C. '1382b(e)(5) of the Social Security Act, if any agreement satisfies the criteria found in 42 U.S.C. ' 1396p(d)(4), it is not counted as a resource. Section 1396p(d)(4) provides an exception for counting a trust as a resource if it is a:

trust containing assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

DISCUSSION

Within the state jurisdictions in Region III (including the District of Columbia), neither the courts nor the lawmakers define a trust. Rather, each jurisdiction sets out in court precedent its own test for finding a valid trust. Below is a breakdown by jurisdiction of the applicable case law as applied to your inquiry.

Virginia

According to Virginia precedent:

express trust is created when the parties affirmatively manifest an intention that certain property be held in trust for the benefit of a third party. *See Peal v. Luther*, 199 Va. 35, 97 S.E.2d 668, 669 (1957); *Broaddus v. Gresham*, 181 Va. 725, 26 S.E.2d 33,35 (1943). An express trust may be created A without the use of technical words.@ Broaddus, 26 S.E.2d at 35. All that is necessary are words, see id. at 35 (citation omitted), or circumstances, see Woods v. Stull, 182 Va. 888, 30 S.E.2d 675, 682 (1944) (citation omitted), A which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . .,@ Broaddus, 26 S.E.2d at 35; see also Schloss v. Powell, 93 F.2d 518, 519 (4th Cir. 1938).

Old Republic Nat. Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998).

When an agreement satisfies 42 U.S.C. '1382b(e)(5), there will always be a corpus. It is irrelevant that a parent or grandparent sets up an agreement that has little or no funds, because ultimately the disabled individual for whom the trust is established will provide the assets. In addition, in these agreements, the disabled individual will be the settlor. 76 Am. Jur. 2d Trusts (1992) (stating that under general trust principles, the person who provides consideration for the trust is the settlor, even though in form the trust is created by another person). Further, the disabled individual will also be a beneficiary, as the trust is established for his/her benefit. Moreover, the essential purpose of the agreement will be to ensure that a trust established with the assets of the settlor is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. In short, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), circumstances unequivocally show an intention that the legal estate be vested in one person, to be held in some manner or some purpose on behalf of another. *Id*. Therefore, Virginia courts will recognize agreements that satisfy 42 U.S.C. ' 1382b(e)(5) as valid trusts.

Delaware

Delaware precedent states that:

No particular words or form are required in order to create an express trust. All that is required is that the parties intended that a relationship, which equity would describe as a trust, exist. “When a question arises as to whether or not an agreement creates a trust, the courts look objectively at the result to determine the matter. . . . The question in each instance is whether the kind of relationship known to the law as a trust has been created. ” It is the intent of the settlor as expressed in the agreement itself which is controlling as to whether a trust has been created. It is immaterial that the parties did not know they were creating a trust.

Cravero v. Holleger, Del. Ch., 566 A.2d 8, 13 (1989) (citations omitted).

When an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the settlor's intent will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because the settlor's expressed intent in such an agreement is to establish a trust, a Delaware court would find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5) is a valid trust.

District of Columbia

The District of Columbia Court of Appeals noted that “there must be proof of the settlor's intention to create a trust, which may be manifested by written or spoken language or by conduct, in light of all surrounding circumstances.” *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983)). The court also added that “[n]o particular form of words or conduct is necessary to manifest an intention to create a trust.” *Id*. at 1136. Rather, the courts in the District of Columbia look to several “evidentiary factors” in determining that intent:

(1) the imperative, as distinguished from precatory, nature of the words used by the settlor to create a trust; (2) the definiteness of the trust property; (3) the certainty of the identity of the trust beneficiaries; (4) the relationship between and financial position of the parties; (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and (6) whether the result reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.

Id.

In an agreement that satisfies the requirements of 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five provides the assets and is the settlor and a beneficiary. The state Medicaid provider(s) will be reimbursed. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI. Logically, the settlor would desire having the agreement construed as a trust. Consequently, when a court within the District of Columbia scrutinizes an agreement established pursuant to 42 U.S.C. '1382b(e)(5) under the evidentiary factors discussed in *Duggan*, it will find a valid trust.

Maryland

The Maryland Supreme Court has stated that:

From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002) (citations omitted).

In an agreement established pursuant to 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five, provides the assets and is the settlor. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because under Maryland law the settlor's intent ultimately determines whether a valid trust exists, a court within that jurisdiction will find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5), which has a clear intent, is a valid trust.

Pennsylvania

The Pennsylvania Supreme Court has discussed the criteria for a valid trust using the following language:

[N]o particular form of words or conduct is necessary to create a trust. Neither the presence nor the absence of words “trust,” “trustee,” or “beneficiary” is determinative of an intention to create a trust. The question is whether the agreements taken as a whole evidence an intent by [the settlors] “to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another.” “To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred.”

* * *

'A trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefits of the other. The term 'trust' is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee....'

Buchanan v. Brentwood Federal Savings & Loan Association, 457 Pa. 135, 143, 20 A.2d 117, 122 (1974); *R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Development Inc*., 334 Pa.Super. 72, 77-78, 482 A.2d 1086, 1089 (1984) (quoting *Buchanan*) (citations omitted).

As mentioned in the discussion of Virginia law, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the property, the settlor, a beneficiary, and the purpose will be known. In other words, an agreement that satisfies the requirements established in 42 U.S.C. '1382b(e)(5) would evidence intent by a settlor to impose upon a transferee of property equitable duties to deal with the property for the benefit of another. *Id*. Therefore, under Pennsylvania law such an agreement amounts to a valid trust.

West Virginia

In West Virginia, courts will determine whether a valid trust is created based upon the intent of the parties. *Bowne v. Lamb*, 119 W.Va. 370, 193 S.E. 563, 565 (1937). Further, "[w]hether the parties intended to create a trust is determined not solely from the wording of the agreement but also from their actions under it and the way the fund is handled." *Id*. When an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), the parties unquestionably intend to create a trust to ensure that the settlor does not have his/her assets in the agreement counted as a resource for purposes of SSI and that the state will be reimbursed for medical assistance that it paid to the settlor. Because the parties' intent will be apparent when an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), a West Virginia court will find that such an agreement is a valid trust.

CONCLUSION

It is our opinion that every jurisdiction within Region III would recognize as a valid trust any agreement established pursuant to 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

James A. W~
Regional Chief Counsel

By:_____
Andrew C. L~
Assistant Regional Counsel

B. PS 00-224 Pennsylvania Trust for Alexander J. E~

DATE: November 1, 1999

1. SYLLABUS

At issue in this opinion is whether or not the trust is considered a countable resource for Supplementary Security Income (SSI) purposes.

Under Pennsylvania law, if one is both the settlor and sole beneficiary of a trust, he/she has the authority to revoke the trust and use the assets for support and maintenance. Thus, the trust is a countable resource for SSI purposes.

2. OPINION

You asked for an opinion on whether the trust established for the benefit of Alexander J. E~ is a countable resource for Supplemental Security Income (SSI) purposes. Because Mr. E~ has the legal authority to revoke the trust and use the assets for his support and maintenance, we conclude that the assets in the trust should be considered a resource to him.

FACTS

At issue is a discretionary trust entitled "Alexander James E~ Irrevocable Trust Agreement" [hereafter "Trust Agreement"] created for the benefit of Alexander James E~, who is disabled. Alexander's parents, James and Rebecca E~ are named as the settlors and co-trustees. The stated intent of the trust is to serve as a special and/or emergency fund to provide for Alexander's "special needs" (Section 2.02). The trust agreement states that the trust funds are not meant to displace or supplant public assistance or other sources of support which may be otherwise available to Alexander, and that the trust funds should not be administered in such a way as to cause public benefits "not to be initiated or terminated" (Section 2.03) The trust agreement further states that the trust principal or income should not be considered available to Alexander for purposes of determining his eligibility for public assistance, and in the event of a contrary ruling, the trustees may take whatever administrative or judicial steps are necessary to obtain a ruling that the trust funds are unavailable (Section 2.04).

According to the terms of the Trust Agreement, upon Alexander's death and after reimbursement to the state of Pennsylvania for prior medical assistance provided to Alexander and payment of any remaining funeral expenses, taxes, and/or expenses related to the running of the trust, the residue should be distributed upon the terms and conditions of Alexander's last will and testament, or in the absence of such will, to those persons who would be the Alexander's heirs had he died intestate (Section 2.05.02). The trust is to be governed, construed, and administered according to Pennsylvania law (Section 6.03).

DISCUSSION

The Social Security Act provides that an unmarried individual is not eligible for SSI if his or her countable resources exceed $2000. 42 U.S.C. § 1382(a)(1)(B)(ii). A resource is defined as cash or other liquid assets, or any real or personal property that an individual owns and could convert to cash to use for his support and maintenance. 20 C.F.R. § 416.1201(a) (1999). Property in trust can be a resource to the extent that it satisfies this definition. Thus, if Alexander has the authority to revoke the trust and then use the funds to meet his food, clothing, or shelter needs, the trust principal is a resource for SSI purposes. See POMS SI 01120.200(D)(1)(a). Whether Alexander can revoke the trust depends on Pennsylvania law.

Alexander Has Authority To Revoke The Trust Because He is Settlor and Sole Beneficiary

In this case, the trust purports to be irrevocable (Section 6.01). However, under Pennsylvania law, even if a trust expressly declares itself irrevocable, it may still be terminated if the settlor is the sole beneficiary of the trust and is not under a legal incapacity. See Schellentrager v. Tradesman Nat. Bank & Trust Co., 88 A.2d 773, 774 (Pa. 1952) (citing RESTATEMENT (SECOND) OF TRUSTS § 339 (1959)); In re Bowers' Trust Estate, 29 A.2d 519, 520-21 (Pa. 1943) (same); POMS SI 01120.200D3 (revocability of grantor trusts).

Here, Alexander's parents are named as the settlors of the trust.

However, under POMS SI 01120.200B2, Alexander would be considered the settlor as the trust was created from the settlement funds of his malpractice lawsuit. See RESTATEMENT (SECOND) OF TRUSTS § 3(1) (1959) (The person who creates the trust is the settlor).

Alexander is also the sole beneficiary. Even though the trust provides that, upon Alexander's death, any remaining assets shall be used to reimburse the state of Pennsylvania for prior medical assistance provided to Alexander and then paid to cover any remaining funeral expenses, taxes, and/or expenses related to the running of the trust, these provisions do not create any additional beneficiaries. Rather, these provisions merely require that the trustee reimburse the appropriate entities for benefits already conferred on Alexander. Thus, Alexander would be considered the actual beneficiary.

Nor does the direction to pay any residue to a class of beneficiaries designated by Alexander in his will create any additional beneficiaries whose consent would be required to terminate the trust. First, there is no indication that Alexander has designated any residual beneficiaries in a written will. Second, even if Alexander had executed a will, because a will is revocable at any time during the testator's life, nothing would prevent him from later canceling it. See Clarification of Regional SSA Program Circular 94-05 Concerning Trusts, OGC-V (Koven) to Trudy Lewis, Acting ARC Programs (5/24/95), at 3, fn 3.

That the residue upon Alexander's death should alternatively be distributed to his heirs as though he had died intestate does not create any additional beneficiaries. Where a trust purports to create an interest in favor of the grantor's "heirs at law," or to his "next of kin," the grantor is considered the sole beneficiary of the trust. See McCreary's Estate v. Pitts, 47 A.2d 235, 238 (Pa. 1946) ("When the remainder interest is to the settlor's next of kin [under the intestate laws], it is in substance a remainder to himself."); RESTATEMENT (SECOND) OF TRUSTS § 127 cmt. b (1959) (grantor is the sole beneficiary where he transfers property in trust to pay the income to himself for life and on his death to pay the principal to his estate). Under SSA policy, therefore, the

trust assets should be considered a countable resource to Alexander as he has the legal authority to revoke the trust and gain access to the funds. POMS SI 01120.D1B (authority to revoke or use trust assets).

CONCLUSION

In conclusion, we note that, because Alexander is the both the settlor and sole beneficiary of the trust, he has the authority under Pennsylvania law to revoke the trust and use the assets for his support and maintenance. The trust assets should therefore be considered a resource to him for purposes of SSI.

4.31 PUERTO RICO

A. PS 12-078 Aracelis' Eligibility for SSI Benefits

DATE: March 21, 2012

1. SYLLABUS

This opinion examines whether real property that no longer serves as the recipient's principal place of residence can be excluded from countable resources. The recipient owns a house in Puerto Rico that she no longer uses as her principal place of residence, and she alleges her daughter has an equitable ownership interest in the real property. The recipient's real property could be excluded from countable resources if the obtained case evidence proves the following: (1) the real property is the recipient's home (regardless of what is the intent to return); (2) the daughter is a co-owner of the house; and (3) the sale of the house would cause undue hardship, due to loss of housing, for the daughter.

2. OPINION

Question Presented

This office is responding to your request for legal advice regarding Aracelis' eligibility for SSI benefits. Aracelis is a current SSI recipient who owns a house in Puerto Rico. She claims that her adult daughter pays all costs related to the house and, as such, her daughter has an equitable ownership interest in the house. You asked whether the agency could exclude the value of Aracelis' house, under POMS SI 01130.100B.5.b, from her countable resources if her daughter lives in the house and has an equitable ownership interest in the house.

Opinion:

The agency could exclude the value of Aracelis' house from her countable resources, provided that it obtains statements from Aracelis' and her daughter indicating that the daughter (1) uses the property as her principal place of residence; (2) would have to move if the property were sold; and (3) has no other readily available housing.

Analysis:

The agency's regulations direct that if a claimant has the right to liquidate her real property then that real property is a countable resource. 20 C.F.R. § 416.1201(a)(1). The claimant's home, however, is an exception to the regulation and, as such, is considered an excluded resource. POMS SI 01130.100B.1. The POMS define a home as property in which the claimant has an ownership interest and that serves as the claimant's principle place of residence. POMS SI 01130.100A.1. Property ceases to be the principle place of residence as of the date the claimant left it with no intention of returning. POMS SI 01130.100B.4. Such property, if not excluded under another provision, is included in determining countable resources. *Id.* A claimant's home is an excluded resource, even if the claimant leaves the home with no intention of returning, if its sale would cause an undue hardship, due to loss of housing, for a co-owner of the property. POMS SI 01130.100B.5.b. Co-ownership of a property exists where an individual, other than the title holder, has established an equitable ownership interest in the property. An equitable ownership interest is a form of ownership that exists without legal title of property. POMS SI 01110.515A.2. An individual may acquire equitable

ownership interest in his or her home by performing certain activities such as making mortgage payments or paying property taxes. POMS SI 01110.515C.3.

For the agency to exclude the value of Aracelis' house from her countable resources, she must demonstrate that: (1) it is her home (regardless of whether she ever intends to return to it); (2) her daughter is a co-owner of the house; and (3) the sale of it would cause undue hardship, due to loss of housing, for her daughter. POMS SI 01130.100B.5.b.

As to the first prong, Aracelis must show that the house is her home. *See* POMS SI 01130.100A.1 (a home is property in which the claimant has an ownership interest and that served as the claimant's principle place of residence). The POMS instruct the agency to accept an individual's allegation of home ownership unless the file raises a question about it. *See* POMS SI 01130.100C.1. You have not indicated that there is any question about Aracelis' ownership interest in the property and, as such, for the purposes of this memo, we assume that she owns the home. If, however, there is an issue, the agency should request evidence of ownership, such as a tax assessment notice, a recent tax bill, a mortgage statement, a deed, or report of title search.

If Aracelis' daughter lives in the house and has an equitable ownership interest in it, then she is a co-owner and, as such, Aracelis satisfies the second prong. Here, it is not clear whether Aracelis has alleged that her daughter actually lives in the home, or only that the daughter pays all the related costs. You should obtain a statement from Aracelis and her daughter regarding their arrangement.

Regarding the third prong, Aracelis must demonstrate that the sale of the house would cause an undue hardship, due to loss of housing, to her daughter. POMS SI 01130.100B.5.b. An undue hardship would result if a co-owner: (1) uses the property as his or her principal place of residence; (2) would have to move if the property were sold; and (3) has no other readily available housing. POMS SI 01130.130A.2. Again, we recommend that you obtain a statement from Aracelis and her daughter about their arrangement to confirm whether these elements are present.

CONCLUSION

If Aracelis satisfies all three prongs, we recommend excluding the value of her home from her countable resources.

Sincerely,
Mary Ann Sloan
Acting Regional Chief Counsel Region II

By:_____
Vernon Norwood
Assistant Regional Counsel

4.32 SOUTH DAKOTA

A. PS 12-045 Treatment of Trust for SSI Purposes (Stephany) – REPLY

DATE: January 23, 2012

1. SYLLABUS

This decision exemplifies an often overlooked element in establishing a special needs trust. This decision shows that a trust must be established by the actions of a parent, grandparent, legal guardian, or a court. The Regional Chief Counsel (RCC)'s office determined that the parents used a power of attorney to establish this trust. Using a power of attorney meant the parents established the trust as the beneficiary's representative, and evidence showed they used only the beneficiary's funds to establish this trust. Therefore, the RCC determined the beneficiary was the creator of the trust. The RCC pointed out that the State court approved the trust but did not establish it. We include this decision because it is a straight forward example of the requirements, whether met or not met, for excepting a special needs trust from resource counting.

2. OPINION

Question Presented

You asked us to review the "Stephany Special Needs Trust" (hereinafter referred to as the "Trust") to determine whether the Trust is a resource for purposes of determining Stephany 's eligibility for Supplemental Security Income (SSI). You also asked whether the agency is bound by a court order amending and approving the Trust *nunc pro tunc.*

Short Answer

We conclude that the Trust is a resource for SSI purposes because it does not meet the statutory criteria to be excepted as a resource. Specifically, the Trust was not established through the actions of a parent, grandparent, legal guardian, or court. Stephany's parents never contributed any money to establish a "seed" trust, and we conclude that South Dakota does not allow the establishment of a "dry" or "empty" trust. Additionally, the South Dakota Third Judicial Circuit Court did not establish the Trust; mere modification and approval of the existing Trust and stating that the amended trust is effective *nunc pro tunc* does not suffice. Stephanie's parents had power of attorney at the time they took action to create the Trust, so the agency considers the Trust to have been created by Stephany herself. In order to rectify the situation, Stephany must revoke the Trust and her parents must create a new seed trust by contributing a nominal amount of their own money prior to the addition of Stephany's money. In that event, the Trust would be a valid special needs trust and excluded as a resource.

BACKGROUND

According to the information you provided, Stephany is a disabled adult SSI recipient born in 1987. In November 2006, Stephany transferred power of attorney to her parents, John and Krystal. The Durable Power of Attorney form, which addressed treatment of Stephany's real, personal, and other property, gives John and Krystal the power to "fund, transfer assets to, and to instruct and advise the trustee of any trust wherein [Stephany is] or may be the trustor, or beneficiary." See Durable Power of Attorney ¶¶ 3, 7. John and Krystal also have the power to "transact business of any kind or class and as [Stephany's] act and deed, to sign, execute, acknowledge and deliver any deed, lease, . . . and such other instruments in writing of any kind or class as may be necessary or proper in the premises." *Id.* ¶ 8.

On February 12, 2008, John and Krystal signed documents setting up the Trust. The Trust refers to John and Krystal as "settlors" as well as co-trustees. *See* Trust ¶ [1] . The Trust states it is "for the benefit of" Stephany, "the 'beneficiary.'" *Id.* The Trust states that it is "funded with the proceeds of the settlement of a liability claim." Art. I(B). The Trust further states that it "shall be initially funded with the amounts described on Schedule A." *Id.* Art. II(A). Schedule A states that the Trust shall be funded with $429,259.41.1 That amount matches Stephany's net proceeds from a personal injury settlement after deduction of attorney fees and costs. *See* Settlement Statement.

The Trust states that it is irrevocable (see Trust Art. VI(Q)) and provides for reimbursement to medical assistance programs at the time of the beneficiary's death. *See* Trust Art. IV(A).

Article VI of the Trust states that the "trustee shall have the power to alter or amend this trust in order to maintain compliance with any law, ruling or decree, or to otherwise assure continuation of the purpose of this trust." Trust Art. VI(R).

On May 27, 2010, an ALJ issued a decision finding that the Trust was not a valid special needs trust (and therefore constituted a resource for SSI purposes) because, when John and Krystal created the trust, they were doing so under the legal authority created by the power of attorney, in effect acting as Stephany's agent. The ALJ concluded that Stephany was overpaid SSI from February 2008 through September 2008; that she was "without fault" in causing the overpayment; and that recovery of the overpayment was waived because recovery would be against equity and good conscience. *See* Partially Favorable Decision at 3-4.

Attorney Eric Solem, Esq., stated in a July 30, 2010 letter to the Appeals Council that John and Krystal "created the trust as a 'seed trust' with their own assets and that the attorney for Stephany, on her authority, transferred funds into the trust." *See* Letter to Appeals Council at 2. However, there is no evidence that John or Krystal ever contributed any money to the Trust, nor does the Trust state that they would do so.

On October 14, 2010, John and Krystal filed a petition for modification of the Trust in the South Dakota Third Judicial Circuit Court. They stated in the petition that the Trust "was funded with the proceeds of the settlement of a liability claim." *See* Trustees' Petition for Modification of the Stephany Special Needs Trust (hereinafter "Petition") ¶ 5. In the Petition, Mr. and

Mrs. stated that they "request that the Court establish the Stephany Special Needs Trust . . . so that Stephany may reapply for SSI benefits." *Id.* ¶ 11. Later in the petition, John and Krystal requested that the Court "enter an Order modifying and amending the terms of the initial paragraph of the Trust and the signature line for the settlers of the Trust making the Court the settlor of the Trust. . . ." *Id.* ¶ 14.

On November 8, 2010, the court entered an "Order *Nunc Pro Tunc* Approving Modification of the Stephany Special Needs Trust" (hereinafter "Order"). The Court stated that it was "authorized to establish" a special needs trust for Stephany's benefit, and that the Trust would "be modified and restated," effective *nunc pro tunc* February 12, 2008, with the Court as settlor of the Trust. Order ¶ 4(1). The Court stated that the Trust would be "modified and restated as attached hereto and is approved and executed by" the Court. *Id.* ¶ 5.

DISCUSSION

The Trust was funded with Stephany's own assets, the proceeds of a litigation settlement. Thus, the Trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual or the individual's spouse are considered resources for SSI purposes even if they are irrevocable. However, there is an exception for certain trusts established under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must:

(1) Contain the assets of an individual under age 65 and who is disabled; and

(2) Be established for the sole benefit of such individual through the actions of a parent, grandparent, legal guardian, or a court; and

(3) Provide that the state(s) will receive all amounts remaining in the trust upon the death of the individual up to the amount equal to the total medical assistance paid on behalf of the individual under a state(s) Medicaid plan.

POMS SI 01120.203(B)(1)(a)-(h). Here, the Trust does not meet these requirements because it was not established through the actions of a parent, grandparent, legal guardian, or a court.

A. The Trust Contains the Assets of An Individual Under Age 65 Who is Disabled.

In order for a trust to meet the special needs trust exception, it must contain the assets of an individual under age 65 who is disabled. *See* POMS SI 01120.203(B)(1)(a). According to the information provided, Stephany was born in 1987, and began receiving SSI in 2007. Stephanie funded the Trust with her own money from a personal injury settlement, thus the Trust contains her assets.

B. The Trust Is for Stephany's Sole Benefit.

In order for a trust to meet the special needs exception, it must also be established for the "sole benefit" of an individual. *See id*. However, if a trust contains provisions that 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 trust corpus to another individual or entity (other than to the state(s) or another creditor for payment for goods and services provided to the individual), it will not be considered to be for the "sole benefit" of the disabled individual. *See* POMS SI 01120.203(B)(1)(e). Here, the trust provides only for distributions "for the benefit" of Stephany during her lifetime; there are no provisions that would allow trust property to be distributed to other individuals or entities. Trust Art. III(A). In addition, the Trust allows for termination only "by exhaustion of the trust estate" or the death of the beneficiary. Trust Art. IV(A). The former clause indicates that the Trust may terminate during Stephany's lifetime only if the trust estate is exhausted, but in that event, there would be no benefit to other individuals or entities. Thus, the Trust is for Stephany's sole benefit.

C. The Trust Was Not Established Through the Actions of a Parent, Grandparent, Legal Guardian, or a Court.

The Trust does not meet the special needs exception because it was not established by the actions of a parent, grandparent, legal guardian, or court. POMS SI 01120.203(B)(1)(f); 42 U.S.C. § 1396p(d)(4)(A). We assume Stephany is a competent adult since she had the capacity to sign a power of attorney, and we have no evidence of guardianship proceedings. 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 the 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 to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust. See POMS SI 01120.203(B)(1)(f). Although Mr. Solem contends that John and Krystal created a seed trust prior to funding the trust with Stephany's assets, we do not agree. The Trust plainly states that it is funded with the proceeds of a litigation settlement. Trust Art. I(B). It further identifies the trust as being "initially funded" by the sources listed on Schedule A. Trust Art. II(A). We have several copies of Schedule A, some of which are completely blank, and others listing $429.259.41 – an amount that corresponds exactly with the proceeds of Stephany's personal injury settlement. Thus, it is evident that the Trust was funded solely with Stephany's assets, and that John and Krystal did not create a seed trust.

Because John and Krystal did not create a seed trust, the Trust can be considered "established" by the parents only if South Dakota recognizes the existence of "empty" trusts – i.e., trusts with no assets.

We conclude that South Dakota does not recognize an "empty" trust. We did not find any statute or case law expressly addressing the establishment of an "empty" or "dry" trust. Nonetheless, a basic trust principle is that a trust governs *property*. The Restatement (Third) of Trusts provides that a trust cannot be created unless there is trust property in existence and ascertainable at the time of the creation of the trust. *See* Restatement (Third) of Trusts (2003) § 2, cmt. i. A leading authority on trusts agrees, stating a trust is, among other things, a relationship with respect to property. Mark, William, Scott, on Trusts (4th Ed. 2001) § 2.3. South Dakota statutes and caselaw are consistent with this authority. South Dakota statutes recognize that property is an essential element of a trust. For example, in order to create a trust, the trust must indicate with reasonable certainty the "subject . . . of the trust," among other requirements. S.D. Codified Laws § 55-1-4. The "subject" of the trust means the trust property. In addition, South Dakota courts have implicitly recognized property as an essential element of a trust. *See, e.g., Higgins v. Higgins*, 71 S.D. 17, 20 N.W. 2d 523, 525 (1945) (to be a valid trust, the provisions "must be reasonably certain as to the property, the beneficiaries and the objects") (emphasis added).

Because South Dakota does not recognize an empty trust, and John and Krystal did not create a seed trust prior to Stephany's transfer of assets to the trust, the trust was not "established" through the actions of a parent. Moreover, because Mr. and Mrs. had power of attorney prior to the creation of the trust—which means they were appointed to act as Stephany's agents in such matters—the facts here represent a situation where a claimant establishes a trust through her own actions. *See* POMS SI 01120.203(B)(1)(g) ("a trust established under a POA [power of attorney] will result in a trust we consider to be established through the actions of the disabled individual himself/herself because the POA merely establishes an agency relationship"). However, "[t]he special needs trust exception does not apply to a trust established through the actions of the disabled individual himself." *Id.* SI 01120.203(B)(1)(f).

Nor was the trust established through the actions of the South Dakota Third Judicial Circuit Court. John and Krystal, as trustees, petitioned to modify the original Trust in 2010 to reflect, among other (minor) changes, that the South Dakota Third Judicial Circuit Court was the "settlor" of the Trust. *See* Petition ¶ 14. In its November 8, 2010 Order, the court approved modification of the Trust, listed itself as settlor, stated that the Trust was "made and entered into by the Court effective *nunc pro tunc* February 12, 2008," and concluded that the Trust would be "modified and restated as attached hereto and is approved an executed by this Court." *See* Order ¶¶ 4-5. We conclude, however, that the court did not establish the Trust through these actions. To be established through the actions of a court, "the creation of the trust must be required by court order." POMS SI 01120.203(B)(1)(f). "Approval of a trust by a court is not sufficient." *Id.* Thus, if the court had ordered at the time of Stephany's personal injury settlement that the Trust be created with the proceeds, the Trust would meet this requirement. That, however, did not occur here. Rather, the Court merely approved an amendment to an already-existing trust. [2] And despite the court calling itself the "settlor," Stephany herself was the true settlor of this Trust, both before and after the amendment. "A grantor (also called a settler or trustor) is the individual who provides the trust principal (or corpus)." POMS SI 01120.200(B)(2). As such, the Trust was not "established" by the Court within the meaning of the Act and POMS. Cf. In *re G~,* 756 N.Y.S.2d 835 (N.Y. Surr. Ct. 2003) (where trust was really created by individual acting through agent, court could not later "establish" trust by entering an order *nunc pro tunc*).

D. The Trust Provides for Medicaid Payback Upon Termination of the Trust.

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 the amount equal to the total amount of medical assistance paid on behalf of the individual under the state Medicaid plan(s). 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). *See* POMS SI 00120.203(B)(1)(h). Here, the Trust states that upon the beneficiary's death, "the trust assets remaining

shall be paid to the medical assistance programs for those states that provided medical assistance to the beneficiary, including the South Dakota Department of Social Services, or its successor agency, as reimbursement for the amount of medical assistance benefits provided to the beneficiary during the beneficiary's lifetime." Trust Art. IV(A). Although the Trust mentions South Dakota in particular, its provisions do not limit reimbursement to South Dakota only. Thus, the Trust meets this requirement for the special needs trust exception.

CONCLUSION

In sum, we conclude that the Trust is a resource for SSI purposes. The Trust was not established through the actions of a parent, grandparent, legal guardian, or a court. We conclude that the State of South Dakota does not allow for the establishment of a "dry" or "empty" trust, and John and Krystal did not create a seed trust, so the Trust was not established through the actions of a parent. Rather, John and Krystal set up the Trust while holding power of attorney for Stephany, meaning the Trust was established through the actions of Stephany herself. We also conclude that the South Dakota Third Judicial Circuit Court did not, in its November 8, 2010 Order, establish the trust through its actions, *nunc pro tunc* to February 2008.

John Jay Lee
Regional Chief Counsel

By:_____
Dorrelyn K. Dietrich
Assistant Regional Counsel

B. PS 12-026 Treatment of Trust for SSI Resources Purposes (Isaac)

DATE: December 8, 2011

1. SYLLABUS

This opinion evaluates whether a Master Trust Agreement (MTA) and an Amended Joinder Agreement (AJA) meet the statutory requirements to be excluded under section 1917(d)(4)(C) of the Social Security Act. Secondly, it establishes that SSA is not bound by an Administrative Law Judge's "*nunc pro tunc*" (now for then) opinion to permit the claimant to amend the original Joinder Agreement to include Medicaid payback language. While the trust documents meet the first two requirements under the pooled trust exception, they do not meet the following requirements: Medicaid reimbursement language; established for the sole benefit and for the benefit of a disabled individual; and, established by the individual, a parent, grandparent, a legal guardian, or a court. Amendments to the MTA and AJA to satisfy the pooled trust exclusion requirements, will apply prospectively, at which time the trust needs to be evaluated under appropriate resource rules.

2. OPINION

Question Presented

You asked whether the South Dakota Guardianship Program Trust (SDGPT) Master Trust Agreement and the Amended Joinder Agreement conform to section 1917(d)(4)(C) of the Social Security Act ("the pooled trust exception"). You also asked whether SSA is bound by the Administrative Law Judge's (ALJ's) comment that the claimant should be permitted to amend the original Joinder Agreement to include Medicaid payback language, *nunc pro tunc*, November 20, 2009, the date he applied for Supplemental Security Income (SSI) benefits.

Short Answer

No. The trust documents do not meet the pooled trust exception to counting assets in the trust sub-accounts as resources. The distribution provisions of the Master Trust Agreement conflict with the Medicaid payback language of the Amended Joinder Agreement. Moreover, we have identified three additional problems with the Master Trust Agreement that are contrary to the pooled trust exception. Further, the amendment of the original Joinder Agreement (and any future amendments of the trust documents) are modifications that apply prospectively, and SSA is not bound by the ALJ's *nunc pro tunc* comment. Lastly, if SDGPT were to amend only the problematic (and no other) provisions of the MTA to satisfy the pooled trust exception, the claimant's sub-account would not be countable as a resource under the regular resource counting rules.

BACKGROUND

Isaac's Family Settlement Fund Management Trust

In April 1994, the claimant's parents petitioned the court to appoint a guardian/conservator of the estates of their three minor children (including the claimant), and to establish Isaac's Family Settlement Fund Management Trust ("Isaac's Family Trust") with the children's share of settlement proceeds from a wrongful death suit. The court approved the claimant's mother as guardian/conservator of the children's estates and Nations Bank Trust as trustee. Petition for Appointment of Guardian and Conservator of the Estates of . . . and Petition for Protective Arrangement ("Petition") (ODAR Exhibit 2). ODAR provided us with a copy of the exhibits considered by the ALJ.

Subject to the court's written approval, the "grantor" (identified as the children's guardian/conservator) could terminate the trust without the consent of the trustee or any beneficiary. Trust, §§ 2, 9 (ODAR Exhibit 1). Isaac's Family Trust also provided for a monthly payout of $220 to each beneficiary. However, for a beneficiary that was a minor, adjudicated incompetent or in the trustee's judgment unable to manage the distribution, the trustee could retain the distribution and use all or any portion of it for the beneficiary's support, maintenance, health and education as the trustee, in its sole discretion, deemed advisable. Petition, § VII; Trust, § 4. "If a Beneficiary . . . die[d] before complete distribution of his or her share of the trust property, then the undistributed balance of such share [would] be distributed to the deceased Beneficiary's estate." Trust, § 4(c).

The claimant had an application for SSI pending when his mother as guardian/conservator established the Trust. Petition, § IX. His parents received advice "that if monies are placed in trust and any income generated does not, when combined with other family income, exceed the sum of $2,000 per month, SSI benefits can likely be maintained for their children." Petition, § IX.

Transfer of Guardianship/Conservator and Management of the Trust Accounts

Effective December 15, 2008, the court appointed the South Dakota Guardianship Program, Inc. (SDGP) as successor guardian for the claimant (and another of Isaac's Family Trust beneficiaries). Order Appointing Successor Guardian/Trustee/Conservator (ODAR Exhibit 4). The court also transferred management of Issac's Family Trust accounts for all three children to SDGPT, a division of SDGP. The court sought and received the consent of all three beneficiaries (all of whom had reached the age of majority) to make these changes.

The claimant applied for SSI benefits on November 20, 2009, and listed a trust valued at $33,000 as a resource. At the initial and reconsideration levels, SSA determined the trust was a countable resource and denied his application for benefits. The claimant requested a hearing before an ALJ. The ALJ considered the SDGPT Master Trust Agreement (discussed further below) and the original Joinder Agreement. In a decision dated August 5, 2011, the ALJ determined "[t]he sole issue before [him] . . . [was] whether the claimant's trust must be included as a resource that precludes [him] from receiving [SSI] benefits." The ALJ ultimately found that "[t]he claimant's trust was properly included as a countable resource in [his] income and resource determination." The ALJ found that the Master Trust Agreement and Joinder Agreement did not satisfy the pooled trust exception because "[n]either . . . contain[ed] provision to reimburse South Dakota, or any other State, for any medical assistance paid on behalf of the claimant beneficiary." The ALJ also stated that "all of the elements of section 1396p(d)(4)(C) are met except [the Medicaid payback requirement]." The ALJ commented further that

[g]iven that it was always the intent of [SDGPT] to provide for the claimant and assist [him] in remaining eligible for [SSI] and Medicaid benefits, . . . the claimant should be afforded [the] opportunity to amend the trust to contain the proper language, *nunc pro tunc*, November 20, 2009, the date of the claimant's original application for benefits under Title XVI of the Social Security Act.

The SDGPT Master Trust Agreement and the Amended Joinder Agreement Definitions, Establishment, and Purpose

SDGPT established the Master Trust Agreement (MTA) in July 1997. The MTA defines "trustors" as "[a]ny individuals or other entities who wish to have the Trustee administer property for the benefit of a person who is developmentally or otherwise disabled [and who] adopt this Agreement" by executing a Joinder Agreement. MTA, Art. I(A) (ODAR Exhibit 18, pp. 61-71). The purpose of a trust sub-account is to provide for the supplemental needs of a beneficiary, i.e., "a person who is developmentally or otherwise disabled." The MTA defines supplemental needs as expenses approved by the trustee, in its sole discretion, that are not covered by any public benefits program. MTA, Art. III(A) & (B); Amended Joinder Agreement (AJA), § 5. SDGPT may resign and choose a successor trustee and replace any successor trustee with another trustee. MTA, Art. IX(A) & (B). The trustee maintains a separate sub-account for each Beneficiary, MTA, Art. I(B), and trust sub-accounts are pooled for the purpose of investing and managing the funds. MTA, Art. II, Art. VII.

Distribution of Assets

The trustee, in its sole discretion, may distribute income and principal to a beneficiary to meet his or her supplemental needs. MTA, Art. V; AJA, § 5.

Amendment and Termination

Article VI(D) of the MTA provides that the trust "shall terminate upon the death of the [b]eneficiary or upon revocation of the Trust if revocation is provided for in Section 7 of the Joinder Agreement." The AJA states explicitly that the sub-account cannot be revoked. AJA,§ 7.

Article VI(A) provides "[t]he Joinder Agreement may be amended only by a superseding Joinder Agreement and only by the [t]rustors who have the power to revoke the Trust." The trustee may amend the MTA, "except for those portions . . . which pertain to the amount of distributions of income and principle to the Beneficiary or the amount of distributions to the [t]rustor or to individuals or other entities upon termination of the trust." MTA, Art. VI(B). The MTA provides that "[n]o amendment of the Joinder Agreement or this Agreement or any Trust created hereunder shall be considered a termination of any such Trust." MTA, Art. VI(C). The MTA also states "[i]f any provision of this instrument is unenforceable, the remaining provisions shall nevertheless be carried into effect." MTA, Art. VIII(C).

Distribution of Assets upon Termination of a Sub-Account

Article IV of the MTA provides for the distribution of assets upon death of a beneficiary or other termination of the trust. "If the [t]rustee under Section 5 of the Joinder Agreement is given direction as to distribution of principal, the [t]rustee may in the [t]rustee's sole discretion pay the last illness and funeral expenses, attorneys' fees and other costs in administering the [b]eneficiary's estate." MTA, Article IV(A). Section 5 of The AJA provides that income and principal are distributed in the trustee's discretion.

Upon a beneficiary's death, the trustee must distribute the balance of the assets "to the individuals or other entities as provided in section 6 of the Joinder Agreement." MTA, Art. IV(B). Section 6 of the AJA provides:

To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Plan.

If the sub-account is revoked or terminated before death of the beneficiary, the assets shall be distributed to the trustors and any other transferors of property to the trust or their heirs in the proportions of their transfers to the Trust. MTA, Art. IV(C) & (D).

Upon death of a "trustor," the trustee shall use trust assets to pay inheritance taxes imposed on the estate because of the trustor's death, unless the trustor has made adequate provision for payment of such taxes in his or her will. MTA, Art. V.

Spendthrift Provision

The MTA provides that "[n]o interest in the principal or income of the Trust shall be anticipated, assigned, encumbered, or subjected to creditor's claim or legal process before actual receipt by the Beneficiary." MTA, Art. VIII(I).

Governing Law

The trust documents are governed by South Dakota law. MTA, Art. VIII(D).

DISCUSSION

1. The MTA Sub-Account Is a New Trust Subject to the Statutory Trust Resource Rules

As an initial matter, we considered whether the court's transfer of management of the claimant's trust sub-account to SDGPT resulted in formation of a new trust or reformation of Isaac's Family Trust. If the transfer resulted in a new trust, the statutory trust resource rules of section 1613(e) of the Social Security Act apply. If, however, the transfer was a reformation of Isaac's Family Trust, only the regular resource counting rules apply (because Isaac's Family Trust was established prior to 1/1/00). As explained below, we conclude the court terminated Family Trust and created a new trust.

Under South Dakota law, "the court may reform the terms of the trust to conform to the trustor's intention, if the failure to conform was due to a mistake of fact or law and the trustor's intent can be established." S.D. Codified Laws § 55-3-28. Here, however, the Order Appointing Successor Guardian/Trustee/Conservator does not state the court is "reforming" Isaac's Family Trust. In fact, the court referred to the MTA sub-accounts as "successor trusts" and approved the transfer *nunc pro tunc*, December 15, 2008, the date of the hearing, rather than retroactively to July 2004, the date Isaac's Family Trust was established.

While arguably in establishing Isaac's Family Trust, the trustor intended to provide for the beneficiaries' maintenance and support without preventing them from qualifying for Medicaid or SSI, the court does not discuss the trustor's intent or any mistake of fact or law. Moreover, Isaac's Family Trust does not contain any provisions that specifically authorize the trustee to conduct a trustee-to-trustee transfer, and the transfer was certainly not out of the beneficiaries' control, since the court requested and obtained their consent. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI—Wisconsin—Review of the WisPACT I Trust (July 29, 2005) (discussing elements of trustee-to-trustee transfers). Thus, we believe there is ample evidence to conclude the transfer resulted in the creation of a new trust that must satisfy the statutory trust resource rules.

2. The MTA and the AJA Do Not Meet the Pooled Trust Exception under 42 U.S.C.§ 1396p(d)(4)(C).

In general, irrevocable trusts created after January 1, 2000, that are established with the assets of an individual by means other than transfer by a will are considered to be a resource of that individual for SSI eligibility purposes. *See* 42 U.S.C. § 1382b(e)(2)(A). The purpose of the trust, the discretion of the trustee, and the restrictions on distributions will not affect its status as a resource. *See id.* § 1382b(e)(2)(C). There is an exception to this general rule for certain pooled trusts that are established under the provisions of section 1917(d)(4)(C) of the Act, commonly known as the pooled trust exception. *See* 42 U.S.C. § 1396p(d)(4)(C). For this exception to apply, the pooled trust must satisfy the following conditions:

(1) The trust must be established and managed by a non-profit association;

(2) A separate account must be maintained for each beneficiary of the trust, but the trust pools these accounts for purposes of investing and managing the funds;

(3) Accounts in the trust must be established solely for the benefit of the disabled individual;

(4) Accounts must be established by the individual, a parent, grandparent, a legal guardian, or a court; and

(5) The trust must provide that, to the extent that amounts remaining in the beneficiary's sub-account upon the death of the beneficiary are not retained by the trust, the state(s) will receive all amounts remaining in trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under state Medicaid plans.

See id.; POMS SI 01120.203(B)(2). Here, as discussed below, the trust documents fail to meet the third, fourth, and fifth requirements. (And although the MTA has a null and void clause, MTA Art. VIII(C), such clause "cannot nullify provisions that would otherwise make the trust a countable resource. . . . [and] cannot overcome missing or conflicting trust provisions." POMS SI 01120.27(D).)

Established and Maintained by a Non-profit Association, Separate Accounts Maintained

The trust documents meet the first and second requirements of the pooled trust exception. SDGPT is a division of SDGP, Inc., a non-profit association. SDGPT established and manages the pooled trust. Consistent with the second requirement, each beneficiary has a separate sub-account, but SDGPT pools these accounts for purposes of investing and managing the funds. MTA, Art. II, Art. VII.

Accounts Established Solely for the Benefit of Disabled Individuals

To be established "for the sole benefit" of an individual, the trust must benefit no one but that individual during his or her lifetime (other than reasonable compensation for a trustee and reasonable costs associated with managing the trust). *See* 42 U.S.C. § 1396p(d)(4)(C)(iii); POMS SI 01120.203(B)(2)(a), (e); POMS SI 01120.201(F)(2).

Where a trust can be terminated during a beneficiary's lifetime, the trust must provide that:

Upon early termination, the trust must reimburse the state(s) in an amount equal to the total amount of medical assistance paid under state Medicaid plan(s);

After reimbursement to the state(s) and payment of allowed expenses, all remaining funds must be disbursed to the trust beneficiary; and

The early termination power is given to someone other than the trust beneficiary.

See POMS SI 01120.199(F). Here, the MTA seems to allow for early termination of the trust, at which time assets shall be distributed to the trustors and any other transferors of property to the trust or their heirs in the proportions of their transfers to the Trust. MTA, Art. IV(C) & (D). The early termination provisions of the MTA do not provide for reimbursement to the state(s) for Medicaid, and do not provide that remaining funds go to the trust beneficiary. Thus, the sub-account is not for the "sole benefit" of the claimant during his lifetime.

The MTA is also problematic because it appears to define disability more broadly than the statute. To meet the pooled trust exception, the sub-accounts must contain assets of disabled individuals "as defined in section 1614(a)(3)" of the Social Security Act ("the Act"). The Act provides that an individual shall be considered to be disabled if he or she is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. *See* 42 U.S.C.§ 1382(a)(3)(A). An individual under the age of 18 shall be considered disabled if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. *See id.* 42 U.S.C.§ 1396p(d)(4)(C). Here, the MTA allows any individual or entity to establish a sub-account "for the benefit of a person who is developmentally or otherwise disabled." MTA, Art. I(A). Thus, the MTA does not define a disabled individual pursuant to section 1614(a)(3) of the Act.

Accounts Established by the Individual, Parent, Grandparent, Legal Guardian or Court

To meet the pooled trust exception, accounts in the trust must be established "by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court." 42 U.S.C. § 1396p(d)(4)(C)(iii); *see also* POMS SI 01120.203(B)(2)(f). The MTA permits any individual or entity to establish a sub-account. MTA, Art. I(A). Thus, contrary to the Act, the trust allows individuals/entities other than those identified in the statute to establish a pooled trust on behalf of a disabled individual.

Medicaid Reimbursement Provision

The trust documents also fail to satisfy the fifth requirement of the pooled trust exception—that the trust contain specific language providing that, to the extent amounts remaining in an individual's account are not retained by the trust, the trust pays 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. *See* POMS SI 01120.203(B)(2)(g).

Although the AJA includes the required provision, the MTA has conflicting provisions. Specifically, the MTA provides that, if the trustee is given discretion to distribute principal under section 5 of the Joinder Agreement, the trustee may pay last illness and funeral expenses, attorney fees, and other costs incurred in administering the beneficiary's estate. MTA, Art. IV(A). After such expenses are paid, the balance of the account shall be distributed as provided in section 6 of the Joinder Agreement. MTA, Art. IV(B). Section 5 of the AJA gives the trustee discretion to distribute principal; as such, the MTA allows the trustee to pay funeral and other expenses before all Medicaid services have been reimbursed. However, these types of expenses cannot be paid until after all Medicaid services have been reimbursed. *See* POMS SI 01120.203(B)(3)(a)-(b) (distinguishing between allowable administrative expenses and prohibited expenses). The MTA also appears to require payment of inheritance taxes due for residual beneficiaries prior to reimbursement to the state(s) for Medicaid services, contrary to POMS SI 01120.203(b). When a "trustor" dies, the MTA provides that the trustee "shall pay out of the principal" any "Federal or State inheritance taxes" imposed on the estate because of the trustor's death. MTA, Art. V.

3. The ALJ's Comment That the AJA Should Apply Retroactively to the Date the Claimant Applied for Benefits Is Not Binding.

You asked whether SSA is bound by the ALJ's comment that the claimant "should be afforded t[he] opportunity to amend the trust to contain the proper language, *nunc pro tunc*, November 20, 2009," the date he applied for SSI benefits. We note that this issue is essentially moot, given that the trust sub-account continues to be countable as a resource.

Nonetheless, we conclude that the ALJ's comment is not binding. "*Nunc pro tunc*" literally means "now for then," and indicates retroactive legal effect. Courts have inherent power to enter orders *nunc pro tunc* in order to correct errors and conform the record to the court's original intent. *See generally* 56 Am. Jur. 2d Motions, rules, and Orders § 62 (2011).

Even assuming an ALJ has the same inherent authority to enter an order *nunc pro tunc*, the ALJ here did not merely correct an error. Rather, the ALJ made a substantive judgment regarding the effect of a future amendment to the trust (and as explained below, the ALJ's substantive judgment on this point is contrary to trust principles).

An ALJ's authority is derived from, and is limited by, the Act and regulations. The ALJ has authority to decide "all the issues brought out in the initial, reconsidered or revised determination, that were not decided entirely in [the claimant's] favor." 20 C.F.R. § 416.1446. Here, the issue before the ALJ was whether the claimant had excess resources exceeding the maximum allowed for SSI eligibility. *See* Notice of Hearing, p. 3 (ODAR Exhibit 29). The ALJ had no authority to decide issues that were not presented—such as whether the claimant would have excess resources at some future date, after amending the trust. As such, the ALJ's comment regarding the effect of a future amendment to the trust is merely dicta and is not binding. Similarly, the ALJ's statement that the trust documents satisfied all elements of the pooled trust exception, except the Medicaid payback provision, is considered dicta and is not binding. As we have explained, there are a number of problematic provisions in the MTA.

4. Amendment of the Joinder Agreement and Future Amendments of the Trust Documents to Satisfy the Pooled Trust Exception Are Modifications That Apply Prospectively.

"[South Dakota] statutes do not explicitly recognize the validity of non-judicial reformations, but the statutes can be fairly interpreted to mean that seeking court affirmation of . . . reformation is permissive rather than mandatory. Simmons, Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts, 55 S.D. L. Rev. 253, 267 n. 69 (2010) (citing S.D. Codified Laws § 55-3-24). However, reformation is a tool to enforce rather than change the agreement. According to the Restatement (Third) of Trusts, there are two separate methods to alter a trust document— reformation and modification. Reformation involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain and properly restate the true, legally effective intent of the settlors with respect to the original terms of the trust they created. *See* Restatement (Third) of Trusts § 62, reporter's notes (2001). In other words, a reformation alters an original donative document to correct a mistake of fact or law so that the text conforms to the intent of the donor. *See* Restatement (Third) of Property § 12.1 (2003); S.D. Codified Laws § 55-3-28. In contrast, a modification involves a change from the true, original terms of the trust. See id. A reformation may relate back to the original date of execution. See id. A modification, however, is a later departure from the intention of the donor. *See* Restatement (Third) of Trusts § 62, reporter's notes. It is therefore not retroactive.

Here, in addition to the AJA, future changes to the MTA would be necessary in order for the trust sub-accounts to meet the pooled trust exception. Under South Dakota law, a "court may reform the terms of the trust to conform to the trustor's intention if the failure to conform was due to a mistake of fact or law . . . ." S.D. Codified Laws § 55-3-28. There is no indication the MTA and the original Joinder Agreement did not accurately reflect the settlors' intentions on the date of execution. Moreover, the significant problems with the MTA could not fairly be viewed as mistakes of law or fact. Indeed, we could not conclude that a reformation occurred any time a trust document were altered to conform to the pooled trust exception simply because the settlor intended to establish a trust that would qualify the beneficiary for SSI benefits; this would be an overly broad interpretation of the reformation criteria. Here, to meet the pooled trust exception, at a minimum, SDGPT would have to adopt a vastly different distribution scheme than that originally intended. Therefore, we conclude the AJA was a modification with only prospective effect. Likewise, any future amendments to the trust documents would be modifications that would not relate back to the date of trust formation.

5. Assuming the Sub-Account Met the Criteria for an Exception under 42 U.S.C.§ 1396p(d)(4)(C), Which it Currently Does Not, the Sub-Account Would Not Be a Resource under the Regular Resource Counting Rules.

Assuming SDGPT were to amend only the problematic (and no other) provisions of the MTA to satisfy the pooled trust exception, the claimant's sub-account must still be evaluated to determine if it is a countable resource. See POMS SI 01120.203(b)(1)(A); POMS SI 01120.200. Under the regular resource counting rules, trust property may be a resource for SSI purposes if the individual: (1) has the authority to revoke the trust and then use the funds to meet his basic needs for food or shelter; (2) can direct the use of the trust principal for his support and maintenance; or (3) can sell his beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a).

Article VI(A) of the MTA provides that, "The Joinder Agreement may be amended only by a superseding Joinder Agreement and only by the [t]rustors who have the power to revoke the Trust." Read in isolation, this section suggests the claimant may revoke the trust. However, Article VI(D) of the MTA states the Joinder Agreement determines whether the trust can be revoked, and the AJA states explicitly that the sub account cannot be revoked.

With respect to requirements two and three above, the claimant does not have the right to direct use of the sub-account principal for his support and maintenance; rather the trustee has sole discretion over distributions. The sub-account does not provide for mandatory payments that the beneficiary could sell. In any event, even if the claimant could sell his beneficial interest in the trust sub-account, that interest would have no significant market value, since disbursements are completely within the discretion of the trustee. Since the sub-account is irrevocable, the claimant's beneficial interest in the trust would be considered a resource with zero value – if the trust were otherwise amended to conform to the pooled trust exception. *See* POMS SI 01140.044.

CONCLUSION

The claimant's sub-account is a new trust that is subject to the statutory resource counting rules. The trust documents do not satisfy the pooled trust exception to counting assets in the sub-account as resources. The ALJ's statement that SSA should apply a future amendment of the Joinder Agreement retroactively is merely dicta and non-binding on the agency. The AJA and any future amendments of the MTA to satisfy the pooled trust agreement should be considered modifications that apply prospectively. If SDGTP were to amend only the problematic (and no other) provisions of the MTA to satisfy the pooled trust exception, the sub-account would not be countable as a resource under the regular resource counting rules.

John Jay Lee
Regional Chief Counsel , Region VIII

By:_____
Yvette G. Keesee
Assistant Regional Counsel

Footnotes:

[1] You provided several copies of the Trust in both its original and amended forms. In some of the copies, Schedule A was left blank. However, in at least one copy of the original Trust, Schedule A stated that the Trust would be funded with $429,259.41. No copies of Schedule A indicated that Mr. or Mrs. contributed any amount of money so as to create a "seed" trust.

[2] Because we conclude that the Court did not "establish" the trust within the meaning of the Act and POMS, we need not address whether SSA give the amendment retroactive effect, per the Court's *nunc pro tunc* order.

4.33 TENNESSEE

A. PS 10-114 Effect of a Tennessee State Court Order Entered *Nunc Pro Tunc* Deleting Language in Trust Created for a Supplemental Security Income Recipient

DATE: July 1, 2010

1. SYLLABUS

In this case the trustees did not disclose the fact that they had established a trust in 2004 for a disabled SSI recipient. Recently, the local field office discovered it and determined it was countable because this special needs trust allowed funeral expenses to be paid prior to any Medicaid reimbursement. The trustees petitioned the state court in January 2010 to change the language to conform to the law and backdate the changes to 2004 through a *nunc pro tunc* order. The Regional Chief Counsel's opinion clearly states that under Tennessee law this type of retro change can only happen as the result of an error on the part of the court, such as a typographical error. It cannot overcome the language submitted by the trustees' legal advisors in 2004. The

opinion establishes that the trust can only be excludable for SSI from the date in 2010 that the court amended it making it non-countable.

2. OPINION

QUESTION

You have asked whether the Social Security Administration (SSA) is bound by a Tennessee state court order that deleted language in a Supplemental Security Income (SSI) recipient's trust when the order was entered *nunc pro tunc*, that is, effective as of the date the trust was created.

OPINION

We believe the State court did not have the authority under Tennessee law to enter its order *nunc pro tunc.* Therefore, SSA is not bound by the court's order to the extent the order attempted to amend the trust retroactively, and SSA should consider the trust amended only as of the date the court entered its order.

BACKGROUND

SSA found Aimee S. A~ (Recipient) entitled to SSI in 1990. On December 9, 2004, Francis A. A~ and Sue E. A~ (Recipient's parents) created an "Irrevocable Supplemental Care Trust" (Trust) for Recipient pursuant to the order and under the authority of the Chancery Court of Jefferson County, Tennessee. The Trust noted Recipient's parents were the court-appointed Co-Conservators of the person of Recipient and Co-Trustees of the Trust. Recipient's parents established the Trust to hold funds payable to Recipient as the result of the sale of the residence she owned. The Trust noted the amount of funds Recipient would receive from the sale of the property "would jeopardize the benefits paid or payable for her support and care . . . ." The Trust indicated the Trust was an "irrevocable Supplemental Care Trust" section 1917(d)(4)(A) of the Social Security Act (Act). Article I of the Trust, titled Irrevocability, states that no court, conservator, trustee, or beneficiary has the right to alter, amend, revoke, or terminate the trust or any of its provisions except as expressly provided by the Trust. Article I states that if consistent with the intent of the Trust, the trustees may ask the court to amend the Trust "so that it conforms to the regulations and policies that are approved by any governing body or agency relating to Medicaid benefits or any similar successor programs as well as any other pertinent State or Federal programs."

Article IV of the Trust, titled Trust Distributions, delineates how the trustees may use the funds in the Trust and how the trustees should dispose of the Trust funds upon Recipient's death. Before the court amended the Trust, the first sentence of Paragraph H of Article IV stated that upon Recipient's death "and after payment of final expenses administrative costs, including funeral or burial expenses, the Trustees shall satisfy any valid claims for reimbursement of medical assistance benefits paid on behalf of [Recipient] during her lifetime which the Trust is legally obligated to satisfy pursuant to [section 1917(d)(4)(A) of the Act] . . . ."

In a subsequent review of Recipient's income and resources, SSA discovered the Trust. Based on the language in the Trust allowing the payment of funeral or burial expenses before the reimbursement of medical assistance benefits paid on behalf of Recipient by the State(s), SSA determined the Trust was not a valid trust under section 1917(d)(4)(A) of the Act and was a countable resource. Therefore, SSA suspended Recipient's SSI and assessed an overpayment.

After SSA informed Recipient of the suspension and overpayment, Recipient's parents filed a motion with the Chancery Court of Jefferson County, Tennessee, "to correct a scrivener[']s error in the original Trust . . . ." On January 21, 2010, the court issued an order amending the Trust. The court ordered that the Trust "is amended by deleting the words 'including any funeral or burial expenses' from the first sentence of Paragraph H of Article IV of the Trust . . . ." The court found that the amendment "is consistent with the intent of the Trust and that such language was inserted originally by error." The court further ordered that "this amendment shall be effective nunc pro tunc in that it is reflective of the parties' original intent."

DISCUSSION

SSI is a general public assistance program for aged, blind, or disabled individuals who meet certain income and resource restrictions and other eligibility requirements. *See* Act §§ 1602, 1611(a); 20 C.F.R. §§ 416.110, 416.202 (2009). "Resources" include cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. *See* Act § 1613; 20 C.F.R. § 416.1201(a) (2009). Generally, the corpus of a trust

established with the assets of an individual is considered a resource. *See* Act § 1613(e)(1)-(3); *see also* Act § 1613(e)(6)(B) (defining corpus and assets).

However, a trust established pursuant to section 1917(d)(4)(A) of the Act, commonly referred to as a Special Needs trust, is not a resource. *See* Act §§ 1613(e)(5), 1917(d)(4)(A); Program Operations Manual System (POMS) SI 01120.203.B.1. A Special Needs trust must:

(1) Contain the assets of a disabled individual under age 65;

(2) Be established for the benefit of the individual by a parent, grandparent, or legal guardian of the individual, or a court;

(3) Provide 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 plan.

See Act § 1917(d)(4)(A); POMS SI 01120.203.B.1.a. To satisfy the requirement that the State(s) be reimbursed for any medical assistance provided to the individual, the trust must list the State(s) as the first payee, with priority over payment of other debts and administrative expenses except for certain specific expenses. *See* POMS SI 01120.203.B.1.h. Allowable administrative expenses that may be paid from the trust prior to reimbursement of medical assistance provided by the State(s) include taxes due from the trust and reasonable fees for the administration of the trust estate. *See* POMS SI 01120.203.B.3.a. However, expenses and payments not permitted prior to reimbursement of medical assistance provided by the State(s) include funeral expenses. *See* POMS SI 01120.203.B.3.b.

In this case, the original language of the first sentence of Paragraph H of Article IV of the Trust provided that upon Recipient's death, the Trust would reimburse "medical assistance benefits paid on behalf of [Recipient] during her lifetime which the Trust is legally obligated to satisfy pursuant to" section 1917(d)(4)(A), but only "after payment of final expenses and administrative costs, *including funeral or burial expenses* . . . ." (Emphasis added.) As noted above, funeral expenses are not a permissible expense prior to reimbursement of medical assistance to the State(s). See POMS SI 01120.203.B.3.b. Thus the Trust as originally created did not comply with section 1917(d)(4)(A) of the Act. *See* Act § 1917(d)(4)(A); POMS SI 01120.203.B.1.a., B.1.h, B.3.b.

On January 21, 2010, the court issued an order amending the first sentence of Paragraph H of Article IV of the Trust to delete the phrase "including funeral or burial expenses." The amendment would appear to render the Trust in compliance with the requirement that the State(s) receive all amounts remaining in the trust upon Recipient's death up to an amount equal to the total medical assistance paid by the State(s) on behalf of Recipient.[1] *See* Act § 1917(d)(4)(A); POMS SI 01120.203.B.1.a, B.1.h. The court order stated the amendment was effective *nunc pro tunc,* meaning the court intended to amend the Trust effective from the date the Trust was created, i.e., December 9, 2004. However, although we believe the court's order effectively amended the trust as of the date of the court order, we do not believe the court had the authority under Tennessee law to issue a *nunc pro tunc* order amending the Trust effective as of the date the Trust was originally created.

Nunc pro tunc is a Latin term meaning "now for then." *See Blackburn v. Blackburn,* 270 S.W.3d 42, 49 n.13 (Tenn. 2008) (citing *Black's Law Dictionary,* 964 (5th ed. 1979)). "All courts have the right, and it is their duty, to make their records speak the truth, and a court, therefore, in a proper case, of its own motion, may order a *nunc pro tunc* entry to be made. . . ." *Blackburn,* 270 S.W.3d at 51 (quoting *Rush v. Rush*, 37 S.W. 13, 14 (Tenn. 1896) (quotation marks omitted)). In addition, "in a proper case, a *nunc pro tunc* order may be used to correct an existing decree, as well as to supply a missing decree." *McCown v. Quillin,* 344 S.W.2d 576, 583 (Tenn. Ct. App. 1960). However:

The error justifying a *nunc pro tunc* entry must have been due to the inadvertence or mistake of the court and not counsel. Moreover, an entry of a judgment *nunc pro tunc* should only be granted when it can be shown by clear and convincing evidence that the judgment sought is the one previously announced.

Blackburn, 270 S.W.3d at 50 (citations omitted). "[A]s a prerequisite to an entry *nunc pro tunc,* there generally must exist some written notation or memorandum indicating the intent of the trial court to enter the judgment on the earlier date." *Id.* at 54 (footnote omitted).

The general rule is that to justify a *nunc pro tunc* order there must exist some memorandum or notation found among the papers or books of the presiding judge, and a *nunc pro tunc* order will not be valid unless there is some such memorandum showing what judgment or order was actually made and these jurisdictional facts recited.

Dewees v. Sweeney, 947 S.W.2d 861, 864 (Tenn. Ct. App. 1997) (quoting *Gillespie v. Martin,* 109 S.W.2d 93 (Tenn. Ct. App 1937) (quotation marks omitted)).

A prerequisite for a *nunc pro tunc* order then, is some previous action by the court that is not adequately reflected in its record. It may not be granted to relieve an attorney from the consequences of his own failure to comply with the rules, but only to correct mistakes or omissions arising from the actions of the court itself.

Id.; see also Blackburn, 270 S.W.3d at 55 ("The error justifying a *nunc pro tunc* entry must have been due to the inadvertence or mistake of the court, not the attorneys or parties"). "Therefore, when determining whether it should enter an order *nunc pro tunc,* the trial court should generally refer only to written notations or memoranda indicating the court's intent to enter the judgment on a specified earlier date." *Blackburn,* 270 S.W.3d at 55.

"Although the trial court has the inherent authority to enter [an order] *nunc pro tunc* to amend or rectify the record, a *nunc pro tunc* [order] may not be entered in an attempt to make the record reflect what *should have happened,* rather than what actually did occur." *Blackburn,* 270 S.W.3d at 55-56. "A '*nunc pro tunc* order' can only be made when the thing ordered has previously been allowed, but by inadvertence has not been entered. It applies only to orders of court, and never to action of counsel." *Cantrell v. Humana of Tenn., Inc.,* 617 S.W.2d 901, 902 (Tenn. Ct. App. 1981) (quoting *Grizzard v. Fite,* 191 S.W. 969 (Tenn. 1916)).

In this case, the information provided indicates the "scrivener's error" the court corrected in its January 2010 order was the result of an error or negligence by Recipient's parents or the attorney for Recipient's parents who prepared the Trust document. The court noted the prohibited language allowing for the payment of funeral or burial expenses before reimbursement of State medical assistance payments was "inserted originally by error" and it entered its order *nunc pro tunc* to reflect "the parties' original intent." Nothing in the court's order suggests that the error was due to a mistake by the court, as required for entry of an order nunc pro tunc. *See Blackburn*, 270 S.W.3d at 50, 54-55; *Dewees*, 947 S.W.2d at 864; *Cantrell,* 617 S.W.2d at 902. Moreover, the information provided, including the court order and the Trust document, does not provide clear and convincing evidence that the court intended the Trust to exclude the prohibited language when the Trust was originally created. *See Blackburn,* 270 S.W.3d at 50; *Dewees,* 947 S.W.2d at 864. The court could not enter its order *nunc pro tunc* in an attempt to make the Trust reflect what should have been omitted when the Trust was originally created, rather than what was actually included in the Trust. *See Blackburn,* 270 S.W.3d at 55-56. Therefore, we believe the court did not have the authority to enter its order *nunc pro tunc.*

We recognize SSA's policy that although SSA is not bound by the decision of a State court in a proceeding to which SSA was not a party, SSA is not free to ignore an adjudication of a State court where the following prerequisites are found: (1) an issue in a claim for Social Security benefits previously has been determined by a State court of competent jurisdiction; (2) this issue was genuinely contested before the State court by parties with opposing interests; (3) the issue falls within the general category of domestic relations law; and (4) the resolution by the State trial court is consistent with the law enunciated by the highest court in the State. *See* Social Security Ruling (SSR) 83-37c (adopting *Gray v. Richardson,* 474 F.2d 1370 (6th Cir. 1973)). However, the order in this case does not meet all of the prerequisites in SSR 83-37c. The court's order was not genuinely contested by parties with opposing interests, and the issue addressed by the court's order did not fall within the general category of domestic relations law. Moreover, as discussed above, the court's entry of a *nunc pro tunc* order was not consistent with Tennessee law. Thus, SSA was not bound under SSR 83-37c, or any other legal authority, to accept the *nunc pro tunc* aspect of the court's order.

CONCLUSION **We believe SSA is not bound by the court's order entered *nunc pro tunc* purporting to amend the Trust as of the date the Trust was originally created. SSA should consider the Trust amended as of the date of the court order—January 21, 2010—and not before that date.**

Very Truly Yours
Mary A. S~
Regional Chief Counsel
By: _____
Brian C. H~
Assistant Regional Counsel

Footnotes:

[1] You did not ask us to provide an opinion regarding whether the Trust meets the other requirements of a Special Needs trust in section 1917(d)(4)(A). However, based on the documents and other information provided, the trust appears to comply with section 1917(d)(4)(A) because Recipient is a disabled and under age sixty-five, the Trust contains Recipient's assets, and the Trust was established for Recipient's benefit by her parents. *See* Act § 1917(d)(4)(A); POMS SI 01120.203.B.1.a. Of course, if SSA determines the Trust meets the requirements of a Special Needs trust, SSA still must determine if the Trust is a resource under the regular resource rules. *See* POMS SI 01120.203.B.1.a.

4.34 TEXAS

A. PS 10-065 Irrevocable Trust Agreement and Early Termination Provision in the Aiden H~ Special Needs Trust, SSN ~ – REPLY

DATE: February 26, 2010

1. SYLLABUS

This opinion examines whether or not a trust established after January 1, 2000 with the assets of an individual is a resource for Supplemental Security Income (SSI) purposes. The trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act. Generally under these provisions, trusts established with the assets of an individual or the individual's spouse are considered resources for SSI purposes, unless an exception applies. The trust in this case is excluded from resources under Section 1917(d)(4)(A) as a special needs trust, even though the trust allows for termination prior to the individual's death. The individual, however, lacks the authority to terminate the trust. Additionally, upon termination preceding death, the trust provides for reimbursement first to any State that has provided medical assistance. If any assets remain, the trust provides that the remainder shall be distributed to the beneficiary. Therefore, no other entity benefits from the trust during the beneficiary's lifetime. In this case, the trust is excluded from resources.

2. OPINION

This memorandum responds to your request for an opinion regarding whether the special needs trust agreement for Aiden H~ (Aiden) qualifies as a special needs trust under section 1917(d)(4)(A) of the Social Security Act (Act) (42 U.S.C. § 1396p(d)(4)(A)), and if so, whether the assets would be exempt from our resource-counting rules for purposes of determining the beneficiary's eligibility for Supplemental Security Income (SSI). After reviewing the facts and relevant law, we have determined that the trust, even though it includes an early termination clause, qualifies as a special needs trust under section 1917(d)(4)(A) of the Act because it is for Aiden's sole benefit during his lifetime. Further, the trust meets the requirements for a special needs trust under section 1917(d)(4)(A) of the Act, and thus, is not a countable resource under the regular resource rules.

Aiden was born in June 2003 and began receiving SSI in September 2003. In August 2003, Aiden was a named plaintiff in a lawsuit before the 334th District Court of Harris County, Texas. *See Kristina Kiddy, Individually and as Next Friend of Aiden Hall, Her Minor Son, and Norman Hall v. Christus Health Gulf Coast, D/B/A Christus St. Catherine Hospital, et al,* No. 2003-48397, 334th District Court, Harris County, Texas. After the parties settled the case, on December 16, 2004, the Court established the special needs trust for Aiden's benefit pursuant to 42 U.S.C. § 1396p, et seq., and Section 142.005 of the Texas Property Code. *See* Exhibit "A," Special Needs Trust Agreement (Trust) at 1-3. The Court directed that the net proceeds of the settlement were to be made available for the benefit of the trust, subject to the terms and conditions of the trust agreement. *Id.*

The trust states that Aiden, a minor incapacitated person, is presently disabled and may be disabled in the future. *See* Trust at 2. One of the primary purposes of the trust is to serve as a supplemental and emergency fund to public assistance and provide for Aiden's non-support needs, over and above those that an agency of any local, state, or federal government pays, such as basic medical care; health and nursing care; dental care; developmental services; rehabilitation therapies; devices; recreation and transportation; programs of training, education, and social opportunities; assistive devices; and personal attendant care. *Id.* at 2-4. The trust is intended to provide supplemental benefits for Aiden without interfering with or reducing any benefits to which he would be entitled from any local, state, or federal agency. *Id.* at 4. The trust specifies that the trust assets should not be deemed to have been or to be available to Aiden. *Id.* at 3. The trust provides that it is irrevocable and that Aiden or any

person acting on Aiden's behalf may not revoke or modify the trust. *Id.* at 6. The trust designated the Southwest Guaranty Court Trust as the Trustee of the trust. *Id.* at 1.

The trust contains an early termination clause, which is a clause that allows for termination of the trust prior to the beneficiary's death. Specifically, the trust states, "[t]he Trust shall terminate when [Aiden] regains capacity as determined by the Court (provided [he] has attained the age of twenty-five (25) years), or upon [Aiden's] death prior to regaining capacity." *See* Trust at 5. Upon termination, the trust provides that the Trustee shall first pay the State of Texas (or other states) "up to an amount equal to the total medical assistance paid on behalf of [Aiden] in accordance with the Medicaid plan of the state or states involved." Id. The trust then provides that, if any assets remain, the Trustee shall distribute the remainder to Aiden, provided that he has attained the age of twenty-five years upon regaining capacity. *Id.* If Aiden dies before receiving all the trust assets, the trust will terminate, and the Trustee shall pay the State of Texas (or other states) "up to an amount equal to the total medical assistance paid on behalf of [Aiden] in accordance with the Medicaid plan of the state or states involved." *Id.* at 5-6. If any assets remain, the Trustee shall distribute the remaining trust assets to the personal representative of Aiden's estate. *Id.* 6.

The trust is subject to the statutory provisions of section 1613(e) of the Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382b(e); Program Operations Manual System (POMS) SI 01120.200, SI 01120.201. Generally, under these provisions, trusts established with an individual's or the individual's spouse's assets are considered resources for SSI purposes even if they are irrevocable. *See id.* However, trusts are exempt from the Act's above statutory provision if they qualify under the provision of section 1917(d)(4)(A) of the Act, commonly known as the special needs trust exception. *See* 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(A); POMS SI 01120.203(B)(1). To qualify for the special needs trust exception, the trust must satisfy the following requirements:

1. The trust must contain the assets of a disabled individual under age 65;

2. The trust must be established for the sole benefit of such individual through the actions of a parent, grandparent, legal guardian, or court; and

3. The trust must provide that the state (or states) will receive all amounts 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.

See 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

In the case at hand, the trust meets the first requirement for the special needs trust exemption: it contains the assets of a disabled individual under age 65. The trust contains Aiden's assets, which he obtained from settlement of a lawsuit. *See* Trust at 1; 42 U.S.C. § 1396p(d)(4)(A). Aiden was born in 2003; thus, when the trust was established in 2004, he was under the age of 65. *Id.* In addition, Aiden had been a disabled individual for SSI purposes under section 1614(a)(3) of the Act since 2003. *Id.* Consequently, the trust meets the first requirement for the special needs trust exception.

The trust meets the second requirement that it must be established through the actions of a parent, grandparent, legal guardian, or court, and the trust must be for the beneficiary's sole benefit. Here, the trust was established through the actions of the 334th District Court of Harris County, Texas. For trusts established though a court's action, the creating of the trust must be required by a court order; approval of a trust by a court is not sufficient. *See* POMS SI 01120.203(B)(1)(f). In the trust at hand, the Court issued an "Order Creating Special Needs Trust for the Benefit of Aiden H~," specifically ordering that the funds awarded to Aiden "shall be held" in a special needs trust for Aiden's benefit. *See* Order at 1; Trust at 2-3. Thus, the trust was properly established through the actions of a court.

Further, the trust was established for Aiden's sole benefit. *See* 42 U.S.C. § 1396p(d)(4)(A). A trust is considered established for the sole benefit of a disabled individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time, for the remainder of the individual's lifetime. *See* POMS SI 01120.201(F)(2). A trust will not qualify for the special needs trust exception if the trust allows for termination of the trust prior to the individual's death and allows payment of the corpus to another individual or entity. *See* POMS SI 01120.203(B)(1)(e). However, payment to the state or to a third party or creditor for payment for goods or services provided to the individual is allowed. *Id.* Here, the trust is for Aiden's sole benefit because only Aiden benefits from the trust during his lifetime, and it is only upon termination of the trust that the State of Texas (or other states) will receive reimbursement for medical assistance paid on behalf of Aiden under a state Medicaid plan. *See* Trust at 5-6. Thus, the trust meets the second requirement for special needs trusts.

The trust also meets the third requirement that a special needs trust must contain specific language providing that upon the death of the individual, the state (or states) will receive all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual under a state Medicaid plan (or plans). *See* 42 U.S.C. § 1396p(d)(4)(A). As noted, the trust contains a state Medicaid reimbursement requirement both upon Aiden's death and upon early termination. *See* Trust at 5-6. The trust specifically states that it must pay the State of Texas (or other states) that furnished medical assistance to Aiden so that the state receives all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid. *Id.* Thus, the trust's state Medicaid reimbursement provision complies with the third requirement for the special needs trust exception.

We note that the trust contains an early termination clause. The Office of the General Counsel has recently determined that section 1917(d)(4)(A) trusts may contain early termination clauses provided Medicaid payback occurs before the individual is paid and provided no other entity benefits from the early termination. *See* Early Termination of Section 1917(d)(4)(A) Trusts, dated January 26, 2010, by Gwen J. K~, Associate General Counsel, Office of Program Law. In this case, the trust provides that termination shall occur when the Court determines that Aiden is fully capable to manage his financial affairs without any significant impairment, but no earlier than age 25. *See* Trust at 5. In that event, the Trustee must first pay the State of Texas (or other states) that furnished medical assistance to Aiden. *Id.* at 5-6. Then, if any assets remain, the Trustee shall distribute the remainder to Aiden, provided, however, that if Aiden has not reached the age of 25 upon regaining capacity, then the trust shall not terminate until he reaches age 25. *Id.* at 5. Thus, the early termination clause in the trust does not disqualify the trust as a special needs trust because it allows funds to be distributed to Aiden during his lifetime only after Medicaid payback, and no other entity benefits from the early termination. *See* 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

For the above reasons, the trust meets the special needs trust exception to counting the trust as a resource under the Act because it contains the assets of a disabled individual under the age of 65, is solely for the benefit of Aiden during his lifetime, and it provides that the State of Texas (or other states) will receive all amounts 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. *See* 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

Although the trust satisfies the special needs trust exception requirements, we must also evaluate the trust under the regular resource rules to determine if the trust is a countable resource for SSI eligibility. *See* POMS SI 01120.200, SI 01120.201, SI 01120.203(B)(1)(a). Under the regular resource rules, a trust will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food and shelter; or (2) direct the use of the trust principal for his support and maintenance under the terms of the trust. *See* 20 C.F.R. § 416.1201(a); POMS SI 01120.200(D)(1)(a). Also, if the individual can sell the right to his beneficial interest in the trust, the trust is a resource. *See* POMS SI 01120.201(D)(1)(a). An evaluation of Aiden's trust as detailed below, demonstrates that the trust would not be a resource under these rules.

Aiden cannot revoke the trust or direct the use of the trust principal for his support and maintenance. Whether a trust can be revoked or terminated depends on the terms of the trust or applicable state law. *See* POMS SI 01120.200(D)(2). According to section 142.005 of the Texas Property Code, under which the trust was created, "a trust created under this section is not subject to revocation by the beneficiary or a guardian of the beneficiary's estate." Tex. Prop. Code Ann. § 142.005(d). Texas trust law further provides that a settler may not revoke a trust if "it is irrevocable by the express terms of the instrument creating it," except it may be judicially terminated under proper circumstances. Tex. Prop. Code Ann. § 112.051(a). In this case, the trust specifically states that it is irrevocable and that Aiden "shall have no power or right to alter, amend, revoke, or terminate" the trust or any terms of the trust agreement. *See* Trust at 6. Thus, the trust is irrevocable, and Aiden cannot revoke or terminate the trust or use the assets to meet his needs for food and shelter.

In addition, Aiden cannot direct the use of the trust's principal for his support and maintenance or sell the right to his beneficial interest in the trust. *See* Trust at 6; 20 C.F.R. § 416.1201(a). The trust specifically states that assets in the trust shall at no time become available to Aiden, be placed in his possession, or come within the control of Aiden's parents or guardians. *See* Trust at p. 3. Hence, Aiden cannot direct the use of the trust's principal. *See* POMS SI 01120.200(D)(1)(a), SI 01120.203(B)(1)(a). Therefore, the trust would not be a countable resource under the regular resource rules.

The Office of the General Counsel has determined that for trusts with early termination clauses, when the trust indicates that the individual holds the power to terminate the trust early, the trust would be countable as a resource for SSI eligibility. *See* Early Termination of Section 1917(d)(4)(A) Trusts, at 4. Here, the power to terminate the trust early resides only with the Court and only when it determines that Aiden has regained capacity, provided he has attained the age of 25 years. *See* Trust at 5.

Aiden does not have the power to terminate the trust early; therefore, the early termination clause does not make the trust a countable resource.

In conclusion, we believe that the trust in this case qualifies as a special needs trust under section 1917(d)(4)(A) of the Act. Further, we believe that the trust is not a countable resource to Aiden for purposes of SSI eligibility.

Very Truly Yours
Michael M~
Regional Chief Counsel
By: _____
Carolyn E. W~
Assistant Regional Counsel

B. PS 05-166 SSI-Review of the D~ R~ Trust, ~-REPLY Your Ref.: S2D5G6, SI 2-1-3 (R~) Our Ref.: 05-0097

DATE: May 31, 2005

1. SYLLABUS

A special needs trust was established for the benefit of an SSI eligible child on January 11, 2005. The trust was executed and approved by a court and the corpus was formed with a lump sum malpractice award. Trust language restricted the use of the funds by the third party trustee and contained a spendthrift provision preventing anticipation or transfer of the beneficiary's interest in the trust. Terms of the trust stated that termination of the trust would provide that any remaining assets be used for reimbursement of Medicaid expenses incurred after the establishment of the trust. Since the trust was established in Texas, state law dictates that Medicaid agencies are considered residual beneficiaries, resulting in an irrevocable trust. The trust meets the special needs trust requirements of age, disability, and being court-established. However, the third requirement is not met. The trust only provides that Medicaid expenses incurred after the trust was established will be reimbursed. Regulations require that the trust language provide for repayment of all incurred medical expenses, regardless of occurrence before or after trust establishment. Since the special needs trust exemption requirements are not met, the trust is determined to be a countable resource. An additional question regarding child support deposited into the trust is not evaluated due to a lack of sufficient information.

2. OPINION

You have asked whether D~ R~'s trust account is a resource to D~ for purposes of Supplemental Security Income (SSI) eligibility and whether child support payments into the trust should be considered income. We believe that the trust is a resource to D~. We do not have sufficient information to render an opinion regarding the child support payments.

FACTS

As we understand the facts, a Trust Agreement ("trust") was executed and approved by the A-14th District Court ("court") of Dallas County, Texas, on January 11, 2005. The trust was established as a result of a settlement agreement in a medical malpractice case, which resulted in the payment of $2,109,561.45 for the benefit of D~. An "SSID" query print-out included in the materials you provided indicates that D~ SSI benefits have been suspended as a result of his receipt of the settlement, pending establishment and approval of a special needs trust. The same SSID printout shows D~ date of birth as February 3, 1994, which places him at the age of five on his application date. D~ is a minor and an incapacitated person, as defined in section 142.007 of the Texas Property Code, and a disabled person, as defined in section 1614(a)(3) of the Social Security Act. The trustee is Morgan Chase Trust Company.

The agreement indicates that it is intended to comply with the requirements of a special needs trust pursuant to 42 U.S.C. § 1396p (d)(4)(A), as amended August 10, 1993, by the Revenue Reconciliation Act of 1993, Pub. L. 103-66. The agreement further indicates that the settlement proceeds are transferred and assigned to the trustee by the court to be held, invested, administered, and distributed by the trustee for D~ benefit, but that the funds shall at no time become available to or placed in D~ possession or come within the control of his guardians, except as provided by the agreement. No transfer or ownership of the settlement funds has been made to D~ or his legal guardians. The agreement also specifies that the court may amend, modify, or revoke the trust, but neither D~ nor the guardian of his estate may do so.

The primary purpose of the trust is to provide a system for management, investment, and disbursement of the settlement proceeds for D~ benefit. The secondary intention is to provide for the continuing conservation and enhancement of the proceeds to supplement any benefits that D~ might receive from any governmental or non-governmental agency. The agreement specifies that the trust is explicitly intended to be a discretionary trust and not a basic support trust, and that the intent is to provide benefits to D~ without interfering with any other benefits he might receive or excusing the obligations of any person to provide for D~ continuing maintenance and support. The trustee has complete discretion to pay or use so much or all of the net income and/or corpus of the trust as it deems appropriate, and any undistributed income shall be accumulated and added to the corpus of the trust.

The express purpose of the trust is to provide for D~ "extra and supplemental needs, over and above the benefits he otherwise receives" from other sources. The court provided a non-exclusive itemization of the types of needs the trustee may meet through the trust funds. These include: dental care; unreimbursed medical expenses; ophthalmic and auditory care; psychological support services; recreational and cultural experiences; expenditures for persons to accompany D~ on vacations and transportation of persons visiting him; expenditures related to D~ hobbies and interests; personal property and services that will enhance D~ life without defeating his eligibility for public assistance; funeral and burial costs; personal care needs and companionship; supplemental nursing care; physical therapy or rehabilitation; private room costs; entertainment items; nutritional and similar services; and payment for D~ care and the training of caregivers.

The trustee has complete discretion as to expenditures during times when D~ is neither receiving nor applying for public assistance. The court, however, imposed a specific prohibition against use of the trust assets or income for any property or services that would be available from any governmental or insurance source during periods of time that D~ has applied for or is receiving means-tested governmental public assistance benefits. At the same time, the trust allows that there may be circumstances during the existence of this trust "wherein it may be in the best interests of the Beneficiary to forfeit or forego the receipt of means-tested governmental public assistance benefits."

The trust is to terminate on the earlier of the date of D~ death or the date the court determines that D~ has regained capacity and is no longer an incapacitated person, except that if D~ regains capacity before age 25, the trust will not terminate until he is age 25. Upon termination of the trust, the trustee shall distribute the remaining trust assets to the State of Illinois or any other State that provides Medicaid benefits to D~, up to an amount equal to the total medical assistance paid on D~ behalf under the state's Medicaid plan for services furnished after the establishment of the trust. Any remaining assets shall be distributed to D~ if he is living, otherwise to the personal representative of his estate to be administered as part of his general probate estate.

The agreement contains provisions for changes of trustees, compensation of trustees, and accountings. It also contains provisions describing various types of investments and describing the powers and liabilities of the trustee. Among the general trust provisions is a spendthrift provision, which specifies that D~ shall not have the power to anticipate, encumber, or transfer his interest in the corpus of the trust in any manner and that neither the income nor the corpus of the trust shall be liable for or charged with any obligations incurred by D~.

The materials you provided include an "SSID" query print-out, which indicates that D~ is receiving child support, apparently in the sum of $300 per month. Your memorandum requesting our opinion indicates that the child support payments are made into the trust. We have no information as to the State of residence of D~ father or whether the child support payments are court-ordered and, if so, in what State the order was issued or the terms of the court order.

DISCUSSION

The trust provides that it is governed by Texas law. In a suit in Texas in which a minor without a legal guardian or an incapacitated person is represented by a next friend or guardian ad litem, the court may, on application of the next friend or guardian ad litem, and on a finding that a creation of a trust would represent the individual's best interests, order delivery of funds accruing to the individual under the judgment to a trust company or bank having trust powers in Texas. Tex. Prop. Code Ann. § 142.005(a) (West 2005). The decree shall provide for the creation of a trust for the benefit of the individual, in which the individual is the sole beneficiary and the trustee has sole discretion with regard to disbursements for the individual's benefit. Tex. Prop. Code Ann. § 142.005(b)(1), (2). If the individual is a minor, the trust terminates on his death, attainment of an age stated in the trust, or age 25, whichever is earlier. If the individual is an incapacitated person, the trust terminates on his death or when he regains capacity. Tex. Prop. Code Ann. § 142.005(b)(4). A trust created under this section may be amended, modified, or revoked by the court at any time, but is not subject to revocation by the individual or the guardian of his estate. Tex. Prop. Code Ann. § 142.005(d). If the court finds that it would be in the best interests of the individual to do so, the trust

may contain provisions determined by the court to be necessary to establish a special needs trust pursuant to 42 U.S.C. § 1396p(d)(4)(A). Tex. Prop. Code Ann. § 142.005(g).

An incapacitated person is a person who is impaired because of mental illness or deficiency, physical illness or disability, advanced age, chronic drug use or intoxication, or any other cause except status as a minor to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person. Tex. Prop. Code Ann. § 142.007.

The trust created for D~ meets the requirements of the Texas Property Code. The court determined that D~ is a minor and an incapacitated person and that creation of the trust would be in his best interest. The trustee has sole discretion with regard to expenditures from the trust funds. The trust terminates upon D~ death or his regaining capacity, but not earlier than age 25. Only the court may amend, modify, or revoke the trust. Further, the court found that it would be in D~ best interest to establish the trust as a special needs trust pursuant to 42 U.S.C. § 1396p(d)(4)(A). Tex. Prop. Code Ann. § 142.005.

Turning to the resource issue, the trust indicates that it is irrevocable. Article II. However, despite the terms of a trust, if an individual is both the settlor and the sole beneficiary, he can revoke the trust. The settlor is one who creates a trust or furnishes the consideration for the creation of a trust, which, in this case, would be D~. Restatement (Third) Trusts, § 3(1). D~, however, is not the sole beneficiary, since, pursuant to POMS SI DAL01120.200, State Medicaid agencies are considered residual beneficiaries in Texas. Accordingly, the Trust is irrevocable.

Pursuant to POMS SI 01120.201(D)(2), the principal of an irrevocable trust established with the assets of an individual (on or after January 1, 2000) is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse (which is the case here, since D~ is a beneficiary), unless one of the exceptions in POMS SI 01120.203 (listing Medicaid trust exceptions for individual and pooled trusts, and the waiver for undue hardship) applies. Here, however, it does not appear that any exception applies.

Specifically, the trust is not a pooled trust, so POMS SI 01120.203(B)(2) (Medicaid pooled trust exception) would not apply, and the undue hardship waiver would not be applicable because the trust does not prohibit disbursements for D~ support and maintenance, when no other source of funds is available, POMS SI 01120.203(C)(2)(a). The final exception, the Medicaid trust exception for individual trusts, applies where the trust is: (1) established with the assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the State for Medicaid payments made for the benefit of the individual during his lifetime. POMS SI 01120.203(B)(1). Here, it appears that D~ is under age 65 and disabled, and the trust was established for his benefit by the Court, when the funds were ordered transferred. However, the third element is not satisfied, since the trust only provides for reimbursement of Medicaid for services furnished after the establishment of the trust. POMS SI 01120.203(B)(1)(a), (f) (State must 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."). Accordingly, it does not appear that any of the exceptions in POMS SI 01120.203 apply, and thus the trust should be considered a resource under POMS SI 01120.201(D)(2).

We do not have sufficient information to offer an opinion regarding the child support payments raised in your request. We do not know whether the child support payments made to D~ are made directly into the trust, what the terms are of any court order regarding the child support, or in what State the payments are made. Therefore, more detailed information as to the child support payments appears necessary before we can issue an opinion on this matter.

CONCLUSION

We believe that the trust in this case is a resource because it does not meet any of the exceptions under the statutory trust resource rules, as discussed above. Further development is needed regarding child support payments that may be made into D~ trust before their treatment as possible income can be determined, pursuant to the law of the pertinent State, depending on the State in which the payments are made or court ordered.

4.35 VIRGINIA

A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~

DATE: August 27, 2003

1. SYLLABUS

Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

2. OPINION

INTRODUCTION

You requested our advice on whether under the laws of the jurisdictions within Region III, a parent or grandparent can establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. In further conversations with your staff, we were instructed to assume that the trust agreements that you wish us to consider satisfy the requirements of 42 U.S.C. '1382b(e)(5).

SUMMARY

We believe that based on court precedent, every jurisdiction within Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establishes an empty trust or a seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

BACKGROUND

To qualify for supplemental security income (SSI), an individual must not have resources that total more than $2,000. 20 C.F.R. ' 416.1205 (2003). In addition, as a general rule, a trust established with the assets of an individual (or spouse) will be considered a resource for SSI eligibility purposes. 42 U.S.C. '1382b(e)(3). There is, however, an exception to these resource provisions. Under 42 U.S.C. '1382b(e)(5) of the Social Security Act, if any agreement satisfies the criteria found in 42 U.S.C. ' 1396p(d)(4), it is not counted as a resource. Section 1396p(d)(4) provides an exception for counting a trust as a resource if it is a:

trust containing assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

DISCUSSION

Within the state jurisdictions in Region III (including the District of Columbia), neither the courts nor the lawmakers define a trust. Rather, each jurisdiction sets out in court precedent its own test for finding a valid trust. Below is a breakdown by jurisdiction of the applicable case law as applied to your inquiry.

Virginia

According to Virginia precedent:

express trust is created when the parties affirmatively manifest an intention that certain property be held in trust for the benefit of a third party. *See Peal v. Luther*, 199 Va. 35, 97 S.E.2d 668, 669 (1957); *Broaddus v. Gresham*, 181 Va. 725, 26 S.E.2d 33,35 (1943). An express trust may be created A without the use of technical words.@ Broaddus, 26 S.E.2d at 35. All that is necessary are words, see id. at 35 (citation omitted), or circumstances, see Woods v. Stull, 182 Va. 888, 30 S.E.2d 675, 682 (1944) (citation omitted), A which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . .,@ Broaddus, 26 S.E.2d at 35; see also Schloss v. Powell, 93 F.2d 518, 519 (4th Cir. 1938).

Old Republic Nat. Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998).

When an agreement satisfies 42 U.S.C. '1382b(e)(5), there will always be a corpus. It is irrelevant that a parent or grandparent sets up an agreement that has little or no funds, because ultimately the disabled individual for whom the trust is established will provide the assets. In addition, in these agreements, the disabled individual will be the settlor. 76 Am. Jur. 2d Trusts (1992) (stating that under general trust principles, the person who provides consideration for the trust is the settlor, even though in form the trust is created by another person). Further, the disabled individual will also be a beneficiary, as the trust is established for his/her benefit. Moreover, the essential purpose of the agreement will be to ensure that a trust established with the assets of the settlor is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. In short, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), circumstances unequivocally show an intention that the legal estate be vested in one person, to be held in some manner or some purpose on behalf of another. *Id*. Therefore, Virginia courts will recognize agreements that satisfy 42 U.S.C. ' 1382b(e)(5) as valid trusts.

Delaware

Delaware precedent states that:

No particular words or form are required in order to create an express trust. All that is required is that the parties intended that a relationship, which equity would describe as a trust, exist. “When a question arises as to whether or not an agreement creates a trust, the courts look objectively at the result to determine the matter. . . . The question in each instance is whether the kind of relationship known to the law as a trust has been created. ” It is the intent of the settlor as expressed in the agreement itself which is controlling as to whether a trust has been created. It is immaterial that the parties did not know they were creating a trust.

Cravero v. Holleger, Del. Ch., 566 A.2d 8, 13 (1989) (citations omitted).

When an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the settlor's intent will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because the settlor's expressed intent in such an agreement is to establish a trust, a Delaware court would find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5) is a valid trust.

District of Columbia

The District of Columbia Court of Appeals noted that “there must be proof of the settlor's intention to create a trust, which may be manifested by written or spoken language or by conduct, in light of all surrounding circumstances.” *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983)). The court also added that “[n]o particular form of words or conduct is necessary to manifest an intention to create a trust.” *Id*. at 1136. Rather, the courts in the District of Columbia look to several “evidentiary factors” in determining that intent:

(1) the imperative, as distinguished from precatory, nature of the words used by the settlor to create a trust; (2) the definiteness of the trust property; (3) the certainty of the identity of the trust beneficiaries; (4) the relationship between and financial position of the parties; (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and (6) whether the result reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.

Id.

In an agreement that satisfies the requirements of 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five provides the assets and is the settlor and a beneficiary. The state Medicaid provider(s) will be reimbursed. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI. Logically, the settlor would desire having the agreement construed as a trust. Consequently, when a court within the District of Columbia scrutinizes an agreement established pursuant to 42 U.S.C. '1382b(e)(5) under the evidentiary factors discussed in *Duggan*, it will find a valid trust.

Maryland

The Maryland Supreme Court has stated that:

From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002) (citations omitted).

In an agreement established pursuant to 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five, provides the assets and is the settlor. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because under Maryland law the settlor's intent ultimately determines whether a valid trust exists, a court within that jurisdiction will find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5), which has a clear intent, is a valid trust.

Pennsylvania

The Pennsylvania Supreme Court has discussed the criteria for a valid trust using the following language:

[N]o particular form of words or conduct is necessary to create a trust. Neither the presence nor the absence of words “trust,” “trustee,” or “beneficiary” is determinative of an intention to create a trust. The question is whether the agreements taken as a whole evidence an intent by [the settlors] “to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another.” “To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred.”

* * *

'A trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefits of the other. The term 'trust' is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee….'

Buchanan v. Brentwood Federal Savings & Loan Association, 457 Pa. 135, 143, 20 A.2d 117, 122 (1974); *R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Development Inc*., 334 Pa.Super. 72, 77-78, 482 A.2d 1086, 1089 (1984) (quoting *Buchanan*) (citations omitted).

As mentioned in the discussion of Virginia law, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the property, the settlor, a beneficiary, and the purpose will be known. In other words, an agreement that satisfies the requirements established in 42 U.S.C. '1382b(e)(5) would evidence intent by a settlor to impose upon a transferee of property equitable duties to deal with the property for the benefit of another. *Id*. Therefore, under Pennsylvania law such an agreement amounts to a valid trust.

West Virginia

In West Virginia, courts will determine whether a valid trust is created based upon the intent of the parties. *Bowne v. Lamb*, 119 W.Va. 370, 193 S.E. 563, 565 (1937). Further, “[w]hether the parties intended to create a trust is determined not solely from the wording of the agreement but also from their actions under it and the way the fund is handled.” *Id*. When an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), the parties unquestionably intend to create a trust to ensure that the settlor does not have his/her assets in the agreement counted as a resource for purposes of SSI and that the state will be reimbursed for medical assistance that it paid to the settlor. Because the parties' intent will be apparent when an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), a West Virginia court will find that such an agreement is a valid trust.

CONCLUSION

It is our opinion that every jurisdiction within Region III would recognize as a valid trust any agreement established pursuant to 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

James A. W~
Regional Chief Counsel

By:_____
Andrew C. L~
Assistant Regional Counsel

4.36 WEST VIRGINIA

A. PS 03-178 Request for Review: Survey of State Trust Law Within Region III, SSN: ~

DATE: August 27, 2003

1. SYLLABUS

Every jurisdiction in Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. 1382b(e)(5) including instances where a parent or grandparent establishes an empty trust or seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

2. OPINION

INTRODUCTION

You requested our advice on whether under the laws of the jurisdictions within Region III, a parent or grandparent can establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date. In further conversations with your staff, we were instructed to assume that the trust agreements that you wish us to consider satisfy the requirements of 42 U.S.C. '1382b(e)(5).

SUMMARY

We believe that based on court precedent, every jurisdiction within Region III would recognize as a valid trust any agreement that satisfies the provisions of 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establishes an empty trust or a seed trust for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

BACKGROUND

To qualify for supplemental security income (SSI), an individual must not have resources that total more than $2,000. 20 C.F.R. ' 416.1205 (2003). In addition, as a general rule, a trust established with the assets of an individual (or spouse) will be considered a resource for SSI eligibility purposes. 42 U.S.C. '1382b(e)(3). There is, however, an exception to these resource provisions. Under 42 U.S.C. '1382b(e)(5) of the Social Security Act, if any agreement satisfies the criteria found in 42 U.S.C. ' 1396p(d)(4), it is not counted as a resource. Section 1396p(d)(4) provides an exception for counting a trust as a resource if it is a:

trust containing assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

DISCUSSION

Within the state jurisdictions in Region III (including the District of Columbia), neither the courts nor the lawmakers define a trust. Rather, each jurisdiction sets out in court precedent its own test for finding a valid trust. Below is a breakdown by jurisdiction of the applicable case law as applied to your inquiry.

Virginia

According to Virginia precedent:

An express trust is created when the parties affirmatively manifest an intention that certain property be held in trust for the benefit of a third party. *See Peal v. Luther*, 199 Va. 35, 97 S.E.2d 668, 669 (1957); *Broaddus v. Gresham*, 181 Va. 725, 26 S.E.2d 33,35 (1943). An express trust may be created A without the use of technical words.@ *Broaddus*, 26 S.E.2d at 35. All that is necessary are words, *see id*. at 35 (citation omitted), or circumstances, *see Woods v. Stull*, 182 Va. 888, 30 S.E.2d 675, 682 (1944) (citation omitted), A which unequivocally show an intention that the legal estate was vested in one person, to be held in some manner or for some purpose on behalf of another . . .,@ *Broaddus*, 26 S.E.2d at 35; *see also Schloss v. Powell*, 93 F.2d 518, 519 (4th Cir. 1938).

Old Republic Nat. Title Ins. Co. v. Tyler (In re Dameron), 155 F.3d 718, 722 (4th Cir. 1998).

When an agreement satisfies 42 U.S.C. '1382b(e)(5), there will always be a corpus. It is irrelevant that a parent or grandparent sets up an agreement that has little or no funds, because ultimately the disabled individual for whom the trust is established will provide the assets. In addition, in these agreements, the disabled individual will be the settlor. 76 Am. Jur. 2d *Trusts* (1992) (stating that under general trust principles, the person who provides consideration for the trust is the settlor, even though in form the trust is created by another person). Further, the disabled individual will also be a beneficiary, as the trust is established for his/her benefit. Moreover, the essential purpose of the agreement will be to ensure that a trust established with the assets of the settlor is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. In short, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), circumstances unequivocally show an intention that the legal estate be vested in one person, to be held in some manner or some purpose on behalf of another. *Id*. Therefore, Virginia courts will recognize agreements that satisfy 42 U.S.C. ' 1382b(e)(5) as valid trusts.

Delaware

Delaware precedent states that:

No particular words or form are required in order to create an express trust. All that is required is that the parties intended that a relationship, which equity would describe as a trust, exist. “When a question arises as to whether or not an agreement creates a trust, the courts look objectively at the result to determine the matter. . . . The question in each instance is whether the kind of relationship known to the law as a trust has been created.” It is the intent of the settlor as expressed in the agreement itself which is controlling as to whether a trust has been created. It is immaterial that the parties did not know they were creating a trust.

Cravero v. Holleger, Del. Ch., 566 A.2d 8, 13 (1989) (citations omitted).

When an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the settlor's intent will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because the settlor's expressed intent in such an agreement is to establish a trust, a Delaware court would find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5) is a valid trust.

District of Columbia

The District of Columbia Court of Appeals noted that "there must be proof of the settlor's intention to create a trust, which may be manifested “by written or spoken language or by conduct, in light of all surrounding circumstances.” *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989) (quoting *Cabaniss v. Cabaniss*, 464 A.2d 87, 91 (D.C. 1983)). The court also added that “[n]o particular form of words or conduct is necessary to manifest an intention to create a trust.” *Id*. at 1136. Rather, the courts in the District of Columbia look to several “evidentiary factors” in determining that intent:

(1) the imperative, as distinguished from precatory, nature of the words used by the settlor to create a trust; (2) the definiteness of the trust property; (3) the certainty of the identity of the trust beneficiaries; (4) the relationship between and financial position of the parties; (5) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; and (6) whether the result reached in construing the transaction as a trust would be such as a person in the situation of the settlor would naturally desire to produce.

Id.

In an agreement that satisfies the requirements of 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five provides the assets and is the settlor and a beneficiary. The state Medicaid provider(s) will be reimbursed. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI. Logically, the settlor would desire having the agreement construed as a trust. Consequently, when a court within the District of Columbia scrutinizes an agreement established pursuant to 42 U.S.C. '1382b(e)(5) under the evidentiary factors discussed in *Duggan*, it will find a valid trust.

Maryland

The Maryland Supreme Court has stated that:

A trust exists where the legal title to property is held by one or more persons, under an equitable obligation to convey, apply, or deal with such property for the benefit of other persons. . . . The creation of a trust depends upon the intention of the settlor.

In fact, it is that purpose and intention, rather than the use of any particular term, that determines whether a valid trust has been established. Thus, a trust will not be created where none in fact was contemplated.

From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church, 370 Md. 152, 181-82, 803 A.2d 548, 566 (2002) (citations omitted).

In an agreement established pursuant to 42 U.S.C. '1382b(e)(5), a disabled individual under age sixty-five, provides the assets and is the settlor. The settlor's purpose will be to ensure that a trust established with his/her assets is not counted as a resource for purposes of SSI and that the state Medicaid provider(s) is reimbursed. Because under Maryland law the settlor's intent ultimately determines whether a valid trust exists, a court within that jurisdiction will find that an agreement established pursuant to 42 U.S.C. '1382b(e)(5), which has a clear intent, is a valid trust.

Pennsylvania

The Pennsylvania Supreme Court has discussed the criteria for a valid trust using the following language:

[N]o particular form of words or conduct is necessary to create a trust. Neither the presence nor the absence of words “trust,” “trustee,” or “beneficiary” is determinative of an intention to create a trust. The question is whether the agreements taken as a whole evidence an intent by [the settlors] “to impose . . . upon a transferee of the property equitable duties to deal with the property for the benefit of another.” “To determine whether there is a trust we are to look, not at the title given, but at the powers and duties conferred.”

* * *

'A trust is a relation between two persons, by virtue of which one of them as trustee holds property for the benefits of the other. The term 'trust' is a very broad and comprehensive one. Every deposit is a trust, except possibly general bank deposits; every person who receives money to be paid to another or to be applied to a particular purpose is a trustee….'

Buchanan v. Brentwood Federal Savings & Loan Association, 457 Pa. 135, 143, 20 A.2d 117, 122 (1974); *R.P. Russo Contractors & Engineers, Inc. v. C.J. Pettinato Realty & Development Inc*., 334 Pa.Super. 72, 77-78, 482 A.2d 1086, 1089 (1984) (quoting *Buchanan*) (citations omitted).

As mentioned in the discussion of Virginia law, when an agreement satisfies the requirements of 42 U.S.C. '1382b(e)(5), the property, the settlor, a beneficiary, and the purpose will be known. In other words, an agreement that satisfies the requirements established in 42 U.S.C. '1382b(e)(5) would evidence intent by a settlor to impose upon a transferee of property equitable duties to deal with the property for the benefit of another. *Id*. Therefore, under Pennsylvania law such an agreement amounts to a valid trust.

West Virginia

In West Virginia, courts will determine whether a valid trust is created based upon the intent of the parties. *Bowne v. Lamb*, 119 W.Va. 370, 193 S.E. 563, 565 (1937). Further, “[w]hether the parties intended to create a trust is determined not solely from the wording of the agreement but also from their actions under it and the way the fund is handled.” *Id*. When an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), the parties unquestionably intend to create a trust to ensure that the settlor does not have his/her assets in the agreement counted as a resource for purposes of SSI and that the state will be reimbursed for medical assistance that it paid to the settlor. Because the parties' intent will be apparent when an agreement is established pursuant to 42 U.S.C. '1382b(e)(5), a West Virginia court will find that such an agreement is a valid trust.

CONCLUSION

It is our opinion that every jurisdiction within Region III would recognize as a valid trust any agreement established pursuant to 42 U.S.C. '1382b(e)(5), including instances where a parent or grandparent establish an unfunded trust (empty trust) or a nominally funded trust (seed trust) for the purpose of receiving a competent adult SSI beneficiary's assets at a later date.

James A. W~
Regional Chief Counsel

By:_____
Andrew C. L~ Assistant Regional Counsel

4.37 WISCONSIN

A. PS 09-123 Wisconsin - SSI Review of Special Needs Trust for Paul J. V~ Your Ref: S2D5G6 SI-2-1-3 WI Our Ref: 08-0184

DATE: June 24, 2009

1. SYLLABUS

This opinion analyzes a special needs trust to determine whether the criteria are met to be exempted from SSI resource counting. The subject trust was established in 2004 with the assets of a disabled individual under age 65. The trust fails to meet the sole benefit criteria to be exempted from SSI resource counting due to an early termination provision that would distribute trust assets as though the beneficiary had died. The provision thus allows that, subsequent to Medicaid reimbursement, the beneficiary's heirs could receive benefit from the trust while he is still alive. The trust also contains a potentially problematic provision stating that members of the beneficiary's family may benefit from distributions of the trust if the trustee determines that such distributions promote the purpose of the trust. The language in that provision is imprecise and does not specify that such benefits to family members are strictly collateral and subordinate to trust distributions made on behalf of the beneficiary.

2. OPINION

You asked us to review the Paul J. V~ Special Needs Trust and annuity to determine whether the trust is a resource for purposes of determining Paul's eligibility for Supplemental Security Income (SSI). We conclude that the trust is a resource for SSI purposes because it is not for the sole benefit of Paul during his lifetime. Specifically, in Article V(B)(5), the trust includes an early termination clause that may result in other people receiving trust assets during Paul's lifetime. This makes the trust a resource. In addition, Article II(C) could raise issues about whether the trust is for the sole benefit of Paul, because it states that other family members may benefit from trust distributions.

BACKGROUND

Paul J. V~ was born in 1980. He began receiving Supplemental Security Income (SSI) benefits in 1982. On September 30, 1983, the Circuit Court of Cook County issued an order (1983 Order) approving a settlement and distribution in the amount of $1,237,000 (Settlement) to Paul's estate. Harris Trust and Savings (Harris Trust) was appointed the guardian of Paul's estate. The Settlement stated that Paul would require twenty-four hour nursing care, including help feeding, clothing, and cleaning himself, for the rest of his natural life, and that Victoria V~, Joseph V~, and Marjorie V~ (Paul's mother, father, and paternal grandmother) would care for Paul in their home. The Settlement included a lump sum payment of $750,000, of which $400,000 was designated for legal fees; $200,000 to reimburse Victoria, Joseph and Marjorie for care given to Paul from the time of his birth until the date of the Settlement; $20,000 to purchase an accessible van for Paul's transportation; and the remaining $130,000 to be invested by Harris Trust. The Settlement also directed that annuity payments be made for Paul to Harris Trust from the Life Insurance Company of North America. The annuity payments, in an amount of $4,000 a month, would begin in October 1983, and continue for twenty-five years. The 1983 Order directed that Harris Trust pay $2500 of the monthly annuity payments to Victoria, Joseph and Marjorie for Paul's care and maintenance.

On March 15, 2000, the Sawyer County (Wisconsin) Circuit Court appointed attorney Michael K~ as Paul's guardian ad litem. In December 2003, SSA reported Paul's mother for not disclosing countable trust resources to SSA since 1982. Victoria and Marjorie were subsequently convicted of mail fraud, and ordered to pay restitution to SSA in the amount of $100,918.

On August 27, 2004, the Sawyer County Circuit Court issued an order establishing the Paul J. V~ Irrevocable Supplemental Needs Trust Dated August 27, 2004. By that date, Paul was an adult, and he had been placed in an adult foster care residence. The stated purpose of the trust was to be a special needs trust described in 42 U.S.C. § 1396p(d)(4)(A) and Wisconsin Statutes §§ 49.454(4), 701.06(5m). *See* Trust, Art. I(B), I(D), II(F). The Trust states that it is the intent of the court that Paul remain eligible at all time for public assistance. *See* Trust, Art. I(B), (I)(D)(1). The Trust also states that the Trust is for Paul's sole benefit, and that the purpose of the Trust is to provide funds to make Paul's life "as pleasant, comfortable and happy . . . as possible" by supplementing those primary services and support provided by public aid. *See* Trust Art. II(D)(2).

The trust was funded with approximately $629,666 in assets remaining from the Settlement, which at Mr. K~'s request were transferred from Harris Trust and placed in trust with Marshall & Isley Trust Co., N.A. (M&I Trust). M&I Trust was named as

Trustee of the Trust. *See* Trust, Art. IV(A). The trust also allows the Trustee to accept additional assets and add them to the trust estate, as long as the additions are consistent with the purpose of the Trust. *See* Trust, Preamble, Art. V(A)(7). The Trustee must make an annual accounting of the trust assets both to the guardian of Paul's estate and to the Sawyer County Probate Court. *See* Trust, Art. VI. The trust establishes that M&I Trust may resign as Trustee by notifying Paul and his guardian in writing. *See* Trust, Art. IV(B). The Trustee also has the discretion to appoint a substitute trustee, to act under the Trustee's supervision. *See* Trust, Art. IV(C).

The Trustee has sole discretion to make such distributions as the Trustee considers necessary and advisable and consistent with the purpose of the Trust. *See* Trust, Art. II(A)(1), II(B)(13), II(D), II(G). Paul has the sole right to use, possess and enjoy any tangible personal property held by the Trust, and any Trust-owned real estate that Paul occupies for residential purposes, unless the Trustee considers such use impractical or inadvisable. *See* Trust, Art. II(B)(4)-(7), VII. The Trustee does not require leave of the court to exercise its powers. *See* Trust, Art. IV(F), V(A)(9). However, the Trustee is directed not to make any expenditure which would cause Paul to become ineligible for public or government support. *See* Trust, Art. II(A)(2), II(F).

In addition to providing supplemental services not available through public assistance, including insurance, medical, educational, vocational, and legal services, *see* Trust, Art. II(B)(1)-(2), (9)-(12), II(D), the Trustee may make payments for household items, living expenses, an accessible automobile or van, and miscellaneous items "by which [Paul's] life will be enriched and made more enjoyable. *See* Trust, Art. II(B)(4)-(7). The Trustee may also use trust assets to help Paul maintain contact with friends and family, and to pay the expenses for caregivers and members of Paul's immediate family to accompany him on or visit him for holidays, vacations, entertainment and "miscellaneous treats." *See* Trust, Art. II(B)(3), (8). The Trust specifically states that members of Paul's family may benefit from distributions of the Trust if the Trustee determines that such distributions promote the purpose of the Trust and are in Paul's best interest. *See* Trust, Art. II(C).

The Trust expressly states that it is irrevocable. *See* Trust, Art. I(C)(1). However, the Trustee may petition the court to amend or terminate the Trust in order to maintain Paul's eligibility for public assistance, or to conform the Trust to any changes in the laws relating to public assistance. *See* Trust, Art. I(C)(2)(a). In addition, if Paul becomes ineligible for public assistance, or if the Trustee considers the benefits available to Paul too insubstantial to continue the Trust, the Trustee may terminate the Trust, reimburse the state for any benefits that Paul has received, and then distribute any remaining assets to Paul or his guardian. *See* Trust, Art. I(C)(2)(b). The Trustee may also terminate the Trust if it determines that the Trust's market value makes administering the Trust uneconomical or the Trustee determines it is in Paul's best interest to terminate the Trust. *See* Trust Art. V(B)(5). In that case, the Trust assets are to be distributed to the remainder beneficiaries as if Paul had died. *Id.*

Unless terminated by the Trustee as stated above, the trust terminates upon Paul's death. *See* Trust, Art. III(A). After Paul's death, the Trustee is directed to reimburse any amounts that a state paid to Paul for medical assistance or other benefits during his lifetime. *See* Trust, Art. III(B). After the reimbursement of those claims, the Trustee has the discretion to pay for Paul's funeral, burial and related expenses. *See* Trust, Art. III(C). If any more assets remain in the Trust, the Trustee may pay any death, inheritance, and estate taxes, and then distribute any remaining assets to Paul's heirs. *See* Trust, Art. III(D)-(E).

The Trust has anti-assignment and spendthrift provisions which state that no beneficial interest in the principle or income of the trust shall be subject to transfer, assignment, anticipation, pledge or seizure by legal process, and is not subject to claims from creditors. *See* Trust, Art. II(F), VIII, X. The Trust is governed by Wisconsin law. *See* Trust, Art. I(B)(1).

DISCUSSION

I. The Trust.

The Trust is subject to the statutory provisions of Section 1613(e) of the Social Security Act for trusts established on or after January 1, 2000. *See* 42 U.S.C. § 1382(b)(e); POMS SI 01120.201. Generally, under these provisions, trusts established with the assets of the individual or the individual's spouse are considered resources for SSI purposes even if they are irrevocable. However, there is an exception for certain trusts that are established under 42 U.S.C. § 1396p(d)(4)(A), commonly known as the special needs trust exception. *See* POMS SI 01120.203. For this exception to apply, the trust must be

a. Established with the assets of a disabled individual under age 65, or the disabled individual's spouse;

b. Established for the sole benefit of the individual by a parent, grandparent, legal guardian, or court; and

c. Provide that the state will receive all amounts remaining in 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.

POMS SI 01120.203(B)(1)(a). If the trust contains provisions that provide benefits to other individuals or entities, or allow for termination of the trust prior to the individual's death and payment of the trust corpus to another individual or entity (other than to the State as payment for goods and services rendered to the individual), the trust is not for the sole benefit of the individual and cannot qualify for the special needs trust exception. POMS SI 01120.203(B)(1)(e). If the trust meets an exception to counting it as a resource under § 1613(e) of the Act, we still must evaluate it under the regular resource rules. *See* POMS SI 01120.203(B)(1)(a).

A. Special Needs Trust Exception

The Trust does not meet the requirements for the special needs trust exception to counting it as a resource under Section 1613(e). The trust meets the first requirement for the special needs trust exception, because Paul was born in 1980, and thus is under the age of 65. The Trust also meets the third requirement of the special needs trust exception. The Trust's termination clause provides that the entire amount remaining in the trust at Paul's death may be paid to reimburse the appropriate state for medical services provided to Paul during his lifetime. Expenses that are prohibited for purposes of meeting the Medicaid payback trust exception, such as funeral expenses, *See* POMS SI 01120.203(B)(3)(a)-(b), may not be paid until after all Medicaid services have been reimbursed.

However, the Trust does not meet the second requirement for the special needs trust exception, because it permits other people to benefit from the Trust during Paul's lifetime, and therefore was not established for Paul's sole benefit. The trust was established for Paul's benefit by the Sawyer County Probate Court, and was funded primarily with assets that derive from proceeds of the settlement of his lawsuit. However, the Article V(B)(5) of the Trust contains an early termination clause, under which the Trustee may terminate the Trust during Paul's lifetime and distribute the Trust assets "to the remainder beneficiaries set forth in Article III" as if Paul had died. Under this clause, in the event of early termination the Trust would properly reimburse the state for medical assistance provided to Paul. *See* Trust, Art. III(B), V(B)(5). However, any funds remaining after the state was reimbursed would be distributed to other persons or entities, while Paul was still alive. *See* Trust Art. III(C)-(E), V (B)(5). For that reason, the Trust does not meet the special needs trust exception to counting it as a resource under the Act, because it is not for the sole benefit of the disabled individual. POMS SI 01120.203(B)(1)(e).

In addition, the provision in Article II(C) could raise issues about whether the trust is for the sole benefit of the disabled individual, because that provision states that family members may also benefit from trust distributions. Although the Trust states that such distributions must promote the purpose of the Trust and be in Paul's best interests, it does not specify that such benefits to family members are strictly collateral and subordinate to trust distributions made on Paul's behalf.

B. Regular Resource Rules

If the Trust were amended so that it satisfied the Medicaid Trust exception requirements, we would also evaluate the trust under the regular resource rules. *See* POMS SI 01120.200. Under the regular resource rules, a trust will be a resource if it is unilaterally revocable, or if the individual can direct the use of the trust principal for his support. 20 C.F.R. § 416.1201(a). Also, if the individual can sell the right to his beneficial interest in the trust, the trust is a resource. POMS SI 01120.200(D)(1)(a), SI 01120.203(B)(1)(a). The Trust would not be a resource under these rules.

First, the trust is irrevocable. As a general rule, a trust is presumed to be irrevocable unless the grantor explicitly reserves the power to revoke the trust at the time of its creation. Restatement (Second) of Trusts, § 330(2); *see generally Zastrow v. Journal Communications*, Inc., 718 N.W.3d 51, 66-67 (Wis. 2006) (Wisconsin follows the Restatement (Second) of Trusts). Here, the Trust specifically states that it is irrevocable. Trust, Art. I(C). However, where a person is both the grantor and sole beneficiary of a trust, the trust may be unilaterally revocable even though the explicit terms of the trust state that the trust is irrevocable. Wis. Stat. 701.12(1); Restatement (Second) of Trusts § 339, comment a; POMS SI 01120.200(B)(2), 01120.200(D)(3), 01120.201(B)(7), CHI01120.200. Paul is a grantor of the Trust because the Sawyer County Probate Court, following a request by Paul's guardian ad litem, ordered the establishment of the Trust with the assets of Paul's estate. *See In re Guardianship of Scott G.G.*, 659 N.W.2d 438, (Wis. App. Ct. 2003), *citing* Wis. Stat. §§ 49.454(4), 54.20(2)(c). However, Paul is not the sole beneficiary of the Trust, because there are remainder beneficiaries, namely Paul's heirs at law, whose consent would be required if he wanted to revoke the Trust. *See* Trust, Art. III(E); Wis. Stat. § 701.12(1); POMS SI CHI 01120.200(D).

Paul also cannot compel the Trustee to use the trust funds for his support and maintenance. *See* Trust, Art. II(A)(1), II(G). Paul may, however, be able to sell his beneficial interest in the Trust. It seems likely, however, that the Trust's spendthrift provision, *see* Trust Art. X, would not be effective against Paul. Wisconsin recognizes spendthrift trusts as valid and not subject to voluntary or involuntary alienation only where the beneficiary is a person other than the settlor. Wisc. Stat. Ann. § 701.06(1)-

(2). Because the Trust is self-settled with the proceeds of Paul's Settlement, it appears that the spendthrift provision would not prevent him from selling his beneficial interest in the trust. Wisc. Stat. Ann. § 701.06(1)-(2). However, we believe that Wisconsin is likely to follow the approach set forth in the Restatement (Third) of Trusts, namely that a transferee would receive only the rights the settlor had to mandatory or discretionary disbursements under a trust. *See* POMS PS 0182.055 (PS 09-104 SSI - Wisconsin - Request for Six State Legal Opinion on Spendthrift Clauses - Reply); *see also In re Walters Family Trust*, 685 N.W.2d 172 (Wis. Ct. App. 2004) (unpublished) (recognizing Restatement (Third) of Trusts as controlling law). Because Paul, and therefore his transferee, cannot compel the Trustee to make disbursement from the Trust, Paul's interest in the Trust is not likely to be of any significant market value. Therefore, the Trust would not be a countable resource under the regular resource rules.

II. The Annuity Contract.

We have not been provided with an annuity contract. However, annuity payments under the Settlement apparently ended in 2008. Because the Trust was a resource from 2004 to 2008, when annuity payments were made into the Trust, those annuity payments were income when they were paid. POMS SI 01120.200(G)(2)(b).

CONCLUSION

In sum, we conclude that this trust is a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Julie L. B~
Assistant Regional Counsel

B. PS 09-104 SSI - Request for Six State Legal Opinion on Spendthrift Clauses - REPL Your Reference: S2D5G6, SI 2-1-3 (Spendthrift) Our Reference: 08-0141

DATE: May 8, 2009

1. SYLLABUS

This opinion addresses whether spendthrift clauses are recognized in the six states that compose the Chicago region and whether these states allow for a settler to establish a spendthrift trust for his or her own benefit. A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principle. All states in the Chicago region recognize a spendthrift provision in a third-party trust. Likewise, all states in the Chicago region recognize that a beneficial interest in a self-settled discretionary trust would typically not be a countable resource as it would have little, if any, market value. In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursements, regardless of whether the trust has a spendthrift provision. Due to a lack of precedent, self-settled trusts with a spendthrift provision in Indiana or Ohio should be submitted to the Regional Chief Counsel's office for evaluation.

2. OPINION

You have asked whether spendthrift clauses are recognized in the six states in the Chicago Region and, if so, whether these states allow for a settlor to establish a spendthrift trust for his or her own benefit. Each of the six states in Region V recognizes spendthrift clauses as valid when they are established by a settlor for a third party. Therefore, the beneficiary of a third party trust could not sell the beneficial interest in that trust if it has a spendthrift provision. The validity and effect of a spendthrift provision in a self-settled trust varies somewhat from state to state. However, in all six states, the settlor's interest in a discretionary trust would not be a countable resource, regardless of any spendthrift provision, because in the laws of those states, even if the settlor can sell the interest, it would have no significant market value, since the transferee could not demand any payments. In Illinois, Michigan, Minnesota and Wisconsin, the settlor could sell the right to receive future mandatory disbursements, even if the trust includes a spendthrift clause, and the current market value of those disbursements would be a resource. In Indiana and Ohio, it appears that a spendthrift clause may effectively prevent a settlor from selling future mandatory disbursements such that the right to those future disbursements would not be a resource. However, since the law has not yet been interpreted clearly, we recommend that you send any self-settled trusts with mandatory disbursements and spendthrift provisions to our office for evaluation if they are governed by Indiana or Ohio law.

DISCUSSION

A spendthrift clause prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. POMS SI 01120.200(B)(16). If a state recognizes the validity of a spendthrift clause, the beneficial interest in the trust, or the right to payments as a beneficiary, is not a countable resource because the beneficiary may not sell his or her beneficial interest in the trust. 1_/ *Id.* In the Chicago Region, all of the states recognize the validity of a spendthrift clause where the trust is established by a settlor for a third party.

However, if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the spendthrift clause may be considered invalid. All of the states in the Chicago Region view such self-settled spendthrift trusts to be invalid with respect to creditors. However, in determining whether an interest in a trust is a resource, the focus is on whether the individual can sell his or her beneficial interest in the trust. The states vary with respect to whether a spendthrift clause would prevent a settlor from selling his or her beneficial interest in the trust. The majority of states in the region, namely Illinois, Michigan, Minnesota and Wisconsin, are likely to follow the Restatement (Third) of Trusts, which indicates that a spendthrift clause in a self-settled trust is invalid with respect to any interest retained by the settlor. RESTATEMENT (THIRD) OF TRUSTS § 58, cmt. e. Under the Restatement, the spendthrift clause would not prevent the settlor's interest from being reached by the creditors or from being sold. *Id.* However, the most a transferee could receive are the rights the settlor has under the trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 60, cmts. b, f. Therefore, we would typically not consider a discretionary interest in a self-settled spendthrift trust to be a countable resource, since such an interest would have little, if any, market value. However, the right to receive mandatory disbursements from such trusts would generally be considered a resource, since the spendthrift clause would not prevent the individual from selling the interest and that interest would generally have market value.

In contrast, Indiana and Ohio law could be read to view self-settled spendthrift clauses to be invalid only with respect to the rights of creditors. Therefore, a spendthrift clause governed by the laws of those states may effectively prevent a settlor from selling his or her interest in the trust. If that is the case, then the right to both mandatory and discretionary disbursements from such trusts may not be considered a resource for SSI purposes in those states. However, we have not encountered any cases actually interpreting these provisions to prevent a settlor from selling the right to mandatory disbursements from a trust. Therefore, we recommend that self-settled trusts with spendthrift provisions that are governed by the law of Indiana and Ohio be referred for an opinion at least where the settlor has a right to mandatory disbursements.

Illinois

In Illinois, a spendthrift clause in a trust established by a third party will effectively prevent the beneficiary from selling his or her beneficial interest. 2_/ *See Danning v. Lederer*, 232 F.2d 610, 612 (7th Cir. 1956); *Hopkinson v. Swaim*, 119 N.E. 985, 990 (Ill. 1918). However, a settlor may not establish a spendthrift trust for his or her own benefit. In re *Marriage of Chapman*, 297 Ill. App. 3d 611 (Ill. App. 1998). Therefore, in a self-settled trust, the settlor could sell the right to mandatory future disbursements for their current market value, despite any spendthrift provision. However, the settlor's beneficial interest in a discretionary trust would not be a countable resource, even though the spendthrift clause would not prevent the settlor from selling the interest because the right to receive discretionary disbursements would have no significant market value. Although we were unable to find any case law which directly addressed this issue, we found that the Illinois courts have relied upon the Restatement (Third) of Trusts as persuasive authority in interpreting trusts. *See* In Re *Estate of Feinberg*, 891 N.E.2d 549 (Ill. App. 2008) (generally recognizing Restatement (Third) of Trusts as persuasive authority). Therefore, we believe that Illinois would adopt the Restatement (Third) approach --that a transferee would receive only the rights the settlor had under the trust, i.e., to receive mandatory or discretionary disbursements when the trust is self-settled and contains a spendthrift provision. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e. Therefore, the right to receive discretionary disbursements would not be considered a countable resource, as it is unlikely the right to discretionary disbursements would have any significant market value.

Indiana

Indiana law recognizes spendthrift trusts as generally valid against both voluntary and involuntary transfers. Ind. Code § 30-4-3-2(a). When the settlor is also the beneficiary of the trust, Indiana law recognizes an exception to this rule with respect to the rights of creditors. Ind. Code § 30-4-3-2; *see also Matter of Cook*, 43 B.R. 996 (N.D. Ind. 1984) (recognizing that if a settlor is also the beneficiary of the spendthrift trust, creditors may reach the trust corpus). Because Indiana law expressly addresses only the validity of a spendthrift clause in a self-settled trust with regard to creditors' rights, it is possible that Indiana would recognize a spendthrift provision to be valid to the extent that it would prevent the settlor from selling his beneficial interest in a self-settled trust. *See* POMS PS 01825.01 (PS 09-015 SSI - Review of the Trust and Annuity for Savanna R. W~) (concluding that even

if the settlor could sell the interest, it would have no value because the trust was discretionary). However, the comments to the section state that it follows the rule in the Restatement (Second) of Trusts section 156, which states that a self-settled spendthrift clause is ineffective against both creditors and transferees. *See* Ind. Code § 30-4-3-2(b); *see also* RESTATEMENT (SECOND) OF TRUSTS § 156(2). If you encounter a self-settled trust governed by Indiana law with a spendthrift provision and with the right to future mandatory disbursements, we recommend that you refer the case to our office for a legal opinion, since the law is not clear at this time.

Michigan

Michigan recognizes the validity of spendthrift trusts, in general, by statute and common law. Mich. Comp. Laws Ann. § 700.2902(2); Matter of *Estate of Edgar*, 389 N.W.2d 696 (Mich. 1986). However, under Michigan law, a person cannot create a true spendthrift trust for himself. *See* In re *Hertsberg Intervivos Trust*, 578 N.W.2d 289, 291 (Mich. 1998) (adopting RESTATEMENT (SECOND) OF TRUSTS § 156). In *Hertsberg Intervivos Trust*, the Michigan Supreme Court adopted Restatement (Second) of Trusts section 156, which states that a creditor or transferee could reach the entire amount of the trust that the trustee could, in his or her discretion, pay to or for the benefit of the settlor of the trust. *See id.* at 291. However, that case involved only the rights of a creditor, and we have previously advised that we think it likely that Michigan would adopt the Restatement (Third) approach--that a transferee, unlike a creditor, would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See* POMS PS 01825.025 (PS 09-062 Michigan - SSI-Review of the Annuity and Special Needs Trust for Jeri L. K~) (citing RESTATEMENT (THIRD) OF TRUSTS § 60 and cmts. e, f (2003)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource despite any spendthrift clause; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the right to discretionary disbursements would have any market value.

Minnesota

Minnesota recognizes the validity of spendthrift trusts though common law; there is no Minnesota statute which expressly deals with spendthrift provisions. *See Morrison v. Doyle*, 582 N.W.2d 237, 240 (Minn. 1998); In re *Mack*, 269 B.R. 392 (D. Minn. 2001). Under Minnesota law, cases involving enforcement of spendthrift provisions have always involved protection of the interest of a beneficiary who is not the settlor of the trust; therefore, in Minnesota, it appears that a spendthrift clause in a self-settled trust would likely be considered void and unenforceable. In re *Mack*, 269 B.R. at 399 (citing *Simmonds v. Larison*, (B.A.P. 8th Cir. 1999)). In reaching its holding in *Mack*, the court looked to the Restatement (Second) of Trusts § 156. 3_/ While there is no Minnesota case specifically adopting the Restatement (Third) of Trusts on this issue, we believe it is likely that a Minnesota court would follow the Restatement (Third) approach in determining the extent to which the settlor's interest can be transferred. *See Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571 (Minn. Ct. App. 2003) (relying upon Restatement (Third) of Trusts in determining the role of a trustee); compare In re *Syverson Trust*, 2003 WL 22016795 (Minn. Ct. App. 2003) (unpublished) (declining to adopt the Restatement (Third) of Trusts where doing so would change existing law in Minnesota, noting such change was reserved for the Minnesota Supreme Court or the legislature). Therefore, the settlor's right to mandatory disbursements would be considered a resource; however, the right to discretionary disbursements would not be considered a resource as it is unlikely the discretionary disbursements would have any significant market value. *See* RESTATEMENT (THIRD) OF TRUSTS § 58(2), cmt. e.

Ohio

Ohio recognizes the validity of a spendthrift clause through statute and case law. *See* Ohio Rev. Code Ann. § 5805.01; *see also Scott v. Bank One Trust*, 577 N.E.2d 1077 (Ohio 1991). Ohio adopted the Uniform Trust Code in 2007, and the controlling provisions are applicable to spendthrift trusts created before and after 2007. *See* Ohio Rev. Code Ann. §§ 5805.01(A), 5805.06(A)(2), and 5811.03(A)(1). Ohio law recognizes the validity of spendthrift provisions in general, and states that "[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter and in section 5810.04 of the Revised Code, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary." Ohio Rev. Code Ann. § 5801.01(C). This suggests that, even in a self-settled trust, a spendthrift provision will prevent the settler from transferring his or her interest in the trust. The only exceptions to the effectiveness of a spendthrift provision relate to when a creditor or assignee of the beneficiary can reach an interest in or a distribution from the trust. Ohio law further states that whether or not a trust contains a spendthrift provision, the settlor's creditor or assignee may reach the maximum amount that can be distributed to or for the settlor's benefit. *See* Ohio Rev. Code Ann. §§ 5805.06(A)(2), 5811.03(A)(1). Indeed, the official comment notes, "[W]hether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the

settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created." *Id.* Because Ohio law allows such liberal access to the trust assets by "assignees," section 5805.06 could be read to suggest that the beneficiary of a self-settled trust could sell his beneficial interest in the trust and the purchaser could obtain the maximum amount that the trustee could distribute to or for the settlor's benefit. However, the Office of General Counsel has determined that the better reading of this provision presumes that only an assignee who is a creditor, not a purchaser for value, could reach the maximum amount the trustee could distribute for the settlor's benefit. *See* POMS 01825.039 Ohio (PS 08-159 SSI Review of the Trust and Annuity for Dustin J. E~). Therefore, it appears that spendthrift provisions in self-settled trusts governed by Ohio law may be fully valid with respect to the limitation on selling the settlor's beneficial interest in the trust. This interpretation of Ohio law would not have a significant impact where a trust is wholly discretionary. Even if the settlor could sell that interest, it would have no significant value. However, this interpretation would also mean that even the right to future mandatory disbursements could not be sold and therefore would not be a resource. This would be a significant departure from the Restatement (Third) of Trusts, as well as the Restatement (Second) of Trusts, both of which state that a spendthrift provision restraining the voluntary and involuntary alienation of the settlor's interest in the trust is invalid. *See* RESTATEMENT (SECOND) OF TRUSTS § 156(1), RESTATEMENT (THIRD) OF TRUSTS § 58(2). In fact, Ohio adopted the comment to Uniform Trust Code provision, which specifically cites to the Restatement (Second) of Trusts § 58(2) and states that "[a] spendthrift provision is ineffective against a beneficial interest retained by the settler." Ohio Rev. Code Ann. § 5805.01, cmt.; Unif. Trust Code § 502, cmt. It would seem odd, therefore, if the Ohio code (and the uniform code) intended to deviate from the Restatement in this important way. Since the law is not entirely clear, and since there are not yet any cases interpreting the Ohio provisions, we recommend that you refer to our office any self-settled trust governed by Ohio with a spendthrift provision and provisions for mandatory disbursements.

Wisconsin

Wisconsin recognizes spendthrift trusts as valid and not subject to voluntary or involuntary alienation only where the beneficiary is a person other than the settlor. Wisc. Stat. Ann. § 701.06(1)-(2). Therefore, it appears that a spendthrift provision would not prevent a settlor from selling his beneficial interest in the trust when he is also the settlor of the trust. Wisc. Stat. Ann. § 701.06(1)-(2)._4 However, we believe that Wisconsin would likely follow the Restatement (Third) approach--that a transferee would receive only the rights the settlor had under the trust, i.e., mandatory or discretionary disbursements. *See In re Walters Family Trust*, 685 N.W.2d 172 (Wis. Ct. App. 2004) (unpublished) (parties recognizing Restatement (Third) of Trusts as controlling law); *see also* POMS PS 01825.055 (PS 08-156 - Wisconsin - Review of the Trust for Brian G~) (citing to Restatement (Third) of Trusts as controlling authority in Wisconsin)). Therefore, the right to future mandatory disbursements from a self-settled trust would be considered a resource; however, the right to discretionary disbursements would not be considered a resource, as it is unlikely the right would be of any significant market value.

CONCLUSION

In sum,

- o All states in the Chicago region would recognize the validity of a spendthrift provision in a third party trust.
- o In all states in the Chicago Region, the beneficial interest in a self-settled discretionary trust would not be a countable resource because even if the individual can sell the interest, it would have no significant market value.
- o In Illinois, Michigan, Minnesota, and Wisconsin, the beneficiary of a self-settled trust can sell the right to future mandatory disbursement, regardless of whether the trust has a spendthrift provision.
- o Trusts governed by Indiana or Ohio law should be referred for a legal opinion if the trust is self-settled and provides for mandatory disbursements and has a spendthrift clause.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Anne M~
Assistant Regional Counsel

/_1 The trust may still be a resource for other reasons.

/_2 In *Matter of Perkins*, 902 F.2d 1254 (7th Cir.1990), the Seventh Circuit Court of Appeals noted the following considerations in determining whether a trust under Illinois law qualifies as a spendthrift trust: "(1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust, and (3) whether the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus and termination of the trust." *See*, e.g., In re *Silldorff*, 96 B.R. 859, 864 (C.D.Ill.1989). The degree of control which a beneficiary exercises over the trust corpus is the principal consideration under Illinois law.

/_3 This provision states:(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest. (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

/_4 Wisconsin law indicates that where a settlor is a beneficiary of a trust regardless of whether it has a spendthrift provision, a creditor may, at the discretion of the court, receive payments from the income or principal of the trust to satisfy a judgment. Wisc. Stat. Ann. 701.06(6)(a).

C. PS 09-088 SSI-Review of the Testamentary Trust for the Benefit of Cassie A~, Ineligible Spouse of Erik A~, 391-90-7317-REPLY Your Ref: S2D5G6, SI-2-1-3 WI (A~) Our Ref: 09-0042-NC

DATE: 4/23/09

1. SYLLABUS

This opinion examines whether or not a claimant's interest in a testamentary trust (i.e. a trust established by a will and effective at the time of the testator's death) is a resource for Supplemental Security Income (SSI) purposes. The opinion also examines whether or not the spendthrift clause is valid. If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal is not the individual's resource for SSI purposes. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance (e.g. it contains a valid spendthrift clause), it is not a resource. In this case, the claimant's interest in the trust is not a resource because the trust is irrevocable and cannot be used by the claimant for support and maintenance due to a valid spendthrift clause that complies with Wisconsin law. However, certain distributions from the trust may be income to the claimant.

2. OPINION

You asked whether the interest of claimant Cassie A~ (formerly M~) in a testamentary trust would be a resource for SSI purposes. Specifically, you want to know whether the sentence in paragraph 4(a), stating that the trust shall be considered a spendthrift trust, would prevent the claimant from selling her interest in the trust. For the reasons discussed below, we conclude that the spendthrift provision is valid, and thus the claimant's interest in the trust would not be a resource. However, certain distributions from the trust would be income.

BACKGROUND

On December 5, 2002, Betty M~, a resident of Wisconsin, executed her Last Will and Testament. On December 17, 2002, M~ executed a codicil in which she modified paragraph 3 of her will.

The will and codicil state, in relevant part, that the claimant will receive 20 percent of the remainder of M~'s estate (after payment of her final illness and funeral expenses and debts and certain specific bequests to other individuals). Will 1-2; codicil 3.

Paragraph 4 of the will states that the amounts bequeathed to the claimant and to Adam M~, another beneficiary, will be held in trust. Will 4(a). Deborah M~, M~'s daughter, is named as the Trustee, and Robert B~ is named as the successor Trustee. Will 4(a), (b).

Paragraph 4 also states that, when each beneficiary attains the age of 30, the entire amount of each beneficiary's share of the corpus shall be paid to him or her. Will 4(a). The claimant will turn 30 years old in June 2014.

In addition, the Trustee has discretion to pay each beneficiary from his or her share of the trust as needed if the Trustee determines that the beneficiary's necessities of life are insufficient. Id. Moreover, the will directs that the income from each beneficiary's share of the trust will be paid to him or her annually in the discretion of the Trustee. Id.

Paragraph 4 further states that the trust "shall be considered as a spendthrift trust." *Id.*

DISCUSSION

Initially, we note that the trust established by M~'s will is a third party trust, since M~ is the grantor. Accordingly, we apply the regular resource rules in POMS SI 01120.200. Under the regular resource rules, an individual's beneficial interest in a trust is a resource if it can be sold. *See* POMS SI 01120.200(D)(1)(a).

Here, the trust provides for a mandatory disbursement of the claimant's entire share of the trust principal when she turns 30 years old. The Trustee also has the discretion to invade the principal and make a disbursement before the claimant turns 30 if the Trustee determines that the claimant's necessities of life are not sufficient. And, although the language appears somewhat confusing, we believe that the provision in 4(a) of the will directing the income from the claimant's share of the trust to be paid to her annually is discretionary.

You asked specifically about the provision stating that the trust "shall be considered as a spendthrift trust." Will 4(a). Based on Wisconsin state law and general trust principles, we conclude that this spendthrift provision is valid, and would thus prevent the claimant from selling her beneficial interest in the trust. Wisconsin explicitly recognizes spendthrift provisions in the case of third party trusts. *See* Wis. Stat. Ann. § 701.06(1)-(2). This is consistent with general trust principles. *See* Restatement (Third) of Trusts § 58(1) (2003) (restraint on voluntary and involuntary alienation of beneficial interest in a third party trust is valid). Moreover, the Restatement explains that no particular form of wording is necessary to create a spendthrift trust, as long as the requisite intention can be discerned from the terms of the trust. "It is sufficient if a settlor simply provides that the trust 'is to be a spendthrift trust.'" *Id.* § 58 cmt. b(3). That is the case here. Thus, since the spendthrift provision is valid, the claimant's beneficial interest in the trust is not a resource.

Finally, as noted above, upon reaching the age of 30, the claimant is entitled to payment of her entire share of the trust principal. This amount would be considered unearned income in the month it is received and a countable resource in subsequent months if it is retained. *See* 20 C.F.R. §§ 416.1123(a), 416.1207(d); POMS SI 00810.030(A), SI 01110.600(B)(3). These rules would also apply to any actual distributions of principal or income from the trust that the claimant receives before she turns 30.

CONCLUSION

For the reasons discussed above, we conclude that the claimant's interest in the trust is not a resource for SSI purposes (although certain distributions from the trust may be income).

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Cristine B~
Assistant Regional Counsel

D. PS 08-156 SSI- Wisconsin-Review of the Trust for Brian G~, ~ Our Reference: 08-0168-NC

DATE: July 23, 2008

1. SYLLABUS

This opinion examines a third-party trust and whether or not it is a countable resource for SSI purposes. The trust in this case is not a resource because the claimant cannot revoke the trust and obtain the assets, nor does he have the authority to direct use of the trust principal for his support and maintenance. Moreover, under the terms of the trust, the claimant cannot assign or sell his right to future payments. It should be noted that the trust may be terminated when the claimant reaches age 60 and thus the trust should be re-evaluated at that time to determine whether it should be counted as income or a resource.

2. OPINION

You asked whether the trust for Brian G~ ("Brian") is a resource for SSI purposes. Specifically, you inquired as to whether Brian can sell his right to the trust, which can terminate on his sixtieth birthday in 2025. We conclude that the trust is not currently a resource to Brian because a spendthrift clause prevents him from selling his right to receive the trust assets on his sixtieth birthday. However, the trust funds should be re-examined when Brian reaches age sixty (or before that if the trustee terminates the trust) to determine whether, after that time, it is income or a resource to Brian.

BACKGROUND

Gerald D. G~ ("Mr. G~") established a revocable Living Trust with his property on March 12, 2003. Mr. G~ was the beneficiary of the trust during his lifetime, and he retained the power, personally, to use, possess, enjoy, and withdraw any or all of the trust property, principal or income for his own benefit. Trust at I(B), XI. Mr. G~ also retained the power to revoke or amend the trust at any time. Trust at VII, X.

On January 12, 2004, Mr. G~ amended the trust, specifically replacing the section which designated beneficiaries and provided for distribution of the trust upon his death. The amended trust now names Brian as the main residual beneficiary. Trust Amendment at II(C). After payment of Mr. G~'s death expenses, the remaining trust corpus is to remain in trust for Brian's benefit. Trust Amendment at II(C).The trustee has "sole and complete discretion" to "make any distributions to the Beneficiary from the Trust that the Trustee deems appropriate for the support, health, welfare and education of the Beneficiary." Trust Amendment at II(D). But, the Trustee is restricted from taking action which jeopardizes Brian's eligibility for Social Security or Medicare benefits. Trust Amendment at II(D).

Brian's trust terminates when he reaches age 60, but may be extended upon mutual agreement of Brian and the trustee, if termination will negatively affect Brian's eligibility for public benefits. Trust Amendment at II(F). Upon termination, the remaining trust corpus would be distributed to Brian. Id.

Under the terms of the trust (which were not amended), the trustee also has the power to terminate the trust if its value is insufficient to carry out its purposes. Trust at V(8).

The trust includes a spendthrift clause, stating that "[n]o interest under this agreement shall be assignable by any beneficiary, or be subject to claims of his or her creditors . . . ." Trust at IV. And the trust states that it is governed exclusively by Wisconsin law. Trust at IX.

Mr. G~ died on January 24, 2004 (just ten days after amending the trust). The value of the corpus of the trust is currently about $101,040.

DISCUSSION

The Social Security Act provides that an individual is not eligible for SSI if his resources exceed $2,000.00. *See* 42 U.S.C. § 1382(a)(1)(B)(ii), (3)(B) (designating allowable resource cap for an individual not living with a spouse). A resource is cash or other liquid assets or real or personal property that an individual owns and can convert to cash to be used for support and maintenance. 20 C.F.R. § 416.1201(a). Trust property may be a resource for SSI purposes. POMS SI 01120.200(A)(1).

Because this is a third party funded trust of which Brian is a beneficiary, only the regular resource rules apply in determining whether the trust is a resource to Brian. POMS SI 01120.200(A)(1), (2)(b). Under these rules, a trust is a resource to an individual if he has the right to revoke or terminate the trust and use the funds for his food or shelter; if he can direct the use of the trust principal for his support and maintenance; or if the trust provides for mandatory disbursements to the individual and he is not prohibited from anticipating, assigning, or selling his right to those future payments. 20 C.F.R. § 416.1201(a); POMS SI 01120.200(A)(2)(b), (D)(1)-(2). Brian's trust is not a resource under these rules.

First, Brian cannot revoke or terminate the trust and obtain the assets. Although the trust permitted the grantor, Mr. G~, to revoke the trust during his lifetime, there is no provision in the trust permitting Brian to terminate the trust and obtain the assets. The trustee has a limited power to terminate the trust if he determines that the value of the trust assets is insufficient to carry out the purpose of the trust. Trust at V(8). If the trustee terminates the trust pursuant to this provision, the trust corpus and certain income would be distributed to Brian. However, Brian does not have the power or authority to terminate the trust under this provision.

Second, Brian does not have the power to direct the use of trust principal for his support and maintenance. The trust does not give Brian, as the beneficiary, any direct power to act with regard to the trust principal or any power to order the trustee to distribute the trust principal on his behalf. *See* POMS SI 01120.200(D)(1)(b). The trust gives the trustee "sole and complete discretion" with regard to distributions. Trust Amendment at II(D). The trust also provides that the trustee is prohibited from taking any actions which could "jeopardize or negatively affect" Brian's eligibility for other resources, including, particularly, any Social Security or other public benefits. Id. Thus, if Brian were to challenge the trustee with regard to a request that the trustee distribute trust principal on his behalf while he is receiving or otherwise eligible for public benefits, it is likely that the Wisconsin courts would construe the trust according to the settlor's intent and not allow any distributions by the trustee that would jeopardize Brian's Social Security or Medicare benefits. *See* In re *Catherine H. B~ Charitable Trust*, 622 N.W.2d 471, 474 (Wis. App. 2000) (settlor's intent controls, especially as expressed in trust document where settlor is deceased). Thus, so long as Brian is receiving or may be eligible for SSI or other public benefits, such as Medicare, he cannot compel the trustee to use the funds in a manner that would make him ineligible for benefits.

Finally, the trust did not provide for any mandatory distributions to Brian which he could anticipate and assign, due to the trust's valid spendthrift provision. *See* POMS SI 01120.200(A)(2)(b), (B)(16), (D)(1)(a). Wisconsin law upholds the validity of a trust settlor's expressly provided-for spendthrift provision imposed upon the trust's beneficiary. Wis. Stat. Ann. § 701.06(1)-(2). However, after Brian reaches age sixty, the trust should be evaluated to determine whether the funds should be considered income or a resource to him at that time.

CONCLUSION

In sum, until it is terminated - either on Brian's sixtieth birthday or pursuant to the trustee's limited power to terminate based on insufficient value - the trust corpus is not a resource to Brian because he cannot terminate the trust and obtain the assets; he cannot compel the trustee to provide for his support and maintenance; and he cannot assign his interest in the trust. After Brian reaches age 60, however (and before that if the trustee terminates the trust), the trust should be re-evaluated to determine whether it should be counted as income or a resource.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Sara E. Z~
Assistant Regional Counsel

E. PS 08-133 SSI- Wisconsin-Review of the Irrevocable Life Insurance Trust Agreement for Nancy S~, ~ Our Reference: 08-108-NC

DATE: June 18, 2008

1. SYLLABUS

This decision highlights the fact that a life insurance policy purchased under the auspices of a revocable trust can also be revoked and, therefore is countable. Unlike many life insurance policies which are the basis of burial contract funding, this revocable policy has no connection to any funeral home.

2. OPINION

BACKGROUND

On December 26, 2007, the Nancy J. S~ Irrevocable Trust (the Trust) entered into a contract with National Mutual Benefit, a life insurance company (National), for a Simple Premium Whole Life insurance policy. The Trust is the policy owner, and Nancy J. S~ (Ms. S~), is the insured. *See* Sections I, III. Also, on November 7, 2007, Ms. S~ executed an Irrevocable Assignment which purports to make an irrevocable assignment of ownership of the policy to the Trust, with Thomas P. S~ acting as trustee (but with the option of assigning his duties to a third party administrator other than National). Thomas accepted the assignment on behalf of the Trust, and an officer of National consented to the assignment on December 26, 2007. Ms. S~ funded the policy with a cash surrender from a policy with Prudential Financial, who issued a check on December 20, 2007, payable to National. The surrender was a "1035 exchange," surrender date November 26, 2007.

The life insurance policy is to pay death benefits upon the death of Ms. S~. Section I. The single premium paid for the policy was $3,982.56, and the death benefit amount is $4,127.00. Death benefit proceeds would consist of the face amount less any indebtedness, plus any insurance additions or dividends left on deposit. Section IV § 1.

The policy states on its face that it could be cancelled it within twenty days of receipt of the policy. The policy also has a cash surrender value that can be obtained at any time, although National may defer payment for up to six months. Section VI § 4. The beneficiary will receive the proceeds when Ms. S~ dies. Section VIII §§ 17-18.

The Trust Agreement was dated November 7, 2007, with Ms. S~ listed as the Grantor and Insured and the Trust listed as Owner and Beneficiary of the life insurance policy. Ms. S~'s estate is listed as the secondary Beneficiary of the Trust. The Trust directs that the policy and the proceeds payable thereunder are the "Trust Estate" and shall be held until Ms. S~'s death and distributed in accordance with the Trust Agreement, by the Trustee for the purposes of paying for the "property …and … services for the final disposition of the insured's body." If the policy proceeds exceed the funeral and burial costs, the excess shall be paid to Ms. S~'s estate. The Trust Agreement directs the Trustee not to surrender the policy, take a loan against the proceeds, change the beneficiaries, or act other than in accordance with the Agreement.

The Agreement includes Spendthrift Provisions which state that (1) no title in the Trust Estate or income therefrom shall vest in Ms. S~'s heirs; (2) no principal or income of the Trust shall be liable to be reached by Ms. S~'s creditors or her heirs creditors; (3) neither Ms. S~ nor her heirs may alienate, encumber, anticipate, or dispose of any interest in the Trust Estate or income therefrom except for the purpose of arranging for the final disposition of Ms. S~'s body.

The Trust and Agreement are stated to be irrevocable, with Ms. S~ as Grantor having "no power to alter, amend, or modify this agreement in any way," and with Ms. S~ further irrevocably assigning the Trustee all rights under the policy. The Trust Agreement was executed in, and is governed by, the laws of Wisconsin. The Trust states it is effective and valid as of November 7, 2007. Ms. S~ signed the Agreement, as did an officer of National and a witness, with a date of December 26, 2007.

DISCUSSION

In general, assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate property, it is a resource. *Id.* A life insurance policy constitutes a resource if the individual can surrender it for cash or recover premiums paid. *See* 20 C.F.R. § 416.1230. Trusts may also constitute a resource under these rules. *See* POMS SI 01120.200. And for trusts established after January 1, 2000, trusts must also be evaluated under special rules. *See* 42 U.S.C. § 1382b(e) (addressing trusts created on or after January 1, 2000); POMS SI 01120.203.

We note that the policy here does not appear to be a "funeral policy" under Wisconsin law, *see* Wis. Stat. Ann. § 632.415(2), since Ms. S~ has not entered into a prearranged funeral plan. *See id.* at 23.30(1)(g); POMS SI CHI 011-30.426(C)(5). Indeed, no funeral home has been identified in any of the documents submitted. *see also* Wis. Stat. Ann. § 632.415. Therefore, it must be evaluated as an ordinary insurance policy.

Here, the policy is a resource for the first 20 days after it was issued. During this time Ms. S~ could have cancelled the policy and recovered the $3.982.56 initial premium paid for the policy. Thereafter, the cash surrender value of the policy is a resource to Ms. S~ unless she effectively and irrevocably assigned it to a trust that is not a resource. In this case, however, the trust is a resource.

Under the regular resource rules, a trust is a resource if the individual has the legal authority to revoke a trust and then use the funds to meet her food and shelter needs; if the individual can direct the use of the trust principle for her support and maintenance under the terms of the trust; or if the individual is entitled to mandatory disbursements and can sell the right to receive future disbursements. 42 U.S.C. § 1382b(e); POMS SI 01120.201(D)(1)(a)-(2)(a). Ms. S~'s trust is a resource under these rules because it is revocable, despite language indicating that the trust is irrevocable.

Ms. S~ is the grantor of the trust, since she provided the consideration by assigning the life insurance policy. Ms. S~ named the trust as the beneficiary, and her estate as secondary beneficiary. Since Ms. S~ will receive the benefit of the funeral goods and services and named no other beneficiary, she is the sole beneficiary of the trust as well. As grantor and sole beneficiary of the trust, Ms. S~ generally would have the power to revoke the trust at will, despite any language in the trust suggesting otherwise. *See* Wis. Stat. Ann. § 710.12(1); POMS SI CHI 01130.427(B)(1) confirms this, stating that "the funds held in a burial trust meet the definition of a resource, unless the trust names a beneficiary in addition to the SSI applicant or beneficiary." This renders

the policy a resource, even after the right to cancel expires, since Ms. S~ could revoke the trust and access the cash surrender value of the policy.

Even if Ms. S~ were to identify an additional beneficiary, such that the trust would not be revocable unilaterally, this trust would still be a resource under the special statutory rules for trusts. *See* 42 U.S.C. § 1382b(e). These provisions do not apply to certain burial trusts where, among other things, the individual irrevocably contracts with a provider of funeral goods and services. POMS SI 01120.201(H)(1). Here, however, as noted, Ms. S~ did not enter into any contract with a provider of funeral goods and services. Thus, this burial trust exception does not apply. *See* POMS SI 01120.201(H)(2). Under the statutory rules, a self-settled trust will be considered a resource, even if it is irrevocable, unless certain exceptions are met. To meet these exceptions the trust must, among other things, provide that any remaining funds in the trust at the death of the individual will be used first to reimburse the state(s) or Medicaid payments. *See* 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4). This trust would not meet an exception to counting it under the statute.

CONCLUSION

In sum, the policy was a resource, valued at $3,982.56 for the first twenty days after it was issued, and it continued to be a resource thereafter, with a value of the cash surrender value of the policy, because the trust to which it was assigned is revocable and also would be counted as a resource under the special statutory trust rules.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Sara E. Z~
Assistant Regional Counsel

F. PS 08-081 SSI-Review of the William S~ Irrevocable Trust, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 WI (S~) Our Ref: 08-059-NC

DATE: March 17, 2008

1. SYLLABUS

This decision illustrates that a pre-01/01/00 countable Trust can be reformed under its own terms and Wisconsin law to be made non-countable. The court in Wisconsin restated and replaced the older trust framework within the body of a new trust that retained enough of the original to allow it to remain under our pre-01/01/00 rules. This restated Special Needs Trust now contains all the elements to be a non-countable trust.

2. OPINION

You asked whether the William S~ Irrevocable Trust is a resource for SSI purposes. For the reasons discussed below, we conclude that the trust is not a resource.

BACKGROUND

In June 1995, the William M. S~ Trust was created with proceeds from the settlement of a lawsuit filed on his behalf. The trust named William's parents, Elizabeth H~ and Scott S~, as grantors, and First Bank, N.A., as trustee. In September 2007, we advised that this trust was a resource to William because of his right to future payments under the mandatory distribution provisions of the trust and because of his unlimited right to change any administrative or ministerial provision of the trust. *See Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI-Wisconsin-Review of the William S~ Trust* (September 24, 2007) [hereinafter *William S~ Trust*].

Subsequently, Elizabeth H~, through her attorney, obtained a court order authorizing the establishment of the William S~ Irrevocable Trust as a restatement of, and replacement for, the William M. S~ Trust. The court order also directed U.S. Bank, N.A., to transfer the funds held in the William M. S~ Trust to the William S~ Irrevocable Trust.

On November 30, 2007, the same date as the court order, the William S~ Irrevocable Trust was created. The trust names Elizabeth H~ as grantor and U.S. Bank, N.A., as trustee. *See* Trust Preamble. The trust provides that it is to be held,

administered, and distributed for William's benefit. *See* Art. III. Property may be added to the trust from any source. *See* Art. I § 2.

The trust is a special need trust, with its purpose to provide for William's supplemental care, and "not to displace public or private financial assistance that may otherwise be provided to him." *See* Art. III § 1. The trust is governed by Wisconsin law. *See* Art. VIII § 2.

The trust provides that it is irrevocable. *See* Art. II. However, the trustee has power to amend the administrative provisions of the trust under certain circumstances. *See* Art. V § 2.

The trustee has sole and absolute discretion in making distributions. *See* Art. III §§ 1, 3; Art. V § 12. Moreover, William does not have the right to liquidate the trust or compel distributions from the trust. *See* Art. III §§ 3, 7.

The trust contains a spendthrift provision which states that no interest in the principal or income shall be anticipated, assigned, or encumbered or subject to any creditor's claims or any legal process prior to the actual receipt by or on behalf of William. *See* Art. III § 7.

The trust terminates upon William's death. After payment of allowable expenses (i.e., death taxes and fees for administration of the trust estate) and reimbursement to the State for Medicaid benefits, any remaining trust assets shall be distributed to William's then living siblings or their surviving issue per stirpes. *See* Art. III § 5.

DISCUSSION

Initially, we must determine the legal relationship between the William M. S~ Trust ("1995 Trust") and the William S~ Irrevocable Trust ("2007 Trust"). According to the court order, the 2007 Trust is considered to be merely a restatement of the 1995 Trust, with all assets in the 1995 Trust transferred to the 2007 Trust on the date the latter was created--November 30, 2007. Based on the court order, we believe that the 2007 Trust is a modification of the original 1995 Trust. This modification appears to be valid, both under the terms of the original 1995 Trust and under Wisconsin law. As noted in our previous memorandum, the 1995 Trust gave William the unlimited right to change any "administrative or ministerial" term. *See William S~ Trust* at 4. Interpreted broadly, this provision could allow the types of changes reflected in the 2007 Trust. Such a modification is permitted by statute in Wisconsin. *See* Wis. Stat. Ann. § 701.12(3) (revocation, modification, and termination of a trust is permitted pursuant to its terms or otherwise in accordance with law); *see also* Restatement (Third) of Trusts § 64(1) (2003).

Because we do not consider the 2007 Trust to be a new trust but, rather, a continuation of the 1995 Trust, it is considered to be a trust established prior to January 1, 2000, and is evaluated under the regular resource rules in POMS SI 01120.200. Under the regular resource rules, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter; or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the individual's interest in the trust will be a resource if he is entitled to mandatory disbursements from the trust and he can sell the right to future disbursements. *See id.*

Here, the 2007 Trust document states that it is irrevocable. *See* Art. II. Under Wisconsin law, however, an otherwise irrevocable trust may be revoked by written consent of the settlor and all beneficiaries. *See* Wis. Stat. Ann. § 701.12; *see also* Restatement (Third) of Trusts § 65 & comment a & Reporter's Note (2003). While the 2007 Trust names Ms. H~ as the settlor, it appears that William is the true settlor of the trust since it was initially funded in 1995 with the proceeds of the settlement of his personal injury lawsuit. Thus, William is the settlor and beneficiary of the 2007 Trust. However, William is not the sole beneficiary, since residual beneficiaries are also named in the trust. Specifically, the trust creates contingent remainder interests in his living siblings or their surviving issue per stirpes. Since there are residual beneficiaries, William cannot unilaterally revoke the trust. *See* Art. III § 5; *see also* POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary."). Accordingly, the 2007 Trust is irrevocable.

The 2007 Trust can also be resource to William if he can direct the use of the trust assets for his support and maintenance under the terms of the trust. Here, the trust states repeatedly that the trustee has absolute discretion to make distributions, and that William has no right to compel the trustee to make a distribution of principal or income to him or for his benefit. *See*

Art. III §§ 1, 3, 7; Art. V § 12. This language would preclude William from directing the use of the trust assets. Therefore, the trust principal is not a resource. In addition, the trust does not provide for mandatory disbursements to William.

Donna L. C~
Regional Chief Counsel, Region V

By: _____
Cristine B~
Assistant Regional Counsel

G. PS 08-060 SSI-Wisconsin-Review of the Amended Testamentary Trust for the Benefit of Sharon C~, ~ - Reply Your Reference: S2D5G6, SI 2-1-3 WI (C~) Our Reference: 08-053-nc

DATE: February 11, 2008

1. SYLLABUS

This opinion evaluates whether the amended third party testamentary trust in question is a countable resource for SSI purposes. The original trust was created and funded solely with third party funds upon the grantor's death in 2006. The original terms mandated regular distributions of trust interest and principal to the SSI beneficiary. The trust was subsequently amended such that the trustee was prohibited from making distributions that would make the beneficiary ineligible for SSI and/or Medicaid benefits.

The trust cannot be terminated by the beneficiary due to the presence of a residual beneficiary. Additionally, the SSI beneficiary cannot direct the trustee to make distributions, and a spendthrift provision prevents the beneficiary from anticipating or otherwise encumbering the future distributions. For these reasons, the amended trust is not a countable resource for SSI purposes.

2. OPINION

You asked us whether the amended testamentary trust for the benefit of Sharon C~ would be a resource for SSI purposes. For the reasons discussed below, we conclude that the amended testamentary trust is not a resource.

BACKGROUND

In July 1984, Alice M. C~ executed her Last Will and Testament. The third section of Ms. C~ will concerned Sharon P. C~, the SSA beneficiary and Ms. C~'s niece. This section of the will provided that, in the event that Bernard C~, Ms. C~'s husband, predeceased her, fifty percent of her estate would be given to her trustee to be held in trust for the purpose of providing maintenance and support for Ms. C~. Will, Third Section, Paragraph B. The will instructed the trustee to pay all of the interest income plus the sum of $5,000 per year from the principal to Ms. C~ until she died or the trust proceeds were expended. Will, Third Section, Paragraph B1a. The will further provided that income and principal distributions would be made at least quarterly, and that if Ms. C~ died before the trust proceeds were expended, then the trust would terminate and the remaining trust assets would be distributed to Ms. C~'s nieces, Mary A. W~ and Alice C. W~, or the survivor. Will, Third Section, Paragraph B1b, B2. The will indicated that the interest of any beneficiary shall not be subject to claims, creditors, or legal process, and may not be alienated or encumbered. Will, Third Section, Paragraph B3.

Ms. C~ died on July 1, 2006; she was predeceased by her husband. Upon Ms. C~ death, the Sharon P. C~ Trust was created and funded with approximately $83,000 from Ms. C~'s estate. In April 2007, an attorney for Ms. C~'s estate filed a Motion to Amend the Testamentary Trust. In this Motion, the trustee and Ms. C~ expressed concern that Ms. C~ will mandated distributions that would render Ms. C~ ineligible for SSI and Medicaid benefits. The trustee and Ms. C~ argued that this result would be inconsistent with Ms. C~ intent to provide supplementary assistance to Ms. C~. In an effort to resolve this controversy, the trustee and all of the beneficiaries of the Trust asked the court to amend the Trust.

Later that month, the Court entered an Order, amending the Trust. The order explained that the Trust should be reformed to operate as a special needs trust, prohibiting distributions which would make Ms. C~ ineligible for SSI benefits. The Order added the following language in italics to the Trust:

1. The trustee shall retain the principal; manage, invest and reinvest, collect all income; and make distributions to or for the benefit of my niece, SHARON P. C~.

a. The trustee shall pay all of the interest income plus the sum of $5,000 per year from the principal to or on behalf of SHARON P. C~ for as long as she lives or until the trust proceeds have been expended.

b. *Income and principal distributions shall be made at least quarterly. However, the Trustee may make no distribution regardless of the age of the beneficiary if such distribution would make the beneficiary ineligible for benefits available from any public or private means tested benefit program, including, without restriction, Supplemental Security Income (SSI) or Medicaid.*

See Order. The Order did not alter any other language in the Trust.

DISCUSSION

As an initial matter, we note that the amendment to the Trust was permitted under Wisconsin law. In the Motion to Amend the Testamentary Trust, the trustee and Ms. C~ argued that the language in Ms. C~'s will would render Ms. C~ ineligible for SSI benefits - a result which would be inconsistent with the intent of Ms. C~ to provide supplementary assistance to Ms. C~. Since the trustees and all affected beneficiaries agreed to the amendment, the Court properly "reformed" the trust in order to operate as a special needs trust, prohibiting distributions that would make Ms. C~ ineligible for SSI benefits. *See* Wis. Stat. Ann. § 879.59(1); *Estate of McCoy v. Wis. Academy of Sciences*, 345 N.W.2d 519 (Ct.App. 1984).

The Amended Trust is a third party trust, under POMS SI 01120.200(A)(2)(b), because it was established by a third party, with only assets of the third party. Therefore, the Amended Trust is not subject to the statutory provisions of Section 1613(e) of the Social Security Act for special needs trusts, because it was not established with the proceeds of the disabled individual. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. Since the Amended Trust is not evaluated under § 1613(e) of the Act, we consider only whether it is a resource under the regular resource rules. *See* POMS SI 01120.203(B)(1)(a).

Under the regular resource rules, a trust is a resource if (1) the SSI beneficiary can revoke or terminate the trust and use the assets for her support and maintenance; (2) the SSI beneficiary can direct the trustee to pay her the funds or use the funds for her support and maintenance; or (3) the SSI beneficiary is entitled to mandatory disbursements and can sell the right to future disbursements. POMS SI 01120.200(D).

Under these rules, the Amended Trust is not a resource. First, Ms. C~ does not have the power to terminate the Amended Trust and use the assets for support and maintenance. Whether a trust can be terminated by a beneficiary depends on the terms of the trust and/or applicable state law. *See* POMS SI 01120.200(D)(2). Here, Ms. C~ does not have the right to terminate the Amended Trust under its own terms or under the terms of Wisconsin state law. The Fifth Section of Ms. C~ will (which was not amended by the court) only permits the trustee to terminate the trust. Under Wisconsin law, a trust may be revoked, terminated or modified by written consent of the grantor and all beneficiaries. *See* Wis. Stat. Ann. § 701.12. Ms. C~ (the grantor) is deceased and thus she cannot consent to the termination of the trust. *See* POMS PS 01825.055 (EE. PS 00-247) (Wisconsin); *see also* Restatement (Second) of Trusts, § 338 and comment a. In addition, there are other beneficiaries whose consent would need to be obtained in order for the Amended Trust to be terminated. POMS SI CHI01120.200(D) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary.").

Second, Ms. C~ cannot direct the trustee to pay her the funds or use the funds for her support and maintenance. Under the terms of the Amended Trust, the trustee cannot make any distribution if the distribution would make Ms. C~ ineligible for SSI or Medicaid benefits. Amended Trust, Third Section, B(1)(b). This language would preclude Ms. C~ from directing the trustee to pay her funds or use the funds for her support and maintenance.

Finally, under the terms of the Amended Trust, Ms. C~ is entitled to at least quarterly distributions of income and principal, provided such distribution would not make her ineligible for SSI or Medicaid benefits. Amended Trust, Third Section, B1b. However, a spendthrift provision prevents Ms. C~ from alienating or encumbering her interests in those payments. Will, Third Section, Paragraph B3. Accordingly, the Amended Trust is not a resource to Ms. C~.

CONCLUSION

In sum, under the ordinary resource rules applicable to third party trusts, the Amended Trust is not a resource for SSI purposes.

Donna L. C~
Regional Chief Counsel, Region V
By: _____
Karen S~
Assistant Regional Counsel

H. PS 07-118 SSI-WISH-Review of Treatment of Rental Arrangements in the Wisconsin Initiatives in Sustainable Housing Trust - REPLY Your Ref: SI 2-1-3 WI (WISH)Our Ref: 06-0087

DATE: April 24, 2007

1. SYLLABUS

This opinion discusses changes to the Wisconsin Initiatives in Sustainable Housing ("WISH") Pooled Trust and the Asset Contribution Agreements ("ACA") pertinent thereto. SSA previously advised that self-settled sub-accounts in the WISH trust were countable resources due to failure to meet the Medicaid payback requirements of Section 1917(d)(4)(C) of the Act. WISH, Inc. has now modified the ACA for a self-settled account and provides that after termination of the trust and payment of allowable death expenses, amounts not retained by the trust will be used to reimburse Medicaid. This modified language resolves the prior defect and sub-accounts with the new language meet the requirements for the pooled trust exception. The opinion further concludes that home property transferred to a sub-account establishes an equitable ownership interest for the beneficiary. As a result, distributions from the sub-account to pay the mortgage or other household bills would constitute ISM in the form of shelter, though limited by the presumed maximum value (PMV).

2. OPINION

You asked us to review proposed revisions to the Asset Contribution Agreements ("ACA") to the Wisconsin Initiatives in Sustainable Housing ("WISH") Trust and provide a response to the arguments of Mr. F~, attorney for the Trust. We previously advised that self-settled sub-accounts in the WISH Trust did not qualify for the pooled trust exception for counting the sub-accounts as resources under the Social Security Act. *See* POMS PS 01825.055 [hereinafter "WISH Trust I Opinion"]. We also advised that certain trust distributions would be income to the beneficiary. For the reasons discussed below, we conclude that neither self-settled nor third party sub-accounts in the WISH Trust would be resources if the proposed revised language in the ACA is used. However, consistent with our previous opinion, certain trust distributions would still be considered income to the beneficiary.

DISCUSSION

Mr. F~ has submitted legal arguments and two revised proposed ACAs (one for self-settled sub-accounts and one for third party sub-accounts) in support of his request for reconsideration of the WISH Trust I Opinion. In his letter, Mr. F~ raises two issues. First, he addresses our conclusion that a self-settled sub-account in the WISH Trust would not qualify for the pooled trust exception under 42 U.S.C. § 1396(d)(4)(C) because it did not contain the required language regarding reimbursement to the State for Medicaid, and would thus be considered a resource. *See* WISH Trust I Opinion at 4. We assume that the version of the Declaration submitted in connection with the WISH Trust I Opinion has not been amended, since no new Declaration was submitted with Mr. F~'s reconsideration request. That document still states that the ACA "shall provide that all Assets remaining in the Sub-account beyond the lifetime of the Sub-account Beneficiary, after payment of allowable expenses, shall be applied to the charitable purposes of the Trust." Decl. Art. 5.3. However, WISH, Inc. has modified the relevant provision in the ACA for a self-settled sub-account. Article XIII now provides that the sub-account terminates upon the death of the sub-account beneficiary ("SB") and that, after payment of allowable expenses of death taxes due from the trust to the State or Federal government and reasonable fees for the administration of the trust estate, any amount remaining in the sub-account that is not retained by the trust will be paid to the State up to an amount equal to the total amount of medical assistance paid on behalf of the SB under the State Medicaid plan. *See* ACA (self-settled) Art. XIII. This modified language sufficiently cures the defect noted in our previous opinion that the WISH Trust did not meet the fourth requirement for the pooled trust exception. *See* POMS SI 01120.203(B)(2)(g).

In the second issue Mr. F~ raises, he seeks reconsideration of our conclusion that, when the SB lives in a home in which title to the home was transferred to the SB's sub-account (either by the SB or a third party) or that was purchased by the Trust out of the SB's sub-account assets, the SB is considered to have an equitable ownership interest in that home and that any mortgage

payments paid by the Trust (minus the SB's monthly occupancy fee) would be in-kind support and maintenance ("ISM") up to the presumed maximum value ("PMV"). WISH Trust I Opinion at 7. Mr. F~ requests "modification of this opinion to find that the relationship between the Trust and sub-account beneficiaries is a landlord-tenant relationship, and that the beneficiary has no ownership interest of the kind that would or should cause him or her to be considered a homeowner for purposes of determining whether or not a business relationship exists between the WISH Trust and the beneficiary." F~ Letter at 2.

Here, the ACA provides that the creator of a sub-account may transfer title to his/her house, which may be subject to a mortgage, to the SB's sub-account. *See* ACA Art. 3.1(a). The ACA also provides that sub-account assets may be used to purchase housing for the SB. *See* ACA Art. 8.12(a) (second sentence). The POMS states that when a trust purchases and holds title to a house as a home for the beneficiary, the beneficiary is considered to be living in his/her own home based on having an "equitable ownership under a trust." *See* POMS SI 01120.200(F)(1). In other words, the purchase of a house by a trust for the beneficiary establishes an equitable ownership interest for the beneficiary of the trust. Accordingly, we apply POMS SI 01120.200(F), which sets forth trust resource and income rules pertaining to the ownership of a home. As we explained in our previous opinion, we believe POMS SI 01120.200(F) also applies when a sub-account creator transfers title to his/her house to the SB's sub-account, as the SB would retain an equitable ownership interest in the home in that case. *See* WISH Trust I Opinion at 7 n.4.

Mr. F~ challenges the "blanket provision that a trust beneficiary has an equitable ownership interest in all property held in the trust." F~ Letter at 5. However, the creation of a trust inherently gives rise to a beneficial (i.e., equitable) interest for the beneficiary. It is a fundamental principle of trust law that a trust beneficiary holds equitable title to the trust property, while the trustee generally holds legal title. *See* Restatement (Third) of Trusts §§ 2 comt. d, 43 cmt. a (2003). The Agency's policy set forth in the POMS recognizes this principle. *See* POMS SI 01110.515(C)(2) (in a trustee-beneficiary relationship, beneficiary does not have legal title to trust property but does have equitable ownership interest), SI 01120.200(B)(4) ("A beneficiary does not hold legal title to trust property but does have an equitable ownership interest in it….The beneficiary owns the benefits of the trust while the trustee holds the title and duties."). Mr. F~ argues that the intention of the donor governs the nature of a property interest. In support, he cites Restatement (Third) of Property § 10.1 (2003). However, this provision, concerning donative documents, deals with the disposition of property by gift and not by trust. *See id.* § 6.1 cmt. a ("The creation of a trust, however, is within the province of the Restatement of Trusts."). Mr. F~ also cites Restatement (Third) of Trusts § 49, which states: "Except as limited by law or public policy…the extent of the interest of a trust beneficiary depends upon the intention manifested by the settlor." This section is consistent with other sections of the Restatement which state that a trust beneficiary has an equitable interest in trust property. The settlor's intention may determine the extent of the beneficiary's interest, but that presupposes that the beneficiary in fact has an equitable interest. Mr. F~ further argues that an SB does not have an ownership interest in a house held in his/her sub-account because the SB's beneficial interest lacks the "incidents" of ownership. However, in listing the "incidents" of ownership, Mr. F~ describes the characteristics of fee simple ownership, not equitable ownership under a trust. *See* POMS SI 01110.515(A) (fee simple ownership is "absolute and unqualified legal title to real property," whereas equitable ownership is "a form of ownership that exists without legal title to property").

Thus, we conclude that there is no legal basis for granting Mr. F~'s request to treat an SB who is living in a house that is held in his/her own sub-account as a renter with no ownership interest. We strongly disagree with Mr. F~'s assertion that "[t]he beneficiary's situation is the same as that of any renter attempting to rent property from a homeowner." F~ Letter at 7. As discussed above, this position is directly contrary to general trust principles and the POMS, which establish that such an SB does in fact have an equitable ownership interest in the house and is not merely a renter. A renter does not have any ownership interest in the home that is provided to him by the Trust because the home is not held in trust for him. As such, it would not be appropriate to consider the renter as equal to an SB whose sub-account assets do include a house. WISH, Inc. has made revisions to the ACA, such as stating that the SB has no equitable ownership interest, labeling the provision of every home as a rental arrangement, and changing the term "monthly occupancy fee" to "monthly rent." *See* ACA Art. 8.1, 8.2, 8.11. However, merely changing the wording of the document does not alter the inherent beneficial interest a beneficiary has in the trust property.

Even if we agreed with Mr. F~ that an SB does not have an equitable ownership interest in a home held in his sub-account, we still would not find that the J~ business arrangement exception applies to the SB, as he suggests. Based on the Seventh Circuit's holding in J~ v. S~, 683 F.2d 107 (7th Cir. 1982), the Agency amended 20 C.F.R. § 416.1130(b), which provides in relevant part:

You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly rent required to be paid equals the current market rental value (*see* § 416.1101). Exception: In the States in the Seventh Circuit (Illinois, Indiana, and Wisconsin), a

business arrangement exists when the amount of monthly rent required to be paid equals or exceeds the presumed maximum value described in § 416.1140(a)(1).

See also 51 Fed. Reg. 13487 (1986). This regulation explicitly states that the business arrangement rule and the J~ exception apply only to "room or rent." However, in the case of a house that is subject to a mortgage, the applicable shelter expense is mortgage payments, not rent. Mr. F~ contends that J~ applied to all forms of shelter, but that the regulation limited the ruling only to rental situations. To the contrary, we believe that the Agency's interpretation of J~ is correct. J~ dealt only with rental situations and did not go so far as to apply to mortgage payments. As the court stated in the first paragraph of the decision, "The specific issue presented by this appeal concerns the validity of the Secretary's regulations governing SSI eligibility which impute as unearned income to SSI recipients the difference between the fair market rental value and the rent actually paid for shelter." J~, 683 F.2d at 1077. Moreover, an analysis of current market rental value is only appropriate in the context of rent, not mortgage payments. For these reasons, Mr. F~'s arguments are not persuasive and do not provide any basis for changing the Agency's longstanding policy.

Thus, consistent with our previous opinion, we conclude that when the Trust provides to the SB as a primary residence a house in which title to the house was transferred to the SB's sub-account (either by the SB or a third party) or that was purchased by the Trust out of the SB's sub-account assets, the SB is considered to have an equitable ownership interest in that house. Accordingly, in determining whether certain distributions from the sub-account (ACA Art. 9.2) would constitute ISM in the form of shelter, we apply the rules in POMS SI 01120.200(F) pertaining to home ownership, and not the J~ exception in 20 C.F.R. § 416.1130(b), which applies only to rental arrangements. Specifically, the purchase of a home would be ISM up to the PMV in the month of purchase, if the SB lives in the home that month. *See* POMS SI 01120.200(F)(3). And if there is a mortgage, each monthly mortgage payment would be ISM up to the PMV. *See* POMS SI 01120.200(F)(3)(b); 20 C.F.R. § 416.1130(b) (ISM includes shelter in form of mortgage payments). But since the SB is required to pay a "monthly rent" for using the home (ACA Art. 8.2), for purposes of determining ISM, the amount of this rent would serve as an offset for the mortgage payment made by the trustee (but this offset would not have any effect on the ISM if the resulting net mortgage payment equals or exceeds the PMV). Moreover, to the extent that the trustee pays for the SB's additional shelter expenses including property taxes, heating fuel, gas, electricity, water, sewer, and garbage removal, such expenses would be considered ISM in the month payment is made (but the total ISM will not be more than the PMV). *See* POMS SI 00835.350, 00835.465(D), 01120.200(F)(3)(c); 20 C.F.R. §§ 416.1130(b), 416.1140. And if the monthly rent is not used up in offsetting a mortgage payment, the remainder would serve as an offset for any other shelter expense distributions.

CONCLUSION

For the reasons discussed above, we conclude that neither self-settled nor third party sub-accounts in the WISH Trust would be resources. However, consistent with our previous opinion, certain trust distributions would still be considered income to the beneficiary.

I. PS 06-104 SSI-Wisconsin-Review of the Request for Reconsideration on the Sub-Account of Robert G~, ~ , in the WisPACT Trust II - REPLY Your Ref: S2D5G6, SI 2-1-3-WI (G~) Our Ref: 06-0003

DATE: March 29, 2006

1. SYLLABUS

In August, 2005 an SSI beneficiary's parents created a sub-account in the WisPACT II Trust for the benefit of the SSI eligible individual.

The sub-account was created with an unspecified transfer of cash to the WisPACT II pooled trust. The WisPACT II Master Trust has been previously evaluated and it has been determined that sub-accounts created after May 17, 2004 can be excluded as a resource if either Medicaid trust exception is met. This opinion discusses that the sub-account in question does not meet the criteria to be excluded under 42 USC 1396p(d)(4)(A) because the parents established the sub-account with the beneficiary's own funds. They failed to establish a "seed trust" and the state of Wisconsin does not recognize "dry" or "empty" trusts.

However, the sub-account does meet the criteria to be excluded under the pooled trust exception described at SI 01120.203(B)(2).

Additionally, the sub-account is irrevocable since the SSI beneficiary is not the sole beneficiary of the sub-account. Since the trust meets the criteria of the pooled trust exception and is irrevocable it is not a resource for SSI purposes.

2. OPINION

You asked whether Robert G~ sub-account in the WisPACT Trust II is a resource to Robert for SSI purposes. We conclude that the sub-account is not a resource.

BACKGROUND

The WisPACT Trust II ("the Master Trust") is a pooled trust containing individual sub-accounts for individual beneficiaries. We have previously reviewed this Master Trust in detail, and therefore do not revisit the details here. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI - Wisconsin - *Review of the WisPACT II Trust*" (March 4, 2005).

On August 5, 2005, Robert's parents, Bernard and Barbara G~, signed several documents to establish the "Robert L. G~ Self-Funded Sub-Account in the WisPACT Trust II" (the "sub-account"). The documents included an "Application to Establish Sub-Account," a "Contribution Agreement" and an "Asset Transfer and Designation of Sub-Account Record." Bernard and Barbara G~ are identified in the Contribution Agreement as the account's "creator[s]." According to the Asset Transfer document, the trust was funded with an unspecified transfer of "cash."

Upon Robert's death, any remaining trust assets will be distributed first to any state to repay Medicaid benefits. Contribution Agreement ("CA") Article V(A). Any trust assets remaining after such repayment may, in the trustee's discretion, be used to pay funeral, burial and related expenses and inheritance or estate taxes, and will thereafter be distributed to Robert's heirs at law or other beneficiaries (limited to immediate family; relatives by blood, marriage or adoption; or charities) as appointed by will or trust. CA Article V(B), V(C), V(D). The Application specifies Robert's heirs by name, Bernard and Barbara G~.

On August 9, 2005, Robert signed a "Durable Power of Attorney - Financial of Robert L. G~," in which he named his parents as co-agents authorized to "perform . . . any act in the management, supervision, and care of my estate and affairs that I personally have authority to perform." According to Robert's attorney, Bernard G~ endorsed a check (issued to him as custodian for Robert) which was used to fund the sub-account. The attorney further indicates that the funds were accepted by the trustee (Associated Bank) on August 23, 2005.

The sub-account was previously determined to be a resource and Robert has requested reconsideration.

DISCUSSION

A trust established with the assets of an individual (on or after January 1, 2000) is a resource if it is revocable or if payments from the trust could be made to or for the benefit of the individual, unless an exception applies. *See* POMS SI 01120.201(D)(1)-(2); 42 U.S.C. § 1382b(e)(2)-(3). Two exceptions are those outlined in 42 U.S.C. §§ 1396p(d)(4)(A) and (d)(4)(C), commonly referred to as "Medicaid trust exceptions." *See also* POMS SI 01120.203. We address these exceptions in turn.

A. Robert's Sub-Account Does Not Meet the Criteria for an Exception Under 42 U.S.C. § 1396p(d)(4)(A).

A trust is not counted as a resource if it meets the criteria outlined in 42 U.S.C. § 1396p(d)(4)(A). These criteria are as follows:

(1) the trust contains the assets of an individual under age 65 who is disabled;

(2) the trust is established for the benefit of the individual by a parent, grandparent, legal guardian or court; and

(3) the trust provides that any funds remaining in the trust upon the death of the individual will be first used to reimburse any state having paid medical assistance on behalf of the individual during his lifetime.

42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

Here, the WisPACT II Master Trust is "intended [to] comply with all requirements of 42 U.S.C. § 1382b(e)(5) and 42 U.S.C. § 1396p(d)(4)(A)." Master Trust, Article V(D). We previously reviewed the Master Trust document and concluded that sub-accounts created after May 17, 2004, could be excluded as a resource under 42 U.S.C. § 1396p(d)(4)(A). *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Wisconsin - Review of the WisPACT II Trust*" (March 4, 2005).

After reviewing Robert's sub-account, however, the Agency concluded in October 2005 that it did not meet all of the criteria outlined in 42 U.S.C. § 1396p(d)(4)(A). Specifically, the trust did not satisfy the second requirement, i.e., that the trust be established by a parent, grandparent, legal guardian or court. Although Robert's parents are identified as the sub-account creators, the trust was funded with Robert's own funds (and we assume Robert is a competent adult since there is no evidence of guardianship proceedings). And, we have advised that, where a parent creates a trust with a competent adult's funds, the parent must either (1) create a "seed trust," i.e., contribute some amount of funds not belonging to the individual prior to transferring the individual's funds to the trust; or (2) the state must recognize the existence of a "dry" or "empty" trust, i.e., a trust containing no property. Further, we have advised that Wisconsin does not recognize the existence of "dry" or "empty" trust. Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *Six State Survey on "Dry" or "Empty" Trusts*, (November 30, 2004). We reaffirmed this opinion in August 2005. Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Wisconsin - Review of the Reconsideration Request on Dean D. Irrevocable Trust Agreement*, (August 19, 2005). Because Robert's parents did not create a seed trust prior to funding the sub-account with Robert's own assets, the sub-account was not "established . . . by a parent" and did not qualify as an excepted trust pursuant to 42 U.S.C. § 1396p(d)(4)(A).

Robert's attorney, Mark R~, disputes our position regarding empty trusts in Wisconsin. Mr. R~ contends that unfunded trusts are considered valid trusts under Wisconsin law "[a]s long as there is an expectancy that the trust will be funded at some later time." R~ letter at [unpaginated] 2. In support of this contention, Mr. R~ cites several sources of authority, including (1) various Wisconsin statutes; (2) a comment to the 2003 Uniform Trust Code; and (3) a Wisconsin workbook for estate planners. We find Mr. R~'s arguments unpersuasive.

First, Mr. R~'s citation to various Wisconsin statutes do not support his position. Wisconsin statute defines a "trust" as "an express living or testamentary, private or charitable trust in property which arises as a result of a manifestation of intention to create it." Wis. Stat. Ann. § 701.01(7) (West 2001). Focusing on the second clause of this definition ("which arises as a result of a manifestation of intention to create it"), Mr. R~ contends that an empty trust could be created if Robert's parents had the intention to create it. *See* R~ letter at [unpaginated] 4. Mr. R~'s interpretation overlooks the first and equally salient clause requiring a "trust *in property.*" *Id.* (emphasis added). As we have advised in the above-referenced opinions, the Wisconsin statute plainly requires the existence of property to create a valid trust. Wisconsin caselaw is in accord. For example, in *McMahon v. Standard Bank and Trust Co.*, 202 Wis.2d 564, 550 N.W.2d 727 (Wis. Ct. App. 1996), a Wisconsin appellate court reviewed several basic principles of trust law. The court observed that "[a] trust is a fiduciary relationship *involving property*," and that a trust has three elements: a trustee, a beneficiary and *trust property. McMahon*, 202 Wis.2d at 568, 550 N.W.2d at 729 (emphasis added). Because both statute and caselaw clearly identify property as an essential element of a trust, we continue to believe that Wisconsin will not recognize as valid a trust that contains no property.

Mr. R~ also cites Wis. Stat. Ann. § 701.07(1)(a) as evidence that Wisconsin recognizes trusts with no property. This section states:

A living trust, otherwise valid, shall not be held invalid as an attempted testamentary disposition, a passive trust under § 701.03, or a trust lacking a sufficient principal because:

(a) It contains any or all of the following powers, whether exercisable by the settlor, another person or both: * * *

5. To add property . . . to the trust at any time.

(b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will, employee benefit plan, life insurance policy or otherwise; or

(c) the principal consists of assets of nominal value.

Mr. R~ does not clearly explain why he believes this section authorizes a trust with no property, but in any event we are not persuaded. In fact, this section reinforces our conclusion that Wisconsin does not recognize an empty trust. This section explains that an otherwise valid living trust "shall not be held invalid as . . . a trust lacking a sufficient principal because . . . (c) The principal consists of assets of nominal value." Wisc. Stat. Ann. § 701.07(1)(c). This provision indicates that the Wisconsin legislature considered the issue of what constituted a sufficient trust principal; and had the legislature intended to validate empty trusts, we think this section would read differently. Mr. R~'s interpretation would supplant "nominal value" with "no value," contrary to the legislature's intent.

Mr. R~ also cites the statutory definition of "settlor" (a person who directly or indirectly creates a trust or adds property to an existing trust) as further evidence that Wisconsin would consider a trust valid even where it contains no property. *See* Wis. Stat. Ann. § 701.01(5). Because the definition recognizes the settlor as someone who "creates a . . . trust" or "adds property to an existing trust," Mr. R~ suggests that Robert's parents could create an empty trust to which Robert later added property. *See* R~ letter at [unpaginated] 4. Mr. R~'s logic is faulty because, as we have explained, Wisconsin statute and caselaw plainly require the existence of property to "create" a valid trust. The definition of settlor does not alter this plain law.

In addition to statutory language, Mr. R~ also cites from "commentary to the Uniform Trust Code," as amended in 2003. This authority is not persuasive for two reasons. First, Wisconsin has not adopted the Uniform Trust Code. Second, to the extent the Uniform Trust Code's commentary can be considered persuasive authority regarding the interpretation of trust law, the cited provision does not support Mr. R~'s argument. Mr. R~ cites a section of the "Comment" to § 401, which explains that a self-funded trust can be created by declaring the trust and attaching a list of assets subject to the trust, without expressly transferring those assets to the trust. This comment does not indicate, however, that a trust can be created with no assets at all. In fact, the Uniform Trust Code clearly indicates the opposite: "[u]nder the methods specified for creating a trust in this section, a trust is not created until it receives property" or an adequate property interest. Uniform Trust Code (Last Revised or Amended in 2005), § 401, comment, available at http://www.law.upenn.edu/bll/ulc/uta/2005final.htm.

Finally, Mr. R~ cites a Wisconsin estate planning workbook, which does seem to support his position. Citing Wis. Stat. § 701.07(1)(b)-(c), the workbook states that trusts "may be funded or unfunded . . . The principal of an unfunded trust may consist of assets of nominal value (e.g., $10 in cash), an insurance policy, or merely the expectancy of transfers during the settlor's life or at death." Ch. 7, pg. 5. Further, in a section discussing trust funding and "minimum corpus," this workbook states that "the expectancy of a later transfer during the settlor's lifetime or at death is sufficient to satisfy the requirements of a valid trust." Ch. 7, pg. 21.

The guidance in this workbook does not alter our conclusion that Wisconsin does not recognize as valid a trust with no property. As explained, the above-referenced statutes and caselaw plainly and unambiguously indicate that an identifiable property interest is a required element of a trust. In suggesting that a trust may funded by "merely the expectancy" of later transfers, we think the workbook interprets the Wisconsin statute too broadly. The statute does recognize that a trust is valid if the principal consists only of a future or contingent property interest (such as naming the trustee as beneficiary under a will, employee benefit plan, life insurance policy "or otherwise"). Wis. Stat. Ann. § 701.07(1)(b). This statute merely recognizes that property can take many forms, including intangible, contingent and future interests (such as the expectancy of payment as the beneficiary of a will). These types of property interests may never materialize (and may thus be mere expectancies), but they are nonetheless identifiable property interests that can form the corpus of a trust. And when read in conjunction with the statutory provisions previously discussed, we do not think the legislature intended to recognize trusts with no identifiable property interests whatsoever.

In sum, we are unconvinced by Mr. R~'s arguments, and maintain our position that Wisconsin does not recognize a trust with no property. Thus, Robert's sub-account was not "established . . . by a parent" and does not qualify as an excepted Medicaid trust pursuant to 42 U.S.C. § 1396p(d)(4)(A).

B. Robert's Sub-Account Meets the Criteria for an Exception Under 42 U.S.C. § 1396p(d)(4)(C).

Pooled trusts established under 42 U.S.C. § 1396p(d)(4)(C) are also excluded as a resource. To be excluded, pooled trusts must meet the following criteria:

(1) the pooled trust must be established and maintained by a nonprofit association;

(2) separate accounts are maintained for each beneficiary, but assets are pooled for investing and management purposes;

(3) accounts are established solely for the benefit of the disabled individual;

(4) accounts are established by the individual, a parent, grandparent, legal guardian or a court; and

(5) upon death of the beneficiary, any funds not retained by the trust will be used to reimburse any state for Medicaid payments made for the benefit of the beneficiary during his lifetime.

42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2). Here, Robert's Sub-Account meets each of these criteria.

1. Established and maintained by a non-profit association

First, the WisPACT II Trust was established on August 13, 2003, by WisPACT, Inc., a non-stock, not-for-profit corporation organized under Wisconsin law. The WisPACT Inc. Articles of Incorporation were filed with the state of Wisconsin on August 22, 2002. On June 9, 2004, the IRS determined that WisPACT is exempt from federal income tax under section 501(a) of the Internal Revenue Code as an organization described in section 501(c)(3). This exemption is effective retroactive to the date of organization, i.e., August 22, 2002. Thus, the WisPACT II Trust was established and is maintained by a nonprofit organization. *See* POMS SI 01120.203(B)(2)(c) (nonprofit association is an organization defined in section 501(c) of the Internal Revenue Code and that also has tax-exempt status under section 501(a) of the Code).

2. Separate accounts maintained

Second, the WisPACT II Trust maintains separate accounts for each beneficiary, although the trustee may pool individual sub-account assets for purposes of investment and management. Master Trust, Article V(D).

3. Established solely for the benefit of the disabled individual

Third, as we previously advised, self-funded sub-accounts in the WisPACT II Trust that were created after the May 2004 amendment are "solely for the benefit of the disabled individual." *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Wisconsin - Review of the WisPACT II Trust*" (March 4, 2005). Because the check was accepted by the trustee on August 23, 2005, Robert's sub-account was created after the May 2004 amendment.

4. Established by the disabled individual

Fourth, the sub-account was "established by the individual," i.e., Robert himself. As explained, the Contribution Agreement lists Robert's parents as the sub-account creators, but (we assume) Robert is a competent adult and the trust was funded with his own assets. As such, Robert's parents acted as his agent and established the sub-account on his behalf.

We initially questioned whether Robert's parents had the authority to establish the sub-account and transfer funds on his behalf. *See* POMS SI 01120.203(B)(2)(f) ("[a] third party establishing the trust account on behalf of the individual must have legal authority to act with regard to the assets of the individual . . . [otherwise the transaction] may result in an invalid trust."). On August 9, 2005, Robert signed a "Durable Power of Attorney - Financial" naming his parents as agents with authority to "perform . . . on my behalf any act in the management, supervision, and care of my estate and affairs that I personally have authority to perform." The power of attorney enumerates powers that the agents may exercise, "which are intended to illustrate, and not to limit, the scope of this power." Among the specifically enumerated powers, the agents may transfer Robert's assets to a revocable trust already in existence (or created by Robert at a later date), provided that the trust agreement contains certain provisions. This enumerated power does not authorize creation of the WisPACT II sub-account, as it allows a transfer or assets to an existing trust that is revocable; the WisPACT II sub-account was not existing and is irrevocable. Although the power of attorney states that the enumerated powers are only intended to illustrate (and not limit) the agent's powers, Wisconsin courts have held that an agent's powers should be strictly construed, and limited only to those powers that are clearly delineated or specified. *See Losee v. Marine Bank*, 703 N.W.2d 751, 755 (Wis. App. 2005). The courts have typically applied this rule in cases where the agent cited broad powers as a defense to the agent's self-dealing (e.g., where agent used the power to make a gift to himself or to secure a mortgage for himself using principal's property as collateral). Here, because Robert's parents are potential residual beneficiaries of the trust, we think a court might find that creating the sub-account involved an element of self-dealing not authorized by the power of attorney.

We need not definitely answer this question, however, because we are satisfied that Robert gave his parents oral authority to create the WisPACT II sub-account. According to Mr. R~, Robert and his parents jointly met with the attorney in early August 2005 to discuss his financial affairs in general and more specifically to create the WisPACT II sub-account. Mr. R~ indicated that Robert was present when his parents signed the Contribution Agreement and transfer of funds document and assented to their doing so. We have no reason to doubt the accuracy of Mr. R~'s account, and thus conclude that Robert's parents had express oral authority to create the WisPACT II sub-account on his behalf. And Wisconsin courts have recognized the validity of transactions based on oral authority. *E.g., Krause v. Holand*, 147 N.W.2d 33 (1967) (recognizing that parol authority may create an agency relationship permitting agent to bind principal, but in the case of realty such parol authority must be clear and express); *Zuhak v. Rose*, 58 N.W. 2d 693, 697 (Wis. 1953) (enforcing contract for land sale negotiated by agent even though agent's authority was not in writing).

5. Contains Medicaid payback provision

Finally, both the Master Trust and Robert's Contribution Agreement direct that, upon Robert's death, any amounts remaining in the sub-account (after payment of administration fees and taxes) shall be first distributed to any State which provided Medicaid benefits to Robert, up to an amount equal to the total amount of benefits paid on his behalf. Master Trust, Article XIV(A)(1); Contribution Agreement Article V(A).

In sum, the sub-account meets all of the criteria outlined in 42 U.S.C. § 1396p(d)(4)(C). As such, the sub-account should be excluded as a resource if it is irrevocable, or evaluated under the regular resource rules if it is revocable. *See* POMS SI 01120.203(B)(2)(a) and (D)(2)(steps 7-8)

C. Robert's Sub-Account is Irrevocable and Therefore Is Not a Resource.

The Master Trust agreement indicates that sub-accounts are irrevocable unless specifically stated otherwise in a contribution agreement. Master Trust agreement, Article VI, § A(2). Robert's Contribution Agreement also provides that the sub-account is irrevocable, and Robert is not the sole beneficiary of the sub-account because there are contingent remainder beneficiaries. Upon Robert's death, any remaining trust assets (after reimbursement to any state having paid Medicaid and payment of fees, taxes and certain expenses) will be distributed to his heirs at law (Robert's current heirs are identified by name as Bernard and Barbara G~) or other beneficiaries as appointed by will or trust. CA Article V(B), V(C), V(D). Absent a contrary intent, a residual interest in heirs at law creates a contingent remainder interest in those heirs, and thus the settlor is not the sole beneficiary of the trust. *See* POMS SI CHI01120.200. Thus, Robert is not the sole beneficiary of the sub-account and does not have the power to revoke the sub-account. (We further note that Robert has no right to direct the use of trust principal for his support, and that Robert has no right to mandatory disbursements from the trust. *See* POMS SI 01120.200(D)(1).)

Because the trust meets the criteria of a Medicaid trust exception and is irrevocable, it is not a resource. *See* POMS SI 01120.203(B)(2)(a) and (D)(2)(step 7). Of course, any disbursements from the trust should be evaluated to determine whether or not such payments should be counted as income.

CONCLUSION

Wisconsin does not recognize the validity of a dry or empty trust, i.e., a trust with no property. Because Robert's parents did not create a seed trust, the sub-account was not "established by a parent" and does not qualify as an excepted Medicaid trust under 42 U.S.C. § 1396p(d)(4)(A). However, the sub-account meets all of the criteria to be an excepted Medicaid trust under 42 U.S.C. § 1396p(d)(4)(C), and the sub-account is irrevocable. Therefore, the sub-account is not a resource.

J. PS 06-081 SSI-Wisconsin-Review of the Declaration of the Wisconsin Initiatives in Sustainable Housing Trust - REPLY Your Ref: SI 2-1-3 WI (WISH) Our Ref: 06-0004

DATE: February 28, 2006

1. SYLLABUS

The Wisconsin Initiatives in Sustainable Housing Trust (WISH) and the subaccounts contained therein are discussed in this opinion. The WISH Trust is a pooled trust established and managed by a nonprofit organization. The Trust is designed to hold assets for the purpose of meeting the housing and other supplemental needs of subaccount beneficiaries. The Trustee has sole discretion regarding disbursements from the Trust, but is required to make a home available for subaccount beneficiaries as a primary residence. The subaccounts are irrevocable, contain a spendthrift clause, and cannot be amended or revoked by the subaccount beneficiary.

The current language contained in the Trust permits that initial post-mortem disbursements from the Trust may be made to creditors other than the State Medicaid agency. As such, self-settled subaccounts contained in the WISH Trust do not meet the pooled trust exception. Subaccounts established solely with the assets of third parties are determined to be excluded from resource counting. Still, disbursements made from the Trust may be countable income in the form of cash unearned income or ISM depending on the circumstances surrounding the disbursement. Whether the subaccount beneficiary has an equitable ownership interest in the home being held by the Trust is also a controlling factor in determining whether ISM in the form of shelter may be received by the beneficiary.

2. OPINION

You asked us whether a sub-account in the Wisconsin Initiatives in Sustainable Housing Trust would be considered a resource for an SSI recipient or applicant. For the reasons discussed below, we conclude that under the current version of the Trust documents, a self-settled sub-account would not qualify for the pooled trust exception and would be a resource for SSI purposes. However, assuming that WISH, Inc. cures the disqualifying defects, neither self-settled nor third party sub-accounts would be resources. However, certain trust distributions would be considered income to the beneficiary.

BACKGROUND

Wisconsin Initiatives in Sustainable Housing ("WISH"), Inc., a Wisconsin nonprofit organization, has established the WISH Housing Trust ("Trust"), which is a pooled trust designed to hold assets for the purpose of meeting the housing and other supplemental needs of disabled persons. WISH has submitted the WISH Housing Trust Declaration ("Declaration") and a sample Asset Contribution Agreement ("ACA") for our review.

Trust Declaration

The Declaration provides that the Trustee, with the consent of WISH, Inc., may accept a contribution of property to be held in a sub-account for the use and benefit of a particular sub-account beneficiary ("SB") during his lifetime consistent with the charitable purpose of the Trust, "provided that each Asset Contribution Agreement shall provide that all Assets remaining in the Sub-account beyond the lifetime of the Sub-account Beneficiary, after payment of allowable expenses, shall be applied to the charitable purposes of the Trust." Decl. Art. 5.3.

For self-settled sub-accounts (i.e., sub-account funded with assets of the SB), the Trust is intended to comply with the requirements of 42 U.S.C. §§ 1382b(e)(5) and 1396p(d)(4)(C) and Wis. Stat. § 49.454(4) (pooled trust exception). Decl. Art. 15.2.

Within the Trust, separate sub-accounts are maintained for each SB, but the assets of the sub-accounts are pooled for investment and management purposes, consistent with 42 U.S.C. § 1396p(d)(4)(C)(ii). Decl. Art. 9.4.

The Declaration states that it is irrevocable, except that it may be amended by agreement of the Trustee and WISH, Inc. or by court order pursuant to Wis. Stat. § 701.10 if, due to changes in the law or other reasons, amendment is necessary to accomplish the purposes of the Trust. Decl. Art. XII.

The Declaration is governed by the laws of the State of Wisconsin. Decl. Art. 15.1.

Asset Contribution Agreement

The ACA declares that the primary purpose of the sub-account is "to provide safe, decent, accessible, stable and sustainable housing for *SB* at affordable rental rates." ACA Art. 6.1.

Also, the Trust is intended to supplement, and not replace or make unnecessary, any public benefits the SB is qualified to receive. ACA Art. 6.2. In the case of a self-settled sub-account, language is inserted that the sub-account is intended to comply with the requirements of 42 U.S.C. §§ 1382b(e)(5) and 1396p(d)(4)(C) and Wis. Stat. § 49.454(4). *Id.*

The ACA provides that the Trustee shall make a home available to the SB as a primary residence. ACA Art. 8.1. The SB, in turn, must pay a monthly occupancy fee which does not exceed the larger of the presumed maximum value or another amount based on the anticipated total annual expenses of owning and maintaining the home. ACA Art. 5.8, 8.2.

Upon the acceptance of property by the Trustee, the ACA and the sub-account created by it are irrevocable and may not be amended or revoked by the sub-account creator, and the property is nonrefundable. ACA Art. II, 3.3. Once they become irrevocable, WISH, Inc. and the Trustee may amend or terminate the ACA and the sub-account only in certain circumstances. ACA Art. II, XI, XII.

During the SB's lifetime, the Trustee must hold all contributed assets and income earned from such assets in a sub-account used for the benefit of the SB (or, in the case of a self-settled sub-account, for the sole benefit of the SB). ACA Art. 4.1. An individual sub-account shall be maintained for the SB, but assets other than the home will be pooled with assets of other individual sub-accounts for purposes of investment and management. ACA Art. 4.3.

The ACA states that the Trustee has absolute discretion regarding all use and distribution of sub-account property on the SB's behalf. ACA Art. 6.3, 9.1. Any payment in cash and any use of income or principal to provide or pay for food or clothing or to supplement housing costs rests in the sole discretion of the Trustee. ACA Art. 9.1. No beneficiary or other person has authority to require a payment in cash or use of income or principal to provide or pay for food, clothing, or supplementation of shelter costs. *Id.*

The Trustee may make payment from the sub-account for all expenses of providing housing to the SB and for all expenses of owning, renting, and maintaining home. ACA Art. 9.1. The Trustee may also make payment for the SB's supplemental needs. ACA Art. 9.5.

The ACA contains a spendthrift provision in which the SB may not anticipate, sell, assign, or otherwise encumber any part of his interest in the assets of the Trust. ACA Art. 6.3.

The ACA provides that the sub-account terminates upon the SB's death, after payment of expenses incurred prior to the SB's death, including funeral and burial expenses, and fees and expenses connected with closing the sub-account. ACA Art. XIII. The remaining assets of the sub-account shall be retained by the Trust and shall be applied to the charitable purposes of the Trust as provided in the Declaration. *Id.*

The ACA is governed by the laws of the State of Wisconsin. ACA Art. 14.1.

DISCUSSION

WISH, Inc. has indicated that sub-accounts within the Trust may be self-settled or established with the assets of a third party. We will discuss each situation in turn.

Self-settled Sub-account

Pursuant to 42 U.S.C. § 1382b(e), the principal of a trust created on or after January 1, 2000, with the assets of an individual will be considered a resource to the extent that the trust is revocable or, in the case of an irrevocable trust, to the extent that any payments from the trust could be made to or for the benefit of the individual (or the individual's spouse), with certain exceptions. *See also* POMS SI 01120.201(D).

Our first inquiry is whether the SB of a self-settled sub-account would have the legal authority to revoke his sub-account. Whether a trust can be revoked depends on the terms of the trust and applicable state law--here Wisconsin. *See* POMS SI 01120.200(D)(2). The Declaration states that it is irrevocable. Decl. Art. XII. Likewise, the ACA states that it and the sub-account created by it are irrevocable. ACA Art. II, 3.3. Despite these provisions, the SB's sub-account would still be considered revocable if he were the sole beneficiary. *See* Restatement (Third) of Trusts § 65 Reporter's Notes (2003) (if grantor is also sole beneficiary of trust, trust is considered revocable regardless of contrary language in trust); POMS SI 01120.200(D)(3). In this case, however, the SB would not be the sole beneficiary. Rather, the Trust creates a contingent remainder interest in WISH, Inc. The Declaration and the ACA both specify that, upon the SB's death, after payment of allowable expenses, the remaining assets are to be retained by the Trust. Decl. Art. 5.3; ACA Art. XIII. Since there is a residual beneficiary, the SB could not revoke his sub-account unilaterally, but would need to obtain the consent of the residual beneficiary. *See* Wis. Stat. § 701.12 (trust may be revoked, modified, or terminated by written consent of settlor and all beneficiaries); POMS SI CHI01120.200(C) ("[I]f the trust names a residual beneficiary to receive the benefit of the trust interest after a specific event, usually the death of the primary beneficiary, the trust is irrevocable. The primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary."). Because we do not presume that WISH, Inc. would consent to a revocation, we would consider a self-settled sub-account irrevocable. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, *SSI - Update on the Law Regarding Grantor Trusts* (July 23, 2003).

As stated above, in the case of an irrevocable trust, the principal will be considered a resource to the extent that any payments could be made to or for the benefit of the individual (or the individual's spouse), with certain exceptions. Here, payments from the sub-account could be made to or for the benefit of the SB, since he would be the sole beneficiary during his lifetime. ACA Art. 4.1. Therefore, a self-settled sub-account within the Trust would be considered a resource, unless an exception applies.

One exception is for a trust that is established under section 1917(d)(4)(C) of the Social Security Act, 42 U.S.C. § 1396p(d)(4)(C), commonly referred to as a pooled trust. In order to qualify for this exception, the trust must contain the assets of a disabled individual and meet the following conditions:

- The trust is established and managed by a nonprofit association.
- The trust maintains a separate account for each beneficiary, but pools these accounts for purposes of investment and management of funds.
- Accounts in the trust are established solely for the benefit of the disabled individual by the individual or a parent, grandparent, legal guardian, or court.
- To the extent that amounts remaining in the beneficiary's account upon his or her death are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan.

See 42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.203(B)(2).

Here, the Trust does not meet all of the conditions of the pooled trust exception. Specifically, the Trust fails to meet the last condition. The POMS unequivocally states that "[t]o 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 pays to the State 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." POMS SI 01120.203(B)(2)(g) (emphasis added). Under the terms of the Declaration and the ACA, upon the SB's death, the Trustee first pays any expenses listed in ACA Art. IX incurred prior to the SB's death, including funeral and burial expenses, and fees and expenses connected with closing the sub-account. Decl. Art. 5.3; ACA Art. XIII. Only after payment of these allowable expenses does the Trust retain the remaining assets of the sub-account. *Id.* Thus, the Trust does not qualify for the pooled trust exception under 42 U.S.C. § 1396p(d)(4)(C), and a self-settled sub-account within the Trust would be considered a resource under 42 U.S.C. § 1382b(e).

If WISH, Inc. is able to cure the above defects and qualify for the pooled trust exception, the Agency would still need to apply the regular resource rules set forth in POMS SI 01120.200 to determine whether a self-settled sub-account would be a resource. *See* 42 U.S.C. § 1382b(e)(1); SI 01120.200(A)(2)(c). Under the regular resource rules, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the current value of the individual's future interest in mandatory disbursements, if any, may be a resource if it can be sold. *See id.*

Applying these rules, a self-settled sub-account would not be a resource. As discussed above, the sub-account would be considered irrevocable because the SB would not be able to revoke it without the consent of WISH, Inc., the residual beneficiary. Moreover, the ACA provides that the SB does not have authority to require a payment in cash or use of income or principal to provide or pay for food, clothing, or supplementation of shelter costs. ACA Art. 9.1. Rather, the Trustee has "absolute discretion" in making all distributions. ACA Art. 6.3, 9.1. Thus, the SB could not direct the use of the sub-account assets for his support and maintenance. Consequently, the SB's sub-account principal would not be a resource. Additionally, neither the Declaration nor the ACA provides for mandatory disbursements to the SB.

With respect to the SB's power to otherwise sell his beneficial interest in the Trust, the ACA contains a spendthrift provision in which the SB's interest in the assets of the Trust is not subject to alienation. ACA Art. 6.3. However, since the SB is also the settlor of the sub-account, a Wisconsin court may decline to give effect to this spendthrift provision. *See* Wis. Stat. § 701.06(6) (where settlor is beneficiary, court may, upon request of judgment creditor, order satisfaction of judgment to extent of settlor's proportionate contribution to trust). In any event, since the sub-account is a discretionary trust and the Trustee could not be compelled to make any distributions, the SB's beneficial interest in the Trust would have no significant market value. *See* Restatement (Third) of Trusts § 60 & cmt. e, f (2003). Accordingly, the SB's beneficial interest in a self-settled sub-account would not be considered a resource.

Third Party Sub-account

In the case of a trust established solely with the assets of a third party, the regular resource rules set forth in POMS SI 01120.200 apply to determine whether the assets in the trust are a resource. As noted above, under this provision, the trust principal will be a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food or shelter, or (2) direct the use of the trust assets for his support and maintenance. *See* POMS SI 01120.200(D)(1)(a). In addition, the current value of the individual's future interest in mandatory disbursements, if any, may be a resource if it can be sold. *See id.*

As with a self-settled sub-account, a third party sub-account would not be a resource under the regular resource rules. Here, the terms of the ACA do not give the SB the right to terminate a third party sub-account. Moreover, under Wisconsin law, the SB would not be able to unilaterally terminate his sub-account, but would need the consent of the settlor and WISH, Inc., the residual beneficiary. *See* Wis. Stat. § 701.12. The ACA also gives the Trustee "absolute discretion" in making all distributions and provides that the SB does not have authority to require the use of the sub-account assets for his support and maintenance. ACA Art. 6.3, 9.1. Consequently, the SB's sub-account principal would not be a resource. Additionally, neither the Declaration nor the ACA provides for mandatory disbursements to the SB.

With respect to the SB's power to otherwise sell his beneficial interest in the Trust, the ACA contains a spendthrift provision in which the SB's interest in the assets of the Trust is not subject to alienation. ACA Art. 6.3. Spendthrift trusts are allowed in Wisconsin. *See* Wis. Stat. § 701.06 (applies to both principal and income). Accordingly, the SB's beneficial interest in a third party sub-account would not be considered a resource.

Sub-account Distributions

Assuming WISH, Inc. cures the defects that would disqualify its self-settled sub-accounts from the pooled trust exception, neither self-settled nor third party sub-accounts would be considered resources under the regular resource rules. However, certain distributions from the sub-accounts would be considered income. For example, any disbursements of cash made directly to the SB would be considered unearned income for SSI purposes. ACA Art. 9.5(a); *see* 20 C.F.R. § 416.1102; POMS SI 01120.200(E)(1)(a). In addition, any disbursements made to a third party resulting in the SB's receipt of food or shelter would be considered income in the form of in-kind support and maintenance ("ISM") up to the presumed maximum value ("PMV"). ACA Art. 9.5(b)(xiii); *see* 20 C.F.R. §§ 416.1102, 416.1130, 416.1140; POMS SI 01120.200(E)(1)(b), SI 02210.201(I)(1).

Because the Trust provides a home to the SB to use as a primary residence (ACA Art. 8.1) and pays for certain housing expenses (ACA Art. 9.1[2]), we must consider whether and the extent to which these provisions would be considered ISM in the form of shelter. This, in turn, depends on the type of housing arrangement that is formed. The first category is where the sub-account creator (either the SB or a third party) transfers title to his home to the sub-account (ACA Art. 3.1(a)), or the Trust purchases a home for the SB out of the SB's sub-account assets (ACA Art. 8.14(a)), and the SB lives in that home. In that case, the Trust holds legal title to the home for the benefit of the SB, who has an equitable ownership interest, and the SB is considered to be living in his own home. *See* POMS SI 00835.110, 01110.515(C)(2), 01120.200(F)(1). Accordingly, we apply POMS SI 01120.200(F), which sets forth resource and income rules pertaining to a home. Because the SB has an equitable ownership interest, he does not receive ISM in the form of rent-free shelter while living in the home. *See* POMS SI 01120.200(F)(2). (Consequently, it is unnecessary for the SB to pay rent.) However, the purchase of a home or the payment of any monthly mortgage by the Trustee would constitute a disbursement from the Trust that results in the receipt of ISM to the SB. *See* POMS SI 01120.200(F)(3). Specifically, the purchase of a home would be ISM up to the PMV in the month of purchase, if the SB lives in the home that month. *See id.* And if there is a mortgage, each monthly mortgage payment would be ISM up to the PMV. *See* 20 C.F.R. § 416.1130(b); POMS SI 01120.200(F)(3)(b). However, since the SB is required to pay a monthly occupancy fee for using the home (ACA Art. 8.2), for purposes of determining ISM, the amount of this fee would serve as an offset for the mortgage payment made by the Trustee (but this offset would not have any effect on the ISM if the resulting net mortgage payment equals or exceeds the PMV). Moreover, to the extent that the Trustee pays for the SB's additional shelter expenses including property taxes, heating fuel, gas, electricity, water, sewer, and garbage removal, such expenses would be considered ISM in the month payment is made (but the total ISM will not be more than the PMV). *See* 20 C.F.R. §§ 416.1130(b), 416.1140; POMS SI 00835.350, 00835.465(D), 01120.200(F)(3)(c). Again, for purposes of determining ISM, if the monthly occupancy fee is not used up in offsetting a mortgage payment, the remainder would serve as an offset for any other shelter expense distributions.

The second category is where the SB lives in a home that is rented or owned by the Trust (separate from the SB's sub-account), i.e., the SB does not have an equitable ownership interest. ACA Art. 8.14(a). Under the ACA, the Trustee sets the monthly occupancy fee which shall not exceed the larger of the PMV or another amount based on the anticipated total annual expenses of owning and maintaining the home. ACA Art. 8.2. As long as the SB's monthly occupancy fee exceeds or equals the PMV, he would not be receiving ISM in the form of room or rent. *See* 20 C.F.R. § 416.1130(b). However, if the SB's monthly occupancy fee is less than the PMV, the lesser of the difference between the monthly fee and either the PMV or the current market value would be imputed as ISM. *See id.* Moreover, to the extent that the Trustee pays for the SB's additional shelter expenses including heating fuel, gas, electricity, water, sewer, and garbage removal, such expenses would be considered ISM in the month payment is made (but the total ISM will not be more than the PMV). *See* 20 C.F.R. §§ 416.1130(b), 416.1140; POMS SI 00835.350, 00835.465(D).

CONCLUSION

For the reasons discussed above, we conclude that under the current version of the Trust documents, a self-settled sub-account would not qualify for the pooled trust exception and would be a resource for SSI purposes. However, assuming that WISH, Inc. cures the disqualifying defects, neither self-settled nor third party sub-accounts would be resources. However, as discussed above, certain trust distributions would be considered income to the SB.

K. PS 05-228 SSI - Wisconsin - Review of the Account of Luann A~, ~, in the Wisconsin Family Community Trust for the Disabled and the WisPACT Trust II - REPLY Our Ref: 05-0136 Your Ref: S2D5G6, SI 2-1-3 WI (A~)

DATE: August 26, 2005

1. SYLLABUS

An irrevocable grantor trust was created in 1994 for an SSI beneficiary. The corpus was held in a subaccount of the Wisconsin Family Community Trust and terms provided that the trustee had exclusive discretion regarding disbursements. The subaccounts of the Trust were determined to be excluded from resource counting as long as they named a residual beneficiary. This subaccount named Wisconsin Medicaid as the residual beneficiary and was, thus, excluded from SSI countable resources. In July 2003, the Trust Advisory Committee terminated the Community Trust and transferred all assets to the WisPACT II trust. A trustee-to-trustee transfer does not constitute establishment of a new trust as long as there is no indication that the beneficiary is using the transfer as an estate planning tool. Since there is no indication that the beneficiary is using the transfer to circumvent SSI resource counting policy, the subaccount in WisPACT II should not be considered a resource.

2. OPINION

You asked whether Luann A~'s former subaccount in the Wisconsin Family Community Trust for the Disabled (Community Trust) and current subaccount in WisPACT Trust II were/are a resource for purposes of SSI eligibility. For the reasons discussed below, we conclude that the Community Trust subaccount was a resource to Luann, and that the WisPACT II subaccount is a resource to Luann. However, the Community Trust subaccount was an excluded resource through March 1995.

BACKGROUND

In November 1994, Lois A~ transferred assets belonging to Luann (a retroactive Social Security benefit payment issued in September 1994) to a subaccount in the Community Trust. The Adoption Agreement names Luann as a beneficiary. The Adoption Agreement also provides that the trustee has discretion with respect to payments, Article 3, and the Master Trust provides that trustee is not authorized to make payments from the trust for the beneficiary's support that is otherwise provided at public expense and that the trust is not to be used to "replace or make unnecessary any form of public aid or assistance" for which the beneficiary qualifies, Section I(B)(2). The Adoption Agreement also provides that the trust is irrevocable, Article 5, and that, upon the claimant's death, the entire remainder goes to "Wisconsin Medical Assistant," which presumably refers to Wisconsin's Medicaid entity, Article 4. Finally, the Master Trust provides that the trust may be amended by the Trust Advisory Committee. Article I(B)(10).

In July 2003, pursuant to Article I(B)(10), the Trust Advisory Committee amended the Community Trust "in its entirety" by substituting the WisPACT Trust II, and stating that the Community Trust should hereafter be known as WisPACT, Inc. Trust II. In a June 2005 letter, attorney Sara B~ indicated that the Adoption Agreement entered into when Luann joined the Community Trust continued to be in force.

DISCUSSION

In Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *SSI-Wisconsin-Review of the Wisconsin Family Community Trust for the Disabled for Judy J.* (Nov. 24, 1999), we indicated that subaccounts in the Community Trust would not be a resource (under the regular resource rules) so long as the Adoption Agreement named at least one additional beneficiary in addition to the claimant, thus making the subaccount irrevocable. Here, the Adoption Agreement states that it is irrevocable and names Wisconsin Medicaid as a remainderman entitled to 100% of Trust assets upon Luann's death.

As indicated in POMS SI CHI01120.200, however, the State is generally considered a creditor, not a beneficiary, in all States in our region except Ohio. As explained in *Scott on Trusts*:

If he creates a trust, ordinarily the inference is that he does not intend to create it for the creditor, but intends to create it only for his own benefit. The result is different where he has agreed with the creditor to set aside the property for the payment of the debt, and particularly where it is agreed that on his so doing there shall be a novation, the trust being substituted for the debt that is thereby discharged. Where the debtor has not agreed with the creditor to make the disposition, there is ordinarily no reason why the debtor should surrender his control over the property, and the inference is that he does not intend to do so. He is simply making the disposition as a convenient step toward the discharge of the debt.

Mark L. A~, Austin W. S~, William F. F~, *Scott on Trusts* § 126.1 (4th ed. 2001). Here, there is no indication that Luann has entered into an agreement to make the disposition in the Trust, and thus the State is a creditor, leaving Luann as the sole beneficiary under the Trust. Because Luann is also the settlor of the Trust (since the Trust was established with funds that belonged to her), the Trust is revocable, notwithstanding the contrary language in the Trust, and therefore was a resource under the regular resource rules. POMS SI 01120.200(B)(2), 01120.200(D)(3), CHI01120.200; Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *SSI-Wisconsin-Review of the Wisconsin Family Community Trust for the Disabled for Judy J.* (Nov. 24, 1999) (citing Wisconsin statutes). However, since the Trust assets consist of retroactive Social Security benefits, they would be an excluded resource for six calendar months following receipt, or through March 1995. POMS SI 01130.600(B)(2).

In July 2003, pursuant to the amendment clause, the Trust Advisory Committee essentially terminated the Community Trust and transferred all subaccounts to the WisPACT Trust II. Although this was done through the amendment clause, rather than a termination clause, the action appears to be valid. Mark L. A~, Austin W. S~, William F. F~, *Scott on Trusts* § 331.2 (4th ed. 2001) ("Where the settlor has reserved power to modify the trust, and the power of modification is unrestricted, it would seem that he can revoke the trust.").

We have recently opined that a trustee-to-trustee transfer, such as occurred here, does not constitute the "establishment" of a new trust for purposes of applying the statutory trust resource rules, at least so long as there is no indication that the claimant is using the transfer as an estate planning tool. Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Review of the WisPACT I Trust (July 29, 2005). Here, there is no indication that the claimant is using the transfer to circumvent our counting rules. Accordingly, we consider whether the trust (into which the transfer is made) is a resource under the rules applicable when the trust (from which the transfer was made) was created, not whether the trust (into which the transfer was made) would be a resource under the rules applicable to trusts established at the time of the transfer. *Id.*

Thus, we apply the regular resource rules only to determine whether Luann's subaccount in WisPACT II is a resource. Because the Adoption Agreement continues to be in force, and because WisPACT II provides that, upon the death of the claimant, subaccount assets are to be distributed first to the State (in an amount necessary to reimburse Medicaid for any benefits paid) and then as provided in the Contribution (Adoption) Agreement, Article XIV(A), all Trust assets remaining at the death of Luann would still go just to Medicaid. As such, for the reasons discussed above, Luann's subaccount in WisPACT II would also be a resource under the regular resource rules.

CONCLUSION

As discussed above, both subaccounts should be considered a resource, subject to the exclusion of the Community Trust subaccount through March 1995.

L. PS 05-219 SSI-Wisconsin-Review of Special Needs Trust for Kenneth J. W~, ~, Established with the ARC Milwaukee and U.S. Bank (N.A.) Community Trust for Persons with Developmental Disabilities - REPLY Your Ref: S2D5G6 SI 2-1-3 WI (W~) Our Ref: 05-0129

DATE: August 11, 2005

1. SYLLABUS

This opinion addresses whether or not the trust in question meets the criteria to qualify for the Medicaid pooled trust exception. As outlined in SI 01120.203, to qualify for this exception, the trust must contain the assets of a disabled individual and satisfy the following conditions: 1) Be established and maintained by a nonprofit association; 2) A separate account be maintained for each beneficiary; 3) The account be established for the sole benefit of the disabled individual by the individual, or parent, legal guardian, or a court; and 4) The trust must provide that to the extent that amounts remaining in the

beneficiary's account upon death of the beneficiary are not retained by the trust, the trust will pay to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

In this case, the trust satisfies the conditions as outlined above and thus is excluded from resources for SSI purposes.

2. OPINION

You asked us whether the Special Needs Trust for Kenneth J. W~ (Mr. W~) established with the ARC Milwaukee and U.S. Bank (N.A.) Community Trust for Persons With Developmental Disabilities (Master Trust) would be a resource for Kenneth for SSI purposes. For the reasons discussed below, it is our opinion that the Trust would not be a resource.

BACKGROUND

The ARC Milwaukee and U.S. Bank (N.A.) Community Trust for Persons With Developmental Disabilities (Master Trust) was established a pooled trust in 1996, and amended on February 25, 2005. *See* Master Trust, introduction (first paragraph); Article V. The purpose of the Trust is to hold assets of individuals who are disabled and to supplement, but not supplant, available government resources to ensure the Beneficiary's comfort and happiness during lifetime. It is also intended to qualify the participant for SSI. Master Trust, first, introductory, paragraph; Master Trust, Article VI B; *see also* Article VI A, C. The Master Trust defines disabled individuals consistent with Section 1614(a)(3) of the Social Security Act. Master Trust, Article I.

Within the Master Trust, individual trust accounts, called "shares," are created and maintained for each beneficiary, including Mr. W~. Master Trust, Article V; Instrument of Adoption, Article II. The funds from each share can be commingled (or pooled) with the amounts in other accounts for investment and management purposes. Master Trust, Article V. The Trust is activated for an individual beneficiary when the Instrument of Adoption is signed by a grantor (defined by the Master Trust as the individual or individuals who have established the Trust by signing the Instrument of Adoption), and when it is accepted by the Trustee. Master Trust, Introduction; Article I. Master Trust, Articles I, IV. A share is established upon receipt, by the trustee, of assets with a minimum value of $25,000 transferred on behalf of a person with a disability. Master Trust, Article IV.

Our materials also include an Instrument of Adoption Agreement that identifies Marie W~ as the Grantor, Kenneth J. W~ as the primary beneficiary, and it is signed by Marie W~, Grantor, representatives of the U.S. Bank National Association, ARC Milwaukee (Financial advisor) and Glenn M~, Personal Advisor. The share for Mr. W~ is funded by net proceeds of a lawsuit which Mr. W~ settled on November 24, 2004 in the amount of $38, 323.31.

These funds are to be managed by a Trustee who is the U.S. Bank (N.A.). The trustee has sole discretion to hold, manage, invest, and reinvest the funds in each share. Master Trust, Articles VI, A; XI. The Trustee has sole and absolute discretion to pay amounts from the principal and earnings in Mr. W~'s share to Mr. W~ in order to provide for his care. Master Trust, Article VI, B-C. The Instrument of Adoption states that it irrevocable, and a spendthrift provision in the Master Trust provides that Mr. W~, as the beneficiary, cannot anticipate, alienate, or encumber any interest in the Trust's principal or income. Instrument of Adoption, Article I, Master Trust, Article VII.

The Master Trust provides that the Trust shall terminate at the time and as provided in the Instrument of Adoption which specifies the person or persons or entities to whom the Trust assets are to be distributed upon termination, provided however no provision in an Instrument of Adoption that allows or directs distributions to or for the benefit of any person other than the beneficiary during the beneficiary's lifetime shall be followed if the Trust contains assets of the beneficiary. Amendments to Master Trust, Article VIII. The Instrument of Adoption provides that the Trust shall terminate upon the death of the primary beneficiary, or if, pursuant to the Master Trust, the Trustee determines that continued administration is impractical due to the size of the principal balance. Instrument of Adoption, Article VII, A(1), A(2). Upon termination, the Adoption Instrument provides that the Trust balance shall be distributed to the following individuals or entities:

(1) the Trustees shall, to the extent required by law, distribute such assets of this Trust as shall be required to reimburse the State for medical assistance benefits paid on behalf of the beneficiary which, if such benefits were not reimbursable by the Trust, would case assets held by this Trust to disqualify Mr. W~ for such benefits; (2) if this Trust terminates pursuant to Article VII, the Trust balance shall be distributed to the beneficiary; (3) If this Trust account has been transferred to a pooled trust, as defined in 42 U.S.C. § 1396p(d)(4)(c), all remaining assets shall be retained by the trustee of the pooled trust to be used as directed under the terms of that trust; (4) if this Trust account has not been transferred to a pooled trust as defined in 42 U.S.C. § 1396p(d)(4)(c), assets remaining after any distributions under Article VII.B. 1, shall be distributed: to Glen M~, or if he had predeceased, to any Supplemental Needs Trust established by Glen M~ for the benefit of Sandra M~.

Instrument of Adoption, Article VII, B.

DISCUSSION

Under the Social Security Act, trusts created on or after January 1, 2000, from the assets of an SSI claimant or beneficiary, will be considered a resource to the extent that the trust is irrevocable or to the extent that any payments can be made from the trust for the benefit of the individual. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. In the present Trust, the trustee has the discretion to use the income and the principal from Mr.W~'s Trust share for his benefit. *See* Master Trust, Article VI. Therefore, the Trust would be a resource to the beneficiary under these provisions. *See* 42 U.S.C. § 1382b(e)(3)(B).

However, certain trusts are excepted from this provision if they qualify under the Medicaid trust exception, 42 U.S.C. § 1396p(d)(4)(C). *See* POMS SI 01120.203(B)(2). In order to qualify for the Medicaid payback trust exception, the trust must contain assets belonging to a disabled individual and must satisfy the following conditions:

It must be established and managed by a nonprofit association.

A separate account must be maintained for each beneficiary of the trust; but, for purposes of investment and management of funds, the trust pools these accounts.

Accounts in the trust must be established solely for the benefit of the disabled individual by the individual, or parent, grandparent, legal guardian, or court.

The trust must provide that to the extent that 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 from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

See POMS SI 01120.203(B)(2).

Here, the Trust appears to qualify for the Medicaid payback exception because it complies with these requirements. ARC Milwaukee, which, along with U.S. Bank, is the organization that established the Community Trust, appears to be a not-for-profit organization. Next, the Trust maintains a separate account for each beneficiary, but pools the accounts for purposes of investment and management of funds. Master Trust, Article V. The Trust further provides that in no event can it distribute any balance to someone other than the beneficiary during the beneficiary's lifetime and thus is established solely for the benefit of the disabled individual. Amendments to the Master Trust, Articles IV, VIII. Here the subaccount was established by Mr. W~, a competent adult, through his mother acting as his agent. Finally, the Instrument of Adoption provides that upon termination, the Trustees shall, to the extent required by law, distribute such assets of the Trust to the state for medical assistance benefits paid on behalf of the beneficiary. Instrument of Adoption, Article VII, B1. Therefore, it appears that the exception would apply.

Furthermore, according to the regular resource rules, *see* POMS SI 01120.200(D), based on the evidence we have, it does not appear that Mr. W~, the beneficiary, would have the right to revoke or terminate the Trust, because the Instrument of Adoption establishes residual beneficiaries: Glen M~, or, if he has predeceased, to any supplemental needs trust established by Glen M~ for the benefit of Sandra M~. Instrument of Adoption, Article VII,B4. *See Berg v. Berg*, 142 Wis. 2d 935 (Wis. Ct. App. 1987) (a trust cannot be revoked (or modified) without the approval of all beneficiaries, even the unascertained ones). Nor can Mr. W~ direct use of the Trust's assets.

With respect to selling Mr. W~'s beneficial interest, the Trust provides that no interest shall be assignable. Master Trust, Article VII. However, since Mr. W~ is the grantor of the trust for state law purposes, the non-assignment provision would not prevent him from selling his interest in the trust. *See Restatement (Second) of Trusts* § 156(1) (1957). But, since disbursements are completely within the trustee's discretion, Mr. W~'s interest in the trust has no significant market value. The interest, however, is a resource since a resource is defined as an interest that an individual (1) owns (2) has the right, power or authority to convert to cash, and (3) is not legally restricted from using for his support and maintenance, POMS SI 01110.100(B)(1), even if the interest has no current market value. POMS SI 01110.100(B)(2), SI 01140.044. Accordingly, Mr. W~'s interest in the Trust should be considered a resource with no market value, even though the Trust principal is not a resource.

CONCLUSION

For the foregoing reasons, we conclude that Mr. W~'s share in the Master Trust would not be a resource.

M. PS 05-172 SSI - Wisconsin- Review of the Life Insurance Funded Burial Trust of Barbara Y~, REPLY; SSN: ~-Action; Your Reference: SI 2-1-4 WI (Y~); Our Ref.: 05-003

DATE: April 5, 2005

1. SYLLABUS

This opinion examines whether or not a life insurance funded burial trust is a resource for SSI purposes. A burial trust is not considered to be a countable resource if an individual irrevocably contracts with a provider of funeral services, funds the contract by prepaying for the goods and services, and the funeral provider places the funds in trust. The claimant in this case purchased a life insurance policy which she irrevocably assigned to a trust presumably as part of a pre-planned funeral agreement. However, the claimant never executed a pre-planned funeral agreement with the funeral home and thus does not have a valid life insurance funded burial contract under Wisconsin law. Because the claimant did not enter into a valid burial agreement, the life insurance policy is a resource for SSI purposes.

2. OPINION

You asked whether a life insurance funded burial trust is a resource to Barbara Y~ for purposes of determining Ms. Y~'s SSI eligibility. We have reviewed the documents that you provided and concluded that the life insurance policy is a resource, because she does not have a funeral agreement and thus, may convert the life insurance policy to cash.

BACKGROUND

The materials for Barbara Y~ that you sent to us consist of a one-page letter from Scott M~, from the P~ Life Insurance Company, to Barbara Y~, a one-page "Irrevocable Assignment of Death Benefit Proceeds and Transfer of Ownership to the P~ Life Insurance Trust," a two-page "Enrollment for Insurance" form for the P~ Life Insurance Company, a one-page notice of who to contact if there are any problems with the insurance, a one-page "Notice of Taxation of Life Insurance," and a nine-page "Life Insurance Certificate." You also included similar documents for Edward L. Y~, which do not appear to be relevant to determining whether Ms. Y~'s life insurance funded burial trust is a resource.

On Ms. Y~'s enrollment form, the policy identifies Barbara L. Y~ as the "insured," as well as the "policy owner." On page two of the enrollment form, "Estate" is named as the beneficiary and "Self" is listed as the "Relationship;" the policy has a face value amount of $1,800.83. Ms. Y~ remitted an insurance premium of $1,500.00 with the enrollment form. The "Certificate Specifications" of the policy indicate that it is a single premium whole life policy that Barbara Y~ purchased on June 28, 2004. The "Certificate Specifications" indicates a death benefit of $1,512.00, payable prior to December 28, 2004, and a death benefit amount thereafter of $1,801.00.

On the "Irrevocable Assignment of Death Benefit Proceeds and Transfer of Ownership to the P~ Life Insurance Trust" form, Ms. Y~ irrevocably assigned her ownership and death benefit proceeds in the P~ Life Insurance Policy to the H~ Funeral Home, in return for a promise to deliver funeral services and merchandise. The form indicates that Ms. Y~ renounced any interest in the policy, including any reversionary rights or power to control ownership. The purpose of the assignment is to assure that ownership rights of the insurance policy are transferred in order to fund the agreement for Barbara Y~'s funeral and burial services. Ms. Y~ signed below the line that purported to make this assignment "irrevocable." According to the document, Ms. Y~ thereby could not surrender the policy for cash or obtain a policy loan. In addition, by signing the agreement, Ms. Y~ warranted that the proceeds paid under the insurance policy would be used solely for the purpose of funding the funeral merchandise and burial services selected in the agreement. Irrevocably assigning ownership of the policy required that all of the funds had to be used for the burial expenses, but Ms. Y~ retained the right to designate a new funeral provider.

However, the materials did not include a pre-planned funeral agreement ("Agreement") between Barbara Y~ and the H~ Funeral Home. The claims representative at the field office confirmed that Ms. Y~ does not have an agreement with the funeral home; all she has is the life insurance policy.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate property, it is a resource. *See* 20 C.F.R. § 416.1201(a)(1). A life insurance policy constitutes a resource if the individual can surrender it for cash or recover premiums paid. *See* 20 C.F.R. § 416.1230. A pre-planned burial contract is a resource if it is revocable or salable.

Program Operations Manual System (POMS) SI 01130.420(B)(1). Trusts can also constitute a resource with specific statutory provisions addressing trusts created after January 1, 2000. *See* 42 U.S.C. § 1382b(e).

A life insurance funded burial contract involves an individual purchasing a life insurance policy in her name and then revocably or irrevocably assigning the ownership of that policy to a third party, generally, a funeral provider. The purpose of such an assignment is to fund a pre-planned burial contract. POMS SI 01130.425(A)(1). Here, Barbara Y~ purchased a life insurance policy which she irrevocably assigned to a trust presumably as part of a pre-planned funeral agreement. However, she never executed the pre-planned funeral agreement; she only has the life insurance policy. Therefore, even though she purports to assign the life insurance policy to the funeral home, she has not contracted for funeral services and retains control of the life insurance policy.

Generally, when a pre-planned funeral agreement is funded by a life insurance policy, we assume that the funeral agreement itself has no resource value and is not salable. POMS SI 01130.425(B)(1). Thus, a pre-planned funeral agreement is not generally considered to be a resource. However, Ms. Y~ did not execute a pre-planned funeral agreement with the funeral home.

Turning to the life insurance policy, if the life insurance funded burial contract is not valid under Wisconsin State law, the value of the life insurance policy is a resource per POMS SI 01130.300(B). *See* POMS SI CHI 01130.426(A). Wisconsin law provides that if an individual pays money to fund a prearranged funeral contract, the money is considered to be held in trust, Wisconsin Statutes Annotated (W.S.A.) § 445.125(1)(a)(1), and the trust can be made irrevocable only up to $3,000.00. W.S.A. § 445.125(1)(a)(2). Wisconsin law also expressly allows the assignment of proceeds of a life insurance policy to fund a pre-planned funeral arrangement. W.S.A. § 632.415(2), formerly W.S.A. § 632.41(2), became effective June 1, 1997. But this law does not limit the ability to irrevocably assign the proceeds of a life insurance policy to fund a pre-planned funeral agreement, so long as the policy holder can designate a different beneficiary and designate a different funeral director or operator of a funeral home to receive the assignment of proceeds. W.S.A. § 632.415(2)-(3). Here, the terms of the assignment under the section titled "Freedom of Choice" specifically state that Ms. Y~ has retained the right to change the designated funeral establishment as provided in the P~ Life Insurance Company Trust. Under the General Provisions, Change of Owner of Beneficiary section of the Life Insurance Certificate, the policy indicates that Ms. Y~ may change the beneficiary by notifying the insurance company in writing, and the change is received and registered in the life insurance company's home office. However, Ms. Y~ has not executed a pre-planned funeral agreement. Ms. Y~ does not have a valid life insurance funded burial contract under Wisconsin law; the assignment of the insurance policy would be revocable or voidable; and thus the value of the life insurance policy is a resource to Ms. Y~. POMS SI CHI 01130.426(A), SI 01130.300(B).

A life insurance policy issued for a burial agreement is not a resource if: (1) the policy holder has irrevocably assigned the proceeds of the policy while retaining the right to designate a different funeral director or operator of a funeral establishment according to the statutory scheme; (2) the policy holder has the right to change the beneficiary; (3) the policy holder has either irrevocably assigned or waived the right to obtain the cash surrender value of the policy; (4) the policy holder has submitted to the insurance company the irrevocable assignment of proceeds and the assignment or waiver of the right to obtain the cash surrender value; and (5) the individual has entered into a valid burial agreement. *See* POMS SI CHI 01130.426(C). The "Irrevocable Assignment of Ownership and Death Benefits Proceeds and Transfer of Ownership to the P~ Life Insurance Trust" document appears to address the first four of these concerns. Ms. Y~ signed this document, below the section addressing these issues. The paragraph titled "Freedom of Choice" specifies that the policy owner retains the right to designate a new funeral provider; numbered paragraph three specifies that the policy owner has waived all rights to surrender the policy for cash; and numbered paragraph six specifies that proceeds paid under the insurance policy may be used only for the funding of funeral services and merchandise. However, Ms. Y~ has not met the fifth requirement: she has not entered into a valid burial agreement. According to the claims representative, Ms. Y~ did not create any pre-planned funeral contract with the funeral home. Generally, a valid burial agreement must: (a) identify the agent selling the agreement and identify the funeral establishment with which that agent is affiliated; (b) indicate that the agreement is being funded by a life insurance policy; (c) identify the funeral establishment that would perform the services; (d) list the funeral services selected; and (e) indicate that the prices for the funeral services and the merchandise were guaranteed. *See* POMS SI CHI 01130.426(C)(5). There is no document in the file which meets these criteria. As Ms. Y~ apparently did not enter into a valid burial agreement, the life insurance policy is a resource.

CONCLUSION

For the foregoing reasons, we conclude that the life insurance policy, purchased by Barbara Y~, was a resource to Ms. Y~. Because Ms. Y~ did not contract with a funeral home for a pre-paid burial agreement, she maintained control over the life

insurance policy, despite the assignment to the P~ Life Insurance Trust in the Irrevocable Assignment of Death Benefit Proceeds and Transfer of Ownership to the P~ Life Insurance Trust.

N. PS 05-029 SSI-Wisconsin- Review of Life Insurance Funded Burial Trust for Linda M. E~ Your Ref: SI-2-1-4 WI (E~) Our ref: 04 P 022 REPLY

DATE: November 3, 2004

1. SYLLABUS

This opinion is in reference to an irrevocable prepaid burial agreement that is supported by a life insurance policy and held in a trust by the Great Western Trust Insurance Company and whether or not the trust is a resource to the beneficiary. Great Western Trust Insurance Company is based in Utah. Utah law states that if the grantor and the sole beneficiary are the same individual, the trust is revocable. However, if the trust has more than one beneficiary, the trust is not revocable. In this case, there are two beneficiaries (SSI beneficiary and the funeral home) to the trust. An irrevocable prepaid burial agreement that is supported by life insurance policy and is held in a trust by the Great Western Trust Insurance Company is not a resource after the mandatory 30 day right of return period if the beneficiary has (A) irrevocably contracted with a provider of funeral services and (B) pre-paid and (C) established an irrevocable trust naming the funeral home as a beneficiary.

2. OPINION

You have asked for our assistance in determining whether the burial trust is a countable resource to Linda E~ for SSI purposes. We have concluded that the life insurance policy was a resource for the first thirty days it was in effect. After that, however, the life insurance policy is not a resource and the life insurance policy to which the trust was assigned might be a resource, but has no market value.

BACKGROUND

The materials that you sent to us consist of an "Application for Life Insurance" to the Great Western Trust Insurance Company. The policy identifies Linda M. E~ as the "Insured" and it identifies "Estate" as the beneficiary. The policy has a face value amount of $16,304.00 and a single premium amount of $15,000.00. The application also sets out an amount of $15,000.00 for the total price of the pre-arranged funeral, with a minimum dollar amount of death benefit at $16,304.00.

The materials also include a pre-need funeral arrangement contract ("Contract") between Linda E~, listed as the Purchaser, and the P~/D~ Funeral Home of Stevens Point, Wisconsin. The contract identifies the P/D Funeral Home as the "Provider." David P~, a licensed funeral director, signed this form, as did Linda E~.

The Contract contains a section entitled "Assignment of Policy Ownership" on page four. This section states, in part, that the Purchaser has assigned ownership rights of the insurance policy to the Great Western Funeral Trust and that the Contract is financed by the insurance policy. The purpose of the assignment is to assure that ownership rights of the insurance policy are transferred in order to fund the Contract for Linda E~'s burial services. Ms. E~ initialed a line that purported to make this assignment "irrevocable." According to the document, the Purchaser thereby could not cancel the assignment, surrender the policy for cash, or obtain a policy loan. In addition, by initialing the agreement, Ms. E~ warranted that the proceeds paid under the insurance policy would be used solely for the purpose of funding the funeral merchandise and burial services selected in the Contract. Irrevocably assigning ownership of the policy required that all of the funds had to be used for the burial expenses, but the Purchaser retained the right to designate a new funeral provider.

The Contract specified funeral provider services of $15,000.00 ($2,470.00 for the basic professional services), and merchandise of $9,205.00 ($5,000.00 for the casket, $4000.00 for the outer burial container, 50.00 for the Register book, 100.00 for memorial folders, 40.00 for Acknowledgement cards and $15.00 for "other"). In addition, the agreement listed cash advance items (death certificate, the cost of opening and closing the grave, the death notice, an honorarium, music, a luncheon, flowers, engraving, and hairdressing) of $2,070.00. Altogether, these items constituted a total pre-need cost of $15,000.00, the initial purchase price of the policy.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for her support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate property, it is a resource. *Id.* A life insurance policy constitutes a resource if the individual can surrender it for cash or recover premiums paid. *See* 20 C.F.R. § 416.1230. A prepaid burial contract is a resource if it is revocable or salable. POMS SI 001130.42. Trusts can also constitute a resource with specific statutory provisions addressing trusts created after January 1, 2000. *See* 42 U.S.C. § 1382b(e).

A life insurance funded burial contract involves an individual purchasing a life insurance policy in her name and then assigning, revocably or irrevocably, the ownership of that policy to a third party, generally, a funeral provider. The purpose of such an assignment is to fund a prearranged burial contract. POMS § SI 01130.425(A)(1). Here, Linda E~ purchased a life insurance policy which she irrevocably assigned to a trust as part of a pre-need funeral agreement. In the same transaction, Ms. E~ agreed that policy proceeds could be used only for funeral and burial services. This arrangement raises three issues that we address in turn: (1) is the pre-paid burial agreement a resource; (2) is the life insurance policy a resource; and (3) is the trust to which Ms. E~ assigned the policy a resource?

The first question is easily answered. When a pre-paid burial agreement is funded by a life insurance policy, we assume that the burial contract itself has no resource value and is not salable. POMS SI 01130.425(B)(1). Thus, the prepaid burial agreement is not a resource.

Turning to the life insurance policy, if the Life Insurance Funded Burial Contract is not valid under state law, the value of the life insurance policy is a resource. POMS SI CHI 01130.426(A). Wisconsin law provides that if an individual pays money to fund a prearranged funeral contract, the money is considered to be held in trust and the trust can be made irrevocable only up to $3,000.00. Wisconsin Statutes Annotated (W.S.A.) § 445.125(1) (a)(1). Wisconsin law also expressly allows the assignment of proceeds of a life insurance policy to fund a pre-need funeral arrangement. W.S.A. § 632.415(2), formerly W.S.A. § 632.41(2) became effective June 1, 1997. But this law does not limit the ability to irrevocably assign the proceeds of a life insurance policy to fund a pre-need funeral agreement, so long as the policy holder can designate a different beneficiary and designate a different funeral director or operator of a funeral home to receive the assignment of proceeds. W.S.A. § 632.415(2)-(3). Here, the terms of the assignment specifically state that Ms. E~ has retained the right to change the assignee to another funeral home. And the policy further indicates that the owner may change the beneficiary by notifying the insurance company in writing, although it recognizes that where the Contract is used to fund a pre-need funeral arrangement contract, excess proceeds would go to the insurance beneficiary or her estate. Thus, Ms. E~'s Life Insurance Funded Burial Contract is valid under Wisconsin law.

The life insurance policy will be a resource for the first thirty days after issuance. Under Wisconsin law, a policy holder has the unrestricted right to return a life insurance policy used to fund a pre-need funeral agreement within 30 days after the policy holder receives the policy. If the policy holder returns the policy, the insurance contract is void and all payments made must be refunded directly to the policy holder. Wis. Admin. Code § Ins. 23.20(1)(e). This right should be conspicuously printed on the front of the policy and would, presumably, remain with the insured who purchased the policy even after that policy has been assigned to the funeral provider. The policy purchased by Ms. E~ has a section under the heading "Contract Termination" which states that the purchaser (you) may cancel the policy within thirty days of its issue date and receive a full refund of all premiums paid. Thus, this policy would constitute a resource to Ms. E~ for the first thirty days after it was issued.

After the 30-day period during which a life insurance policy issued for a burial agreement is revocable, such policy would not be a resource if: (1) the policy holder has irrevocably assigned the proceeds of the policy while retaining the right to designate a different funeral director or operator of a funeral establishment according to the statutory scheme; (2) the policy holder has the right to change the beneficiary; (3) the policy holder has either irrevocably assigned or waived the right to obtain the cash surrender value of the policy; (4) the policy holder has submitted to the insurance company the irrevocable assignment of proceeds and the assignment or waiver of the right to obtain the cash surrender value; and (5) the individual has entered into a valid burial agreement. *See* POMS SI CHI 01130.426 (C). The "Assignment of Policy Ownership" section of the Guaranteed Pre-need Funeral Arrangement Contract appears to address the first four of these concerns. Ms. E~ initialed the section entitled Irrevocable Assignment. Paragraph four under the Irrevocable Assignment section specifies that the Purchaser retains the right to designate a new funeral provider; paragraph two specifies that the Purchaser has waived all rights to surrender the policy for cash; and paragraph three specifies that proceeds paid under the insurance policy may be used only for the funding of the funeral merchandise and services selected in the contract. In addition, Ms. E~ has entered into a valid burial agreement

because: (a) it identified the agent selling the agreement and it identified the funeral establishment with which that agent is affiliated; (b) it indicated that the agreement is being funded by a life insurance policy; (c) it identified the funeral establishment that would perform the services; (d) it has listed the funeral services selected; and (e) it indicated that the prices for the funeral services and the merchandise were not guaranteed. *See* POMS SI CHI 01130.426(c)(5). As such, the life insurance policy is not a resource (after the first thirty days). (Although the life insurance policy is not a resource, it does offset the burial funds exclusion. POMS SI 01130.425(c)(2)).

Turning to the Trust to which the policy was assigned, a trust established by an individual with her own assets on or after January 1, 2000, will generally be considered a resource under federal law if it is revocable, or even if it is irrevocable, to the extent that payments to the trust could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(1)-(2). This rule applies if payments can be made for the benefit of the individual "under any circumstances, no matter how unlikely or distant in the future." POMS SI 011020.201(D)(2)(b).

These provisions, however, do not apply to burial trusts where (A) the individual irrevocably contracts with a provider of funeral goods and services; (B) funds the contract by pre-paying for the goods and services *and* (C) either (1) the funeral provider subsequently places the funds in trust, *or* (2) the individual establishes an irrevocable trust naming the funeral home as a beneficiary. POMS SI 01120.201(H)(1). Under these circumstances, the funeral provider is considered, for federal law purposes, to have established the trust with the provider's own funds. *See* Memorandum from Associate General Counsel, Office of Program Law, to Associate Commissioner Legislative Development, *Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No.) 106-169*, (Aug. 29, 2000).

We conclude that Ms. E~ irrevocably contracted with a provider of funeral goods and services for a funeral, because as part of the Pre-Need Burial Contract, she irrevocably assigned ownership of the life insurance policy to a trust, indicating that the proceeds could be used only for funding funeral services. Ms. E~ also prepaid for the goods and services by funding the contract with the Life Insurance Policy. The third prong of the trust analysis requires determining whether the funeral provider placed the funds in trust, or whether Ms. E~ "established an irrevocable trust naming the funeral provider as the beneficiary." POMS SI 01120.201(H)(1). Because the funeral provider did not place the funds in trust, the question is whether Ms. E~ has established an irrevocable trust that names the funeral home (or provider) as the beneficiary.

In the Assignment of Policy Ownership, Linda E~ irrevocably assigned ownership of the insurance policy to the Great Western Funeral Trust. The specific assignment language provides that the assignment was permanent and that the assignment could not be changed by the Purchaser. Ms. E~ also waived all rights to change the policy ownership, surrender the policy for cash, receive a loan based on the policy, or receive any refund for premiums paid. Ms. E~ also instructed that all proceeds paid under the insurance policy could be used solely for the purpose of funding the funeral merchandise selected in the Contract. The Assignment of Policy Ownership further acknowledges that policy holders can irrevocably assign their ownership rights to a life insurance policy. In addition, the Great Western Funeral Trust document acknowledges acceptance of such an irrevocable assignment in Paragraph 1 of the document.

However, regardless of trust language to the contrary, a trust is revocable under Utah law, which governs the Great Western Funeral Trust, if an individual is both the grantor and the sole beneficiary of the trust. In *Clayton v. Behle*, 565 P.2d 1132, 1133 (Utah 1977) the Utah Supreme Court held that "where the settlor is the sole beneficiary by the weight of the evidence, he can terminate the trust at any time and compel the trustee to re-convey the property to him. This is true even if the purposes of the Trust have not been fully accomplished."

Here, there is no question that Ms. E~ is the settlor of the trust, because her life insurance policy funded the trust. Under these circumstances, however, we believe that a court would conclude that Ms. E~ is not the sole beneficiary of the trust, because the P~/D~ Funeral Home would be considered an intended beneficiary. In general, when an individual creates a trust that will pay a debt and transfer to the trust was not made in connection with an agreement with the creditor, the creditor is not an intended beneficiary of the trust. Instead, the trust is intended only for the benefit of the debtor, who can revoke the trust at any time. *See* Restatement (Second) of Trusts § 330 comment h (4th ed. 1987). However, where transfer to the trust is made pursuant to an agreement with the creditor, the creditor will be considered a beneficiary of the trust. *Id.* Here, Ms. E~ assigned her life insurance policy to the Great Western Funeral Trust as part of an agreement with P~/D~ Funeral Home and in consideration for the funeral home's agreement to provide funeral services for her upon her death. Under such circumstances, we believe that a court would likely find that P~/D~ Funeral Home is an intended beneficiary of the Great Western Trust under Utah law. Thus, the funeral provider's consent would be required in order to revoke the trust. In keeping with the clear intent of the parties, we believe that a Utah court would find that Ms. E~ effectively established an irrevocable trust, and sufficiently

named the funeral provider as a beneficiary of that trust under Utah law. Thus, because Ms. E~ has (A) irrevocably contracted with a provider of funeral services and (B) pre-paid and (C) established an irrevocable trust naming the funeral home as a beneficiary we conclude that the funeral home established the trust for Federal law purposes. POMS SI 011201 (H)(I). The trust therefore would not be considered a resource under 42 U.S.C. § 1382b(e)(3)(B) or under our trust rules. *Id.*

A final consideration is whether Ms. E~ retains an equitable interest in the trust established in effect by the funeral home provider. We assume that Ms. E~ retains an equitable interest but that her interest has no resource value under the rules for trusts established by third parties. *See* POMS SI 01130.200. The trust is irrevocable, and Ms. E~ cannot direct the trustee to make disbursements for her support and maintenance. Legally, Ms. E~ could sell her interest in the trust (as there is nothing in the trust or contract prohibiting such a sale); but, because the trust is funded with a life insurance policy on Ms. E~'s life, such that the funds can only become available on her death, Ms. E~'s equitable interest in the trust has no discernable market value. *Cf.* POMS SI 01130.420(B)(2) ("If a burial contract cannot be … sold without significant hardship, it is not a resource."). Thus, if Ms. E~'s interest in the trust is a resource it has no market value. POMS SI 01140.044.

Lastly, because the funeral provider's future interest in the trust is contingent upon providing the contracted for funeral services, we considered whether the possibility that Ms. E~ could never have a funeral would make the trust arrangement void under the common law Rule Against Perpetuities. However, Utah does not follow the common law Rule Against Perpetuities and has instead, enacted a statutory "wait and see" rule to determine the validity of contingent future interests. Ut. St. 75-2-1203. Under Utah's statutory Rule Against Perpetuities, a contingent or future interest only becomes invalid if it does not vest from within 1,000 years after the interest is created. Thus, the current trust arrangement is valid notwithstanding the contingent future interest.

CONCLUSION

For the foregoing reasons, we conclude that the life insurance policy, purchased by Linda E~ was a resource to her for the first thirty (30) days that the policy was in effect, because she had the right to cancel the policy during that time and obtain a refund of premiums paid. Thereafter, because the assignment to the Great Western Funeral Trust was irrevocable, pursuant to the Guaranteed Pre-Need Funeral Arrangement Contract, and because P~/D~ Funeral Home was sufficiently named as a beneficiary of the Trust under Utah law, the life insurance policy and the contract are not a resource. In addition, the Trust to which the policy was assigned has no market value, even if it is a considered a resource. (However, the LIFBC does offset the burial funds exclusion).

O. PS 04-326 SSI-Wisconsin-Review of Erik M~ Trust, SSN: ~ -ACTION Your Reference: S2D5G6, SI 2-1-3 WI (M~) Our Reference: 04S042

DATE: September 8, 2004

1. SYLLABUS

A trust was established in July, 2003 for a legally incompetent, eligible individual. The trust was established with his funds (grantor trust) by his legal guardians and qualifies as a Medicaid trust. Remainder interests were granted to the eligible individual's two brothers, thus, creating an irrevocable trust. The trustees were assigned absolute discretion over distributions on behalf of the beneficiary and the trust does not contain any provisions allowing the beneficiary to direct use of the trust assets. In addition, the trust contains a "spendthrift" provision precluding the eligible individual from assigning his interest in the trust. Wisconsin state law, however, allows the grantor of a trust who is also the beneficiary to sell his interest in the trust regardless of the "spendthrift" provision. It is concluded that the beneficiary could sell his interest in the trust, but disbursements are completely within the trustee's discretion. Therefore, the trust has no significant market value and is considered to be a countable resource with zero value.

2. OPINION

You have asked whether the trust established for Erik M~ ("Erik") is a resource for the purposes of determining Erik's eligibility for Supplemental Security Income (SSI). As discussed below, the trust might be a resource, but has zero market value.

FACTS

On July 18, 2003, the Erik P. M~ Irrevocable Supplemental Needs Trust was established by Kenneth A. M~ and Georgellen O. M~, the parents and co-guardians of Erik. The Trust was established for Erik's sole benefit. Its purpose is to supplement any public benefits that are providing or may provide for Erik's primary support, medical and other service needs. The Trust states that it is irrevocable, and is governed by the law of Wisconsin. The Trust also authorizes the Trustees, in their discretion, to transfer all or some of the Trust assets to a trust account established for the sole benefit of Erik in a pooled trust established in compliance with 42 U.S.C. § 1396p(d)(4).

The Trust provides that, upon Erik's death, the remaining income and principal in the Trust shall be transferred to the state of Wisconsin and any state which has provided Medicaid benefits to Erik, up to an amount equal to the total Medical Assistance benefits paid on Erik's behalf under the state plan. Any remaining principal and income shall be transferred to Erik's two brothers or their issue.

DISCUSSION

Under federal law, a trust established by an individual (with his own assets) after January 1, 2000 generally will be considered a resource to him if the trust is revocable. 42 U.S.C. § 1382b(e)(3)(A); POMS SI 01120.201(D)(1). The Trust states that it is irrevocable. However, a trust that purports to be irrevocable can be revoked if the settlor of the trust is also the sole beneficiary. 76 Am. Jur. 55; *see McLain v. Jarecki*, 232 F.2d 211, 212 (7th Cir. 1956) ("a person becomes the settlor of a trust if he supplies the consideration, in spite of another person's mechanical declaration of trust"); Restatement (Second) of Trusts § 339, comment a (1959); Restatement (Third) of Trusts § 65 & comment a & Reporter's Note (2003). Even though Erik is the true settlor of the Trust (since the Trust was established with funds that belonged to his estate), he is not the sole beneficiary under the Trust (which would make the Trust unilaterally revocable notwithstanding any contrary language). POMS SI 01120.201(B)(7), 01120.200(B)(2); CHI01120.200. Specifically, the Trust creates contingent remainder interests in Erik's brothers. Accordingly, the Trust is irrevocable. *Berg v. Berg*, 142 Wis. 2d 935 (Wis. Ct. App. 1987) (a trust cannot be revoked without the approval of all beneficiaries).

Even if it is irrevocable, a trust will still be a resource under the statute if there are any circumstances under which payment cold be made to or for the benefit of the individual, unless an exception applies. 42 U.S.C. § 1382b(c)(3)(B). One such exceptions, commonly referred to as the Medicaid payback trust exception, applies where the trust is: (1) established with the assets of an individual under age 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the state for Medicaid payments made for the benefit of the individual during his lifetime. *See* 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

It appears that Erik meets the first requirement, as he is under 65 and disabled. It also appears that Erik meets the second requirement, as the Trust was established by his parents and legal guardians. Moreover, the fact that his parents are his guardians means that Erik is an incompetent adult. Finally, the Trust provides that, upon Erik's death, any funds remaining in the Trust will be used to reimburse the state for Medicaid payments made for Erik's benefit during his lifetime. As such, the Medicaid trust exception applies.

Since the Medicaid payback exception applies, we turn to the ordinary resource rules to determine whether the Trust is a resource. *See* POMS SI 01120.200, 011.20.203(B)(1). Under the ordinary resource rules, a trust will be a resource if: (1) the SSI beneficiary can revoke the trust and use the assets for his support and maintenance; (2) the individual can direct the trustee to pay him the funds or use the funds for his support and maintenance; or (3) if the individual can sell his beneficial interest in the trust. POMS SI 01120.200(D). Here, as we have explained, Erik cannot revoke the trust. Moreover, Erik cannot direct the use of the trust assets. Whether Erik can direct the use of the trust assets depends upon the terms of the trust agreement and applicable state law. *See* POMS SI 01120.200(D)(1), (D)(2). According to the terms of the trust agreement, Erik does not have the authority to direct the payment of trust assets for his support and maintenance. The trust provides that the Trustee shall use the principal and interest of the trust to "supplement any public benefits that are providing or may provide for [Erik's] primary support, medical and other service needs." Article II, § B. The Trust further provides that "the Trustee has absolute discretion in regard to all distributions on behalf of the Beneficiary." *Id.* Moreover, the trust agreement contains no provision allowing Erik to act on his own or order actions by the trustee, which, if present, could constitute directing the use of the assets. *See* POMS SI 01120; SI 01120.200(D)(1)(b). Therefore, the trust gives the trustee sole and absolute discretion to distribute trust income or principal and, as such, Erik does not have authority to direct the use of the trust assets.

Finally, applying normal resource rules, a trust can also be a resource if the individual can sell his beneficial interest in the trust. The Trust contains a "spendthrift" provision which precludes Erik from assigning his interest in the Trust. Trust, Article II, D.

However, since Erik is the grantor of the trust for state law purposes, the spendthrift provision would be invalid and would not prevent him from selling his interest in the Trust. *See* Restatement (Second) of Trusts § 156(1) (1957); Wis. Stat. § 701.06. But, since disbursements are completely within the trustee's discretion, Erik's interest in the Trust has no significant market value. Thus, it should be considered a resource with zero value. POMS SI 01140.044 (property that meets the definition of a resource is a resource, even if it has no value).

CONCLUSION

For the reasons discussed above, we conclude that the trust might be a resource, but has zero market value.

P. PS 04-140 Wisconsin Forethought Life Insurance Funded Burial Trust for Marcella L. P~ SSN ~

DATE: June 24, 1997

1. SYLLABUS

This 1997 opinion concludes that a life insurance-funded burial trust arrangement is not a countable resource for SSI purposes. Under this pre 1/1/2000 arrangement, the eligible individual irrevocably transferred ownership of a life insurance policy to the Forethought Trust. By doing this, she gave all rights to this policy and it is not a resource. The opinion further concludes that the Forethought Trust meets the requirements to be considered valid under Wisconsin State law which requires that ownership of the policy must be assigned to a person or entity other than a funeral home.

2. OPINION

This is in response to your inquiry concerning a Forethought Life Insurance Funded Burial Trust (LIFBT) for Marcella P~. You asked if the LIFBT in question is valid under Wisconsin state law and, if the LIFBT is not valid, whether the cash surrender value of the life insurance policy could be excluded since it has been irrevocably assigned to the Forethought Trust. We believe that the Forethought LIFBT in question is valid and should therefore not be counted as a resource for SSI purposes.

FACTS

In July 1996, Ms. P~ bought a life insurance policy from the Forethought Life Insurance Company. Ms. P~ did not name a beneficiary. Later that month, she irrevocably transferred ownership of the policy to the Forethought Trust, giving up her right to control the policy, surrender it for cash or obtain a loan against it, and specifying only that the proceeds of the policy were to be used to fund burial expenses.

DISCUSSION

A resource, for SSI purposes, includes assets that the individual owns and could convert to cash to be used for her own support and maintenance. *See* 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can use the trust assets to meet her needs for food, clothing, and shelter. POMS SI 01120.105(A)(1), 01120.200(D)(1)-(3).

If an individual neither owns nor has the legal right to direct the use of trust assets to meet his or her support and maintenance needs and if state law allows a revocably assigned life insurance policy that funds a funeral contract to be placed irrevocably in trust, the LIFBT is not a resource for SSI purposes. POMS SI 01130.425D.2.E.

After purchasing the Forethought life insurance policy, Ms. P~ irrevocably transferred ownership of the policy to the Forethought Trust. This was a valid transfer in which Ms. P~ relinquished the right to control the policy, to surrender it for cash, or to obtain a loan against it. Thus, the remaining question is whether this Forethought LIFBT package is valid under Wisconsin law.

We have previously advised that this particular Forethought LIFBT package is valid under Wisconsin law. *Wisconsin Forethought Life Insurance Funded Burial Contract for Phillip H.*, OGC V (M~) to Kayser, SSA-V (6/9/97). For a LIFBT to be valid under Wisconsin law, there are several requirements: (1) a funeral provider cannot be named as a beneficiary of the insurance policy that is issued; (2) ownership of the life insurance policy must be assigned to a person or entity other than the funeral home; and (3) the assignee must be free to select any funeral provider to fund the client's funeral needs at the time of death. *Wisconsin Life-Insurance Funded Burial Agreements*, OGC-V (M~) to Panama, ARC, SSA-V (10/28/92).

We note that, following a statutory amendment effective May 10, 1996, Wisconsin statute §632.41(2)(b) now permits the assignment of the proceeds of the policy to a funeral provider, if certain requirements are met. Nonetheless, the statute preserves the requirement that a life insurance policy sold under the act shall permit the policyholder to designate a different beneficiary and a different funeral provider to receive the assignment of proceeds. W.S. § 632.41(2)(b)(3). *Wisconsin Forethought Life Insurance Funded Burial Contract for Phillip H.*, OGC V (M~) to K~, SSA-V (6/9/97).

Although Ms. P~ did not name a beneficiary, this does not defeat the validity of the LIFBT, since the statute does not require that the purchaser of a LIFBT name a beneficiary. It is necessary, however, that she assign ownership of the life insurance policy to a person or entity other than the funeral home, and that the assignee must be free to select any funeral provider to fund the client's funeral needs at the time of death.

As stated above, Ms. P~ has irrevocably divested herself of ownership of the policy, and of the right to control the policy, to surrender it for cash, or to obtain a loan against it. The document transferring ownership of the policy to the Forethought Trust specifies that the proceeds of the policy will be used to fund Ms. P~'s burial costs. The Forethought Trust is not a funeral provider--it appears to be a creation of the Forethought Life Insurance Company, whose name appears on the Forethought Trust forms and which shares the same Batesville, Indiana address. And lastly, there is apparently no pre-need agreement with any funeral home, indicating that the assignee remains free to select any funeral provider at the time of the claimant's death.

For these reasons, we believe that the Forethought LIFBT is valid under Wisconsin law and should not be counted as a resource for SSI purposes. If upon further inquiry into the matter you have additional questions, please let us know if we can be of assistance.

Thomas W. C~
Chief Counsel, Region V

By: _____
Myriam M~
Assistant Regional Counsel

Q. PS 04-073 SSI-Wisconsin-Review of the Marital Settlement Agreement for Donald R~ and Sylvia R~ and the Sylvia A. R~ Special Needs Trust, ~ Your Ref: S2D5G6, SI 2-1-3 WI Our Ref: 03P086 Social Security No. ~,

DATE: 2/02/04

1. SYLLABUS

The SSI beneficiary was divorced from her spouse and was awarded a marital settlement that was ordered to be paid into a Special Needs Trust created for her benefit. Wisconsin law permits an individual to make spousal payments into a trust and Wisconsin law also permits an individual to irrevocably assign spousal support payments to a trust. If the trust is not a resource for SSI purposes, then the payments are not considered income. However, if the trust is a countable resource for SSI purposes, then the payments are income regardless of assignment.

2. OPINION

You asked whether the spousal support payments being deposited into the trust are countable income for Sylvia R~ for Supplemental Security Income (SSI) purposes. We conclude that the spousal monthly payments are legally assignable to the trust, and that the assignment is irrevocable, so that the payments should not be considered income to Ms. R~, if the trust is not a resource. If the trust is a resource, the payments are income. Whether amounts held in trust are a resource depends on the Agency's policy interpretation of the Medicaid payback trust exceptions to counting trusts as resources under the statute.

BACKGROUND

Sylvia R~ is disabled and receives SSI. On June 26, 2003, the Circuit Court of Outagamie County, Wisconsin, entered an Order modifying a judgment of divorce and supplemental judgment between Ms. R~ and Donald R~ which incorporated the parties' Stipulation dated April 30 and May 7, 2003. Stipulation and Order (Stipulation). The Stipulation set forth the distribution of $186, 462.62, the net sale proceeds from jointly held real estate. The Stipulation provides that each party is entitled to one-half of the net sale proceeds (Stipulation and Order, 1). The Stipulation further provided that a number of items would be deducted

from Mr. R~'s half of the net proceeds, including $30,000 to be placed in an account of Mr. R~'s choosing from which monthly payments would be made to the trust account of Ms. R~ (Stipulation and Order, s 2.b, 5).

On June 26, 2003, the same date that the court entered the Stipulation and Order, Ms. R~'s attorney filed a Petition to Establish Trust and for Approval of transfer of Funds to Trust (Petition to Establish Trust and For Approval of Transfer of Funds to Trust (Petition)). Ms. R~'s attorney stated that Ms. R~ was entitled to receive funds from assets to be distributed from proceeds from the sale of investments and monthly payments from Mr. R~ in the amounts set forth in the Stipulation and Order; that she was permanently disabled, but that she had needs that were not provided for under public benefits; that it would be in Ms. R~'s best interest to have the funds and proceeds used for her care under a Special Needs Trust, as provided for under § 42 U.S.C. 1396p(d)(4) and §49.454(4), Wis. Stats. (Petition, 3-7)). On the same date, June 26, 2003, the Court ordered the establishment of the Sylvia A. R~ Irrevocable Special Needs Trust attached as Exhibit B and the transfer of funds to the trust as set forth in Exhibit A, including Ms. R~'s half share of the net sale proceeds. Order to Establish Trust and for Approval of Transfer of Funds to Trust (Order) ; *see also* Exhibits A and B.

The Stipulation and Order

The Stipulation provides that each party is entitled to one-half of $186, 462.62, the net sale proceeds of jointly-held real estate (Stipulation and Order, 1). The Stipulation provides that a number of items would be deducted from Mr. R~'s half of the net proceeds, including $30,000, which he was directed to place in an account out of which monthly payments would be made into a trust account established by Ms. R~. (Stipulation and Order, 2. a; 5). The Stipulation required that Mr. R~ place $30,000 into an account of his own choosing; that the account established by Mr. R~ make monthly payments into a trust account to be established by Ms. R~; that in no event shall any payments be made directly to Ms. R~; that the payments be in the amount of $419 per month for five years from May 2003 through April 2008; that at the end of five years, beginning in May 2008, Mr. R~'s account must pay the sum of $219 per month to Ms. R~'s trust account for as long as there are funds in Mr. R~'s account (Stipulation and Order, 5). The Stipulation further provided that if the funds ran out before Ms. R~'s death, she would have no entitlement to further payments form Mr. R~ under any circumstances; that jurisdiction as to maintenance to Ms. R~ shall terminated at that time; and Ms. R~ shall not be entitled for any further maintenance payments from Mr. R~. (Stipulation and Order, 5). If Ms. R~ died while funds remained in the account, such funds reverted to Mr. R~ (*Id.*). Finally, the Stipulation provided that once Mr. R~ funded the account with the $30,000, so long as the account was fully insured, his maintenance obligation to Ms. R~ was terminated. (*Id*.).

Sylvia A. R~ Irrevocable Special Needs Trust

Pursuant to the Petition of Ms. R~'s attorney, the court created a trust for the benefit of Ms. R~ called the SYLVIA A. R~ IRREVOCABLE SPECIAL NEEDS TRUST dated June 25, 2002. The trust states that it will be funded with assets to be distributed to Ms. R~ as set forth in Schedule A, such as her half of the net sale proceeds, and from other assets owned by Ms. R~ and that the Trustee may, in her or his discretion accept additions from any other source. (Trust, Art. I B). It states that it is governed by the laws of the State of Wisconsin (Trust, Art. III A) and that it is establish in accordance with 42 U.S.C. § 1396p(d)(4)(A) and § 49.454(4), Wis. Stats. (Trust, Art. III, B). The trust, therefore, purports to be a Medicaid payback trust pursuant to 42 U.S.C. § 136p(d)(4)(A). The trust is established for the benefit of Ms. R~ who has serious and permanent disabilities (Trust, Art. II, A). Its "primary" purpose is to give Ms. R~ the opportunity to enjoy the most pleasant, comfortable and happy life as is possible. (*Id.*). The trust also states that because trust assets are not sufficient to ensure adequate and appropriate care for Ms. R~ throughout her lifetime, another purpose of the trust, therefore, " is to provide funds to supplement the essential, primary support, services and medical care provided by public assistance in order to ensure [Ms. R~'s] care, comfort and happiness, not to replace essential, primary support, services and medical care provided by public assistance to which [Ms. R~] may be entitled" (Trust, Art. II B).

The trust states that the trustee may use trust income and principal for Ms. R~'s benefit at such times and in such amounts as the Trustee, in her or his sole and absolute discretion, determines are consistent with the purposes of the trust (Trust, Art. IV, A). The trustee may investigate any and all public sources of support, services or benefits available to Ms. R~ and must consider the effect of any distribution to or for Ms. R~'s benefit on her eligibility for such support, services or benefits (Trust, Art. IV, B). The trust includes a non-exclusive list of expenses or costs for which the trustee may make distributions, most involving the purchase of goods and services (Trust, Art. IV C).

The Trustee has the authority, if the trustee deems it advisable, to initiate or pay the expenses of another party to initiate an action to enforce Ms. R~'s right to public assistance should such public assistance be denied, suspended, reduced or terminated for any reason whatsoever (Trust, Art. IV D). The trustee my employ legal counsel or pay the expenses of legal counsel

employed by another party to determine Ms. R~'s eligibility for any public assistance or the effect of any distribution or other action on public assistance Ms. R~ receives or is entitled to receive (*Id*.). The trustee has no duty to preserve principal if she or he considers its current use in Ms. R~'s best interest; Ms. R~'s care, comfort, and happiness shall be the sole consideration in the trustee's exercise of discretion to make or withhold distributions; the trustee shall have no liability for any good faith exercise of her or his power to make or withhold distributions of income or principal; the trustee may consider other resources available to Ms. R~, including her eligibility for public assistance (Trust, Art. IV, E). The trust states that at no time shall Ms. R~ obtain a vested interest in Trust income or principal, that the trustee may terminate all distributions of income and principal to or for the benefit of Ms. R~ if the trustee considers it likely that such continued distributions will result in a reduction of public assistance to her; and that at all times the trust is meant to be interpreted to come within the provisions of Wisconsin Statute 701.06(5m), which exempts the trust assets from the claims of the State of Wisconsin or its agencies (Trust, Art. IV, G). The trust further provides that distribution of the income and principal of the trust is solely in the trustee's discretion and is not subject to any order of any court under sec. 701.13, Wis. Stats., or any other statute or legal or equitable doctrine (Trust, Art. IV, G). It also states that the trustee "may be arbitrary and unreasonable in exercising her or his discretion" (*Id*.).

The trust states that it is irrevocable; that it can be amended only in a manner consistent with the purposes of the trust and "only by an appropriate Court upon petition of the Trustee, for any reasons sufficient to the Court, including changes in the law relating to public assistance" (Trust, Art. VIII s A, B). It also provides that the trustee is authorized, with or without court approval, to make administrative or ministerial modifications to the provisions of the trust for the purpose of conforming to law or factual and economic circumstances (Trust, Art. VIII, C(3); Art. IX, T).

The trust provides that after the death of the beneficiary of the trust, Ms. R~, distribution after payment of trust fees and expenses, the trustee "shall, to the extent required by law, distribute such assets of the trust as shall be required to reimburse the State of Wisconsin for the medical assistance benefits paid on behalf of [Ms. R~] which, if not reimbursable by the terms of this Trust, would cause assets held by this Trust to disqualify [Ms. R~] for benefits during her lifetime" (Trust Art. V, A(1)). After these payments, the trustee may in his or her discretion, pay Ms. R~'s funeral, burial and related expenses, (Trust V, A(2)); and pay, indirectly or directly, income, gift, death, inheritance or estate taxes (Trust, V, A(3)). If any assets remain after these payments, Trustee shall distribute such assets to Ms. R~'s heirs-at-law, in equal shares, or to their issue per stirpes, pursuant to the intestacy provisions of Wisconsin statutes then in effect (Trust, Art. V A(4)).

DISCUSSION

1. Monthly Payments Made to Trust Are Not Income to Ms. R~, unless the Trust is a Resource.

Wisconsin law expressly gives family courts the discretion to order spousal maintenance payments to be placed in trust. Wis. Stat. Ann. §767.31 (West 2003); *see also In re Paternity of Tucker M.O*., 544 N.W.2d 417, 421 (Wis. 1996) (court properly ordered support payments to be placed in trust fund). Wisconsin law states that:

The court may appoint a trustee, when deemed expedient, to receive any payments ordered, to invest and pay over the income for the maintenance of the spouse entitled thereto . . . or to pay over the principal sum in such proportions and at such times as the court directs.

Wis. Stat. Ann. § 767.31 (West 2003). Here, the court ordered the trustee to receive assets, including additions from any source which would appear to include the monthly payments to the trust. Upon the petition of Ms. R~'s attorney, the court appointed a trustee to receive the transfer of assets listed as well as to receive other assets owned by Ms. R~, and to receive, in the trustee's discretion, additions from any other source. *See* Order; Trust, I(B); *see also* Petition, 3 (stating that Ms. R~ is entitled to receive funds from the sale of investments and monthly payments from Mr. R~ as set forth in the Stipulation). The court appointed a trustee to receive "any payments ordered" which appear to include the monthly payments from Mr. R~ to the trust. Even though the trustee is not required to pay over the monthly payments for the maintenance of Ms. R~, the monthly payments to the trust, appear to be proper under Wisconsin law._11 The Supreme Court of Wisconsin seems open to settlement terms that modify statutory provisions, at least where the statute does not prohibit such deviations. *See Nichols v. Nichols*, 469 N.W.2d 619, 623 (Wis. 1991).

However, while Wisconsin law permits a court to order a trustee to receive any payments ordered, including spousal support payments, they may still constitute unearned income to the spouse who receives the payments. Under both Wisconsin and federal law, spousal maintenance payments ordinarily constitute unearned income attributable to the spouse who receives the payments. 20 C.F.R. § 416.1121(b); Wis. Stat. Ann. §§71.03(1), 71.52(6) (West 2003); POMS SI 00830.418. A legally assignable payment that is assigned to a trust, however, is not considered income for SSI purposes, but only if the assignment is

irrevocable. *See* POMS SI 01120.200(G)(d). If the assignment is revocable, the payment is income to the individual legally entitled to receive it. *Id*.

Here, the monthly payments are deposited into the trust from an account established by Mr. R~ over which Ms. R~ has no control. *See* Stipulation; Trust. While Ms. R~'s attorney petitioned the Court to establish the trust, she cannot control any disbursements from the trust income or principal (Trust, s IV(A), (G)). Nor is there any language in either the Stipulation or the Trust state indicating that the monthly payments to Ms. R~ shall continue "until further order of the Court." Rather, under the terms of the trust, only the trustee can petition the court to modify the trust (Trust, VIII(B)).

The parties, then, agreed to non-modifiable monthly payment amounts and a non-modifiable termination of the payment amounts: Mr. R~ was to establish an account of his own choosing, fund it with $30,000 out of his share of the net sale proceeds; pay a non-modifiable monthly amount of $419 into Ms. R~'s trust for a non-modifiable term of five years from May 2003 through April 2008; and thereafter, a non-modifiable amount of $219 until the funds in the account ran out or until Ms. R~ died. In the former case, Ms. R~ agreed that she would be entitled to no further maintenance; in the latter, she agreed that any remaining funds would revert to Mr. R~. Moreover, the parties agreed that the payments were to be made to the trust account and that "(i)n no event shall any payments be made directly to" Ms. R~ (Stipulation, 5). Thus, it appears that the parties intended that Ms. R~ could not ask to modify the agreement to revoke the transfer to the trust and receive the maintenance payments herself.

These provisions are more restrictive than Wisconsin law, which provides that after any judgment of divorce providing for maintenance or creating a trust, the Court retains the discretion to hear motions from either party to revise or modify the order with respect to the amount or payment of maintenance, "and may make any judgment or order respecting any of the matters that such court might have made in the original action." Wis. Stat. Ann. § 767.32 (West 2003). However, a court can modify the amount of maintenance or the time period over which it must be paid only if there is a substantial change in circumstances. *See* Wis. Stat. Ann. § 767.32(1)(a); *Whitford v. Whitford*, 232 Wis.2d, 38, 41; 606 N.W.2d 563, 567 (Wis. 1999); *Nichols v. Nichols*, 469 N.W.2d 619, 622 (Wis. 1991).

Moreover, under Wisconsin law, parties may establish non-modifiable settlement terms, and, in certain circumstances, the parties may be estopped from requesting modification of these terms, notwithstanding general statutory provisions of Wisconsin Statute §767.32, which generally allows for modifications. *Nichols*, 162 Wis. 2d at 105, 469 N.W.2d at 622; *Whitford v. Whitford*, 232 Wis. 2d 38, 44-45, 606 N.W.2d 563, 568 (Wis. Ct. App. 1999). Estoppel applies when (1) both parties entered a stipulation to the agreement freely and knowingly; (2) the overall settlement is fair and equitable; (3) the settlement, including the maintenance agreement, is not against public policy; and (4) the non-modifiable term must be one that the court could not have ordered without the parties' agreement. The case law also indicates that because the parties are giving up the statutory right to modification, their agreement must be clear and unequivocal. *Id*., 232 Wis.2d at 44, 606 N.W.2d at 568.

Here, the stipulation meets this four-part test. The non-modifiable terms in the stipulation could not have been ordered by the court without the parties' agreement. There is no suggestion that both parties did not enter the stipulation freely and knowingly. The overall settlement was not against public policy. *See Nichols*, 162 Wis.2d 96, 106-07 (holding that a provision in a divorce judgment providing that the amount of maintenance cannot be modified does not violate public policy). The stipulation was fair and equitable. In agreeing to non-modifiable monthly payments only to the trust, it appears that the parties agreed on this amount of maintenance and the payment only to the trust based on the assumption that the trust would allow Ms. R~ to continue receiving public benefits, including SSI. In addition, both parties gained other benefits: Mr. R~ agreed to reduce his half of the net proceeds from the sale of jointly held real estate by, among other things, paying off the mortgage debt, in exchange for a fixed maintenance obligation; Ms. R~ gave up the option to modify the monthly payments in exchange for receiving her half of the net proceeds and for continuing eligibility for SSI. *See N~,* 162 Wis.2d 96, 108-115, 469 N.W.2d 619, 624-27; *Whitford*, 232 N. Wisc.2d 38, 49-51, 606 N.W. 2d 563, 570-72 (Wisc. 1999). It therefore appears that the conditions of estoppel apply here to preclude Ms. R~ from seeking modification of these non-modifiable terms. Thus, the assignment of the monthly payments to the trust is irrevocable and should not be considered income to Ms. R~, if the trust is not a resource. However, if the trust is a resource, the payments would be income. POMS 01120.201(J)(3)(b).

2. Assets Held in the Trust May or May Not Be Resources to Ms. R~

We next address whether the trust assets, including the payments actually made to and held in the trust, should be considered a resource to Ms. R~. Under the Social Security Act, trusts created on or after January1, 2000, from the assets of an SSI claimant or beneficiary will be considered a resource to the extent that the trust is revocable or to the extent that any payments can be made from the trust for the benefit of the individual. *See* 42 U.S.C. § 1382b(e); POMS SI 01120.201. This rule applies unless the

trust satisfies the statutory requirements of a Medicaid payback trust. *See* 42 U.S.C. §1382b(e)(5); POMS SI 01120.203. When the statutory trust provisions do not apply, regular resource rules still apply. POMS SI 01120.200; POMS SI 01120.203(B)(1). Under the regular resource provisions, a trust is a resource if it is unilaterally revocable, if the SSI beneficiary can direct the trustee to provide for her support and maintenance, or if the SSI beneficiary can sell her beneficial interest in the trust. POMS SI 01120.200(D)(1).

The trust was established with Ms. R~'s assets, including the her share of the proceeds of the net sale of investment property. The trust was created after January 1, 2000, and the trustee has discretion to expend all of the trust assets for Ms. R~'s benefit. Thus, the trust will be a resource under the statute, unless the Medicaid payback trust exception applies. It appears that the Medicaid payback exception may apply to counting the trust under the statute, depending on how the Agency interprets that provision. If the Agency determines that the exception applies to counting the trust as a resource under the statute, the trust would not be a resource under regular resource rules

a. The Medicaid Payback Exception May Apply to Counting the Trust as a Resource Under Statutory Provisions.

The Medicaid payback exception to counting the trust as a resource under the statute applies where the trust is (1) established with the assets of an individual under the age of 65 who is disabled; (2) established for the benefit of such individual by a parent, grandparent, legal guardian or a court; and (3) provides that, on the death of the individual, any funds remaining in the trust will be used to reimburse the appropriate state for Medicaid payments made for the benefit of the individual during her lifetime. *See* 42 U.S.C. § 1396p(d)(4)(A); POMS SI 01120.203(B)(1).

Here, the first and third requirements are met. Ms. R~ is under age 65 and is disabled. And, the trust provides that, upon Ms. R~'s death, any remaining funds would first be used to reimburse that state of Medicaid payments made for her benefit during her lifetime.

The second requirement, however, may be problematic. The court established the trust, but it did so at the request of Ms. R~'s attorney, and presumably could not have done so without her consent. The Office of the General Counsel previously has advised that the Medicaid payback exception in 42 U.S.C. § 1396p(d)(4)(A), is best interpreted to require that the trust be established by parents, grandparents, legal guardians and courts for disabled children and disabled incompetent adults, or by a court where the individual is not exercising any discretion in the creation of the trust. *See* Memorandum from Associate General Counsel for Program Law to Acting Associate Comm. for Program Benefits, *Questions Related to Implementation of Section 205 of the Foster Care Independence Act of 1999, Pub. L. No. 106169* (Feb. 7, 2002). If the Agency were to adopt a policy based on this interpretation of the statute, the trust in this case would not be "established by" the court for purposes of 42 U.S.C. § 1396p(d)(4)(A), and therefore would not qualify for the Medicaid payback trust exception to counting the trust as a resource under the statute. It would be counted as a resource under 42 U.S.C. § 1382b(e) and POMS 01120.201.

However, if the Agency considers this trust, as a matter of Agency policy, to be established by the court under these circumstances, the trust would otherwise qualify for the Medicaid payback trust exception to counting the trust as a resource under 42 U.S.C. §1382b(e). If the Agency determines that the exception applies to counting the trust under the statute, the regular resource rules would apply to determine whether the trust is a resource. *See* POMS SI 1120.200; POMS SI 01120.203(B)(1).

b. The Trust Is Not a Resource Under the Regular Resource Rules.

Under regular resource rules, assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his support and maintenance. 20 C.F.R. § 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is considered a resource. *Id*. at (1). Thus, trust assets are a resource to an individual if she can revoke the trust and use the assets to meet her individual needs for food, clothing, and shelter; if the individual can direct the use of the trust assets for her support and maintenance under the terms of the trust; or if the individual can sell her beneficial interest in the trust. *See* POMS SI 01120.200(D)(1).

Whether the claimant can revoke or terminate the trust or direct use of the assets depends upon the terms of the trust agreement and applicable state law. *See* POMS SI 01120.200(D)(2). Wisconsin Law provides that, after a judgment providing for maintenance, the court may, at any time, on petition of either party, revise and alter the judgment "respecting the appropriation of a payment of the principal and income of the property so held in trust, and may make any judgment or order respecting any of the matters that such court might have made in the original judgment . . . ." Wis. Stat. Ann. § 767.32(1)(a) (West 2003). This statute requires a showing of a change in circumstance in order to make revisions or modifications to the

amount of or length of time for paying maintenance, but we found no such limitation on changing the entity to whom the payments would be made. Wis. Stat. Ann. § 767.32(1)(a); *Whitford v. Whitford*, 232 Wis.2d, 38; 606 N.W.2d 563 (Wis. 1999); *Nichols v. Nichols*, 469 N.W.2d 619 (Wis. 1991). Thus, under the statute, it would appear that Ms. R~ could ask the court at any time to amend or revise the trust to pay income or principal for her support and maintenance.

As explained above, however, the Supreme Court of Wisconsin has recognized that parties may establish non-modifiable settlement terms, and that, in such circumstances, the parties may be estopped from requesting modification of these terms, notwithstanding general statutory provisions of Wisconsin Statute §767.32, which generally allows for modifications. *Nichols*, 162 Wis. 2d at 105, 469 N.W.2d at 622; *Whitford v. Whitford*, 232 Wis. 2d 38, 44-45, 606 N.W.2d 563, 568 (Wis. Ct. App. 1999). As discussed, we believe that estoppel applies here to prevent Ms. R~ from asking for any modification in the monthly payments. For the same reasons, we also believe that under these circumstances, a court would conclude that Ms. R~ intended the terms of the trust to be non-modifiable, so that funds from any of the assets held in the trust could not be paid, even on order of the court, except in the trustee's discretion. The trust itself states that "Distribution of the income and principal of this Trust is solely in the Trustee's discretion and is not subject to any order of any court under Section 701.13, Stats., or any other statute or legal or equitable doctrine." (Trust Art. IV, G). We conclude that a court would most likely conclude that the provisions are sufficiently clear and unequivocal to establish a non-modifiable provision regarding the appropriation and payment of the principal and income of the property held in trust pursuant to the divorce decree.

As discussed, the other elements of estoppel appear to exist, as well. Both parties appear to have entered the agreement freely and knowingly; the overall settlement seems fair and equitable; the settlement, including the provision in question, do not seem patently against public policy, since both state and federal law allow these types of trusts for indigent disabled individuals; and the non-modifiable terms are ones that the court could not have ordered without the parties' agreement.

We note that, even if Ms. R~ could not ask the court to revise the trust under Section 767.32, she still could revoke the trust if she were the grantor and sole beneficiary of the trust. *See* Wis. Stat. Ann. §701.12(1) (West 2003) (absent express language providing a right of revocation, modification, or termination, a trust cannot be revoked or modified unless the grantor or settlor and all of the beneficiaries agree). Here, however, Ms. R~ could not revoke the trust unilaterally because the trust names other contingent beneficiaries of the trust, including Ms. R~'s heirs, whose consent would be necessary to revoke the trust. *See* Wis. Stat. Ann. § 854.22 (West 2003) (designation of "heirs" generally assumed to create a beneficial interest in those that would inherit).

Furthermore, the trust would not otherwise be a resource under the regular resource rules because Ms. R~ cannot direct the trustee to make payments for her support and maintenance, and presumably could not sell her beneficial interest in the discretionary trust for her benefit. *See* POMS SI 01120.200(D)(1)(a); (Trust Art. II G); Restatement (Third) of Trusts, §60, comment f (2003).

Finally, we note that, even if the trust is not a resource, any distributions made directly to Ms. R~ or paid for her support and maintenance, will be income to her. *See* 20 C.F.R. §416.1102; POMS SI 01120.200(E)(1)(a)-(b). Similarly, if the trustee terminates the trust, due to insubstantial assets, and pays Ms. R~ any remaining funds after reimbursing the State for medical assistance, any assets she receives would be income to her. (Trust Art. I, C(2)).

CONCLUSION

In summary, we conclude that Wisconsin law permits Mr. R~ to make spousal support payments into trust. Under Wisconsin law, and by agreement of the parties, Ms. R~ has irrevocably assigned the monthly payments to the trust and the payments should not be considered income, if the trust is not a resource. It is a resource, the payments are income regardless of the assignment.

The assets in the trust, including any maintenance payments actually assigned to and held in the trust, may be resources, depending on whether the Agency adopts the position that the trust cannot be considered to be established by the court where the SSI claimant is a competent adult and requested that the court establish the trust. If the Agency determines that, under such circumstances, the trust was established by the individual, rather than the court, then the trust would be a resource under the statutory provisions because it would not meet the Medicaid payback exception to counting the trust. If, however, the Agency decides that, under these facts, the trust is considered to be established by the court, the trust otherwise meets the requirements for the Medicaid payback exception to counting it under the statute. The trust also would not be a resource under the regular resource rules. The trust is irrevocable; Ms. R~ cannot compel the trustee to pay for her support and

maintenance; and she cannot sell her beneficial interest in the trust. However, any payments from the trust to Ms. R~ or for her support and maintenance would be income to her.

_11 It should be noted that none of the documents provided to us specifically designate the monthly payments from Mr. R~'s account into the trust as maintenance payments nor require that they be used for her maintenance. *See* Stipulation, Petition, Order, and Trust. Nor does the Stipulation recognize that the payments be included as income on Ms. R~'s income tax returns. Nevertheless, the Stipulation states that Mr. R~'s obligation with respect to maintenance ends once he deposits the $30,000 into an account established by him, as long as it is properly insured account, and that the court's jurisdiction with respect to maintenance to Ms. R~ shall terminate when the funds run out. Stipulation, 5. Thus, while the pertinent documents do not specifically designate the monthly payments as maintenance payments, the Stipulation contains language indicating that the payments are related to the maintenance obligations of Mr. R~ and the right of Ms. R~ to receive maintenance.

R. PR 04-051 SSI-Minnesota-Review of the Interest of David H~ in the H~ Revocable Living Trust, ~-ACTION Your Ref: S2D5G6, SI 2-1-3 MN Our Ref: 3P091

DATE: December 22, 2003

1. SYLLABUS

This opinion concerns a living trust in the State of Wisconsin. The trust agreement created 3 separate trusts. The SSI beneficiary is the grantor and beneficiary of one of the 3 trusts. The trust was established in 1983, so it was evaluated under the SSI trust rules in effect prior to the 1/1/2000 change in the law. The SSI beneficiary's trust is not revocable and the beneficiary cannot direct the use of the trust, so that trust not a resource for SSI purposes. However, the beneficiary does have access to the trust income which is kept in a separate account. Therefore, the income generated by the trust is unearned income for SSI purposes and, if retained, is a countable resource.

2. OPINION

You have asked us whether the interest of David H~ in the H~ Revocable Living Trust is a countable resource to him for purposes of SSI. For the reasons discussed below, we conclude that the trust principal is not a countable resource, but that the trust income, if any, may be a countable resource.

FACTS

On September 15, 1983, Leroy H~ ("Leroy"), Susan C. H~ ("Susan"), and David H~ ("David") created the H~ Revocable Living Trust. The trust was funded with real estate located in Rock County, Wisconsin, which the three individuals received undivided interests under the will of their grandfather. The purpose of the trust is to develop the trust property as a business asset. Trust § 1.1.

The trust agreement created three separate trusts. The first trust was established with Leroy's undivided one-half interest in the real estate and was for his benefit. The second trust was established with Susan's undivided one-fourth interest in the real estate and was for her benefit. The third trust was established with David's undivided one-fourth interest in the real estate and was for his benefit. Trust § 1.2. Thus, David is the grantor and primary beneficiary with respect to his trust. As of June 30, 2003, David's trust was valued at $295,070.50.

According to the trust agreement, any trust may be amended or revoked when any two of the three grantors do so in writing. Trust § 7.1. In addition, a grantor has the right to withdraw any income accrued to his/her account at any time. Trust § 1.4. Upon termination of any trust, the remaining assets are to be distributed first to the respective grantor, if living; then in accord with the grantor's will; and if there is no valid will, to the grantor's "heirs-at-law." Trust § 1.5.

The trustees generally have the right to make distributions in cash or in kind or partly in each as they *see* fit. Trust § 8.1(c). The trust agreement also states that the trustees have sole discretion to distribute any portion of the net income of each grantor's trust for the health care, education, and maintenance and support of the grantor. Trust § 1.3. Any income may be accumulated in a separate income account for each beneficiary. *Id*.

The trust agreement also contains a spendthrift provision, which prohibits the assignment or anticipatory transfer of the beneficiaries' interests in their respective trusts. Trust § 8.1(r).

DISCUSSION

For SSI purposes, a resource is defined as cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his support and maintenance. *See* 20 C.F.R. § 416.1201(a) (2003). If the individual has the right, authority, or power to liquidate the property, it is a resource. *See id*. Trust assets are a resource if the individual can (1) revoke or terminate the trust and use the assets to meet his needs for food, clothing, or shelter, (2) direct the use of the trust assets for his support and maintenance under the terms of the trust, or (3) sell his beneficial interest in the trust. *See* POMS SI 01120.200(D)(1)(a).

Initially, we note that, although David lives in Minnesota, Wisconsin law governs in this case. The trust agreement specifies that all questions concerning the trust are to be determined in accordance with Wisconsin state law. Trust § 6.8.

We first determine whether David has the legal authority to revoke his trust. The trust agreement provides that any two of the three grantors may amend or revoke any trust. Trust § 7.1. Since David cannot revoke his trust on his own, but would need the consent of at least one other grantor, we do not consider the trust revocable by David for purposes of determining whether it is a countable resource.

Wisconsin law also provides that a trust may be revoked by written consent of the grantor and all beneficiaries. *See* W.S.A. § 701.12. As stated above, David is the grantor and beneficiary of his trust. However, David is not the sole beneficiary, since residual beneficiaries are also named in the trust agreement. The trust agreement states that, upon David's death, the remaining assets are to be distributed in accord with his will, or there is no valid will, to his "heirs-at-law." Trust § 1.5. Under current Wisconsin law, a future interest in one's "heirs at law" or similar language generally creates residual beneficiaries, unless a contrary intent is indicated. *See* W.S.A.§§ 700.11, 854.22. _11] This is consistent with the general trust principle which presumes that "language expressing an apparent intention to create a remainder in someone's heirs is so intended and is to be given that effect." Restatement (Third) of Trusts § 49, comment a(1). Since there are residual beneficiaries, David cannot revoke his trust without their consent. Therefore, we again do not consider the trust revocable for purposes of determining whether it is a countable resource. *See* Memorandum from Reg. Chief Counsel, Chicago, to Ass't Reg. Comm.-MOS, Chicago, SSI - Update on the Law Regarding Grantor Trusts, at 3-4 (July 23, 2003).

Next, we determine whether David has the power to direct the use of the trust assets for his support and maintenance. The trust language on this issue is less than clear. Section 8.1(c) of the trust agreement states that the trustees have discretion to make distributions as they see fit. And under § 1.3, the trustees have sole discretion to make distributions of the net income of the trust for the grantor's health care, education, and maintenance and support. However, § 1.4 provides that the grantor has the right to withdraw any accumulated and undistributed trust income at any time. Thus, under the terms of the trust, David does not have the power to direct the use of the trust principal for his support and maintenance. However, it appears that David has full access to the trust income, which is kept in a separate income account. Accordingly, any generated trust income would be considered unearned income in the month it is accrued and credited to David's account, and a countable resource in subsequent months if it is not withdrawn._22] *See* 20 C.F.R. §§ 416.1102, 416.1121, 416.1123; POMS SI 00810.005, SI 00810.015, 01110.600.

Lastly, we determine whether David has the power to sell his beneficial interest in his trust. Although the trust agreement contains a spendthrift provision, it cannot be given effect, because a grantor is not permitted to create a spendthrift trust for his own benefit. *See* W.S.A. § 701.06; Restatement (Third) of Trusts § 58(2) & comment e. David's interest in the trust principal would not have significant market value, as it may be unlikely that anyone would purchase an undivided one-fourth interest in the property with no right to unilaterally revoke the trust. David would, however, be able to sell his interest in future trust income, which may be withdrawn unilaterally at any time.

CONCLUSION

In sum, the principal of David's trust is not a countable resource. Although the trust is revocable under its terms, we do not consider it revocable for purposes of SSI because David cannot revoke the trust on his own. Moreover, David cannot direct the use of the trust principal for his maintenance and support, or sell his beneficial interest in the trust principal. The accrued trust income, however, is considered unearned income in the month it is acquired by the trust. In subsequent months, if the trust income remains in the income account, it is considered a countable resource, because David has the right to withdraw the full amount of the accumulated trust income at any time, and the spendthrift provision does not prevent him from selling his interest in future trust income.

Sincerely,

Kim L. B~
Acting Regional Chief Counsel, Region V

By:
Cristine H. K~
Assistant Regional Counsel

_11 This law took effect on May 12, 1998, and applies to deaths occurring on or after January 1, 1999, except with respect to irrevocable governing instruments executed before that date. The new law applies in David's case because his death will occur after January 1, 1999, and his trust is revocable.

_22 The information provided does not indicate whether the trust has generated any income.

S. PS 03-102 SSI - Wisconsin - Review of Life Insurance Funded Burial Trust for Barbara K~, ~

DATE: March 5, 2003

1. SYLLABUS

In this opinion, OGC found that an insurance policy assigned to a trust was a resource for SSI purposes because the owner retained the power to revoke the agreement and could convert the policy to cash which she could use for her support and maintenance. While the trust established by the funeral provider was irrevocable, the assignment of the insurance proceeds to fund the trust was revocable. Therefore, OGC concluded that the beneficiary rather than the funeral provider established the trust. Finally, OGC opined that the undue hardship provision explained at SI 01120.203E. should be considered in this case because the trust would be viewed by a Georgia court as irrevocable. This is an interesting case because it serves as a reminder to field offices that State law from more than one jurisdiction may have to be considered when rendering a determination. In the instant case, Wisconsin law applies to the transactions at hand, but Georgia law determines whether the trust is irrevocable for purposes of applying the undue hardship provision for trusts.

2. OPINION

You have asked for our opinion regarding Barbara K~ irrevocable assignment of her right to change the beneficiary of her life insurance policy to a Funeral Home and Pre-Thana Trust. We do not reach the issue of the beneficiary assignment because we conclude that the pre-need burial agreement Ms. K~ entered into is revocable; thus the trust to which she assigned her insurance policy is a resource under federal law. However, the Agency may want to consider whether the undue hardship exception may apply to counting Ms. K~ trust as a resource.

BACKGROUND

On March 27, 2002, Ms. K~ sister Jeanette K~, applied for a life insurance policy with the Fortis Benefits Insurance Company for Ms. K~. The policy was issued on April 7, 2002. It is to be paid by quarterly premiums of $247.14. No beneficiary is designated on the application.

The file also contains a “Pre-need Agreement/Assignment.” The front page of the assignment indicates that the agreement is being funded by a life insurance policy; that the prices of some funeral goods and services are guaranteed and some will be determined at the time of need; identifies Janet V~ as the sales agent and indicates that a sales commission is being paid to her; identifies the S~ Funeral Home and is signed by the funeral home's “authorized person”; the assignment also indicates that it is irrevocable. The irrevocability clause indicates that, in exchange for the promise of the funeral home specified in the document to provide the specified goods and services, the purchaser irrevocably assigns all incidents of ownership including the right to change the beneficiary, obtain a loan against the policy, surrender it for cash or change the owner. The funeral home in turn agrees to immediately transfer its ownership rights in the policy to the Pre-T~ Trust, which then holds the policy as agent for Ms. K~.

The funeral home and the purchaser agree that after Ms. K~ death, the trustee will pay the policy proceeds to the funeral home if it provides the goods and services and to another funeral home if it provides the goods and services. The back page of the Pre-need Agreement/Assignment contains additional terms. Among them is a termination provision, which indicates that the

purchaser may cancel the agreement at any time before the funeral home furnishes the goods and services. The termination provision further indicates that termination would not cancel the insurance policy, which is governed by the terms of the policy itself; nor does termination of the agreement cancel any transfer of ownership of the policy to the Pre-T~ Trust.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for her support and maintenance. 20 C.F.R. § 416.1201(a). A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. 20 C.F.R. § 416.1230. Here, the life insurance policy was a resource for the first thirty days after it was issued because Ms. K~ had the unrestricted right to cancel the policy and recover the full amount of the premiums paid. Wis. Admin. Code § Ins 23.30 (giving purchasers of life insurance policies thirty days to cancel the policy and recover premiums paid). Ms. K~ policy was to be paid by quarterly amounts of $247.14; thus, the value of the policy during the first thirty days was most likely $247.14.

After the first thirty days, we must determine whether the trust to which the policy was assigned is a resource. A trust established by an individual on or after January 1, 2000, as this one is, generally will be considered a resource, under federal law, if it is revocable, or, even if it is irrevocable, to the extent that payments from the trust could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201(D)(1)-(2). This rule applies if payments can be made for the benefit of the individual "under **any** circumstance, no matter how unlikely or distant in the future." POMS SI 01120.201D.2.b.

These provisions do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral goods and services and either (1) the funeral provider subsequently places the funds in a trust, or (2) the individual establishes an irrevocable trust naming the funeral provider as the beneficiary. POMS SI 01120.201H.1. Under these circumstances, the funeral home is considered, for federal law purposes, to have established the trust. *See Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No.) 106-169*, Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development (Aug. 29, 2000). The statutory provisions at 42 U.S.C. § 1382b(e)(3)(B), however, will apply where an individual establishes a burial trust with his or her own assets but does not enter into a pre-need funeral contract with a funeral provider; or the individual enters into an irrevocable funeral contract with a funeral provider, but establishes a revocable trust to fund the contract; or the individual enters into a revocable funeral contract with a funeral provider, even if the funeral provider places the money in a trust. POMS SI 01120.201H.2. In these circumstances, the individual, rather than the funeral home, is considered, for federal law purposes, to have established the trust.

In this case, Ms. K~ burial agreement is revocable; thus, the trust to which the insurance policy was assigned is a resource even though the funeral home placed the funds in trust. POMS SI 01120.201H.2. As noted, the Pre-need Agreement/Assignment contains a termination provision. The termination provision states that the purchaser, i.e., Ms. K~, "may cancel this Agreement at any time, if the cancellation is in writing and received before the Funeral Home furnishes the funeral goods and services." The provision further indicates that "[c]ancellation releases all parties from their obligations under this Agreement."

We note that the language in the Pre-Need Agreement/Assignment is confusing. For example, the irrevocable assignment clause initialed by Ms. K~ guardian, which appears on the front page, indicates that "ownership" has been assigned to a "Funeral Home and Pre-T~ Trust." Yet, the clause later indicates that the "Purchaser hereby irrevocably assigns all incidents of ownership of Policy to the Funeral Home," and then that "The Funeral Home agrees to immediately transfer its ownership rights . . . to the Pre-T~ Trust, which will hold the Policy as agent for [Ms. K~]." The termination provision in the Pre-Need Agreement/Assignment indicates that cancellation "would not cancel any transfer of ownership of the Policy to the Pre-T~ Trust." In any event, because the agreement with the funeral home is revocable, the trust to which Ms. K~ insurance policy may have been assigned is a resource under 42 U.S.C. § 1382b(e)(3)(B). POMS SI 01120.201H.2. The value of the resource is the cash surrender value of the life insurance policy, which depends on how long Ms. K~ has held the policy.

SSA, however, may waive application of the statutory trust counting provisions if the individual is ineligible for benefits due to counting an irrevocable trust as a resource, and if the individual meets the criteria for undue hardship. 42 U.S.C. § 1382b(e)(4); POMS SI 01120.203C.2.a.; *Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No.) 106-169*, Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development (Aug. 29, 2000); Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *SSI-Wisconsin-Review of Wisconsin Life Insurance Funded Burial Trust for Betty N~*, at 3-4 (October 29, 2002) (hereinafter, *N~* memo). When the Agency evaluates whether an individual has established undue hardship, assets in an irrevocable trust are not considered to be available funds. *N~* memo at 4; *Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No.) 106-169*, Associate

General Counsel Office of Program Law to Associate Commissioner for Legislative Development (Aug. 29, 2000). As explained below, Ms. K~ trust is irrevocable.

In determining whether the trust is irrevocable, for undue hardship purposes, we turn to the terms of the trust and applicable state law. The documents submitted suggest that the parties intended the assignment to trust to be irrevocable. However, the trust also should be evaluated under Georgia law, which governs the trust by the trust's own provisions, to determine whether the trust may be revoked under state law. We have previously verified with Region IV OGC that, under Georgia law, an identical trust would not be considered revocable. *N*~ memo at 4.

As we explained in *N*~, Georgia previously followed the general trust rule that a grantor who is also the sole beneficiary of a trust can revoke a trust even though the trust states that it is irrevocable. *N*~ memo at 4, *citing Moore v. First Nat'l Bank & Trust*, 130 S.E.2d 718 (1963). However, the Georgia Supreme Court acknowledged that the state legislature nullified the holding in *Moore*, for trusts created after 1973, by passing a statute providing that no trust that purported to be irrevocable could be terminated in whole or in part. *N*~ memo at 4, citing *Woodruff v. Trust Co.*, 210 S.E.2d 321, 323-25 (Ga. 1974). The current Georgia statute states that "[a] settlor shall have no power to modify or revoke a trust in the absence of an express reservation of such power." *N*~ memo at 4, citing Ga. Stat. Ann. § 53-12-150 (2002). Thus, it appears that a Georgia court would not allow Ms. K~ to revoke the trust because she did not expressly reserve the right to revoke the trust.

CONCLUSION

In sum, we conclude that Ms. K~ life insurance policy was a minimal resource for the first thirty days after it was issued because Ms. K~ retained the unrestricted right to cancel the policy and recover the $247.14 premium she had paid. After the first thirty days, the policy was still a resource, with a value equal to its cash surrender value. This is because the trust to which she assigned the insurance policy would be considered a resource under the provisions of the Social Security Act. The statutory provisions apply because the policy was assigned to trust pursuant to a revocable contract with a funeral provider; therefore, Ms. K~ is considered to have established the trust. However, because the trust is irrevocable, the Agency may wish to consider whether the undue hardship provisions may apply in this case.

Sincerely,

Donna L. C~
Acting Regional Chief Counsel, Region V
Social Security Administration

By:
Elizabeth F~
Assistant Regional Counsel

T. PS 03-081 SSI - Wisconsin - Review of Burial Trust for Mary M. G~, ~ Your Reference No.: SI-2-1-3 Our Reference No.: 03P006

DATE: January 23, 2003

1. SYLLABUS

In this opinion, the individual entered into an irrevocable contract for $5,116.18 for funeral and burial services which was subsequently placed in an irrevocable trust by the funeral director. This trust is considered to be established with the assets of the funeral director. Under Wisconsin law burial agreement funds must be held in trust but the trust can be made irrevocable only up to $2,500. Therefore, SI 01130.420C.5.b. was followed to determine that, after applying all appropriate exclusions, the resource value of this burial arrangement is $1,000.

2. OPINION

You have asked whether Mary G~ $5,116.18 burial trust is a resource for the purposes of SSI. We conclude that after applying Wisconsin's $2,500.00 statutory limit on the irrevocability of burial trusts, and SSA's burial space and burial fund exclusions, Ms. G~ is left with $1,000.00 which is a countable resource for SSI purposes.

BACKGROUND

The file contains an informational memorandum from the Wisconsin Department of Workforce Development (DWD), explaining how to treat the Wisconsin Funeral Directors Association (WFDA) master funeral trust agreement for determining an individual's eligibility for Medicaid. The memorandum indicates that the agreement between the purchaser and the funeral home constitutes a purchase, and it is not an installment burial contract, an insurance funded burial contract or divestment. In explaining how to calculate how much of the burial trust can be excluded, the memorandum references Wis. Stat. § 445.125(1) - which directs that burial agreements funded by trusts may be made irrevocable up to $2,500.00.

The file indicates that Ms. G~ entered into an irrevocable contract with the O~-E~ Funeral Home. Ms. G~ contracted for $1,485.00 worth of "basic services" of the funeral director and staff; $450.00 for embalming; $355.00 for the funeral ceremony; $210.00 to transfer her remains to the funeral home; $1,694.18 for a casket and $922.00 for an outer burial container. Her total price for services and merchandise was $5,116.18, which she apparently paid in full. The money Ms. G~ paid is being held in the master trust.

DISCUSSION

A trust created on or after January 1, 2000, even an irrevocable trust, is considered to be a resource "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual." 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201D.2. As in this case, however, when an individual signs an irrevocable, non-assignable agreement with a funeral home, pre-pays for the goods and services, and the funeral home places the funds in an irrevocable trust, SSA considers the trust to have been established with the assets of the funeral director. POMS SI 01120.201H.1. In such instances, SSA applies its regular resource rules rather than its rules for trusts. *Id.*

A burial contract that cannot be revoked or sold without significant hardship is not a resource. POMS SI 01130.420B.2. State law determines the revocability of a burial contract. POMS SI 01130.420B.3. As the Wisconsin DWD memorandum indicates, Ms. G~ burial trust/agreement is not a life insurance funded burial contract. Accordingly, Wis. Stat. Ann. § 445.125(1) applies. Wisconsin requires burial agreement funds to be held in trust, however, the trust can be made irrevocable only up to $2,500.00. Wis. Stat. Ann. § 445.125(1). The statute also excludes certain items, such as outer burial containers, which are considered revocable. Wis. Stat. Ann. §§ 445.125(4)(b), 701.12. In addition to applying state law, SSA applies its own rules in excluding burial spaces and burial funds. POMS SI 01130.400; SI 01130.410; SI 01130.420. Although the Wisconsin statute indicates that the $922.00 for the outer burial container is revocable, SSA includes this in the burial space exclusion, which does not have a monetary limit; the $922.00 is thus excludable. POMS SI 01130.400A.1.

After initially deducting the $922.00 outer burial container from Ms. G~ $5,116.18 trust we are left with $4,194.18 subject to the statutory limit. This remaining trust amount includes both burial space (the $1,694.18 casket) and burial service items (embalming, transportation and ceremony services totaling $2,500.00). POMS SI 01130.400B.1.; POMS SI 01130.410B.2.a. The $2,500.00 statutory limit is first applied to the burial space portion - Ms. G~ $1,694.18 casket. POMS SI 01130.420C.5.b. Such application leaves $806.00 of the statutory $2,500.00 to apply to the $2,500.00 worth of burial services. After such application, Ms. G~ is left with $1,694.00 of burial services beyond Wisconsin's statutory limit, which is revocable under state law. However, our calculations do not end there. Ms. G~ still has $694.00 of SSA's $1,500.00 burial funds exclusion - $1,500.00 minus the $806.00 already applied - which can be applied to the $1,694.00 remainder. POMS SI 01130.420C.5.b. This additional calculation leaves $1,000.00, which is a countable resource.

CONCLUSION

$1,000.00 worth of burial services in Ms. G~ burial trust is beyond Wisconsin's statutory limit for irrevocable burial contracts and is also beyond SSA's $1,500.00 burial funds exclusion. The amount is thus a resource for SSI purposes.

Sincerely,

Donna L. C~
Acting Regional Chief Counsel, Region V
Social Security Administration

By:
Elizabeth F~
Assistant Regional Counsel

U. PS 03-072 SSI - Wisconsin - Review of the Wisconsin Life Insurance Funded Burial Contract for Kathleen F. S~, ~ Your Reference No.: S2DG6, SI-2-1-8 Our Reference No.: 02 P098

DATE: December 30, 2002

1. SYLLABUS

In this opinion an insurance funded burial contract is excluded from counting as a resource for SSI purposes. The individual irrevocably assigned ownership and proceeds of a life insurance policy to her sister on the condition that the policy's proceeds may only be used to pay for funeral expenses. The sister signed an agreement with a funeral home for a funeral but did not assign the ownership of the insurance to the funeral home. However the sister, acting with power of attorney, signed a "public assistance" caveat that the individual was irrevocably renouncing the power to control the policy and irrevocably waived all rights to surrender the policy for cash, and irrevocably assigned the policy for payment of funeral expenses. Based on these facts the individual does not appear to have the right to surrender her policy for its cash value. In addition, the individual's assignment of the proceeds to her sister is akin to a trust agreement since she assigned her legal ownership to the sister and retained a beneficial right which can only be used for funeral expenses. This assignment agreement was established prior to 1/1/2000 and meets the pre-1/1/2000 requirements for a trust to be excluded from resource counting.

2. OPINION

You have asked us whether a life insurance funded burial contract set up on behalf of Kathleen F. S~ is a resource for the purposes of SSI. We conclude that the insurance policy is not a resource after the initial twenty days in which Kathleen S~ had the right to revoke the insurance policy, because Kathleen S~ irrevocably waived her right to recover the cash surrender value or to recover the premium paid on the policy.

FACTS

The documents you have provided include a February 16, 1996, "Application for Insurance/Annuity" from Prairie States Life Insurance Company (Prairie States); the application indicates that the policy is a single premium policy, and the initial benefit of the policy is $6,838.00. The application indicates that $6,804.26 was paid upon application. The file contains three checks equaling the paid premium amount. Two checks, dated February 12, 1996, are made out directly to the Borgwardt Funeral home. The other check, dated February 19, 1996, appears to be made out to Prairie States "for the benefit of" (FBO) Kathleen S~; this check also indicates that Kathleen S~ is the remitter and references an irrevocable funeral trust agreement with "F. J. Borgwardt Sons, Inc." The application for life insurance identifies Kathleen S~ as the proposed insured and the owner, and her sister, Dorothy Z~, as the irrevocable beneficiary. Dorothy Z~ is also identified as having power of attorney (P.O.A.). The application indicates that the beneficiary designation is irrevocable. The application identifies the Borgwardt Funeral Home in a section entitled "Agent's Report"; nothing else on the document indicates the insurance policy is intended to fund funeral services. The application is signed by Dorothy Z~, not by Kathleen S~. However, the file also contains a February 16, 1996, "Signature Statement" from Prairie States upon which Kathleen S~ (by Dorothy Z~'s signature) is identified as the applicant and/or prospective owner of a life insurance policy on the life of Kathleen S~ and that due to "mental incompetency," Kathleen S~ is incapable of signing the application. Dorothy Z~ signed the statement as the "owner" and indicated that her relationship to the insured was a sister.

Additionally, the file contains an "Irrevocable Assignment of Ownership and Beneficiary Designation and Agreement to Apply Proceeds for Burial" signed on February 16, 1996, by Dorothy Z~ as the insured. This assignment indicates that "as owner and insured" of the "above insurance policy," the right, title and interest in the policy is irrevocably assigned to the beneficiary named above - Dorothy Z~ - on the condition that the beneficiary agrees to use the total policy proceeds towards the cost of funeral services and merchandise upon the death of the owner. The assignment further indicates that the heirs of the insured and the beneficiary are also irrevocably bound to the agreement.

The file also contains a February 16, 1996, "Pre-need Disclosure Statement"; it identifies Dorothy Z~ as the beneficiary and is signed by Dorothy Z~ as the "purchaser." The statement contains a preamble in which it is noted that the Federal Trade Commission requires certain disclosures to prohibit misrepresentation. The statement lists disclosures pertaining to the price of funeral and burial services and indicates that certain services may or may not be required under the law. The file references a "Guaranteed Funeral Trust." The file contains a disclosure statement that, in relevant part, indicates that the pre-need funeral guarantee was being offered by a licensed funeral director; that a copy of the Wisconsin Buyers Guide to Life Insurance was provided; that the insurance policy offered as a funding vehicle was being offered by a licensed insurance agent; that the

purchaser had twenty days to cancel the insurance policy and receive a full refund; that if an "Irrevocable Assignment of Ownership and Beneficiary Designation and Agreement to Apply Proceeds for Burial" was executed, the entire proceeds of the insurance policy must be used for funeral expenses, and any excess amount will be used for additional funeral services or donated to charity and in no event would the excess amount be refunded to the deceased's estate or to any other persons; and that the "cash advance items" identified in the gratuitous pre-need funeral guarantee were estimates only, and that "since they are provided by others that [sic] the funeral home of your choice are not absolute and may vary and cannot be guaranteed by the funeral home of your choice."

Finally, the file contains an "Option for At Need Funeral Services" signed on February 16, 1996, by Dorothy Z~ as the policy owner. The "at need" option identifies the Borgwardt Funeral Home and identifies Dorothy Z~ as the beneficiary. The option indicates which services have been selected; the total amount of services equals $6,804.26. Signing the form indicates that the policy owner acknowledged and understood that the option was not a "pre-need" funeral service contract; the option did not involve an assignment of insurance proceeds prior to the death of the insured, the family, next of kin or authorized agent was not obligated to exercise the option and the option did not involve the purchase or sale of any goods or services. Dorothy Z~ also signed after a caveat reserved to recipients of public assistance. The caveat indicated that the undersigned acknowledged, understood and confirmed that by signing she was irrevocably renouncing the power to control the policy; irrevocably waived all rights to surrender the policy for cash or obtain a loan against it; did not assign the rights waived to any other person; irrevocably committed the use of the policy to the payment of funeral services and merchandise provided for the insured.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his/her support and maintenance. 20 C.F.R. § 416.1201(a) (2001). If the individual has the right, authority or power to liquidate the property, it is a resource. *Id.* A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. 20 C.F.R. § 416.1230.

Here, Kathleen S~ purchased a life insurance policy on which she has (1) identified an irrevocable beneficiary - her sister and (2) irrevocably assigned the proceeds of her insurance policy to the same beneficiary with an agreement that the proceeds from the policy be used to fund Kathleen S~'s funeral. The policy was irrevocably assigned to a trust. The file also contains an option for at need funeral services.

The Insurance Policy

Under current Wisconsin law, Kathleen S~'s insurance policy would be a resource for the first thirty days after it was issued because, during that time period, she could cancel it and receive the full amount of any premiums paid. Wis. Adm. Code § Ins 23.30; Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *SSI-Wisconsin-Review of Wisconsin Life Insurance Funded Burial Contract (LIFBC) for Donna W.*, at 2 (December 13, 1999). Kathleen S~'s policy indicates that she could return it for a refund during the first twenty days of issue. We can assume that the twenty day limit was the law at the time Kathleen S~'s policy was issued. Moreover, unless Kathleen S~ applied for SSI benefits in 1996, the revocability period should not be relevant to her current eligibility for SSI benefits.

Beyond the initial twenty-day period, Kathleen S~ most likely cannot get the cash surrender value without the consent of any irrevocable beneficiary. We do not have the actual policy, but this is a standard provision. Kathleen S~ also irrevocably assigned her right, title and interest in the insurance policy to the beneficiary on the condition that the beneficiary use the total policy proceeds towards the cost of funeral services and merchandise. Also as part of that transaction, Kathleen S~ agreed that any excess proceeds from the policy would not revert to her estate or to any other person. Based on these facts, Kathleen S~ does not appear to have the right to surrender her insurance policy for its cash value.

The Trust

Kathleen S~'s assignment of the proceeds of her life insurance policy to her sister is akin to a trust agreement, since Kathleen S~ assigned her legal ownership interest and retained a beneficial right, which can only be used for her funeral. Because the trust in this case was created prior to January 1, 2000, it will be considered a resource if: (1) Kathleen S~ can revoke or terminate the trust and recover the assets; (2) she can direct the trustee to use the trust assets to provide for her support and maintenance; or (3) she can sell her beneficial interest in the trust. POMS SI 01120.200(D)(1). The second and third prongs of this analysis are not problematic since the trust assets are available for the benefit of Kathleen S~ only upon her death and can be used only to

pay for her funeral, not for her support and maintenance, and no one is likely to purchase Kathleen S~'s beneficial interest in the trust since it is tied to her life insurance policy which is available only when she dies.

With respect to the first prong of the trust analysis, we believe that the trust is irrevocable, because if the option contract is valid (which we believe it is as explained in more detail in the following section) and irrevocable, the funeral provider who issued the option contract could be considered a beneficiary to the trust whose consent would be required in order to revoke the assignment and recover the case surrender value. The assignment of the insurance policy to Dorothy Z~ to pay for Kathleen S~'s funeral was done as part of the same set of transactions with the funeral home that provided the option contract; the option contract assumes that the policy will be assigned to a relative to be used to pay for the funeral services if Kathleen S~ or her relatives exercise it. Therefore, it appears that the policy was assigned to Dorothy Z~ with the agreement of the funeral home to protect the assets so that they would be available in order to exercise the option contract. Under these circumstances, the funeral home may be considered a beneficiary to the trust whose consent would be required in order to revoke and recover the cash surrender value. *See Restatement (Second) of Trusts*, § 330, comment h (1957); Austin W. S~, *The Law of Trusts*, § 330.6 (4th ed. 1987).

The Option Contract with the Funeral Home

We believe that the option contract was intended to be irrevocable. Although Kathleen S~ or her next of kin is not required to exercise the option with the identified funeral home, it is apparent that Kathleen S~ has agreed to irrevocably set aside her life insurance policy in order to ensure that the option contract will be exercisable at her death. For example, on the contract, Kathleen S~ indicated that she acknowledged, understood and confirmed that by signing she was irrevocably renouncing the power to control the policy; irrevocably waived all rights to surrender the policy for cash or obtain a loan against it; did not assign the rights waived to any other person; irrevocably committed the use of the policy to the payment of funeral services and merchandise provided for the insured.

We note that subsequent to the time Kathleen S~ entered into her life insurance funded burial agreement, Wisconsin law on the subject changed significantly. *See* Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, *SSI-Wisconsin-Review of Wisconsin Life Insurance Funded Burial Trust for Bernice M. E~* (December 9, 2002). While the statutory distinction between burial agreements funded by trusts and by life insurance policies - Wis. Stat. § 445.125(3m) - was created in 1995 (1995 Wis. Act 295), the Wisconsin Administrative Code provisions specifying the manner in which the insurance policies or the burial agreements should be structured, were not in effect until October 1, 1997 (Wis. Adm. Code § Ins 23.30) and November 1, 1998 (Wis. Adm. Code § FD 6.07). Additionally, Wis. Stat. § 632.415 was not created until 1999 and was not effective until July 1, 2000. 1999 Wis. Act 191. All of the documents relevant to this case were signed in February 1996; consequently, they may not be fully compliant with current Wisconsin law.

We believe, however, that the option contract/burial agreement is valid in spite of the change in Wisconsin law. We believe that Wisconsin courts would not find that the current statutory and regulatory provisions regarding life insurance funded burial agreements apply to this matter. In *In re Estate of N~*, 175 N.W.2d 640, 643 (Wis. 1965), the court held that art. 1, § 10 of the Wisconsin Constitution barred retroactive application of a statute if it "substantially lessens the value of a pre-existing contract." In so finding, the court noted that Wisconsin had long held this view of statutory retroactivity. Citing *Pawlowski v. Eskofski*, 244 N.W. 611 (Wis. 1932), the *N~* court noted that Wisconsin relied on Supreme Court precedent for its construction of art. 1, § 10: "That court long ago held that any statute, whether remedial or not, that operated to deprive a party to a contract antedating the enactment of the statute of any valuable right secured to him by that contract is void as to that contract." *Pawlowski*, 244 N.W. at 613, *citing Edwards v. Kearzey*, 96 U.S. 595. In this case, a retroactive application of Wis. Stats. §§ 445.125(3m), 632.415, would operate to deprive Kathleen S~ of a vested property interest she had under the prior law - her burial contract.

Finally, we note that the option contract could be a resource if Kathleen S~ could sell it. SI 01110.100(B)(1); *see also Williston on Contracts*, § 412 at 47, (3d ed. 1951) (rights under contract are assignable); *Federal Deposit Ins. Corp. v. First Mortg. Investors*, 250 N.W.2d 362, 368 (Wis. 1977) "unless expressly restricted an option is freely transferable." Here, however, the option is not transferable - and thus not a resource - because it is inextricably tied to the insurance policy on Kathleen S~'s life.

CONCLUSION

In sum, it is our opinion that, because the documents in the file indicate that Kathleen S~'s burial agreement is irrevocable, and she may not obtain the cash surrender value of her life insurance policy or use the trust to which it was assigned for her support and maintenance, Kathleen S~'s life insurance funded burial agreement is not a resource for the purposes of SSI except during

the twenty-day period after February 16, 1996, when Kathleen S~ could have canceled the policy and received a refund of her premium.

Sincerely,

Gary A. S~
Acting Regional Chief Counsel, Region V
Social Security Administration

By:
Elizabeth F~
Assistant Regional Counsel

V. PS 03-061 SSI - Wisconsin - Review of the Life Insurance Funded Burial Trust for Jennifer P~ - REPLY Your Ref: S2D5G6, SI 2-1-3 WI Our Ref: 03P002

DATE: December 5, 2002

1. SYLLABUS

In this Wisconsin opinion, ownership of a life insurance policy was irrevocably assigned to a life insurance trust whose proceeds are to be used for the funeral expenses of insured individual. This trust is a resource for SSI purposes because it was created on or after January 1, 2000 with the individual's own assets and there are circumstances under which payment from the trust could be made for the benefit of the individual, i.e., it will pay the individual's funeral expenses. This trust also would be a resource because it is revocable under Wisconsin law. It is revocable because the SSI applicant is both the grantor and the sole beneficiary of the trust.

2. OPINION

You asked whether a life insurance burial trust established for Jennifer P~ is a resource for SSI purposes. We have reviewed the materials you sent, and have concluded that the life insurance policy assigned to the trust is a resource. Furthermore, because the trust is revocable, the Agency need not consider whether counting this resource results in an undue hardship.

Background

Ms. P~ purchased a life insurance policy with a single premium of $1,930. The policy has a face value of $2000. Ms. P~ applied for the policy on February 27, 2002, and the policy was issued on March 11, 2002. The policy provides that Ms. P~ had 20 days after receipt of the policy to cancel the policy and recover the premium paid. The policy also has a cash surrender value that increases over time.

In her application for the insurance policy, Ms. P~ names the Jennifer S. P~ Trust as the beneficiary of the policy and states that the policy is being irrevocably assigned to an irrevocable life insurance trust. Ms. P~ also signed a document entitled "Irrevocable Life Insurance Trust Agreement," which is dated February 27, 2002. The agreement indicates that the life insurance policy will be held by the trust, which will use the proceeds at Ms. P~'s death to provide for her funeral. The trust states that, if any funds are remaining after these expenses are paid, the remainder will be paid to the secondary beneficiary named in the trust document. The trust document names the "Estate of the Insured" as the secondary beneficiary.

On March 25, 2002, Ms. P~'s guardian executed an Amendment of Application, which apparently also is signed by an agent of the insurance company. The amendment states that the application for the life insurance policy was amended to read that it was "[i]ssued with Date of Trust being February 27, 2002."

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his support and maintenance. *See* 20 C.F.R. § 416.1201(a). A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. § 416.1230.

This policy has a cancellation period of twenty days after it was issued, during which time Ms. P~ had the right to cancel the policy and recover the premium paid. We believe that the date the policy actually was issued, on March 11, 2002, should control in determining the time period during which Ms. P~ still could recover her premium. Ms. P~'s guardian apparently attempted, on March 25, 2002, to amend the application for the policy to reflect that the policy was issued with the date of the trust, i.e., February 27, 2002. However, unless Ms. P~ produces reliable evidence that the insurance company would not have allowed her to recover her premium at any time through the twenty day time period following March 11, 2002, we believe it would be appropriate to consider the $1,930 premium to be a resource during that time.

After that time period, the policy will be a resource if Ms. P~ could surrender the policy for cash. Here, Ms. P~ has assigned the policy to trust. Therefore, the policy will be a resource to her if the trust is a resource. A trust created on or after January 1, 2000, generally is considered a resource, under Section 1613(e) of the Social Security Act, even if the trust is irrevocable, to the extent that "there are any circumstances under which payment from the trust could be made to or for the benefit of the individual." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201D.2. Ordinarily, if an individual establishes an irrevocable burial trust with his or her assets, Section 1613(e) of the Act applies and the trust is considered a resource. *See* POMS SI 01120.201H.2.; Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No.) 106-169, Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development (Aug. 29, 2000). The Agency may consider waiving application of Section 1613(e) of the Act if counting an irrevocable trust as a resource results in the individual's ineligibility for SSI due to excess resources and other criteria for undue hardship are alleged. POMS SI 01120.203C.2.a.; *see* generally 42 U.S.C. § 382b(4).

Here, Ms. P~'s trust would be a resource under federal law, even if it were revocable, because the assets will be used to provide for her funeral. Furthermore, the Agency need not consider whether to waive application of the law under the undue hardship provisions because the trust is revocable.

Under Wisconsin law, a trust is revocable, despite any trust language to the contrary, when the individual is both the settlor (or "grantor") and the sole beneficiary of a trust. *See* Wis. Stat. Ann. § 701.12. Wisconsin law states that "[b]y written consent of the settlor and all beneficiaries of a trust or any part thereof, such trust of part thereof may be revoked, modified or terminated ...." Wis. Stat. Ann. § 701.12(1). Thus, if Ms. P~ is the sole beneficiary of the trust, she could unilaterally revoke the trust. Here, the trust names no other beneficiaries. Indeed, the trust names Ms. P~'s own estate as the secondary beneficiary to receive any remaining assets after providing for Ms. P~'s funeral.

CONCLUSION

In sum, we conclude that, unless Ms. P~ produces reliable evidence to the contrary from the insurance company, the Agency should assume that Ms. P~ could recover the $1930 premium she paid for her life insurance policy until twenty days after the policy actually was issued on March 11, 2002. After that time, the cash surrender value of the policy would be a resource because the policy was assigned to a trust that was to be used for Ms. P~'s benefit. Because the trust is revocable, the Agency need not consider whether application of federal law would constitute undue hardship

Sincerely,

Donna C~
Acting Regional Chief Counsel,
Region V

By:_____
Suzanne E. D~
Supervisory Counsel

W. PS 03-058 SSI - Wisconsin - Review of the Life Insurance Funded Burial Trust for Tab H~, ~ - REPLY Your Ref: S2D5G6, SI 2-1-3 WI Our Ref: 03P003

DATE: December 6, 2002

1. SYLLABUS

In this Wisconsin opinion, ownership of a life insurance policy was irrevocably assigned to a life insurance trust which is to be used for the funeral expenses of the insured person. This trust is a resource because it was created on or after January 1, 2000 with the individual's own assets and there are circumstances under which payment from the trust could be made for the benefit of the individual, i.e., it will pay the individual's funeral expenses. This trust also would be a resource because it is revocable under Wisconsin law because the SSI applicant is both the grantor and the sole beneficiary of the trust. The trust document has a space for naming a residual beneficiary but none was named.

2. OPINION

You asked whether a life insurance burial trust established for Tad H~ is a resource for SSI purposes. We have reviewed the materials you sent, and have concluded that the trust is a resource. Furthermore, because the trust is revocable, the Agency need not consider whether counting this resource results in an undue hardship.

Background

Mr. H~ apparently has a life insurance policy which, as of August 30, 2002, had a face value of $3,632.62. A letter from the insurance company suggests that the policy may have had a higher face value before that time, but we do not have a copy of the insurance policy or any other documents that indicate when the policy was issued or the original value of the policy.

On August 26, 2002, Mr. H~ signed an irrevocable assignment of his life insurance policy to the Tab R. H~ Irrevocable Trust. He also has signed an Irrevocable Life Insurance Trust Agreement which indicates that the life insurance policy will be held by the trust, which will use the proceeds at Mr. H~'s death to provide for his funeral. The trust states that, if any funds are remaining after these expenses are paid, the remainder will be paid to the secondary beneficiary named in the trust document. The trust document has a space for naming a secondary beneficiary to the trust. However, that space was left blank.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his support and maintenance. *See* 20 C.F.R. § 416.1201(a). A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. § 416.1230. We do not have a copy of the life insurance policy to determine whether the policy had any period during which the policy can be cancelled or what any cash surrender value may be.

In any event, because Mr. H~ has assigned the policy to trust, the policy will be a resource if the trust is a resource. A trust created on or after January 1, 2000, generally is considered a resource, under Section 1613(e) of the Social Security Act, even if the trust is irrevocable, to the extent that "there are any circumstances under which payment from the trust could be made to or for the benefit of the individual." 42 U.S.C. § 1382b(e)(3)(B); *see also* POMS SI 01120.201D.2. Ordinarily, if an individual establishes an irrevocable burial trust with his or her assets, Section 1613(e) of the Act applies and the trust is considered a resource. *See* POMS SI 01120.201H.2.; Exclusion of Certain Burial Trusts from Section 205 of Public Law Number (Pub. L. No.) 106-169, Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development (Aug. 29, 2000). The Agency may consider waiving application of Section 1613(e) of the Act if counting an irrevocable trust as a resource results in the individual's ineligibility for SSI due to excess resources, and if other criteria for undue hardship are alleged. POMS SI 01120.203C.2.a.; *see* generally 42 U.S.C. § 382b(4).

Here, Mr. H~'s trust would be a resource under federal law, even if it were revocable, because the assets will be used to provide for his funeral. Furthermore, the Agency need not consider whether to waive application of the law under the undue hardship provisions because the trust is revocable.

Under Wisconsin law, a trust is revocable, despite any trust language to the contrary, when the individual is both the settlor (or "grantor") and the sole beneficiary of a trust. *See* Wis. Stat. Ann. § 701.12. Wisconsin law states that "[b]y written consent of the settlor and all beneficiaries of a trust or any part thereof, such trust of part thereof may be revoked, modified or terminated ...." Wis. Stat. Ann. § 701.12(1). Thus, if Mr. H~ is the sole beneficiary of the trust, he could revoke the trust

unilaterally. Here, the trust names no other beneficiaries. Indeed, the space for naming a secondary beneficiary has been left blank.

CONCLUSION

In sum, we conclude that Mr. H~'s life insurance policy is a resource under federal law because it is assigned to a trust that will be used for his benefit. Because the trust is revocable, the Agency need not consider whether application of this federal law constitutes an undue hardship.

Sincerely,

Donna L. C~
Acting Regional Chief Counsel,
Region V

By:_____
Suzanne E. D~
Supervisory Counsel

X. PS 03-057 SSI - Wisconsin - Review of Life Insurance Funded Burial Trust of Bernice M. E~, ~ Our Reference No.: 02PO57

DATE: December 9, 2002

1. SYLLABUS

In this case, the ownership of a Forethought Life Insurance policy was irrevocably assigned to a funeral director. The funeral director subsequently assigned the ownership of the policy to a Forethought Trust which will pay for the funeral services. This opinion finds that the irrevocable assignment of the life insurance policy to the funeral director substantially complies with the Wisconsin law that governs prepaid burial contracts and this individual can be considered to have an irrevocable prepaid burial contract under Wisconsin law. Therefore, this burial contract/trust arrangement meets the POMS requirements in SI 01120.210H.1. i.e., this transaction constitutes a purchase of goods and services by the individual and trust is considered purchased with the funeral director's funds, not the individual's. Therefore, the life insurance policy and the trust are not resources for SSI purposes.

2. OPINION

You have asked us whether a life insurance funded burial contract set up on behalf of Bernice M. E~ is a resource for the purposes of SSI. We conclude that, assuming a burial agreement, which substantially complies with Wisconsin law, has been established with the funeral firm of Bernice E~'s choice, the life insurance policy is a prepayment for funeral services and would not be a resource after the first thirty days during which Bernice E~ had the unrestricted right to revoke the insurance policy.

BACKGROUND

The file contains an application to the Forethought Life Insurance Company for a single premium policy with an initial payment of $6,000.00. The application was signed by Bernice E~ on March 27, 2000. The file also contains an “Irrevocable Assignment of Ownership to a Funeral Firm” signed by Bernice E~ on the same day. The irrevocable assignment identifies Downs Funeral Home as the funeral firm to which ownership of the policy is to be transferred, contingent upon delivery of funeral services and merchandise. By signing the irrevocable assignment, Bernice E~ acknowledged that she understood that the assignment was permanent and irrevocable, and except for retaining the right to change the designated funeral firm and beneficiary, she renounced her power to control the policy. Bernice E~ further acknowledged that she understood that ownership of the policy would be transferred by the funeral firm to the Forethought Trust, which would assure payment to the designated funeral firm for the purpose of funeral services and merchandise. Bernice E~ also waived all rights to surrender the policy for cash or to obtain a loan against it, and represented that she did not assign these rights to any other person.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his/her support and maintenance. 20 C.F.R. § 416.1201(a) (2001). If the individual has the right, authority or power to liquidate the property, it is a resource. *Id.* A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. 20 C.F.R. § 416.1230.

In Wisconsin, a life insurance policy sold as a funeral policy must contain the "unrestricted right to return the policy or certificate within 30 days of the date it is received" whereupon "the insurance contract is void and all payments made under it must be refunded directly to the policyholder." Wis. Adm. Code § 23.30 (1)(d). This provision must be conspicuously printed on the front of the policy or attached thereto. Wis. Adm. Code § Ins 23.30(1)(e). Accordingly, Bernice E~'s life insurance policy was a resource for the first thirty days after it was issued because under Wisconsin law, she had the unrestricted right to cancel the policy and recover the full premium of $6,000.00. Thus, the value of the policy for the first thirty days was $6,000.00.

Beyond the first thirty days, we must determine whether the trust to which the policy was assigned is a resource. A trust established by an individual on or after January 1, 2000, generally will be considered a resource under federal law, if it is revocable or, even if it is revocable, to the extent that payments from the trust could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201D.1.-SI 01120.201D.2. This rule applies if payments can be made for the benefit of the individual "under **any** circumstance, no matter how unlikely or distant in the future." POMS SI 01120.201D.2.b.

These provisions do not apply to burial trusts where the individual irrevocably contracts with a provider of funeral goods and/or services *and* either (1) the funeral provider subsequently places the funds in a trust or (2) the individual establishes an irrevocable trust naming the funeral provider as the beneficiary. POMS SI 01120.201H.1. Under these circumstances, the funeral home is considered, for federal law purposes, to have established the trust. *Exclusion of Certain Burial trusts from Section 205 of Public Law Number (Pub. L. No. 106-169*, Associate General Counsel Office of Program Law to Associate Commissioner for Legislative Development (Aug. 29, 2000).

However, the statutory provisions at 42 U.S.C. § 1382b(e)(3)(B) will apply where an individual establishes a burial trust with his or her own assets but does not enter into a pre-need funeral contract with a funeral provider; the individual enters into an irrevocable funeral contract with a funeral provider, but establishes a revocable trust to fund the contract; or the individual enters into a revocable funeral contract with a funeral provider even if the funeral provider places the money in a trust. POMS SI 01120.201H.2. In these circumstances, the individual rather than the funeral provider is considered, for federal law purposes, to have established the trust.

Here, the funeral establishment placed the funds in trust so the trust will be considered to have been established by the funeral establishment, for federal law purposes, if Bernice E~ has an irrevocable contract with the funeral home for funeral goods and services. We do not have an actual contract with the funeral home, but it appears from the assignment of the insurance policy that Bernice E~ intended to irrevocably assign ownership of the policy in exchange for the funeral provider's promise to provide funeral services and merchandise. This would appear to be sufficient to show there had been an irrevocable contract for funeral goods and services as long as the assignment is valid under state law.

Wisconsin law expressly provides that a life insurance policy may provide for the assignment of the policy proceeds to a funeral director or operator of a funeral establishment if the insurance intermediary selling the policy is not an agent of the funeral director or operator of the funeral establishment or "if the assignment of proceeds is contingent on the provision of funeral merchandise or funeral services as provided for in a burial agreement that satisfies the requirements of [Wis. Stat. §] 445.125(3m) and rules promulgated by the funeral directors examining board under [Wis. Stat. §] 445.125(3m)(j)1. b." Wis. Stat. Ann. § 632.415(2) (established in 1999, 1999 Wis. Act 191). A life insurance policy sold with the intent to provide funeral services also "shall permit the policyholder to designate a different beneficiary, upon written notice to the insurer, and a different funeral director or operator of a funeral establishment that is to receive the assignment of proceeds, after written notice to the current funeral director or operator of the funeral establishment." Wis. Stat. Ann. § 632.415(3). The law does not appear to limit the ability to irrevocably assign the proceeds of such a life insurance policy either in amount or in terms of who may be the beneficiary. In this case, Bernice E~ irrevocably assigned her rights in the life insurance policy, but retained the right to designate a different beneficiary and funeral establishment. Accordingly, as long as the burial agreement she has entered into substantially complies with the law, the assignment of the proceeds of Bernice E~'s life insurance policy is valid under Wisconsin law.

The Wisconsin insurance code provides that an insurance policy that violates a statute or rule is nonetheless enforceable against the insurer as if it conformed to the statute or rule. Wis. Stat. § 631.15(3m); *Brunson v. Ward*, 629 N.W.2d 140 (Wis. 2001) (when uninsured motorist coverage on policy was below the statutory requirement, statutory level of coverage was read into policy even though it was not reflected in the premium paid). Accordingly, it is our belief that the life insurance policy sold to fund a burial agreement might contain errors and still be enforceable as though it adhered to the law. For example, if the policy does not contain on its face the caveat that it is entirely revocable for the first thirty days after issuance, should the purchaser seek to revoke it in that time, Wisconsin courts would allow the revocation during that time.

Wisconsin Stat. § 445.125(3m) provides that a "burial agreement" means a written agreement between an operator of a funeral establishment or funeral director and "a person in which the operator of the funeral establishment or funeral director agrees to provide to a person, after that person is deceased, funeral merchandise or funeral services." Wis. Stat. § 445.125(3m) (established in 1995, 1995 Wis. Act 295). Burial agreements must comport with the statute and with the rules established by the Funeral Directors Examining Board. Wis. Stat. § 445.125(3m)(b). The statute and the code provision contain overlapping directions. Based on these authorities, we have determined that the following provisions should be included in a burial agreement:

a. the identity of the funeral establishment and the insurer or insurers the agent selling the policy and agreement represents and whether sales commission or other form of compensation is being paid to the agent;

b. the identity of the funeral establishment that will be used to provide the services and merchandise;

c. an indication that a life insurance policy is being used to fund the agreement as well as the type of insurance;

d. the nature and extent of any price guarantees;

e. a list of the funeral services and merchandise selected and the price of each item, including a statement as to whether the prices are guaranteed at the time the agreement is arranged or at the time of need; if the services and merchandise are to be provided at the time of need, they may not exceed the prices set forth in the funeral establishments general price list required under industry practice and Federal Trade Commission regulations;

f. the effect on the burial agreement of changing the life insurance policy, including changing the assignment of proceeds, the beneficiary or changing the use of the proceeds;

g. any penalties incurred by the policy holder as a result of failing to make premium payments or incurred upon cancellation or surrender of the life insurance policy as well as any money received upon cancellation or surrender;

h. all information concerning what is to be done and whether any entitlements arise in the event of a difference between the proceeds of the life insurance policy and the amount actually needed to fund the burial agreement;

i. any restrictions or penalties relating to the delivery of services under the agreement including the inability of the operator of the funeral establishment to perform;

j. this statement in not less than 12-point boldface type "Burial agreements are regulated by the Wisconsin Funeral Directors Examining Board. Should you have a complaint, please contact the Board at 1400 E. W. Avenue, P.O. Box 8935, M., W~ or by telephone at (608) ~."

We note, however, that the failure of the burial agreement to exactly comport with the statutory and regulatory standards does not render the life insurance funded burial agreement void and thus make the insurance policy a resource. We believe that Wisconsin courts would require only substantial and not strict compliance with Wis. Stat. § 445.125(3m) and its accompanying regulations. The ultimate question in a court's determination of whether the doctrine of substantial compliance applies to a statue is whether the statutory provisions not strictly complied were so essential that the failure of compliance results in the invalidity of the contract. *Bechthold v. City of Wauwatosa*, 277 N.W.2d 657, 660 (Wis. 1938). Wisconsin has recognized that substantial compliance with even a mandatory statute may be legally sufficient. *Midwest Mutual Ins. Co. v. Nicolazzi*, 405 N.W.2d 732, 735 (Wis. App. 1987). Factors considered with respect to the substantial compliance doctrine include the objectives sought to be accomplished by the statute, the consequences of non-compliance set forth in the statute, whether a penalty is imposed for non-compliance and whether dereliction is beyond the direct control of those whose rights are at stake. *Id.* at 735-36. The doctrine contemplates "actual compliance in respect to the substance essential to every reasonable objective of the statute." *Id.* at 736 *quoting Sutherland Statutory Construction*, § 57.26 (internal quotation omitted).

We believe that the intent of Wisconsin's burial agreement statute is to ensure that an individual entering into a burial agreement funded with the proceeds of a life insurance policy is fully informed and aware that an agent of a funeral establishment may be involved in and profit from the sale of the life insurance policy and that the cost of funeral services and merchandise cannot be inflated because they are being funded with the proceeds of a life insurance policy. Additionally, Wis. Stat. § 445.125(3m) does not set forth any penalties or consequences if the provisions are not strictly adhered to. Moreover, because it is the funeral directors and their agents who draft the burial agreements, compliance with the statute is beyond the direct control of the parties whose rights it is intended to safeguard. All of these factors lead us to conclude that Wis. Stat. § 445.125(3m) is directory rather than mandatory and Wisconsin courts would not void a burial agreement if it did not strictly comply with Wis. Stat. § 445.125(3m). Thus, notwithstanding the eleven points enumerated above, we believe that in order to substantially comply with Wis. Stat. § 445.125(3m) a burial agreement should:

a. specify the identity of the agent and the funeral establishment with which he or she is affiliated

b. indicate that the agreement is being funded by a life insurance policy;

c. identify the funeral establishment that will provide the services;

d. list the funeral services and merchandise selected; and

e. indicate whether prices for funeral merchandise and services are guaranteed.

We stress that the key element in determining whether a life insurance policy intended to fund a burial is a resource is whether the individual can utilize the policy for maintenance and support. 20 C.F.R. § 416.1230. Accordingly, in Wisconsin, after the 30 day period during which a life insurance policy issued for a burial agreement is revocable, such a policy could be assigned to a funeral provider to fund a burial agreement and generally would not be a resource if: (1) the policyholder irrevocably assigns the proceeds of the policy while retaining the right to designate a different funeral director or operator of a funeral establishment according to the statutory scheme; (2) the policy holder has the right to change the beneficiary; (3) the policyholder has either irrevocably assigned or waived the right to obtain the cash surrender value of the policy; (4) the policy holder has submitted to the insurance company the irrevocable assignment of proceeds and the assignment or waiver of the right to obtain the cash surrender value; and (5) the policy holder has entered into a burial agreement with a specific funeral provider. POMS SI 01120.201H.2.; Wis. Stat. §§ 445.125(3m), 632.415.

Assuming Bernice E~ has entered into a burial agreement (contract) that substantially complies with Wisconsin law, we believe that the life insurance policy constitutes a prepayment for funeral services and is thus not a resource. POMS SI 01120.201H.1. Additionally, the “Irrevocable Assignment of Ownership to Funeral Firm” document appears to satisfy Wisconsin's requirements that the policyholder the policy holder has the right to change the beneficiary, has irrevocably assigned the right to obtain the cash surrender value of the policy and has submitted the irrevocable assignment of proceeds and the assignment or waiver of the right to obtain the cash surrender value to the insurance company. Accordingly, after the initial thirty days during which a life insurance policy intended to fund a burial agreement is revocable in Wisconsin, the insurance policy would not be a resource for the purposes of SSI.

CONCLUSION

In sum, Bernice E~'s life insurance policy was a resource valued at $6,000.00 for the first thirty days after it was issued since she had the right to cancel it during that time. As long as Bernice E~ has contracted with a funeral services provider for funeral services, the life insurance policy is not a resource after the first thirty days.

Sincerely,

Donna L. C~
Acting Regional Chief Counsel, Region V
Social Security Administration

By: /s/
Elizabeth F~
Assistant Regional Counsel

Y. PS 03-023 SSI-Wisconsin--Review of the Life Insurance Policy and Funeral Trusts of Marion P~, ~

DATE: October 16, 2002

1. SYLLABUS

This opinion clarifies State law regarding prepaid burial agreements in Wisconsin. The beneficiary possesses a burial trust, a casket trust and a life insurance policy. The burial trust is not a resource to the beneficiary because it is irrevocable. The initial deposit to fund the trust was $1,500 when the trust was established in 1986. At that time, State law permitted the irrevocable treatment of the first $1,500 of a burial agreement funded by a trust. **NOTE:** The current amount allowed per Wisconsin law is $2,500; effective 07/01/03, the allowable amount will increase to $3,000. *See* Wis. Stat. Ann. §445.125(a)(2)-(3). The beneficiary's assignment of her life insurance policy to a funeral home also met the statutory requirements for burial agreements funded by life insurance policies and could be excluded. Finally, however, the casket trust could not be excluded because it was deemed revocable. Although the trust was termed "irrevocable," the statutory limit for irrevocable burial agreements in effect when the casket trust was established would have been exceeded since we already recognized, as irrevocable, the $1,500 burial trust. OGC opined that it was doubtful a State court would recognize a second irrevocable trust under the statute.

2. OPINION

You have requested our opinion on whether Marion P~'s life insurance policy, funeral trust, and casket trust would be a resource for SSI purposes. We conclude that, the funeral trust complies with Wisconsin law concerning trust-funded burial agreements, and that it would not be a resource to Ms. P~ because it is irrevocable. Ms. P~'s casket trust, however, would be a countable resource. Although the trust purports to be irrevocable, when the amount in the casket trust is combined with the amount in the pre-existing funeral trust, the funds would exceed the Wisconsin statutory limit for irrevocable burial agreements in effect at that time. Consequently, Wisconsin's general trust law provisions would apply, and the trust would be a resource because Ms. P~ could revoke the trust unilaterally.

Ms. P~'s assignment of her life insurance policy to Hansen Funeral Home appears to comport with most of the Wisconsin statutory requirements for burial agreements funded by a life insurance policy. Therefore, for the reasons stated below, we conclude that the life insurance policy would be considered a resource for the first thirty days after it was issued since, during that time, she could return the policy for a refund of the premium paid. After that thirty-day period, if you can confirm that Ms. P~ had the right to change the beneficiary of the insurance policy and that she has the right to name a different funeral firm to receive the proceeds, the policy would not be a resource because she could no longer return the policy for a refund of the premiums, and could not surrender the policy for cash without the consent of the funeral provider.

BACKGROUND

In 1986, Ms. P~ entered into an "Irrevocable Funeral Trust Agreement" with Hansen Funeral Home "to set forth in advance some arrangements of a funeral service." The agreement indicates that Ms. P~ deposited $1,500 with Marshfield Savings and Loan for such expenses. The agreement provides that, in accordance with Section 445.125 of the Wisconsin statutes, the first $1,500 is designated as an irrevocable trust fund, "which **must** be used for the funeral and final disposition of [Ms. P~]." The agreement further states that any dividends and/or interest earned on the $1,500.00 are irrevocable and can never be withdrawn by the depositor. The funeral trust is currently valued at $3,358.51.

On October 25, 1989, Marion P~ entered into a Casket Trust Agreement with Batesville Casket Company to pay for her burial casket. The agreement indicates that Ms. P~ deposited $1,000 with Marshfield Savings Bank for future payment of the cost of a burial casket. The agreement states that the $1,000 deposit plus interest and accruals "shall constitute an irrevocable trust fund established pursuant to Section 445.125 of the Wisconsin statutes." The agreement further states that the "casket trust account shall constitute an irrevocable trust fund which shall be considered a grantor trust pursuant to Section 677 of the Internal Revenue Code," and that interest payable on her deposit would be made a part of the Irrevocable Trust Fund. The casket trust is currently valued at $1,966.30.

Finally, in April 2001, Ms. P~ signed a document agreeing to assign and transfer to Hansen Funeral Home her rights to receive death benefits from Prudential Life Insurance Company. The funeral home's right to receive death benefits was contingent on their providing funeral goods and services as provided by "prearranged or at-need funeral agreements." The cash value of the policy was $4,012.60; the death benefit was $4,655.82. In November 2001, Prudential Financial advised the Agency that Ms. P~

could only surrender the policy or access the dividends if both she and a representative from the funeral home signed the request form. In January 2002, Prudential Financial reported that Marion P~ owned the life insurance policy, cash surrender value, and the accumulations on the policy, and that the only restriction on her cashing in the policy was that, in addition to her signature, she needed to obtain the signature of a representative from Hansen Funeral Home.

DISCUSSION

Casket and Funeral Trusts

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his/her support and maintenance. 20 C.F.R. § 416.1201(a) (2002). Since the trusts at issue here were established prior to January 1, 2000, the trust assets would be a resource if, under applicable law, Ms. P~ could (1) revoke the trust, (2) direct the use of the trust funds for her own support and maintenance or sell her beneficial interest in the trust. POMS SI 01120.200(D)(1).

We conclude that the funeral trust at issue here is irrevocable. Consistent with Wisconsin law in 1986 (when Ms. P~ entered into the agreement), the funeral trust designated Ms. P~'s $1,500.00 deposit plus any dividends or interests earned as irrevocable. Wis. Stat. Ann. § 445.125(1)(b)-(c) (1985) (noting that burial agreements funded by trusts can be made irrevocable as to the first $1,500 of the funds paid under the agreement by the depositor, and that any interest or dividends accruing to the trust fund can be made irrevocable) (current version at Wis. Stat. Ann. § 445.125(1)(a)(2)-(3) (West 2002)). Because the amount in the funeral trust does not exceed the $1,500 statutory limit in effect in 1986 and is designated as irrevocable, Ms. P~ does not have the legal authority to revoke the trust and the trust fund is not a countable resource for SSI purposes. POMS SI 01120.200(D)(2).

Ms. P~'s casket trust, however, would be a countable resource. Although the trust similarly designates Ms. P~'s $1,000.00 deposit plus any interests and accruals earned as irrevocable pursuant to Wis. Stat. Ann. § 445.125, as discussed in the preceding paragraph, Ms. P~ had already established an irrevocable funeral trust up to the $1,500.00 statutory limit. Therefore, we do not believe a Wisconsin state court would recognize a second irrevocable trust under that statute. Consequently, the $1,000.00 casket trust would be subject to the general trust provisions of Wis. Stat. Ann. § 701.12(1), which states that, notwithstanding any language to the contrary, a trust can be revoked if the grantor and all beneficiaries agree. Since Ms. P~ provided the funds for the trust and is the sole beneficiary, she could revoke the trust unilaterally, despite purporting to make the trust irrevocable, and the exception in Wis. Stat. Ann. § 445.125 would not apply.

Life Insurance Policy

A life insurance policy can be a resource if an individual can surrender it for cash or recover the premiums paid. 20 C.F.R. § 416.1230. A life insurance funded burial contract involves an individual purchasing a life insurance policy in her name and then assigning, revocably or irrevocably, either the proceeds or ownership of the policy to a third party, generally a funeral provider. The purpose of the assignment is to fund a prearranged burial contract. POMS § SI 01130.425(A)(1). Assuming the policy allowed Ms. P~ to assign ownership, ownership of Ms. P~'s life insurance policy was assigned to Hansen Funeral Home in April 2001 to provide previously arranged funeral goods and services.

Wisconsin law expressly provides that "[a] life insurance policy may provide for the assignment of the proceeds of the policy to a funeral director or operator of a funeral establishment. . . ." Wis. Stat. Ann. § 632.415(2). This law does not appear to limit the ability to irrevocably assign the proceeds of a life insurance policy to fund a preneed funeral agreement. However, the policyholder must be able to designate a different beneficiary after written notice to the insurer, and the policyholder must be able to designate a different funeral director or operator of a funeral establishment to receive the assignment of proceeds, after written notice to the current designated funeral director or operator of a funeral establishment. Wis. Stat. Ann. § 632.415(3).

Further, under Wisconsin law, a policyholder has the unrestricted right to return a life insurance policy used to fund a pre-arranged funeral agreement within 30 days after the policyholder receives the policy. Wis. Admin. Code § Ins. 23.30(1)(d) (2002). This provision must be conspicuously printed on the front of the policy or attached thereto. *Id.* at 23.30(1)(e). If the policyholder returns the policy, the insurance contract is void and all premiums paid must be refunded directly to the policyholder. *Id.* at 23.30(1)(d).

Therefore, as we have previously advised, you can generally assume that, in Wisconsin, a life insurance policy used to fund a preneed burial contract is a resource for the first thirty days after it is issued, since the policyholder should have the right to cancel the policy during that time and recover any premiums paid. After thirty days, the policy will **not** be a resource if:

a. the individual has irrevocably assigned the policy or policy proceeds to a funeral firm, with the right to name a different funeral firm to receive the proceeds;

b. the individual had the right to change the beneficiary of the insurance policy;

c. the individual has either irrevocably assigned or waived the right to obtain the cash surrender value of the policy; and

d. the individual has submitted to the insurance company the irrevocable assignment of proceeds and the assignment or waiver of the right to obtain the cash surrender value.

See Memorandum from Regional Chief Counsel, Chicago, to Assistant Regional Commissioner-MOS, Chicago, Review of Wisconsin Life Insurance Funded Burial Contract (LIFBC) for Donna Walker, Dec. 13, 1999).

In this case, if you can verify that Ms. P~ had the right to change the beneficiary of the insurance policy and that she has the right to name a different funeral firm to receive the proceeds, then the agreement would appear to satisfy these requirements. 20 C.F.R. § 416.1230. Ms. P~ assigned her right to receive death benefits from her life insurance policy to Hansen Funeral Home and crossed out language in the assignment which would have allowed her to revoke the agreement during her lifetime. Furthermore, the insurance company has recorded the assignment and has indicated that it would require both Ms. P~'s signature and the signature of a representative from the funeral home in order for Ms. P~ to obtain the cash surrender value. Thus, she cannot obtain the cash surrender value of the policy unilaterally.

If you cannot confirm that Ms. P~ had the right to change the beneficiary of the insurance policy and that she has the right to name a different funeral firm to receive the proceeds, then this case should be referred to our office for further guidance. In that case, we would request that you provide a copy of the burial agreement and/or life insurance policy, including any named beneficiaries.

CONCLUSION

For the foregoing reasons, we conclude that the funeral trust is not a countable resource because it is irrevocable. However, the casket trust was a resource because it was revocable and because the exception in Wis. Stat. Ann. § 445.125 would not apply. The life insurance policy was a resource for the first thirty days after it was issued (since Ms. P~ could cancel the policy and recover the premium paid during that time). After that time, however, the policy would not be a countable resource, if Ms. P~ had the right to change the beneficiary of the insurance policy, and the right to name a different funeral firm to receive the proceeds.

Thomas W. C~
Regional Chief Counsel

By:_____
Kathryn A. B~
Assistant Regional Counsel

Z. PS 03-006 SSI - Wisconsin - Supplemental Trust for Elizabeth M. H~, SSN ~, Your Reference: S2D5G6

DATE: October 3, 2002

1. SYLLABUS

This opinion concerns a trust established by a grandmother with her own funds for her mentally disabled granddaughter. This trust, established with the assets of a third party, is not a resource for SSI purposes because the granddaughter cannot direct the use of the assets, cannot terminate or revoke the trust and use the assets for her support and maintenance, and cannot sell her beneficial interest in the trust.

2. OPINION

FACTS

It appears that Mary L. N~, Elizabeth H~'s grandmother, wishes to establish the "Elizabeth M. H~ Supplemental Trust." Elizabeth H~ is mentally handicapped. The trust names Mary N~ as both the donor of the trust assets and the trustee of the trust. The trust is to be funded with the property listed in Schedule A, but the materials you submitted do not list any property in Schedule A. The trust provides that during Mary N~'s lifetime, it is to be held for her benefit, and that she can amend or revoke the trust, in whole or in part, at any time.

Upon the death of Mary N~, if Elizabeth H~ survives her, the trustees may in their discretion, expend trust income or principal to provide for Elizabeth's comforts, amenities, services, and experiences over and above the benefits she otherwise receives as a result of her mental handicap from any governmental or private source. The trust property is not to be used to provide for Elizabeth's primary care or support. The trust also states that during Elizabeth's lifetime, the trustees may from time to time, at their discretion, pay or distribute such part of the income or principal of the trust, as may be appropriate, to any one or more then living of Mary's issue.

The trust contains a spendthrift provision that prohibits Elizabeth from transferring, voluntarily or involuntarily, any trust income or principal. The trust income or principal cannot be subject to the claims of creditors, or the claims of Elizabeth's spouse or former spouse. In the event that the trustee has notice or believes that Elizabeth's interest in any part of the trust income or principal has been or may be diverted for these purposes, the trustee shall not pay out such trust income or principal to Elizabeth.

Upon Elizabeth's death, or upon Mary's death if Elizabeth predeceases Mary, the amount remaining in the trust will be paid and distributed as follows: (1) the trust property will be divided equally among Elizabeth's children, with the share of any deceased child divided equally to such child's issue, and (2) if Elizabeth leaves no issue, the trust property will be divided equally among her surviving brothers and sisters, with the share of any deceased brother and sister divided equally among that brother's and sister's issue; or, if Elizabeth has no surviving brothers or sisters, or there are no surviving issue of any then deceased brothers and sisters, the trust property will be divided equally among the surviving issue of Elizabeth's nearest ascendant, who is Mary's descendant; or, if there are no such surviving issue, then the trust property will be divided equally to Mary's surviving issue. If after Mary's death there are no beneficiaries eligible to receive the trust property, the trust property will be distributed to persons then living who would inherited Mary's estate if she had then died intestate.

DISCUSSION

To qualify for SSI benefits, a claimant must show that her resources are below a statutory maximum. 42 U.S.C. 1382(a); 20 C.F.R. 416.202, 416.1205. Resources are defined as cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for her support and maintenance. 20 C.F.R. 416.1201(a). If the individual has the right, authority or power to liquidate the property or her share of the property, it is considered a resource. 20 C.F.R. 416.1201(a)(1). A trust created by a third party with the third party's funds is a resource if the individual can direct the use of the assets, if the individual can terminate the trust and use the trust assets for her support and maintenance, or if the individual can sell her beneficial interest in the trust. POMS SI 01120.200D.1. Whether the individual can terminate the trust, direct the use of the trust assets, or sell her beneficial interest depends on the terms of the trust agreement and applicable state law. POMS SI 01120.200D.2. Here, the trust is not a resource to Elizabeth under any of these methods.

The trust gives Mary, as the grantor of the trust who is donating he assets of the trust, the power to revoke or terminate the trust. Elizabeth, however, is not given the power to terminate the trust and obtain the assets. Elizabeth may be entitled to receive the trust assets upon Mary's death, if she survives Mary. However, Elizabeth could not direct the trustee to pay over cash or to make payments for her support and maintenance. Article II of the trust makes clear that this is a "discretionary" trust, or one in which the trustee has full discretion to make distributions from the trust income and principal, and that the beneficiary has no control over the trust. POMS SI 01120.200B.10. The trust specifies that the trustee may from time to time, in the trustees' absolute discretion, pay or distribute to or for Elizabeth's benefit, part or all of the net trust income or principal that may be appropriate to supplement, but not replace, the public or private assistance which Elizabeth qualifies for and receives. The Supplemental Trust also provides that the trustee is not authorized to make payments from the trust for Elizabeth's primary care or support. This is a related rule that applies to grantor trust, where the grantor is also the beneficiary.

The trust also contains a spendthrift provision that prohibits Elizabeth from transferring, voluntarily or involuntarily, any trust income or principal. Spendthrift provisions generally are valid where the interest protested is that of a beneficiary other than the grantor herself. Such provisions generally provide that a beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditor's. *Restatement (Second) of Trusts* 152, 153, 156, 157; *Restatement (Third) of Trusts* 58(1) (Tentative Draft No. 2 Mar. 10, 1999). Elizabeth would not retain the right to voluntarily transfer her interest in the trust income and principal.

CONCLUSION

We conclude that the supplemental trust is not a resource to Elizabeth for purposes of determining her eligibility for SSI

Thomas W. C~,
Regional Chief Counsel

By:_____
Henry S. K~
Assistant Regional Counsel

AA. PS 02-067 Jean M. B~ Trust, Wisconsin SSN ~

DATE: April 9, 2002

1. SYLLABUS

This opinion concerns 2 grantor trusts established in Wisconsin and funded by life insurance policies. Both were established prior to 1/1/2000. The trusts are not countable as resources for SSI purposes because the beneficiary does not have the legal authority to revoke the trusts or direct the use of the trusts' assets for her own support. Because of a change in the Social Security Act, this precedent is only applicable to a trust established before 1/1/2000.

2. OPINION

Jean M. B~ (Ms. B~) has established two trusts with directions to pay her funeral expenses with the proceeds of two life insurance policies used to establish the trusts. You have asked whether these trusts should be considered countable resources to Ms. B~ for purposes of SSI eligibility. For the reasons discussed below, we believe that neither of the trusts should be considered a countable resource.

Background

Ms. B~ created both trusts at issue, using life insurance policies written by the Medico Life Insurance Company. The trusts explain that, at Ms. B~'s death, the proceeds are to be distributed to the trust to be used for Ms. B~'s burial expenses. To the extent that the funds are greater than burial costs, secondary beneficiaries have been named for each trust.

The first trust was created July 3, 1997, based on life insurance policy number ~, with Good Shepherd Lutheran Church as the secondary beneficiary. The second trust, based on life insurance policy number ~, was created March 11, 1998, with Ms. B~'s great nieces and nephews as secondary beneficiaries. The face value is $1,036 for each policy ($2,072 total) and the cash surrender value at January 1, 2001 was approximately $465 for each policy ($930 total). discussion

For purposes of determining SSI eligibility, a resource is any cash or other liquid assets or any real or personal property that an individual owns and can convert to cash to be used for her support and maintenance. *See* 20 C.F.R. 416.1201(a). If the individual has the right, authority or power to liquidate the property, it is a resource. *Id.* Accordingly, trust assets are resources if the individual can revoke the trust and use the funds to meet her needs for food, clothing and shelter. *See* Program Operations Manual System (POMS) SI 01120.200 (D)(1). However, if an individual does not have the legal authority to revoke the trust or direct the use of the trust funds for her own support and maintenance, then the trust principal is not a resource for SSI purposes. *See* POMS SI 01120.200(D)(2).

In this case, Ms. B~ does not have the right to terminate the trust. In Wisconsin, a trust can be revoked with the consent of the grantor and all beneficiaries. Wis. Stat. Ann. 701.12(1). Under Wisconsin law, the person who directly or indirectly creates a trust, or adds property to an existing trust, is the grantor. Wis. Stat. Ann. 701.01(5). This is consistent with the general trust

theory that the grantor of a trust is the person who provides the consideration for the trust. 76 Am. Jur. 2d 55 (1992); POMS SI 01120.200(B)(2). In this case, Ms. B~ is the grantor of the trust because she provided the life insurance policies that formed the basis of the trusts. Ms. B~ is a beneficiary because the trust proceeds will be used to pay her funeral expenses. However, she is not the sole beneficiary because each Trust Agreement lists secondary beneficiaries. In order to revoke either trust, all of the secondary beneficiaries would have to agree to revoke and Ms. B~ cannot, by herself, revoke the trust.

Trust assets are also a resource if the individual could "direct the use" of the trust. In this case, the direction was given at the establishment of the trust (to pay for Ms. B~'s funeral and give the remainder to the secondary beneficiaries) and Ms. B~ does not have the authority to require that any funds be paid to her prior to the funeral. Also, even though it is possible, in theory, that Ms. B~ could sell her interest in the trust, given the terms of the trust (to pay for Ms. B~'s funeral) it is unlikely to be marketable. Therefore, the trust assets are not a resource to Ms. B~ under this theory either.

We also considered whether the trusts were invalid because they violate the Rule Against Perpetuities, since it is possible that Ms. B~ may never have a funeral. However, Wisconsin has abolished the Rule Against Perpetuities. Wis. Stat. Ann. 700.16(5). Under Wisconsin law, a future interest or trust will be void only if it suspends the power of alienation of property for longer than a life or lives in being plus a period of thirty years. Wis. Stat. Ann. 701.19(1) ("In the absence of contrary or limiting provisions . . . a trustee has complete power to sell, mortgage or lease trust property without notice, hearing or order."). We were able to conclude that, in Wisconsin, this rule did not make the trusts invalid.

CONCLUSION

You have indicated that Ms. B~ would not have excess funds even if the life insurance policies were considered countable resources and that, in any event, the policies could be excluded under the burial fund exclusion. However, for future reference, you asked whether, in this situation, the policies would be considered a countable resource. We conclude that neither Trust Agreement, each of which was created prior to January 1, 2000, is a countable resource because the life insurance policies were assigned irrevocably to a trust and Ms. B~ cannot obtain the cash surrender value of the policies to be used for her own support and maintenance.

BB. PS 01-190 SSI - Wisconsin - Review of Pekin Life Insurance Assignment To Funeral Home, Prepared by Pekin Life Insurance Co.

DATE: July 2, 2001

1. SYLLABUS

This opinion concerns an assignment form submitted by the Pekin Life Insurance Company applicable to life insurance funded burial contracts in Wisconsin. The company asked SSA to evaluate whether a transaction using this form would be countable as a resource for SSI purposes. Under this assignment form, the policyholder irrevocably assigns the policy to the funeral director who then must re-assign the policy to a trust. In this case the life insurance funded funeral arrangement would be a resource for SSI purposes for the first thirty days. This is because under Wisconsin law, the policy holder has the right to return a policy used to fund a funeral arrangement within thirty days of receiving it. After thirty days, the policy would no longer be a resource for SSI purposes because it is then irrevocable.

2. OPINION

INTRODUCTION

Michele G. V~, of the Pekin Life Insurance Company, has submitted an assignment form applicable to life insurance funded burial contracts and asked us for our opinion as to whether a policy assigned in this manner would be a resource for SSI purposes. We are enclosing a copy of Ms. V~' letter and the assignment form so that you may contact Ms. V~ and advise her of our opinion. For reasons stated below, we conclude that, for the first thirty days after such a policy is issued, the policy would be a resource because the policyholder could cancel the policy and recover the premium. After that thirty-day period, however, the policy would not be a resource because the policyholder irrevocably assigns the ownership of the policy and waives the right to obtain the cash surrender value.

FACTS

Pekin Life Insurance Company submitted an assignment form applicable to life insurance funded burial contracts (*see* attached form), and requested the legal opinion of the Social Security Administration's Office of the General Counsel as to whether the contract complies with Wisconsin law and whether such a contract would constitute a resource for SSI purposes. The assignment form assigns the policyholder's ownership of the life insurance or annuity policy to a funeral home in return for the funeral home's promise to immediately transfer ownership of the policy to a trust (the Pekin Life Insurance Trust). The funeral home irrevocably assigns the ownership rights and the rights to policy proceeds to the trust. The policyholder waives the right to surrender the policy for cash, to obtain a loan or advance on the policy, and to pledge or assign the policy as collateral. The funeral home also acknowledges that any right to receive any of the proceeds of the policy is contingent on delivering funeral services and merchandise. The policyholder, however, retains the right to choose a different funeral home to provide funeral services and merchandise and receive the policy proceeds.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his or her support and maintenance. *See* 20 C.F.R. 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *See id.* A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. 416.1230.

Wisconsin law expressly provides that "[a] life insurance policy may provide for the assignment of the proceeds of the policy to a funeral director or operator of a funeral establishment. . . ." W.S.A. 632.415(2). This law does not appear to limit the ability to irrevocably assign the proceeds of a life insurance policy to fund a preneed funeral agreement. However, the policyholder must be able to designate a different beneficiary after written notice to the current beneficiary, and the policyholder must be able to designate a different funeral director or operator of a funeral establishment to receive the assignment of proceeds, after written notice to the current designated funeral director or operator of a funeral establishment. W.S.A. 632.415(3). We believe that a life insurance policy would not be a resource if an individual irrevocably assigns the ownership or proceeds of the policy in this manner and if the individual irrevocably assigns or waives the right to obtain the cash surrender value.

Further, under Wisconsin law, a policyholder has the unrestricted right to return a life insurance policy used to fund a pre-arranged funeral agreement within 30 days after the policyholder receives the policy. If the policyholder returns the policy, the insurance contract is void and all premiums paid must be refunded directly to the policyholder. Wis. Admin. Code Ins. 23.30(1)(d).

As we have previously advised you, you can generally assume that, in Wisconsin, a life insurance policy used to fund a preneed burial contract is a resource for the first thirty days after it is issued, since the policyholder should have the right to cancel the policy during that time and recover any premiums paid. After thirty days, the policy will not be a resource if:

(1) the individual has irrevocably assigned the policy or policy proceeds to a funeral firm, with the right to name a different funeral firm to receive the proceeds;

(2) the individual has the right to change the beneficiary of the insurance policy;

(3) the individual has either irrevocably assigned or waived the right to obtain the cash surrender value of the policy; and

(4) the individual has submitted to the insurance company the irrevocable assignment of proceeds and the assignment or waiver of the right to obtain the cash surrender value.

See Memorandum from Regional Chief Counsel, Chicago, to Assistant Regional Commissioner-MOS, Chicago, Review of Wisconsin Life Insurance Funded Burial Contract (LIFBC) for Donna W~, Dec. 13, 1999).

Applying these rules, the contract submitted by Pekin Life Insurance Company would constitute a resource to the policyholder for the first thirty days after such a policy is issued. After the initial thirty days, however, the policy would not constitute a resource. Although the assignment to the funeral home requires that the funeral home re-assign the policy to a trust, we believe that the trust provisions are secondary to the assignment of the policy to the funeral home. The funeral home must reassign the policy to a trust to safeguard the policy so that it will be available to carry out the main agreement for the funeral services. However, the main intent of the parties is to irrevocably assign the policy to the funeral home, as permitted by state law. Therefore, state law provisions regarding irrevocable assignment to the funeral home control. *See* Donna W~ Memorandum, supra, at 4.

We conclude that the life insurance funded burial contracts submitted by Pekin Life Insurance Company would constitute a resource to the policyholder for the first thirty days after such a policy is issued, but not thereafter. The value of the resource during the first thirty days would be the amount of premiums paid. After thirty days, the policy would no longer be a resource because the policyholder irrevocably assigns the policy and waives the right to obtain the cash surrender value of the policy. Consistent with Wisconsin law, the policyholder retains the right to change the beneficiary of the policy and to designate another funeral home or provider to receive the proceeds of the policy. Thus, the assignment seems to conform with state law requirements.

CC. PS 01-100 SSI-Wisconsin-Review of a Trust for Jesse S. B~, ~; Your ref: S2D5G3

DATE: March 7, 2001

1. SYLLABUS

This opinion concerns a grantor trust in Wisconsin. In this case the grantor is not the sole beneficiary because the trust created 2 beneficiaries. Because there is an additional beneficiary, the grantor cannot revoke the trust. And because the trustee has full discretion to distribute the assets, the grantor cannot direct the use of the assets. Therefore, the trust is not a resource of the grantor for SSI purposes. However, each month the trust disburses a cash payment to the grantor's guardian for the grantor. Although the guardian does not use the disbursements for the grantor's food and shelter, the disbursement is considered cash income to the grantor for SSI purposes.

NOTE: Because of a change in the Social Security Act, this precedent may be applicable only to trusts established before 1/1/00.

2. OPINION

You asked us to review a trust agreement created by the Circuit Court of Sheboygan County, Wisconsin, for the benefit of Jesse S. B~ to determine whether the funds placed in the trust constitute a countable resource to Mr. B~ for Supplemental Security Income (SSI) purposes. You also asked us to determine whether distributions made from the trust would be income to Mr. B~ or his mother, Ellen P~. For the reasons set forth below, we believe that the trust is irrevocable and the trust principal is not a countable resource to Mr. B~. Some distributions to Mr. B~ may, however, constitute unearned income. The distributions made to Ellen P~ constitute unearned income to Ms. P~ or Mr. B~ depending on whether the distributions were made to her for her own benefit, or as guardian for Mr. B~.

FACTS

On March 8, 1991, in settlement of a medical malpractice claim brought on behalf of Jesse S. B~, a trust was created for the benefit of Mr. B~ and his mother. Trust, Art. I.

Pursuant to the trust agreement, the trustee retains full discretion to distribute trust assets or income to Mr. B~ and his descendants for their "health, support in the accustomed manner of living, maintenance and education." Trust, Art. V, B. In addition, the trustee has absolute discretion to distribute any part of the trust assets and income, up to sixty thousand dollars ($60,000), to Mr. B~'s mother. Trust, Art. V, C. However, if any beneficiary becomes eligible for supplemental security income or other public assistance, the trustee may in his discretion limit distributions to supplement public assistance and other resources. Trust, Art. V, B, C. The trustee further retains the discretion to terminate any distributions of income or principle to any beneficiary if such distribution is likely to result in reduced government benefits or support. Trust, Art. V, B, C.

The trust agreement further provides that no beneficiary has the right to anticipate any income or principal of the trust, to sell, transfer, mortgage, or pledge the trust assets or income. Trust, Art. VI, D. This is commonly known as a spendthrift provision.

ANALYSIS

Under the regulations, "resources" are "[c]ash or other liquid assets or any other real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. 416.1201(a). If an individual has the right, authority or power to liquidate the property it is considered a resource. 20 C.F.R. 416.1201(a)(1).

Generally, a beneficiary does not have the right or power to liquidate the assets of an irrevocable trust. Thus, the assets contained in an irrevocable trust are not considered a countable resource for SSI purposes. POMS SI 01120.200(D)(2). However,

if the grantor is the sole beneficiary of a trust, the trust is revocable regardless of language to the contrary and thus would be considered a countable resource to the beneficiary. POMS SI 01120.200(D)(3).

The instant trust purports to be irrevocable. However, Mr. B~ is the grantor of the trust, since the trust was established with the proceeds of the settlement of a lawsuit brought on his behalf. *See* POMS SI 01120.200(B)(2). Thus, we must determine whether Mr. B~ retains the power to revoke the trust under applicable state law. POMS SI 01120.200(D)(1)(b).

Under Wisconsin law, a trust may be revoked, terminated or modified by written consent of the grantor and all the beneficiaries. *See* Wisc. Stat. Ann 701.12. Although the trust sometimes refers to Jesse S. B~ as "the Beneficiary" the trust was created "for the benefit of" Mr. B~ and his mother. Trust, Art. I. *See In re Estate of S~*, 275 Wis. 290, 298 81 N.W.2d 729, 734 (1957) (a person for whose benefit a trust is created is a trust beneficiary). In addition, the trustee is permitted to distribute trust principal and income to or for the benefit of Mr. B~'s descendants, including all children and grandchildren. Trust, Art. V, B. We do not assume that Mr. B~ will be able to obtain the consent of his existing offspring, if any, or unascertainable beneficiaries to revoke or terminate the trust. *See* Supplemental Security Income - Wisconsin Trust - Michael G~ (~), OGC-V (K~) to M~, ARC-MOS (February 23, 2000) at 3. Thus, there is at least one additional beneficiary to the trust and Mr. B~ does not retain the power to revoke the trust on his own.

Even when a trust is not revocable, trust assets may be considered a countable resource if the beneficiary has the right or power to direct that the funds be used for his support and maintenance, or to sell his interest in the trust and use the proceeds for his support and maintenance. 20 C.F.R. 416.1201(a)(1); POMS SI 01120.200(D)(1)(b). Here, the trustee has the full discretion to distribute or withhold trust assets and income. Trust, Art. V, B, C. Therefore, Mr. B~ cannot direct the use of the trust assets for his support and maintenance. Nor can he sell his interest in the trust. The spendthrift provision of the trust would not prevent Mr. B~ from selling his beneficial interest in the trust, since he is also the grantor of the trust. POMS SI 01120.200(B)(16); Restatement (Second) of Trusts 156(a). However, we generally conclude that a beneficial interest in a discretionary trust is essentially unsellable. *See* W~; Restatement (Third) Trusts 60 comment f (tentative draft no. 21 March 10, 1999). Thus, the trust property is not a countable resource for SSI purposes. 20 C.F.R. 416.1201(a)(1).

Although the trust principal is not considered a countable resource, certain distributions may be considered income. For example, any disbursements of cash made directly to Mr. B~ are considered unearned income for SSI purposes. POMS SI 01120.200(E)(1)(a). In addition, any disbursements made to a third party, including Mr. B~'s mother, resulting in Mr. B~'s receipt of food, clothing or shelter are considered income in the form of in-kind support and maintenance. POMS SI 01120.200(E)(1)(b).

An August 25, 1998, report of contact included in the file indicates that each month a check is issued to Ms. P~ for Jesse B~. Thus, Ms. P~ apparently received trust distributions as Mr. B~'s legal guardian acting on his behalf. Your notes also indicate that Ms. P~ understands that trust distributions may not be used for food, shelter, or clothing and therefore are not used for such purposes. Nevertheless, Ms. P~ is receiving cash distributions. Therefore, if she is receiving them in her capacity as Mr. B~'s guardian, as the report of contact reflects, the funds are considered Mr. B~'s "unearned income" for SSI purposes. 01120.200(E)(1)(a). If, on the other hand, Ms. P~ is receiving distributions in her capacity as a beneficiary, the funds should be counted as Ms. P~'s "unearned income." *See* 42 U.S.C. 1382c(f)(2); Social Security Ruling 81-21; POMS SI 01330.200(A).

CONCLUSION

The trust principal is not a countable resource for Mr. B~. Cash distributions from the trust directly to Mr. B~ may be considered unearned income. Distributions to Ms. P~ are considered unearned income to Ms. P~ or Mr. B~, depending on whether the distributions were made to her as a beneficiary of the trust or were made to her as Mr. B~'s guardian to be used for his benefit.

DD. PS 00-436 Wisconsin Trust for Travis J. W~; SSN: ~ Your Reference No.: S2D5G3

DATE: November 24, 1997

1. SYLLABUS

A Revocable Supplemental Trust was established in 1997 that named an SSI beneficiary as a "contingent beneficiary" of the trust. His mother established the trust to receive assets either from her estate or from deposits she might make during her lifetime. Wisconsin state law permits establishment of a trust without initial principal if the trust will obtain property through a will, however, the trust is not created until the property is acquired and the intention is confirmed. Since the grantor (the SSI

beneficiary's mother) is not identified as a beneficiary under a will, there is some question as to the validity of the trust naming the SSI recipient as a "contingent beneficiary". Regardless, the SSI beneficiary is precluded by trust terms from revoking the trust or obtaining a vested interest in trust income or principal. Any funds that were transferred into the trust in the future are not to be used for the SSI beneficiary's basic needs such as food, clothing, and shelter. Therefore, the trust should not be considered a resource for SSI purposes.

2. OPINION

You have asked for our assistance in determining whether the trust agreement in question is a countable resource to Mr. W~, an SSI applicant. For the following reasons, it is our opinion that the trust is not a countable resource because there is no property in the trust.

FACTS

On June 22, 1997, Mr. W~'s mother, Lucille A. W~, executed a trust agreement entitled "Travis J. W~ Revocable Supplemental Trust," in which she described herself as grantor and initial trustee. No initial trust principal was deposited. Lucille W~ expected the trust to receive assets either from her estate, or from deposits she might make during her lifetime. Mr. W~ was named as a "contingent beneficiary" of the trust, with no vested interest in trust income or principal, and no right to revoke the trust agreement. Upon Mr. W~'s death, the trust is to terminate with the assets to transfer to Mr. W~'s sister, Cassandra W~, and her estate.

DISCUSSION

Under the applicable regulation, "resources" are:

cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource....

20 C.F.R. § 416.1201(a). Therefore, if an individual is able to obtain funds or convert property to cash to be used toward his support and maintenance, such funds or property are to be included as resources for purposes of determining SSI eligibility. Trust assets are a resource if the individual has access to the trust assets and can direct the use of the assets to meet his needs for food, clothing, and shelter, or if she can revoke the trust and obtain unrestricted access to the trust assets. *See* Programs Operation Manual System (POMS) SI 01120.105.(A).(1), 01120.200.(D).(1)-(3). We have reviewed the documents you have provided and, for the following reasons, we conclude that the trust agreement in question does not establish a countable resource under 20 C.F.R. § 416.1201.

As an initial matter, we do not believe the documents you provided us establish the existence of a valid trust. A basic requirement for the creation of a valid trust is the existence, at the time of the creation of the trust, of trust property or subject matter - that is, the existence of a trust "res" consisting of property actually in existence, and in which the trustor has a transferable title or interest. "A trust without a res is impossible." *American Jurisprudence 2d*, Trusts § 47.

No initial principal was deposited, and the documents do not indicate whether any additional property has been added to the trust since its establishment. Accordingly, it is unclear whether there are any trust "assets" at present.

Article I of the trust document expresses the trustee's "expectation that this Trust will receive assets from the Trustee's estate through her will, and that no initial Trust principal has been deposited pursuant to Wis. Stats. 701.07(1)(b)." Wisconsin Statutes Annotated § 701.07(1) states, "A living trust, otherwise valid, shall not be held invalid as ... a trust lacking in sufficient principal because ... (b) The principal consists of a designation of the trustee as a primary or direct, secondary or contingent beneficiary under a will...." W.S.A. § 701.07 addresses the situation in which a person who hopes or expects to acquire property in the future, although he or she has no present interest therein, may manifest an intention or make a promise to create a trust in such property. Thus, this provision allows a trust to be established by a person who will obtain property through a will. The trust is not created, however, until the property is acquired and this intention is confirmed. Lucille W~, the trustee, did not identify herself as a beneficiary under a will. Her intention to fund the trust through her will, does not create sufficient trust principal to create a trust.

Even if this is a valid trust, by its express terms, Mr. W~ cannot revoke the trust and is precluded from ever obtaining a vested interest in trust income or principal. Trust funds are not to be used to provide for Mr. W~'s essential primary support and services such as food, clothing, and shelter. Therefore, if there were trust property, it would not constitute a resource.

CONCLUSION

Accordingly, we conclude that the trust assets at issue, if any, should not be considered a resource to Mr. W~ for SSI purposes.

Thomas W. C~
Chief Counsel, Region V
By:_____
Edward P. S~
Assistant Regional Counsel

EE. PS 00-337 Supplemental Security Income - Wisconsin Trust - Christopher J. M~, Jr., SSN ~; Your Reference: S2D5G3

DATE: June 9, 1999

1. SYLLABUS

This opinion involves an Irrevocable Supplemental Trust established on February 19, 1999. The trust assets are not considered a countable resource for SSI purposes since the settlor (the SSI recipient) is not the sole beneficiary of the trust and he cannot direct use of the trust assets for his support and maintenance.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You inquired whether the assets held under the terms of the Christopher J. M~, Jr. Irrevocable Supplemental Trust, established February 19, 1999, should be treated as a countable resource for SSI purposes for the beneficiary of the trust, Christopher J. M~ Jr. After reviewing the documents you provided, we conclude that the trust assets should not be considered a countable resource under 20 C.F.R. 416.1201(a)(1).

FACTS

SSI recipient, Christopher J. M~, Jr. (Chris), was a beneficiary of his uncle's estate, which was closed in December 1998. On February 19, 1999, Chris' inheritance became available to him when his grandfather was appointed guardian to receive the inheritance on Chris' behalf. The inheritance consisted of an IRA account, a bank account balance, and a mortgage note, valued at a total of $53,028.09. Waeffler letter of March 3, 1999. Also on February 19, 1999, Chris' guardian established the Christopher J. M~, Jr. Irrevocable Supplemental Trust (Trust), naming himself and the U.S. Bank National Association as Trustees and Chris as the beneficiary. Trust Declaration at 1. On February 26, 1999, the guardian transferred the assets Chris had inherited from the guardianship estate into the Trust. Waeffler letter of March 3, 1999. Although the Trust Declaration allows the Trustees to accept additions to the Trust from other sources, there is no indication in the materials you provided to us that the Trust contains any assets other than those from Chris' inheritance. Trust Declaration at 1.

The primary purpose of the Trust is to provide for Chris' secondary and post-secondary education. Trust Declaration at 1. A secondary purpose is to supplement the support, services, and medical care provided to Chris by federal, state or local government programs. Trust Declaration at 2, 5. The terms of the Trust are to be construed under Wisconsin law in effect when the Trust was created and in a manner that will not disqualify Chris from receiving SSI or other public benefits. Trust Declaration at 2.

The Trustees have absolute discretion to make disbursements for Chris' benefit consistent with the purposes of the Trust, including disbursements for the following expenses: education, medical services not otherwise available through governmental programs, housekeeping services, child care, companions, legal representation, vacations, transportation, entertainment, furniture, household goods, personal items, living quarters, funeral expenses, and tax obligations. Trust Declaration at 3-4.

The Trustees also have discretion to "terminate all distributions of income and principal" if they think that continued distributions will result in a reduction in governmental assistance to Chris. Trust Declaration at 5. In addition, there is a provision that Chris cannot assign his interest in income or principal to anyone else. Trust Declaration at 7.

The Trust terminates under either of two conditions. First, the Trust terminates and the principle and income must be distributed to Chris if (a) Chris has attained the age of 21, (b) SSA has determined that he is no longer disabled, and (c) the Trustees determine that he is not eligible or likely to become eligible for any public benefits. Trust Declaration at 6. This provision complies with Wisconsin law allowing a guardian of a minor to place a ward's assets into a trust under certain conditions and with court approval. Wis. Stat. Ann. 880.175 (West 1991). Second, if the Trust is still in existence when Chris dies, the residue must be distributed to whomever Chris has appointed by will or by trust (after reimbursement to the state for medical assistance benefits and, in the Trustees' discretion, payment of funeral expenses and death, inheritance, and estate taxes). If Chris dies without exercising a valid power of appointment, the residue of the Trust passes to his "issue by right of representation" or, if no issue, to his "heirs at law" under Wisconsin intestacy laws. Trust Declaration at 6.

Under Section VIII of the Trust Declaration, the Trust is irrevocable, although it can be amended by the Trustees with court approval in a manner consistent with the purposes of the Trust. Trust Declaration at 8. Section X of the Trust Declaration, however, gives the Trustees power to terminate the Trust, in whole or in part, and distribute the assets to Chris if, in the Trustees' absolute discretion, termination would be in Chris' best interests. Trust Declaration at 14.

DISCUSSION

1. The Inheritance Was Income in February 1999.

The pertinent SSI regulation provides that resources include cash or other liquid assets or any real or personal property that a person owns and can convert to cash to be used for the person's support and maintenance. 20 C.F.R. 416.1201(a). If the person has the right or power to liquidate the property, or his share of the property, it is a resource. *Id.*

An inheritance is not a resource until it has value, i.e., it can be used to meet the distributee's needs for food, clothing, or shelter. *See* POMS SI 00810.005(A). Under Wisconsin law, a guardian must apply a ward's personal property, or income from personal property or real estate, as far as may be necessary for the ward's education, maintenance, and support. Wis. Stat. Ann. 880.21 (West 1991 Supp. 1998). Therefore, Chris' inheritance was income in February when it became available to him. *See* Wisconsin Family Community Trust for the Disabled, Maybelle T~ (F~) to M~, ARC-MOS, SSA V (January 13, 1999) at 1.

2. The Trust Is Not a Resource

We turn to the question of whether the principal and any accumulated income in the Trust constitute a resource for SSI purposes. Trust assets are a resource if, under the terms of the trust, the individual can direct use of the trust assets for his support and maintenance. POMS SI 01120.200(D)(1)(a). Trust assets are also a resource if the individual has the power to revoke the trust and then use the funds to meet his food, clothing, or shelter needs. *Id.* A trust may be revocable because the trust document allows for revocation, or it may be revocable through application of state law. POMS SI 01120.200(D)(2).

The Trust Declaration gives the Trustees absolute discretion over disbursements, subject to the limitation that they can make disbursements only for expenses over and above those covered by government programs and only to the extent that such disbursements will not disqualify Chris from receipt of SSI or other government benefits. In addition, there is a clause that prohibits Chris from assigning any interest he may have to anyone else, including his creditors. Thus, under the terms of the Trust Declaration, Chris does not have the power to direct use of the trust assets for his support and maintenance.

The Trust Declaration is ambiguous as to whether or not the Trust is revocable. *See* Trust Declaration at 8, 14. We need not resolve that issue, however, since, even if we were to assume that Section X, paragraph R of the Trust Declaration is controlling, that paragraph allows for termination of the Trust only in the absolute discretion of the Trustees. Trust Declaration at 14. The Trust Declaration gives Chris no power to revoke the Trust or to direct the Trustees to revoke the Trust.

Nor does Wisconsin trust law give Chris the power to revoke the Trust. Under Wisconsin law, the person who directly, or indirectly, creates a trust or adds property to an existing trust is the settlor. Wis. Stat. Ann. 701.01(5) (West 1981 Supp. 1998). This is consistent with the general trust law principle that the true settlor of a trust is the person who provides the consideration for the trust, even if another person nominally creates the trust. 76 Am. Jur. 55; POMS SI 01120.200(b)(2); POMS SI 01120.200(J)(2)(a). Here, although Chris' guardian was named as the settlor, Chris is the true settlor of the Trust because the Trust was funded with Chris' inheritance.

Consistent with general trust principles, Wisconsin law provides that a Trust that is not revocable by its terms may nevertheless be revoked upon written consent of the settlor and all beneficiaries. Wis. Stat. Ann. 701.12 (West 1981). *See* Restatement (Second) of Trusts 330-31. Since Chris is the settlor of the Trust, he has the power to revoke the Trust only if he is also the Trust's sole beneficiary. If however, there are other beneficiaries, including contingent beneficiaries, he cannot revoke the Trust without their consent. Under the terms of the Trust Declaration, Chris is the sole beneficiary during his lifetime. The question is whether there are contingent beneficiaries with a remainder interest at Chris' death who would be required to consent to revocation of the Trust. If so, we do not consider the Trust revocable by Chris for purposes of determining whether the assets are a countable resource.

Chris has a general power to appoint the person or persons who will receive the residue of the Trust upon his death. Trust Declaration at 6. Under general trust law, a general power of appointment does not create a remainder interest in those to be named by will, since the person who has power of appointment could fail to execute a will, fail to exercise the power of appointment in a will, or revoke the will. We found no Wisconsin statutes or caselaw to the contrary. Therefore, if the general power of appointment were the only provision for the Trust residue, the Trust would be Chris' resource because he could compel the Trustees to terminate the Trust and re-convey the assets to him. *See* Restatement (Second) of Trusts 330, comment e. *See also* Clarification of Regional SSA Program Circular 94-05 (K~) to L~, Acting ARC, SSA V, at 3 (May 24, 1995).

However, the Trust Declaration also provides that, in the event Chris does not execute a valid appointment pursuant to his general power, the assets in the Trust when Chris dies are to be distributed to Chris' "issue." Trust Declaration at 6. This provision precludes Chris from terminating the trust because it creates a remainder interest in Chris' children as contingent beneficiaries. *See Boyle v. Kempkin*, 9 N.W.2d 589, 592 (Wis. 1943) (creation of remainder interest in trust to "children" created vested equitable interest); Restatement (Second) of Trusts 127, comment b (if beneficial interest is limited to settlor for life and on his death the remainder goes to his children, issue, or descendants, an interest in the remainder is created in the children, issue, or descendants, and the settlor is not the sole beneficiary). *See also M~*, et al., Wills Trusts and Estates 353 (West 1988), citing *Levy v. Crocker Citizens National Bank*, 14 Cal. App. 3d 102 (1971) (consent of children required for revocation, even if children take only in default of testamentary power of appointment retained by settlor). Thus, Chris does not have the power to revoke the Trust.

That we cannot presently ascertain who will be Chris' issue at the time of his death, or even whether such issue will exist, does not change the result. Wisconsin law provides that a court may consent to revocation on behalf of unascertained or unborn beneficiaries after a hearing where a guardian ad litem represented their interests. Wis. Stat. Ann. 701.12(2)(West 1981). *See also* Restatement (Second) of Trusts 127 and comment b, 339 and comment b; 76 Am. Jur. 95; Review of the Joseph B~ Trust, OGC-V (B~) to M~, ARC, SSA-V, at 5 (January 12, 1999).

Where a beneficiary does not have the power to direct use of the trust for his support and maintenance and does not have the power to revoke the trust on his own, the trust assets may still be a resource for SSI purposes if the beneficiary can sell his interest in the trust and use the proceeds for his support and maintenance. 20 C.F.R. 416.1201(a)(1). In theory, Chris could enter into an agreement to exercise his general power of appointment in favor of a creditor or other person for payment. *See* Wis. Stat. Ann. 702.01(3) (West Supp. 1998) (general power of appointment may be exercised in favor of donee's creditors if exercisable during lifetime and in favor of creditors of estate if exercisable by will). It is unlikely, however, that Chris' power of appointment would have any real market value. We think it unlikely that anyone would purchase the right to take the contingent remainder of the Trust upon Chris' death, since there is no certainty as to the amount, if any, that would remain in the Trust at the time of Chris' death.

Since Chris cannot direct use of the trust assets for his support and maintenance, revoke the Trust, or sell his interest in the Trust, the Trust assets do not constitute a countable resource for purposes of Chris' entitlement to SSI. We note, however, that any amounts actually distributed to Chris from the Trust would be income to him and any disbursement to a third party in exchange for food, shelter, or clothing for Chris would be in-kind income to Chris. POMS SI 01120.200(E)(1)(a)-(b).

CONCLUSION

Under the terms of the Trust Declaration, all disbursements are at the discretion of the Trustees who are limited to making disbursements for Chris' supplemental needs only. Chris cannot direct use of the Trust assets for his support and maintenance. The Trust Declaration does not give Chris the power to revoke the Trust, nor does he have such power under Wisconsin law. Although he is the true settlor of the Trust, he is not the sole beneficiary because the Trust Declaration creates contingent interests in Chris' "issue." Finally, it is unlikely that anyone would pay for the right to have Chris exercise his general power of

appointment in his/her favor, since the value of the remainder at Chris' death is uncertain. Therefore, the Trust assets should not be considered Chris' countable resources for SSI purposes.

FF. PS 00-318 Forethought Life Insurance Funded Burial Contract in Wisconsin Viola L. K~, ~ (Your November 18, 1994 Request) (Your ref: S2D5B51, SI 2-1-8)

DATE: March 21, 1995

1. SYLLABUS

This opinion concerns a life insurance-funded burial contract in Wisconsin. In this case the life insurance policy has been assigned to the funeral home. However, a life insurance-funded burial contract must be assigned to a person or entity other than the funeral home to be considered valid under Wisconsin law. Therefore this policy is not valid and the ownership has not been irrevocably assigned. Therefore, the purchaser is still considered the owner of the policy for SSI purposes.

2. OPINION

On November 18, 1994, you asked us to review a Forethought life insurance funded burial arrangement that was marketed in Wisconsin to Viola L. K~, ~. Specifically, you asked us to determine: (1) if the plan is legal under Wisconsin law; and (2) if so, does it constitute a countable resource for Supplemental Security Income (SSI) purposes. With your November 18, 1994 request you included: (1) the application to Forethought Life Insurance Company for a life insurance policy by the individual with a power-of-attorney to act for the insured; (2) the life insurance policy; and (3) the irrevocable assignment of policy ownership to a funeral home. You did not submit to us a pre-need funeral agreement between the insured and the funeral home.

As we have previously advised you, for a life-insurance-funded burial contract to be valid under Wisconsin law, ownership of the life insurance policy must be assigned to a person or entity other than the funeral home. / In the package you submitted for our review, however, ownership of the life insurance policy has been assigned to a funeral home. We presume that the same funeral home has made pre-need funeral arrangements with the insured. Therefore, based on the information we currently have, we do not think SSA should find that the Forethought package is valid under Wisconsin law.

Should the insured attempt to cure the deficiency by irrevocably assigning the life insurance policy to a person or entity other than the funeral home, please resubmit the entire package to us for our review. In order for us to issue a definitive opinion, we will also need to see the pre-need funeral agreement between the insured and the funeral home at that time.

Should the insured make no effort to cure the deficiency, it would appear that the purported irrevocable assignment of policy ownership to a funeral home was not valid under Wisconsin law. Therefore, in our opinion the policy ownership has not effectively been irrevocably assigned. The balance of the package, however, would appear to be valid. For that reason, you should treat the purchaser as the owner of the life insurance policy for SSI purposes, subject to any exclusions for life insurance or burial funds that otherwise apply.

GG. PS 00-307 Supplemental Security Income - Wisconsin Trust - Matthew T. K~, SSN ~, Your Reference: S2D5G3

DATE: September 18, 2000

1. SYLLABUS

This opinion concerns an Irrevocable Family Trust established in December 1992. For reasons explained below, the trust is not countable as a resource.

In Wisconsin, a trust can only be revoked with the consent of the grantor and all beneficiaries. The grantor of the trust is the SSI recipient's mother. In addition to the SSI recipient, there are other beneficiaries named.

Therefore, since the SSI recipient is not the grantor or sole beneficiary of the trust it is not a countable resource to him. However, any payments from the trust fund should be considered in assessing the SSI recipient's eligibility for SSI benefits.

CAUTION: Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You asked that we review the "Cynthia L. K~ Irrevocable Family Trust" to determine whether it is a countable resource for Matthew T. K~ (Matthew), a Supplemental Security Income (SSI) recipient. For the reasons stated below, we conclude that the funds in the trust should not be considered a countable resource to Matthew. The disbursements to Matthew from that trust fund should, however, be considered income in assessing Matthew's eligibility for SSI benefits.

FACTS

In December 1992, Cynthia L. K~ (Cynthia), Matthew's mother, established the Cynthia L. K~ Irrevocable Family Trust (the trust). The trust was funded with $10.00 and a million dollar whole life insurance policy on Cynthia's life. It appears that Cynthia contributes about $8,000.00 each year into the trust. The trust assets have now been changed over to an annuity. We do not know any of the terms of the terms of the annuity. The trust names Cynthia as the grantor and Thomas E. S~ as the trustee. The trust provides that it may not be amended or revoked.

The trust states that the trustee shall hold, administer, and distribute the trust estate as enumerated in the trust. The trust provides that prior to Cynthia's death, for a period of thirty days following any contribution to the trust, each living child of Cynthia shall have the right to withdraw from the trust an amount not exceeding the lesser of: (a) $10,000 as described in the Internal Revenue Code as a gift for federal gift tax purposes, or (b) his proportionate share of the contribution.

The trust further provides that at least quarterly, the trustee shall pay the net trust income equally, to or for the benefit of Cynthia's children. If Cynthia's children are then not living, the income shall be added to the principal. The trust also states that the term "children" includes all children and descendants, whether born or adopted before or after the trust instrument was executed. We do not know how many children Cynthia has.

DISCUSSION

To qualify for SSI benefits, a claimant must show that his resources are below a statutory maximum. 42 U.S.C. 1382(a); 20 C.F.R. 416.202, 416.1205. Resources are defined as cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his support and maintenance. 20 C.F.R. 416.1201(a). If the individual has the right, authority or power to liquidate the property or his share of the property, it is considered a resource. 20 C.F.R. 416.1201(a)(1). Trust assets are a resource if the individual has access to the trust assets, or can direct the use of the assets, or can terminate the trust and use the trust assets for his support and maintenance. POMS SI 01120.200(D)(1). Whether the individual can terminate the trust or direct the use of the trust assets depends on the terms of the trust agreement and applicable state law. POMS SI 01120.200(D)(2).

In this case, Matthew does not have the right to terminate the trust. In Wisconsin, a trust can be revoked with the consent of the grantor and all beneficiaries. Wis. Stat. Ann. 701.12(1) (West 1981 Supp. 1999); 76 Am. Jur. 2d 94 (1992). This is true even if the trust document specifically states that it may not be revoked. *Id.*

Under Wisconsin law, the person who directly or indirectly creates a trust or adds property to an existing trust is the grantor. Wis. Stat. Ann 701.01(5) (West 1981 Supp. 1999). This is consistent with general trust principal that the grantor of a trust is the person who provides the consideration for the trust. 76 Am. Jur. 2d 55 (1992); POMS SI 01120.200(B)(2). In this case, Cynthia, Matthew's mother, is the grantor of the trust because she provided funds to establish the trust, and continues to add funds to the trust.

Matthew is a beneficiary, but not the sole beneficiary of the trust. As noted above, under Wisconsin law, a trust can be revoked with the consent of the settlor and all beneficiaries. Wis. Stat. Ann. 701.12(1) (West 1981 Supp. 1999); 76 Am. Jur. 2d 94 (1992). During Cynthia's lifetime, it appears that the beneficiaries of the trust include Matthew and Cynthia's other children, whether born or adopted before or after the trust instrument was executed.

Although the trust principal is not a resource for Matthew, disbursements from the trust under certain circumstances would be income for determining Matthew's SSI eligibility and level of benefits. During Cynthia's lifetime, for thirty days following her annual $8,000.00 contribution to the trust, Matthew has the right to withdraw from the trust an amount not exceeding the lesser of: (a) $10,000 as described in the Internal Revenue Code as a gift for federal gift tax purposes, or (b) his proportionate

share of the contribution. In this case, he would have the right to withdraw from the trust his proportionate share of the approximate $8,000.00 annual contribution. At the start of the thirty-day period, this share is income to Matthew. If the thirty days pass into another calendar month, this share is Matthew's resource. If he does not exercise his right to obtain the funds, they cease to be a resource when the thirty-day period ends. The trustee is authorized to disburse this cash from the trust directly to Matthew, and such a disbursement would be income for SSI purposes. *See* 20 C.F.R. 416.1102; POMS SI 01120.200(E)(1)(a),(b).

In addition, during Cynthia's lifetime, the trustee is directed to disburse to Matthew or for his benefit, at least quarterly, his proportionate share of the net income from the trust. Matthew's right to obtain these payments would also be income for SSI purposes. *See* 20 C.F.R. 416.1102; POMS SI 01120.200(E)(1)(a),(b). We do not, however, know if the trust has generated any income. This will depend on the terms of the annuity.

CONCLUSION

Thus, we conclude that the funds held in the trust do not constitute a countable resource for purposes of determining Matthew's SSI eligibility because Matthew does not have the right to revoke the trust. Matthew's right to obtain payments from the trust fund, whether Matthew's proportionate share of the approximate $8,000.00 annual contribution by Cynthia, or his quarterly proportionate share of the net income from the trust should be considered as income in assessing his eligibility for SSI benefits.

HH. PS 00-287 States Named as Beneficiary to a Trust; Your Reference No. SI-2-1-3

DATE: June 24, 1997

1. SYLLABUS

This opinion states that if a trust is excluded from resources for Medicaid eligibility purposes, it may still be a resource for SSI purposes. Additionally, providing for reimbursement to the State for Medicaid expenditures on behalf of the beneficiary does not make the State a residual beneficiary of the trust. Because of a change in the Social Security Act, this precedent may only be applicable to a trust established by an individual before 01/01/00.

2. OPINION

You asked for state-by-state evaluation of how trusts created under the Omnibus Reconciliation Act (OBRA) of 1993, P.L. 103-66, 13611(b) (codified at 42 U.S.C. 1396p(d)(4)), to shelter money for Medicaid purposes should be treated when determining whether the trust assets are a resource for SSI purposes. We conclude that, for any state, the mere fact that a trust may comply with the OBRA 1993 provisions is irrelevant to determining whether the trust assets are a resource for SSI purposes.

DISCUSSION

In the OBRA 1993, Congress established an exception to the resource guidelines for the Medicaid program. *See* P.L. 103-66, 13611(b). Under this provision, when determining an individual's eligibility for, or amount of benefits to be paid under Medicaid, trust assets and income from that trust will not be considered as resources and income if the trust meets certain guidelines. To meet these requirements the trusts must, among other things, provide that, on the death of the individual, the State will receive all remaining trust assets up to an amount equal to the total medical assistance paid on behalf of the individual under the State's Medicaid program. *See* 42 U.S.C. 1396p(d)(4).

Congress limited the applicability of this provision, however, to the Medicaid program and did not make a similar provision for the SSI program. Therefore, even if a trust is consistent with the provisions of the OBRA 1993 and state statutes that implement that provision, the trust assets still may be a countable resource for SSI purposes. *See* Illinois OBRA '93 Trust for Dominick J. G~, ~, OGC-V (D~) to Gerald K~, Center Director, SSA-V (Apr. 14, 1997); Revocability of Wisconsin Trust for Clayton D. B~, ~, OGC-V (D~) to Gloria J. P~, ARC-POS (Oct. 28, 1994) at 4, n.7; cf. POMS SI 00601.060.H.1 (some trusts that are not resources for SSI purposes may affect Medicaid eligibility).

Furthermore, no residual beneficiary is created merely because the OBRA 1993 trust requires that, on the death of the individual, the state be reimbursed for Medicaid assistance paid on behalf of the individual. *See* Supplemental Security Income - Wisconsin Trust - Michelle J. L~, ~, OGC-V (Mates) to Gloria J. P~, ARC-MOS (June 9, 1997); Illinois OBRA '93 Trust for Dominick J. G~, ~, supra. The Restatement (Second) of Trusts 3(4) defines a beneficiary as "[t]he person for whose benefit property is held

in trust." None of the trust property in an OBRA 1993 trust is held for the "benefit" of the state. Rather, any amounts paid to the state after the individual's death are reimbursements for amounts the state paid for the benefit of the individual.

CONCLUSION

In summary, although some of our prior opinions may have suggested otherwise, on further consideration, we feel the better approach is to treat OBRA 1993 trusts the same as any other trust, for SSI purposes. Although trust assets may not be considered a resource for Medicaid purposes under the OBRA 1993 provisions, this does not affect how the trust is treated under the SSI program. Furthermore, no residual beneficiary is created merely because the trust requires that any sums remaining in the trust at the death of the individual be paid first to the state to reimburse it for any benefits paid on that person's behalf. Therefore, this provision would not affect the individual's ability to revoke the trust if he or she is the grantor and sole beneficiary of the trust.

II. PS 00-270 State of Wisconsin - Irrevocable Funeral Trust Agreement for Walter E. J~

DATE: August 10, 1995

1. SYLLABUS

This opinion concerns a funeral trust in the State of Wisconsin. The individual deposited a total of $4,800 into the trust. Consistent with Wisconsin State law, $2,000 is designated by the trust as irrevocable. Under the trust, the individual retains the authority to revoke or liquidate the remaining $2,800. Therefore, $2,000 in the trust is not countable as a resource. But, $2,800 is countable as a resource for SSI purposes. **CAUTION:** Because of a change in the Social Security Act, this precedent may only be applicable to trusts established before 1/1/00.

2. OPINION

You have asked for our assistance in determining (1) whether the "Irrevocable Funeral Trust Agreement" in question satisfies the requirements of Wis. Stat. Ann. 445.125 (West 1994) even though certain sections of the agreement have not been completed and (2) how much, if any, of the funds deposited pursuant to the agreement constitute a countable resource to a Supplemental Security Income (SSI) recipient, Walter E. J~. To qualify for SSI benefits, an applicant must show that his income, both earned and unearned, is below the statutory maximum. 42 U.S.C. 1382(a)(1). Income is anything a claimant receives in cash or in kind. 20 C.F.R. 416.1102 (1994).

Under the applicable regulation, "resources" that are countable as income are defined as:

cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

See 20 C.F.R. 416.1201. The Program Operation Manual System (POMS) addresses the circumstances under which specifically trust funds are considered a resource to an SSI recipient:

If an individual does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource for SSI purposes. POMS SI 01120.200D.2 (emphasis in the original). Thus, in this case, to constitute a countable resource as described in the regulations and POMS, Mr. J~ must have the right, authority, or power to liquidate the funds of the funeral trust agreement in question and apply them to meet his support and maintenance needs.

The pertinent facts reveal that on April 26, 1995, Mr. J~ (the Depositor) entered into a funeral trust agreement with Bob P~, the funeral director of the Metcalfe Kuenster Page Funeral Home (the Funeral Home). The funeral trust agreement states in pertinent part that:

The First $2000 of funds deposited under [the] agreement must be used for the funeral of the Depositor. . .

The intent of the Depositor is to designate the first $2000 of the funds deposited pursuant in this agreement as an irrevocable funeral trust fund, which must be used for the funeral and final disposition of the Depositor . . . The Depositor further directs

that any dividends and/or interest earned on the fund shall be . . . [m]ade irrevocable and added to the minimum amount to be deposited and used for the Depositor's funeral . . . Before his/her death the Depositor, after written notice to the Funeral Home, may withdraw any portion of the principal deposited in excess of $2000, provided that no interest and/or dividends also made irrevocable is ever withdrawn by the Depositor.

The funeral trust agreement also states that the Funeral Home will provide, under the following sections: (A) "professional and staff services and facilities," (B) an "outer burial chamber," and (C) "services and merchandise." Mr. J~ did not specify the types of such items and services and/or their "estimated" costs, but noted that such items and services would be selected or added "at need." With regard to the above burial/funeral items and services, the funeral trust agreement provides that:

The actual and total cost of the services and merchandise provided by the Funeral Home ([in section] (A) only or including (B) and/or (C)) shall be determined as of the date of the Depositor's death. The Depositor reserves the right to amend this agreement subsequently in writing to change any details of the funeral and final disposition specified here provided that the Funeral Home may then adjust the cost of the funeral service accordingly.

Pursuant to this funeral trust agreement, Mr. J~ deposited $4,800.00, which was held in trust by the designated Depository, the Badger State Bank.

Notwithstanding Mr. J~'s failure to designate specific burial/funeral merchandise and services and their estimated costs in sections (A)-(C) of the agreement, we nonetheless believe that the funeral trust agreement is a valid burial agreement under Wis. Stat. Ann. 445.125, and as such, is irrevocable as to the first $2,000.00, plus all interest and/or dividends earned on the fund. Therefore, we do not believe that the first $2,000.00, plus all interest and/or dividends, is a countable resource. It is our opinion, however, that the remaining $2,800.00 under the funeral trust agreement is revocable and thus a countable resource to the SSI recipient.

Section 445.125 of the Wis. Stat., Ann.,/ which governs burial agreements such as the one in question, in pertinent part, reads:

(1)(a) Whenever a person . . . makes an agreement with another person selling or offering for sale funeral or burial merchandise or services . . . for the purchase of a casket, outer burial container not preplaced into the burial excavation of a grave, combination casket-outer burial container or other receptacle . . . for the burial or other disposition of human remains or for the furnishing of funeral or burial services, either of which is intended to be provided for the final disposition of the body of a person . . . wherein the use of such personal property or the furnishing of such services is not immediately required, all payments made under the agreement shall be and remain trust funds, including interest and dividends if any, until occurrence of the death of the potential decedent, unless the funds are sooner released upon demand to the depositor, after written notice to the beneficiary.

(b) Notwithstanding [Wis. Stat. Ann. 701.12(1)/], such agreements may be made irrevocable as to the first $2,000 of the funds paid under the agreement by each depositor.

(c) Any interest or dividends accruing to a trust fund under par.(b) may be made irrevocable.

With regard to the issue of the revocability of a trust, the POMS defers to the terms of the trust and/or State law:

The revocability of a trust and the ability to direct the use of the trust principal depends on the terms of the trust agreement and/or on State law. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance, it is not a resource.

POMS SI 01120.200D.2 (emphasis in the original).

The funeral trust agreement in question wholly complies with the terms of Wis. Stat. Ann. 445.125. In particular, explicitly under the terms of the funeral trust agreement and in accordance with Wis. Stat. Ann. 445.125, Mr. J~ has no authority to revoke or liquidate the first $2,000.00, plus all interest and/or dividends, of the trust funds deposited under the funeral trust agreement. Mr. J~, however, has the authority to revoke or liquidate the remaining $2,800.00 in trust funds, and may use those funds to meet his food, clothing or shelter needs or direct the use of those funds for his support and maintenance.

Hence, the remaining $2,800.00 in trust funds constitutes a countable resource.

That Mr. J~ neglected to select specific burial/funeral merchandise and services and provide their estimated cost in sections (A)-(C) of the funeral trust agreement does not appear to be of any legal consequence, given that Section 445.125 does not require

that such items and services necessarily be specified. Rather, Section 445.125 requires only that there be an agreement for the purchase of certain general types of burial containers and/or services. Consistent with the state statute, the funeral trust agreement in this case generally describes the burial/funeral merchandise and services that will be provided under the funeral trust agreement. Although the funeral trust agreement provides room for the Depositor to specifically describe burial/funeral merchandise and services and their costs, the fact that Mr. J~ did not do so does not appear to be a critical omission since the "actual and total" costs of such burial/funeral items and services are not determined until the Depositor's death, and since the Depositor has the "right" at any time prior to his death to "change any details of the funeral and final disposition" as long as the costs are adjusted accordingly.

JJ. PS 00-265 Wisconsin Forethought Life Insurance Funded Burial Contract for Phillip H~, SSN ~

DATE: June 9, 1997

1. SYLLABUS

In Wisconsin, irrevocable assignment of a life insurance policy funding a funeral contract to the Forethought Trust is valid under State law. The policy is not a resource to the individual.

Because of a change in the Social Security Act, this opinion may only be valid to trusts established by an individual prior to 01/01/00.

2. OPINION

This is in response to your inquiry concerning a Forethought Life Insurance Funded Burial Contract (LIFBC) for Phillip H~. You asked if the LIFBC in question is valid under Wisconsin State Law and, if the LIFBC is not valid, whether the cash surrender value of the life insurance policy could be excluded since it has been irrevocably assigned to the Forethought Trust. We believe that the Forethought LIFBC in question is valid and should therefore not be counted as a resource for SSI purposes.

FACTS

In May 1996, Mr. H~ purchased a life insurance policy from the Forethought Life Insurance Company for the purpose of funding his burial expenses. Mr. H~ named his father, John H~, beneficiary. John H~ signed an affidavit attesting to his understanding that the proceeds of the life insurance were to be used for Mr. H~'s funeral costs. Mr. H~ then transferred ownership of the life insurance policy to the Forethought Trust, giving up his right to control the policy, surrender it for cash or obtain a loan against it.

DISCUSSION

A resource, for SSI purposes, includes assets that the individual owns and could convert to cash to be used for his own support and maintenance. *See* 20 C.F.R. 416.1201(a). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can revoke the trust and use the assets to meet his needs for food, clothing, and shelter. POMS SI 01120.105.A.1, 01120.200(D)(1)-(3).

Consistent with SSI's trust policy, if an individual neither owns nor has the legal right to direct the use of trust assets to meet his or her support and maintenance needs and state law allows a revocably assigned life insurance policy that funds a funeral contract to be placed irrevocably in trust, the LIFBC is not a resource for SSI purposes. POMS SI 01130.425D.2.E.

After purchasing the Forethought life insurance policy, Mr. H~ irrevocably transferred ownership of the policy to the Forethought Trust. This was a valid transfer in which Mr. H~ relinquished the right to control the policy, to surrender it for cash, or to obtain a loan against it. Thus, the remaining question is whether this Forethought LIFBC package is valid under Wisconsin law.

Prior to May 10, 1996, W.S.A. 632.41(2) provided that "No contract in which the insurer agrees to pay for any of the incidents of burial or other disposition of the body of a deceased may provide that the benefits are payable to the funeral director or any other person doing business related to burials." Accordingly, we have previously advised you that, for a LIFBC to be valid under Wisconsin law, there are several requirements: (1) a funeral provider cannot be named as a beneficiary of the insurance policy that is issued; (2) ownership of the life insurance policy must be assigned to a person or entity other than the funeral home; and (3) the assignee must be free to select any funeral provider to fund the client's funeral needs at the time of death.

Forethought Life Insurance Funded Burial Contract In Wisconsin-Viola L. K~, OGC-V (M~) to P~, ARC, SSA-V (3/21/95); Wisconsin Life-Insurance Funded Burial Agreements, OGC-V (M~) to P~, ARC, SSA-V (10/28/92).

We note that, following a statutory amendment effective May 10, 1996, 632.41(2)(b) now permits the assignment of the proceeds of the policy to a funeral provider, if certain requirements are met. Nonetheless, the statute preserves the requirement that a life insurance policy sold under the act shall permit the policyholder to designate a different beneficiary and a different funeral provider that is to receive the assignment of proceeds. W.S. 632.41(2)(b)(3).

The recent amendment does not affect Mr. H~'s Forethought LIFBC, which is equally valid under either version of the statute since (1) the beneficiary of the Forethought LIFBC is Mr. H~'s father, not a funeral provider; (2) Mr. H~ then irrevocably assigned ownership of the life-insurance policy to the Forethought Trust, not a funeral provider; and (3) although the beneficiary of the insurance policy, Mr. H~'s father, signed an affidavit stating that he would use the proceeds of the fund for Mr. H~'s burial expenses, he remained free to select a different funeral provider at any time.

We note the existence of a document entitled "Funeral Purchase Contract" between Mr. H~ and the Pratt Funeral Home. However, this does not appear to be an enforceable contract, given that several essential components are missing, such as the signature of the funeral home. At most this document indicates Mr. H~'s casket preference. Furthermore, Pratt Funeral Home itself has denied the existence of a pre-need contract with Mr. H~ and has indicated that Mr. H~ is free to change funeral provider at any time.

Your letter states that the insurance company indicated that it would distribute the proceeds of the policy to the Pratt Funeral Home on the death of Mr. H~. As you correctly point out, this cannot be the case, since there is no assignment of proceeds to the funeral home, nor is there any pre-need contract between Pratt Funeral Home and Mr. H~. Moreover, the life insurance policy states clearly that absent any assignment of proceeds by the insured, Forethought will disburse the death benefit to the beneficiary of the policy.

For these reasons, we believe that the Forethought LIFBC is valid under Wisconsin law and should not be counted as a resource for SSI purposes.

KK. PS 00-257 Supplemental Security Income - Wisconsin Trust - Sarah K. H~, SSN ~, Your Reference: S2D5G3

DATE: November 10, 1997

1. SYLLABUS

The trust in the opinion is not a countable resource for the following reasons:

1) The SSI recipient named in the trust does not have the authority to direct payments from the principal of the trust for her support and maintenance. 2) The trust cannot be revoked by the SSI recipient and the principal used for her support and maintenance. and 3) The SSI recipient is not the sole beneficiary of the trust and cannot revoke the trust without consent of additional parties.

2. OPINION

You inquired whether the funds held pursuant to the terms of a trust agreement should be treated as a countable resource for purposes of SSI eligibility for Sarah K. H~, the beneficiary of the trust.

The pertinent SSI regulations provide at 20 C.F.R. 416.1201(a) that:

[R]esources means cash or other liquid asset or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance. (1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

Thus, if an individual is able to obtain funds or convert property to cash to be used toward her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility determinations. Trust assets are a resource to the individual if she "has legal authority to revoke the trust and then use the funds to meet [her] food, clothing or shelter

needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust. . . ." POMS SI 01120.200(D)(1)(a). We have reviewed the documents presented to us and, for the reasons discussed below, we conclude that this trust should not be a countable resource under 20 C.F.R. 416.1201.

FACTS

This trust was established by order of the court in In re Matter of Guardianship of Sarah K. H~ No. 96-GN-34 (Jefferson County Circuit Court) and appears to have been funded with proceeds from a settlement between Sarah H~ and Allstate Insurance Company. The memorandum of inquiry notes that Sharon H~ is the mother and legal guardian of Sarah K. H~. The SSID attached to the request indicates that Sarah is incompetent and her mother is her legal guardian.

The trust names Sharon H~ as Grantor, and Carl H~ as Trustee. The trust contains two clauses regarding revocation of the trust. First, "[o]n the death of the beneficiary, the Trustee shall pay the expenses of the last illness, funeral and burial of the beneficiary out of the principal of the Trust Estate, unless the Trustee in his discretion determines that other provisions have been made for the payment of such expenses". H~ Trust, Article I, Section 3. Second, "[i]f at the death of Sarah Katie H~ there remains any portion of such share created for said child, after complying with paragraphs 1-3 herein, the Trustee shall terminate said Trust, and pay over to the surviving issue of Grantor said funds equally upon the same terms contained in Article II, Section 1., herein before stated." Article I, Section 4.

DISCUSSION

A trust may be a countable resource if the beneficiary can either: (1) direct the trustee to pay over trust principal for her support and maintenance; or (2) revoke the trust and then use the funds for her support or maintenance. A trust may be revocable either according to language in the trust document itself or according to law.

First, Ms. H~ does not have the authority to direct the payment of trust principal for her support and maintenance. A trust may be a resource "in the rare instance, where he/she has the authority under the trust to direct the use of the trust principal." POMS SI 01120.200(D)(1)(b). Ms. H~'s trust is not one of these rare instances. Payment of trust principal is to be at the discretion of the Trustee, Carl H~. H~ Trust, Article II, Section 1. Second, the trust provides that "[t]he determination of the Trustee with respect to the advisability of making any payments out of income or principal to the beneficiary, shall be conclusive on all persons howsoever interested in the Trust." H~ Trust, Article II, Section 3. Therefore, Ms. H~ does not have authority to demand payment from the trust, as Carl H~, Trustee, has exclusive authority over trust payments. In addition, even Mr. H~'s power to disburse trust principal is limited. Mr. H~, as Trustee, is prohibited from making any payment that will jeopardize Ms. H~'s eligibility for "state, federal, local, or other governmental subsidy or aid." H~ Trust, Article II, Section 1, 2. Therefore, Ms. H~'s access to the trust principal is restricted, and the trust principal should not be considered a countable resource for this reason.

Second, a trust may also be a countable resource if it may be revoked and trust proceeds used by the beneficiary for her support and maintenance. POMS SI 01120.200(D)(1)(a). A trust may be revocable either through the language of the trust itself or by the operation of state trust law. Ms. H~'s trust is not revocable in either manner.

Ms. H~'s trust provides for revocation only upon the death of Ms. H~ herself. H~ Trust, Article II, Sections 3 4. On Ms. H~'s death, the Trustee is to pay all expenses of the last illness, funeral, and burial, and then to terminate the trust. H~ Trust, Article II, Sections 3 4. Upon termination, the remainder of the trust principal is to be paid to "the surviving issue" of "Grantor". H~ Trust, Article II, Section 4. Neither provision empowers Sarah H~ to revoke the trust and use the trust principal for her support and maintenance, as both provide for termination only upon her death.

The next question, then, is whether Ms. H~ can revoke the trust pursuant to state trust law. Under Wisconsin law, a trust may be revoked by written consent of the grantor and all beneficiaries. Wisc. Stat. Ann. 701.12 (West 1981 Supp. 1996). It is necessary to determine, therefore, who is the grantor and who are the beneficiaries for purposes of determining the revocability of the trust.

The nominal grantor of Ms. H~'s trust is her legal guardian and mother, Sharon H~. Wisconsin law provides that the grantor of a trust is the person who, either directly or indirectly, creates the trust. Wisc. Stat. Ann. 701.01(4) (West 1981 Supp. 1996). The grantor of a trust is the person who provides the consideration for a trust, even if another is the nominal grantor. 76 Am. Jur. 55; POMS SI 01120.200(B)(2); POMS SI 01120.200(J)(2)(a). Ms. H~'s trust appears to have been funded with the proceeds of a settlement between Sarah H~ and Allstate Insurance Company. In re Guardianship of Sarah K. H~, Case No. 96-GN-34 (Jefferson

County Circuit Court, July 24, 1997). The consideration for the trust was property due to Sarah H~. Therefore, it appears that Sarah H~ is the true grantor of this trust, even though her mother, Sharon H~, has been named as the grantor. *See* Sara K~, ~ RA V (D~) to ARC-MOS 7-30-97, re: Wisconsin Trust.

The documents provided do not indicate whether the trust contains additional property that originated from a source other than Ms. H~, thus creating another grantor. If there is another grantor, his or her consent would also be required in order to revoke that aspect of the trust. In that case, the trust would not be a countable resource. Since we have determined that the trust should not be a countable resource even if Ms. H~ is the only grantor, these additional facts should not affect the opinion given.

The next issue, then, is who are the beneficiaries of the trust. A beneficiary is any person with a beneficial, or equitable ownership, interest in the trust. Wisc. Stat. Ann. 701.01(6) (West 1981 Supp. 1996); POMS SI 01120.200(B)(4). Wisconsin law appears to recognize that even unborn or unascertained contingent beneficiaries are beneficiaries for purposes of revocation by consent. *See* Wisc. Stat. Ann. 701.12(2) (West 1981 Supp. 1996); Restatement (Second) of Trusts 127 and Comment (b); Restatement 339 and Comment (b); 76 Am. Jur. 95. If there are any contingent beneficiaries other than Sarah H~, therefore, she cannot revoke the trust, and the trust is not a countable resource for purposes of determining SSI eligibility.

Ms. H~'s trust names as contingent beneficiaries "the surviving issue" of the "Grantor". H~ Trust, Article II, Section 4. It appears that the principles of Wisconsin trust law direct a finding that, while Sarah H~ is the grantor for purposes of determining whether the trust is revocable, Sharon H~ is defined in the trust document as "Grantor", and is presumably the person whose "issue" should be considered for purposes of determining who are the intended beneficiaries of the trust.

Wisconsin trust law provides that "[t]he paramount object of will or trust construction is the ascertainment of the testator's or [grantor's] intent." *Estate of Furmanski v. Furmanski*, 196 Wis. 2d 210, 215 (Wis. Ct. App. 1995). In determining the grantor's intent, one must first look to the trust document itself. *Furmanski*, 196 Wis.2d at 215; *Estate of Barr v. Barr*, 78 Wis.2d 254, 258 (Wis. Sup. Ct. 1977). If there is no ambiguity in the trust document itself, the language of the trust should control, viewed in light of the circumstances surrounding its drafting. *Barr*, 78 Wis.2d at 258; *Furmanski*, 196 Wis.2d at 568.

The language of Ms. H~'s trust is unambiguous. Sharon H~ is named as grantor, and the trust principal is to be divided equally among her surviving issue upon Sarah H~'s death. H~ Trust, Article II, Section 4. Even if we were to look further into the circumstances surrounding the creation of the trust, it is clear that Sharon and Sarah H~ intended for Sharon H~ to be the grantor. The parties could have named Sarah H~ as the sole beneficiary of her own trust, but did not do so. Therefore, the contingent beneficiaries of this trust are the issue of Sharon H~ that survive Sarah H~'s death.

The documents provided to us do not contain information regarding whether Sharon H~ currently has, or is capable of having in the future, children other than Sarah H~. If Sharon H~ currently has, or is capable of bearing children, Sarah H~ will not be able to revoke the trust. *See* Restatement (Second) Trusts 340 and Comments (d) (e); 76 Am. Jur. 93. Wisconsin law seems to direct the same result. Wisconsin law requires the appointment of a guardian ad litem to represent the interests of the unborn or unascertained beneficiaries of a trust when the grantor and other beneficiaries seek agreement to revoke the trust. Wisc. Stat. Ann. 701.12 (West 1981 Supp. 1996). Therefore, a trust cannot be revoked (or modified) without the approval of all beneficiaries, even the unascertained ones. *See Berg v. Berg*, 142 Wis.2d 935 (Wis. Ct. App. 1987).

Even if Sarah H~ is deemed the grantor for purposes of determining who are contingent beneficiaries, Ms. H~ does not appear to be the sole beneficiary. Where a grantor intends to create a contingent interest in his heirs, he may do so. *See* Restatement (Second) Trusts 127 and Comment (b); POMS SI 00120.200(J)(2)(b); Clarification of Regional SSA Program Circular 94-05 Concerning Trusts RA V (W~) to ARC, Programs, 5-24-95. Therefore, even if Sarah H~ is the grantor, she has manifested an intent to name her surviving issue as contingent beneficiaries, with a remainder interest in the trust principal. In either case, Sarah H~ is not the sole beneficiary of the trust.

Since Ms. H~ is not the sole beneficiary of the trust and cannot revoke the trust without the consent of additional parties, the trust is not revocable and should not be counted as a resource for purposes of determining SSI eligibility. *See* Sarah L. B~, ~ RA V (Lee) to Acting ARC-MOS 6-6-97, re: Wisconsin Trust.

It should be noted, however, that any disbursements of trust principal or income to Sarah H~ may be income for SSI purposes. POMS 01120.200(E)(1). Any disbursement of cash directly to Sarah H~, or paid to a third party in exchange for food, shelter, or clothing for Ms. H~, will represent in-kind income to Sarah H~. *Id.* at 01120.200(E)(1)(a) (b).

CONCLUSION

For the above reasons, we believe the trust principal should not be considered a resource when determining Ms. H~'s eligibility for SSI.

LL. PS 00-247 SSI-Wisconsin-Review of a Trust for Michael G~

DATE: February 23, 2000

1. SYLLABUS

This opinion concerns a testamentary trust established for an SSI recipient by his aunt in her will. The opinion explains that the testamentary trust is not countable as a resource because the recipient has no authority to revoke the trust, sell his interest in the trust, or direct the use of the trust assets.

2. OPINION

Subject:

Michael G~, an SSI recipient, is the beneficiary of a testamentary trust created by his aunt, Lucille T~. You asked whether the funds held pursuant to the terms of the trust agreement should be treated as a countable resource to Mr. G~ for purposes of waiving an SSI overpayment. Based on our review of the documents provided, and for the reasons set out below, we believe that the assets in the trust are not a countable resource to Mr. G~.

FACTS

On June 17, 1992, Lucille T~ executed the Amendment to Lucille V. T~ Revocable Trust (hereafter "trust") in which she provided to leave, upon her death, a portion of her estate in trust (hereafter "separate trust") to her nephew, Michael G~, for the duration of his life. Trust Agreement, Article III, B, C(4). The Associated Citizens Bank is named trustee of the trust and the separate trust. Trust Agreement, Article VII, A. The trust agreement gives the trustee discretion to distribute the income and principal from the separate trust to provide for Mr. G~' "support, welfare and health," but directs that payments "shall be reduced or withheld" as necessary to preserve his "continued eligibility for Medicaid, Social Security Disability income, or any similar income or services." Trust Agreement, Article III, B, C(4). The trust agreement includes a "spendthrift" provision preventing Mr. G~ from assigning his rights. Trust Agreement, Article III, B, C(10). The separate trust may be terminated at the trustee's discretion if the fair market value of the separate trust assets does not exceed $10,000.00. Trust Agreement, Article X. Otherwise, the separate trust will terminate upon Mr. G~' death. Mr. G~ has the power to appoint the remainder of the separate trust by will. Trust Agreement, Article III, B, C(4). If he does not exercise his power to appoint, then "any remainder at his death shall be given to his brothers and sisters in equal shares or to his heirs by right of representation." *Id.*

DISCUSSION

I. Applicable Law

A "resource" is cash, other liquid assets, or any real or personal property that an individual owns and can convert to cash to be used for his or her support and maintenance. 20 C.F.R. 416.1201(a) (1999). If the individual has the right, authority, or power to liquidate the property, it is a resource. *Id.* Trust assets are a resource if the individual can direct the use of the assets to meet his need for food, clothing, and shelter, or if he can terminate or revoke the trust and obtain unrestricted access to the trust assets. Program Operations Manual System (POMS) SI 01120.105 (A)(1), 01120,200(D)(1)-(3). Whether the claimant can terminate the trust or direct use of the trust assets depends on the terms of the trust declaration and applicable state law. POMS SI 01120.200(D)(2). An individual's beneficial interest in a trust also may be a resource if the individual can sell that interest. *See* Supplemental Security Income - Wisconsin Trust - Christopher J. M~, Jr., (~), OGC-V (B~) to M~, ARC-MOS (June 9, 1999) at 5.

II. If Ms. T~ is Alive, the Separate Trust Assets Are Not a Resource to Mr. G~.

The Trust Agreement is a living trust, executed and revocable by Ms. T~ during her lifetime. Trust Agreement, Article I, A. If Ms. T~ is still alive, she can revoke the trust. *See* Restatement (Second) of Trusts, 330, 332, 367. Thus, Mr. G~ has no beneficial interest in the separate trust assets while Ms. T~ is alive.

III. If Ms. T~ is Deceased, the Separate Trust Assets Are Not A Resource to Mr. G~.

A. Mr. G~ Has No Authority To Direct The Use of the Separate Trust Assets.

Upon Ms. T~'s death, the Trust Agreement becomes irrevocable, and Mr. G~ becomes the beneficiary of the separate testamentary trust. The Trust Agreement gives the trustee absolute discretion over disbursements from the separate trust, except that the trustee can make disbursements only to the extent that such disbursements will not disqualify Mr. G~ from receipt of Medicaid, SSI or other government benefits. Trust Agreement, Article III, B, C(4). Thus, under the Trust Agreement, Mr. G~ does not have the power to direct use of the separate trust assets for his support and maintenance.

B. Mr. G~ Has No Authority To Revoke the Separate Trust.

A trust may be revocable by the language of the trust or pursuant to state law. Mr. G~ may not revoke the separate trust by either manner. The Trust Agreement does not state whether the separate trust is revocable. Under the Trust Agreement, however, the separate trust may be terminated if either of two conditions are met. First, the separate trust may be terminated at the discretion of the trustee if the fair market value of the separate trust assets is less than $10,000.00. Trust Agreement, Article X. Otherwise, the separate trust will terminate upon Mr. G~' death. Trust Agreement, Article III, B, C(4). Neither provision, however, empowers Mr. G~ to revoke the separate trust and use the separate trust principal for his support and maintenance. Thus, the terms of the Trust Agreement do not indicate that the separate trust is revocable by Mr. G~.

The next issue, then, is whether Mr. G~ can revoke the separate trust pursuant to state law. Under Wisconsin law, a trust may be revoked, terminated or modified by written consent of the grantor and all beneficiaries. *See* Wisc. Stat. Ann. 701.12 (West 1981 Supp. 1999). Wisconsin law further provides that a grantor of a trust is the person who, either directly or indirectly, creates the trust. *See* Wisc. Stat. Ann. 701.01(5) (West 1981 Supp. 1999). Ms. T~ is the grantor of the trust because she executed the Trust Agreement and established the embedded separate testamentary trust. If Ms. T~ is deceased, she cannot consent to the revocation of the separate trust. Consequently, the separate trust would be irrevocable under Wisconsin law.

Moreover, the Trust Agreement provides that Mr. G~ has the power to "appoint the remainder of the [separate] trust by Will. In the event that he fails to exercise this power to appoint, then any remainder at his death shall be given to his brothers and sisters in equal shares or to his heirs by right of representation." Trust Agreement, Article III, B, C(4). This provision creates residual or "contingent" beneficiaries whose consent must be obtained in order for the trust to be revoked. We do not assume that they will consent to terminate the separate trust. Because Mr. G~ cannot revoke or terminate the separate trust at will, the separate trust is irrevocable.

C. Mr. G~ Has No Authority To Assign His Interest in the Separate Trust.

Where a beneficiary does not have the power to direct use of the trust for his support and maintenance and does not have the power to revoke the trust on his own, the trust assets may still be a resource for SSI purposes if the beneficiary can sell his interest in the trust and use the proceeds for his support and maintenance. 20 C.F.R. 416.1201(a)(1). The Trust Agreement contains a spendthrift clause, stating that "neither the income or principal shall be susceptible of assignment, anticipation, provocation or seizure by legal process. Trust Agreement, Article III, B, C(10). In addition, the trustee has full discretion to make or withhold disbursements from the separate trust. Trust Agreement, Article III, B, C(4). Thus, Mr. G~' interest in the separate trust would have little or no fair market value.

Since Mr. G~ cannot direct use of the separate trust assets for his support and maintenance, revoke the separate trust, or sell his interest in the separate trust, the separate trust assets do not constitute a countable resource for SSI purposes. 20 C.F.R. 416.1201; POMS SI 01120.200(D). We note, however, that any amounts actually distributed to Mr. G~ from the separate trust would be income to him, and any disbursement to a third party in exchange for food, shelter, or clothing for Mr. G~ would be in-kind income to Mr. G~. POMS SI 01120.200(E)(1)(a)-(b).

CONCLUSION

In summary, the assets of the separate trust are not countable resources because Mr. G~ cannot direct that the trustee use the trust assets for his support and maintenance; revoke or terminate the trust to obtain the assets; or sell or otherwise transfer his interest in the trust.

MM. PS 00-200 Whether Trust Established By A Legally Incompetent Grantor That Solely Benefits Grantor And Those Whom the Grantor Might Appoint in Her Will Is A Revocable Trust Under Wisconsin Law And Hence A Countable SSI Resource; Theresa L. D. G~, SSN ~

DATE: March 29, 1995

1. SYLLABUS

At issue in this opinion is if a trust established by a legally incompetent grantor who is also the sole beneficiary of the trust can be revoked by the grantor/sole beneficiary.

Wisconsin law recognizes that when the grantor of a trust is the sole beneficiary of the trust, the grantor/sole beneficiary can revoke the trust even if the trust states that it is irrevocable.

An incompetent in Wisconsin could revoke the trust for which he/she is the grantor/sole beneficiary as the court and guardian ad item would be under an obligation to act in the grantor/sole beneficiary's best interest.

2. OPINION

This is with reference to your January 26, 1995 request for advice as to whether the interest of Theresa D. G~, an SSI recipient, in a trust was a countable asset for Supplemental Security Income (SSI) purposes. Your memorandum and the trust document you attached indicate that Ms. D. G~, a Wisconsin resident and legal incompetent, acted through her Guardian Ad Litem to establish a trust with her proceeds from a personal injury lawsuit settlement. Her incompetency is apparently the result of the injuries she sustained in the automobile accident that led to the lawsuit./

Ms. D. G~ is the grantor of the trust which provides that the trustee shall pay to Ms. D. G~ during her life time so much of the income and principal as the trustee determines is desirable to supplement the other benefits she receives but that the trust's income and assets shall not be used for food, clothing or shelter. The trust states that it is irrevocable. The trust also provides that upon the death of Theresa D. G~, the balance of the trust shall be divided pursuant to the terms of Ms. D. G~'s last will. You attached a copy of Ms. D. G~'s current will.

We conclude that trust is revocable and is, therefore, a countable resource for SSI purposes. If Ms. D. G~ revokes the trust, she will have unrestricted access to the assets that had been the trust's principal and could use those assets for her support and maintenance.

While under most circumstances a trust's provisions can bar the grantor from revoking the trust, most states including Wisconsin recognize that where the grantor is the sole beneficiary of the trust, the grantor can revoke the trust. Restatement (Second) of Trusts, 339 (1959); 76 Am. Jur. 2d Trusts 96 (1975); Wis. Stat. 701.12. In Wisconsin, a trust may be revoked, modified or terminated "By written consent of the settlor [grantor] and all beneficiaries of a trust or any part thereof." Wis. Stat. 701.12(1). Accordingly, if the grantor is the sole beneficiary, the grantor alone can revoke the trust in Wisconsin.

The ability of a grantor/sole beneficiary to revoke a trust is not limited by language in the trust that purports to make the trust irrevocable nor is the power to revoke defeated if the purposes to the trust have not yet be achieved. Restatement (Second) of Trusts, 339 (1959); 76 Am. Jur. 2d Trusts 96 (1975). Therefore, the language in the D. G~ trust purporting to make it irrevocable does not bar Theresa D. G~ from revoking the trust if she is the sole beneficiary.

Although the trust does direct that the balance of trust assets at Theresa D. G~'s death are to be "divided pursuant to the terms and conditions of the Last Will and Testament of Theresa L. D. G~," Ms. D. G~ is still considered the sole beneficiary of the trust under generally accepted trust law. Where no individual beneficiaries other than the grantor and no class of beneficiaries are named in the trust, the grantor is considered the sole beneficiary even though the trust provides that the balance of the trust's assets at the grantor's death go to those appointed in the grantor's will. Under the Restatement (Second) of Trusts, the grantor is considered the sole beneficiary in the following instances: (1) trust pays grantor income for life and after grantor's death pays the principal to whoever is appointed in grantor's will or by deed or, in absence of such an appointment, to the grantor's heirs or next of kin, (2) trust pays grantor income for life and after grantor's death pays the principal to grantor's estate, and (3) trust pays grantor income for life and makes no provisions for who gets principal after grantor's death. Restatement (Second) of Trusts, 127 (comment b including illustration 2), 339 (comment b including illustration 2) (1959); *see also Doyle v Bank of Montclair et al.*, 9 N.J.Super. 586, 76 A.2d 41, 43 (1950) (grantor held to be sole beneficiary of trust that paid grantor income for life and after grantor's death paid the principal to whoever was appointed in grantor's will or by deed or, in absence of such an

appointment, to the grantor's heirs or next of kin); *Dunnett v. First National Bank Trust Co.*, 184 Okl. 82, 83, 85 P.2d 281, 283 (1938) (same); *Bottimore v. First Merchants National Bank,* 170 Va. 221, 227, 231, 196 S.E. 593, 594, 596 (1938) (same)./

Accordingly, the persons mentioned in Theresa D. G~'s will are not considered beneficiaries or contingent beneficiaries under the trust and their consent would not be necessary to revoke the trust. The rationale for this rule of construction is that such a trust permits the grantor to eliminate any potential beneficiaries other than the grantor. Although the trust may provide that those appointed in the will may receive certain benefits after the grantor dies, the grantor is not required to execute a will and, even if such a will were executed, the grantor can revoke or modify the will at the grantor's discretion./ Therefore, the rights of these potential beneficiaries are illusory during the grantor's lifetime because the grantor can eliminate these rights at the grantor's sole discretion.

The final issue here is whether the trust should be considered revocable by Theresa D. G~ where she is legally incompetent. The general rule is that "If the settlor [grantor] is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust . . . ." Restatement (Second) of Trusts, 339 (1959) (emphasis added). In Wisconsin, however, "such consent [to revoke or modify the trust] may be given on behalf of a legally incapacitated . . . beneficiary by the court after a hearing in which the interests of such beneficiary [is] represented by a guardian ad litem." Wis. Stat. 701.12(2). As the court and guardian ad litem would be under an obligation to act in the incompetent's best interests, an incompetent in Wisconsin could therefore revoke the trust for which the incompetent is the sole beneficiary if it were in his or her best interests.

While the Wisconsin statute does refer to an incompetent "beneficiary" and not to an incompetent "grantor," we do not believe this precludes Theresa D. G~ from revoking the trust. As Theresa is both the grantor and beneficiary, the guardian ad litem and court can also act in her capacity as grantor. Moreover, if an incompetent in Wisconsin cannot act as a grantor through the action of the incompetent's guardian ad litem and the court, then Theresa D. G~'s action as grantor to create the trust would be invalid. Such invalidity would mean that there is no trust, and the assets purportedly held by the trust are in fact held by Theresa D. G~, also making the assets countable resources for SSI purposes.

NN. PS 00-152 Supplemental Security Income-Wisconsin Trust, Sarah L. B~, SSN ~

DATE: June 6, 1997

1. SYLLABUS

The issue involves whether funds held in a trust are a resource when there are contingent beneficiaries and under the terms of the trust, any revocation results in the immediate payment of the trust assets to the contingent beneficiaries.

Under Wisconsin law, all trusts may be terminated or modified only with written consent of the Settlor and all beneficiaries, if any, to the trust. The trust principal would not be counted as a resource because the individual lacks the unilateral right, power, or authority to liquidate the trust. In addition, any revocation would result in payment of the trust assets to the contingent beneficiaries. Since revocation would not allow the individual to convert the trust assets for use toward his/her support and maintenance, the funds in the trust are not a resource for SSI purposes.

2. OPINION

You have requested an opinion on whether the funds held pursuant to the terms of a trust agreement should be treated as a countable resource for purposes of eligibility for SSI for Sarah L. B~, the beneficiary of the trust.

The pertinent SSI regulations provide at 20 C.F.R. 416.1201 that:

resources means cash or other liquid asset or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource....

Thus, if an individual is able to obtain funds or convert property to cash to be used toward her support and maintenance, such funds or property are to be included as resources for purposes of SSI eligibility determinations. We have reviewed the documents provided to us and, for the reasons discussed below, we conclude that this trust should not be a countable resource under 20 C.F.R. 416.1201.

DISCUSSION

The memorandum of inquiry refers to Sarah B~ as the Settlor even though the actual terms of the trust refer to her father, Marvin B~, as both Settlor and Trustee. *See* Introduction and Article I of *Borth's* Trust. We assume that you consider Sarah to be the Settlor because she indirectly funded the subject trust, and her father is the nominal Settlor. *See* Wisc. Stat. Ann. 701.01(4); *see also* 76 Am. Jur. 2d 55 ("The settlor of a trust is the person who provides the consideration for the trust, even if another entity nominally creates the trust"). The information provided to this office does not indicate the source of trust assets, or whether additional assets are included in the trust.

For purposes of determining whether the subject trust is a countable resource, however, it does not ultimately matter whether Sarah or her father was the de facto Settlor. It also does not ultimately matter whether the subject trust was technically "revocable" or "irrevocable." Under Wisconsin law, all trusts may be terminated or modified only with written consent of the Settlor and all beneficiaries, if any, to the trust. *See* Wisc. Stat. Ann. 701.12 (West 1981 Supp. 1996). As you accurately pointed out, Holly K. B~, Michelle A. B~, and Brian S. B~ are all contingent beneficiaries to the trust. *See* Wisc. Stat. Ann. 701.05(2)-(3) (West 1981 Supp. 1996); *see also* Restatement (Second) of Trusts 127 and comment (b); 339 and comment (b) (1959); 76 Am. Jur. 2d 95 (a trust cannot be terminated by consent where there exist contingent beneficiaries that cannot be determined until the happening of certain events).

The written consent of the identified contingent beneficiaries and the Settlor is required to revoke the subject trust, and SSA policy would prohibit the trust principal from being counted as Sarah's resource on revocability grounds because she lacks the unilateral right, power, or authority to liquidate the trust. *See* Deborah A. N~, ~ RA V (L~) to Acting ARC-MOS 7-22-96, re: Wisconsin Trust.

It is also significant that under the express terms of the subject trust, any revocation results in the immediate payment of trust assets to the contingent beneficiaries. *See Borth's* Trust Article IV. In particular, the trust provisions state that should any governmental agency withhold support payments because of the trust existence, the trust shall terminate with all proceeds to be immediately paid to the contingent beneficiaries. *See Borth's* Trust Article 1, Subsection C. Thus, even if Settlor and the contingent beneficiaries consented to revocation in writing, the trust assets would not revert to Sarah. Revocation would not allow Sarah to convert the trust assets for use toward her support and maintenance, and as such, the trust should not be considered an available resource for SSI consideration. *See* 42 U.S.C. 1382b; 20 C.F.R. 416.1201 (A "resource," for the purpose of being eligible for SSI benefits, is defined as property that the beneficiary owns and could convert to cash, or property over which the beneficiary has the right, authority, or power to liquidate).

Finally, the Program Operations Manual System ("POMS") states that if the claimant is a beneficiary of a trust and the beneficiary's access to the trust principal is restricted, then the principal is not a resource for the claimant. POMS 01120.105(A)(2). The subject trust has been tailored to preclude the Trustee from using trust assets to pay for Sarah's primary needs, and it specifically limits the Trustee to furnishing services such as dental treatment, education, special training, and education. *See Borth's* Trust Article I, Subsection C. This section indicates that Sarah cannot, as the beneficiary, compel the Trustee to distribute trust funds in a manner that would endanger her eligibility for public assistance under the unearned income provisions of the regulations. *See* 20 C.F.R. 416.1123, 416.1124. *See* Laura S~, ~, RA V (B~) to Acting ARC-POS Region V (M~) 5/27093, re: Wisconsin Supplemental Trust. This fact, along with the foregoing reasons, demonstrates that the subject trust should not be a countable resource under 20 C.F.R. 416.1201.

A. PS 03-039 SSI-Wisconsin-Review of the Life Insurance Funded Burial Contract of William E~, ~--REPLY Your Reference: S2D5G6 Our Reference: 02P069

DATE: November 13, 2002

1. SYLLABUS

The opinion in this case concerns whether or not a burial contract or the life insurance policy used to fund the burial contract are considered resources for purposes of SSI eligibility. For SSI purposes, assets are considered a resource if an individual owns them and can convert them to cash to be used his/her support and maintenance. In this case, the life insurance policy is not a resource because the beneficiary never owned the policy nor did he have the power to surrender the policy for cash. This opinion also addresses the issue of whether or not the burial trust that was funded with the life insurance policy is considered a

resource. The trust is not considered a resource because the beneficiary could not revoke the trust and use the funds for his support and maintenance.

2. OPINION

You asked whether the burial contract for William E~ was a countable resource to William E~ for SSI purposes. We conclude that neither this burial contract nor the life insurance policy used to fund the contract are resources to William E~. William was never the owner of the insurance policy on his life, has no right to claim the cash surrender value of the policy, and does not have the right to sell the contract with the funeral provider.

Background

On May 30, 2001, Jerry E~, brother to William E~, purchased an insurance policy on the life of William E~. Jerry E~ was the owner of the policy and responsible for paying the $1,500 single premium payment. William E~ was given no rights under or ownership interest in this policy. Also on March 30, 2001, Jerry E~ assigned ownership of the policy to Church and Chapel, a provider of funeral services and merchandise. In return, the funeral provider transferred the policy to a funeral trust and agreed provide funeral services for William E~. Jerry E~ retained the ability to change the beneficiary of the policy to another funeral provider who provides or will provide funeral services at William E~'s death, but waived rights to the surrender value, proceeds, and any income from the policy.

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his support and maintenance. *See* 20 C.F.R. § 416.1201(a). A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. *See* 20 C.F.R. § 416.1230. William E~ never owned the life insurance policy and did not have the ability to surrender this policy on his life for cash or to recover the premiums. Therefore, the life insurance policy is not a resource to him under this rule. Nor would William have the right to sell the right to receive the funeral under the contract because he was not a party to that contract. Furthermore, it seems unlikely that anyone would purchase it, since it is funded with a life insurance policy on his life.

A trust established by an individual on or after January 1, 2000, as this one is, generally will be considered a resource, under federal law, if it is revocable, or, even if it is irrevocable, to the extent that payments from the trust could be made to or for the benefit of the individual. 42 U.S.C. § 1382b(e)(3)(B); POMS SI 01120.201D.1.- SI 01120.201D.2. Because William E~ did not establish this trust, this rule does not apply to make this trust a countable resource for him. He cannot revoke the trust, since he did not create it or provide the funds. He cannot reach the trust funds to provide for his support and maintenance. And, he presumably could not sell his beneficial interest in the trust, since it is funded with a life insurance policy payable only on William's death. *See* POMS SI 01120.200D.

Furthermore, even if the policy or the contract were resources to William, the resource would be excludable under 20 C.F.R. §§ 416.1230 & 416.1231(b). 20 C.F.R. § 416.1231(b)(1) (2002) provides that up to $1,500 in funds may be set aside for burial expenses of the individual and excluded when determining resources. These amounts may include burial contracts, burial trusts, or other instruments with a cash value clearly designated for the individual's burial expenses, so long as these assets are kept separately from non-burial related assets. 20 C.F.R. § 416.1231(b)(3) (2002). The assets in this case are kept separately and clearly designated for burial expenses of William E~. Therefore, the $1,500 exclusion should apply to the burial agreement for William E~. POMS SI 01130.41D. Likewise, 20 C.F.R. § 416.1230 provides that life insurance policies are excludable for up to $1,500 in face value. POMS SI 01130.300B.2.

CONCLUSION

We believe do not believe that this burial contract, the life insurance policy, or the funeral trust is a resource to Willliam E~. Even if this were a resource, however, it would appear to be excludable under the life insurance exclusion or the burial funds exclusion.

Sincerely,

Lucille G. M~
Acting Regional Chief Counsel,
Region V

By:_____
Malinda H~
Assistant Regional Counsel

B. PS 02-135 Review of a Resource Needed for SSI Claimant's Physical Condition Alicia W~, SSN ~

DATE: September 16, 2002

1. SYLLABUS

This opinion addresses whether a personal effect (in this case, a piano) owned by an SSI recipient, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required by her physical condition under the household goods and personal effects exclusion. This is essentially an evidentiary issue; i.e., the key is whether the fact finder in the FO has sufficient evidence to determine that the piano is required by the individual's physical condition. Under 20 CFR 416.1216(c), certain household goods and personal effects are excluded from SSI resource counting if they are "required because of a person's physical condition." As long as there is sufficient evidence for the fact finder to determine that the piano (or similar item) is required as treatment or therapy for the individual's physical condition, then the item could be excluded as a resource. If the fact finder cannot determine that the piano (or similar item) is required, then the current market value of the piano (or similar item) is subject to the $2,000 maximum exclusion for household goods and personal effects [20 CFR 416.1216(a) - 20 CFR 416.1216((b)]. It should be noted that the exclusions discussed above do not appear in the Social Security Act.

2. OPINION

You asked whether a piano, owned by SSI claimant Alicia W~, should be considered a countable resource for SSI purposes, or whether it can be excluded as a resource required because of her physical condition. We conclude that, although there is no caselaw or other legal authority interpreting the applicable regulation, 20 C.F.R. 416.1216(c), the Agency may consider the piano as an excludable resource, under 20 C.F.R. 416.1216(c), provided Ms. W~ can show that playing the piano is required as treatment or therapy for her physical condition. If the Agency finds that the piano is not so required, further development and consideration may be warranted to determine the actual current market value of the piano.

FACTS

Alicia W~ owns a baby grand piano that the Wausau Field Office reported is worth $7000. It is not clear how the valuation of $7000 was reached. For purposes of this memorandum, we assume that $7000 is likely the amount Ms. W~ paid for the piano. Ruth J~, a benefit specialist with the Aging and Disability Resource Center of Marathon County, has advised SSA that Ms. W~ tried to sell her piano by advertising it in a local newspaper and with the Wausau Conservatory of Music and by contacting several local churches. Two individuals expressed interest, but Ms. W~ received no offers to buy the piano. We do not know what price Ms. W~ asked or whether anyone would be willing to purchase the piano for less than her asking price. Ms. J~ stated, in April 2002, that a local music store sold only one comparable piano in the preceding year. The price that the music store charged was not reported. Although Ms. J~ indicated that she was providing the field office with a statement from the music store, no such statement was included in the materials forwarded to us. Ms. J~ also reported that Ms. W~ uses the piano daily and that she is the only member of her household.

Ms. W~ has a congestive heart condition and hypertension. On December 12, 2001, her physician, Arthur W~, M.D., wrote a letter stating that playing piano provided Ms. W~ with positive health benefits in terms of stress relief, which resulted in positive benefits for her hypertension. Dr. W~ further stated that being forced to sell her piano in order to receive SSI "would have a deleterious effect on her overall health."

DISCUSSION

The Social Security Act (the Act) provides that certain resources are excludable resources for SSI purposes. 42 U.S.C. 1382b. Among the resources that may be excluded are household goods and personal effects, but only to the extent that their total value does not exceed the $2000 limit set by the Commissioner. 42 U.S.C. 1382b(2)(A); 20 C.F.R. 416.1216(b). The regulations define "personal effects" to include musical instruments. Thus, a portion of the value of Ms. W~'s piano could be excluded as a personal effect, provided the total value of her other personal effects and household goods is less than $2000. However, it

appears that Ms. W~'s piano may be worth considerably more than that. We must determine, therefore, whether her piano may be excludable for some other reason, or whether the value of her piano can be considered less than previously assumed.

Exclusion for Items Required for Person's Physical Condition

The exclusion for household goods and personal effects that are required because of a person's physical condition does not appear in the Act. *See* 42 U.S.C. 1382b. The exclusion became a part of SSI regulations effective October 20, 1975. 40 Fed. Reg. 48911, 48916 (October 20, 1975). Neither the preamble to the final regulation published on that date nor the preamble to the proposed regulation states the rationale for the exclusion or gives any further clarification as to its application. *See* 39 Fed. Reg. 2487 (January 22, 1974); 40 Fed. Reg. at 48911. Thus, we cannot ascertain from those publications whether the Agency intended for the exclusion to apply to items such as a piano that provide "positive health benefits" in terms of an individual's physical condition. The POMS, likewise, provides no guidance in this situation. *See* POMS SI 01130.430. We were unable to find any caselaw interpreting the regulatory provision or any OGC precedential opinion on the subject. Similarly, we found no caselaw regarding other needs-based federal entitlement programs that might be helpful in interpreting 20 C.F.R. 416.1216(c).

The Internal Revenue Code (IRC), however, includes a personal income tax deduction for medical care expenses. 26 U.S.C. 213(a). The definition of "medical care" includes amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . .." 26 U.S.C. 213(d)(1)(A). The Internal Revenue Service (IRS) addressed the issue of whether the cost of a piano could be deducted under the IRC medical care provision in two private letter opinions. In the first, parents bought a piano so that their child, who had polio, could strengthen her finger muscles and improve her posture. Priv. Ltr. Rul. 59-03205410A (March 20, 1959), 1959 WL 59702. The IRS determined that, if the use of the piano was prescribed by a physician to mitigate the effects of the child's illness, and if the child was the only one to use the piano, a portion of the cost could be deducted as a medical care expense. *Id.* The portion of the piano's cost that could be deducted was "the minimum cost of a piano of a quality sufficient for the therapeutic purposes" subject to the ceiling of 7.5% of adjusted gross income, as provided in 26 U.S.C. 213(a). Priv. Ltr. Rul. 59-03205410A. Another private letter ruling states that, after suffering a nervous breakdown, a taxpayer's daughter "was induced by her doctors to resume piano lessons, in view of her particular aptitude in this area, as it was hoped that this would be good therapeutic treatment and would create a motivation toward recovery." Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. The taxpayer could not find a suitable used piano, so he bought a new piano for $800. The IRS held that the taxpayer could take a medical care deduction for "an amount which does not exceed the minimum cost of a piano of a quality sufficient to effect the prescribed therapy," subject to the limitations in 26 U.S.C. 213. Priv. Ltr. Rul. 63-02264710A (February 26, 1963), 1963 WL 14192. To the extent, however, that the expenditure was "elaborate," i.e., beyond the need for the prescribed medical therapy, it was not deductible because it was not directly related to medical care. *Id.*

The IRC provision relied upon in these two private letter rulings is not identical to the resource exclusion provision in the Social Security Regulations. The IRC section would apply to expenditures for treatment of a mental condition as well as a physical condition, but the Social Security regulation would allow exclusion of an item only if it is required because of the SSI claimant's physical condition. Compare 26 U.S.C. 213(d)(1)(A), 20 C.F.R. 416.1216(c). While the Social Security regulation allows for exclusion of a resource "required because of a person's physical condition," 20 C.F.R. 416.1216(c) (emphasis added), the IRC provision, 26 U.S.C. 213(d)(1), allows a tax deduction for "amounts paid" for treatment (emphasis added). Although the IRC section does not address whether an expenditure is medically required, the private letter rulings provide some support for the conclusion that, in some cases, piano playing may be prescribed as part of an individual's medical treatment.

There is nothing in the Social Security Act or Social Security Regulations to direct a conclusion on this issue. We think it reasonable, however, to conclude, based on the private letter rulings, that there are situations in which a doctor may reasonably require a patient to play a piano as a necessary part of treatment or therapy for the patient's physical condition. Unlike the medical care deduction provision in the IRC, the SSI exclusion for items required for a person's physical condition does not place any limitation on the value of items which can be excluded, even though some of the items listed, such as an engagement ring or a dialysis machine, could have considerable monetary value. 20 C.F.R. 416.1216(c); *see also* POMS SI 01130.430 ("Items Excluded Regardless of Value") (emphasis added).

The letter from Ms. W~'s physician states that it is important that she enjoy the benefits of her piano because it relieves her stress and, consequently, has a positive effect on her hypertension. The doctor further states that selling the piano to receive SSI benefits would be "deleterious" to her health. In the absence of evidence casting doubt on the doctor's credibility, we think this statement may be sufficient for a fact-finder to conclude that the piano is required for Ms. W~'s physical condition. You may want to obtain clarification from the doctor, however, that he considers playing the piano a required part of Ms. W~'s

treatment or therapy for her hypertension or her congestive heart condition. You may also want to verify that the "deleterious" effect of selling the piano refers to her inability to receive the therapeutic benefit of playing the piano, rather than to other factors, such as a contemplated elevation of her blood pressure because selling the piano would upset her.

If you find that playing a piano is required for Ms. W~'s physical condition and she is the only person who will use the piano, the entire value of the piano should be considered an excludable resource. If, however, you find that playing piano is not required for Ms. W~'s physical condition, it will be necessary to determine the piano's value.

Determining the Current Market Value

If you determine that the piano is not an excludable resource under 20 C.F.R. 416.1216(c), the current market value of the piano will be subject to the $2000 maximum exclusion for household goods and personal effects. 20 C.F.R. 416.1216(a) - 20 C.F.R. 416.1216(b). Contrary to Ms. J~'s contention, the fact that Ms. W~ was unable to sell her piano does not necessarily mean that the value of the piano is zero. The piano likely has some value, even if it is not the $7000 purchase price. It is possible that the value of the piano is zero, however, if, for example, a buyer's expense to move the piano from Ms.W~'s home to a new location exceeds the price that a buyer would ordinarily pay for the piano.

The information provided to us did not indicate what price Ms. W~ was asking for the piano when she advertised it. It may be that she was simply asking a higher price than the current market value and, therefore, did not get an offer. We suggest further development to ascertain the current market value of the piano. For example, did Ms. W~ get any offers to buy the piano and, if so, what amount was offered? Ms. J~ indicated that the local music store sold one comparable piano over the past year. What was the sale price? Are there other music stores in the area that carry comparable pianos? If so, what price do they charge? Has Ms. W~'s piano been appraised? How much would a pawn shop pay for the piano, given that it could be difficult to sell quickly?

We note that POMS SI 01150.200 contains a provision that, under certain circumstances, allows for conditional SSI benefits for a limited period while an individual attempts to sell a non-liquid resource. The individual must agree to sell the resource at the current market value within a specified period and use the proceeds to refund the overpayment of conditional benefits. POMS SI 01150.200B.1. The period of conditional benefits where personal property is concerned would generally end after three months, except that there could be one three-month extension granted for good cause. SI 01150.201A. The individual must make reasonable efforts to sell the resource, taking all necessary steps to sell the resource through the local media. SI 01150.201B.1. The information provided to us does not indicate whether Ms. W~ was eligible for, or received, conditional benefits under these POMS provisions.

We also note that, even if Ms. W~ purchased the piano for $7000, and if the Agency determines that the current market value of her piano is less than $7000, it does not necessarily mean that her purchase was a transfer for less than fair market value. *See* POMS SI 01150.005A. (transfers of resources for less than fair market value after December 14, 1999 may result in a period of SSI ineligibility). Nor does the fact that Ms. W~ may not be able to sell her piano for the same price she paid mean that she paid more than the fair market value. Fair market value is the current market value of a resource at the time the resource is transferred, i.e., the going price for which it could reasonably be expected to sell at the time, on the open market in the geographic area involved. POMS SI 01150.005. If Ms. W~ bought her piano on the open market, e.g., from a merchant, the $7000 purchase price is assumed to be the fair market value at the time of the transfer. POMS SI 01140.005C.4.a. It may be that the value of the piano has depreciated since its purchase, or simply that the going price for a comparable piano was $7000 at the time of the purchase but is less now due to economic conditions. A prospective buyer might be willing to pay more for a piano bought from a merchant whose reputation is known than he would pay in a private sale by a stranger. A merchant might also be in a position to charge more because he could offer a factory guarantee or a store guarantee that a private seller like Ms. W~ cannot offer. Finally, a merchant might be in a position to wait until a buyer came along who was willing to pay a higher price. Thus, the current market value of the piano, in Ms. W~'s hands, may be less than the amount she paid for the piano, even though the original purchase was not a transfer for less than fair market value.

CONCLUSION

In summary, we conclude that, if the Agency fact-finder concludes that Ms. W~ has shown that playing piano is required as part of her treatment or therapy for her physical condition, the piano's entire value may be excluded under 20 C.F.R. 416.1216(c). If the fact-finder concludes that playing piano is not required for Ms. W~'s physical condition, the current market value of the piano should be considered a household good or personal effect subject to the $2000 maximum exclusion for all household goods and personal effects. However, the Agency may want to give further consideration to the current market value of the piano in Ms. W~'s hands.

Sincerely,
Thomas W. C~
Regional Chief Counsel

By:_____
Nancy L. B~
Assistant Regional Counsel

C. PS 02-062 Pre-review of Irrevocable Assignment of Death Benefit Proceeds and Transfer of Ownership Document for Advance Planning, Inc. a Private Wisconsin Corporation

DATE: April 11, 2002

1. SYLLABUS

The issue discussed here is whether or not a life insurance policy that is assigned to fund a burial agreement is considered a resource for SSI purposes. A life insurance policy can be considered a resource if an individual can surrender it for cash or recover the premiums paid. Under Wisconsin law, a life insurance policy issued for a burial agreement is revocable for the first 30 days after issuance. Recognizing this, for SSI purposes the policy would considered a resource for the first 30 days, but not thereafter.

2. OPINION

You sent us, for pre-review, a sample "Irrevocable Assignment of Death Benefit Proceeds and Transfer of Ownership" used by Advance Planning, Inc. of Wisconsin to transfer the proceeds and ownership of life insurance policies to funeral firms, which then transfer ownership of the policies to a trust. You have requested our opinion regarding whether a life insurance policy transferred under the assignment would be a resource for SSI purposes. We conclude that, under Wisconsin law, the policy would be revocable during the first 30 days after issuance; accordingly, the policy would be a resource until the 30 day period expires. However, assuming the policy is otherwise valid and allowed for such an assignment, it would not be a resource after the first 30 days it is assigned using the proposed document.

BACKGROUND

Under the document provided, the policy owner would "irrevocably assign the ownership and beneficiary designation" of a Great Western Life Insurance policy identified within the document to a funeral firm also identified within the document; the funeral firm, in turn, promises "to immediately transfer ownership of the policy to the Great Western Funeral Trust" on behalf of the insured. By signing the agreement, the policy owner further agrees that: (1) no other irrevocable assignment of ownership or beneficiary rights exists; (2) all proceeds of the policy must be used for funeral/burial expenses; (3) the assignment is permanent and cannot be revoked, amended or terminated; (4) the transferor has waived all contracted rights to surrender the policy for cash, to obtain loans against the policy or to change owner of the policy; (5) the transferor has renounced any interest in reversionary or power to control ownership rights; (6) the transferor will pay all premiums due on the identified policy; (7) the funeral firm will transfer ownership of the policy to the Great Western Funeral Trust which shall assure payment to the funeral firm; and (8) if a different funeral firm is chosen by the transferor, owner, his or her family or representative for the provision of merchandise and services prior to the identified funeral firm's provision of those services, the Great Western Funeral Trust shall make payment to the providing funeral firm.

The policy owner, the beneficiary and a representative of the funeral firm must sign the document. The funeral firm representative accepts the assignment on behalf of the funeral establishment, and acknowledges that the assignment satisfies "the purchaser's obligation under the Funeral Arrangement Contract" with the understanding that payment of the proceeds is contingent upon delivery of the merchandise and services "as specified in that Contract."

DISCUSSION

Assets are a resource for SSI purposes if the individual owns them and can convert them to cash to be used for his/her support and maintenance. 20 C.F.R. 416.1201(a) (2001). If the individual has the right, authority or power to liquidate the property, it is a resource. *Id.* A life insurance policy can be a resource if the individual can surrender it for cash or recover the premiums paid. 20 C.F.R. 416.1230.

In Wisconsin, when an individual pays money to fund a prearranged funeral contract, the money is generally considered to be held in trust which can be made irrevocable only up to $2,500 plus interest or dividends. Wis. Stat. Ann. 445.125(1). This statute, however, distinguishes burial agreements funded with the proceeds of life insurance policies, which are not subject to these provisions. Wis. Stat. Ann. 445.125(1)(a)(1). Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Wisconsin-Review of Wisconsin Life Insurance Funded Burial Contract (LIFBC) for Donna W~, at 2 (December 13, 1999).

Wisconsin law expressly provides that a life insurance policy may provide for the assignment of the policy proceeds to a funeral director or operator of a funeral establishment provided the insurance intermediary who sells or facilitates the sale of the policy is not an agent of the funeral director or operator of the funeral establishment. Wis. Stat. Ann. 632.415(2). A life insurance policy sold with the intent to provide funeral services "shall permit the policyholder to designate a different funeral director or operator of a funeral establishment . . . after written notice to the current funeral director or operator of the funeral establishment." Wis. Stat. Ann. 632.415(3). The law does not appear to limit the ability to irrevocably assign the proceeds. However, Wis. Adm. Code 23.30 expressly provides that an insurance policy sold as a funeral policy must contain the "unrestricted right to return the policy or certificate within 30 days of the date it is received" whereupon "the insurance contract is void and all payments made under it must be refunded directly to the policyholder." Wis. Adm. Code 23.30 (1)(d). Moreover, this provision must be conspicuously printed on the front of the policy or attached thereto. Wis. Adm. Code 23.30(1)(e).

As we have previously advised, it is our belief that, after the 30 day period during which a life insurance policy issued for a burial agreement is revocable, such a policy would not be a resource if (1) the policyholder irrevocably assigns the proceeds of the policy while retaining the right to designate a different funeral director or operator of a funeral establishment according to the statutory scheme, (2) the policy holder has the right to change the beneficiary, (3) the policyholder has either irrevocably assigned or waived the right to obtain the cash surrender value of the policy and (4) the policy holder has submitted to the insurance company the irrevocable assignment of proceeds and the assignment or waiver of the right to obtain the cash surrender value. Memorandum from Regional Chief Counsel, Chicago, to Ass't Reg. Comm. - MOS, Chicago, SSI-Wisconsin-Review of Wisconsin Life Insurance Funded Burial Contract (LIFBC) for Donna W~, at 3 (December 13, 1999).

The document appears to set up a transfer of proceeds which complies with Wisconsin law. Paragraph 3 provides for a permanent and irrevocable transfer of the policy's proceeds; paragraph 4 provides for the waiver of the cash surrender value; paragraph 5 renounces reversionary rights or power to control ownership; and paragraph 7 provides that the insured or a family member or representative may chose a different funeral firm to provide the services. Assuming the life insurance policy the document references comports with statutory requirements and allows for such an assignment, the policy transferred pursuant to the document would not be a resource.

CONCLUSION

For the foregoing reasons, we conclude that, assuming the life insurance policy surrendered pursuant to the document meets the statutory requirements, the policy would be a resource for the initial 30 day period during which the insured may return the policy, but not thereafter.

D. PS 00-330 Wisconsin Real Property Bettie J. M~ (A/N ~)

DATE: April 19, 1996

1. SYLLABUS

Despite quitclaiming his interest in home property to his spouse, under certain circumstances, an individual retains property rights under the Wisconsin homestead statute. The property may not be sold without his consent.

2. OPINION

Bettie M~ owns a home at ~ Street in Milwaukee, Wisconsin. You inquired whether this property could be sold to someone other than Ms. M~'s husband, Rufus M~, if he did not sign the conveyance or join in the transaction with a separate conveyance.

In Wisconsin, each spouse's signature or separate conveyance is required to effect the sale of homestead property. Wis. Stat. Ann. 706.02(1) (West 1981 Supp. 1995). The fact that Mr. M~ in September 1994 quitclaimed his interest in the property to Bettie M~, who moved out of the home in June 1993 and had no intention of returning, suggested a substantive variation to the general rule and prompted this inquiry.

This question ultimately focuses upon whether Bettie M~'s home could be considered to be a "countable resource," which could affect her eligibility for Supplemental Security Income (SSI) benefits. The Social Security Act (the "Act") provides that every aged, blind, or disabled individual who is determined to be eligible on the basis of her income and resources shall be paid Supplemental Security Income (SSI) benefits by the Commissioner of Social Security. 42 U.S.C. 1381a. The Act specifies those elements that are counted toward income, excluded from income, and excluded from resources in determining eligibility. 42 U.S.C. 1382a, 1382b.

Relevant to the current inquiry, both the Act and the regulations provide that a home is excluded in determining the resources of an individual (and his eligible spouse, if any). 42 U.S.C. 1382b; 20 C.F.R. 416.1212. A home is "any property in which an individual (and spouse, if any) has an ownership interest and which serves as the individual's principal place of residence." 20 C.F.R. 416.1212(a). Whether the home is a countable resource, therefore, generally depends upon two factors: first, whether the individual has an ownership interest in the property, and second, whether the home serves as the individual's principal place of residence. Although the home no longer serves as Bettie M~'s principal place of residence, an exception under the Program Operations M~ System (POMS) provides that the property could nevertheless be excludable provided that its sale would cause Rufus M~ hardship as a co-owner of the property. POMS SI 01130.100A.6.b. (7/90). We conclude that under Wisconsin's homestead statute and case law, Mr. M~'s September 1994 quitclaim deed to Bettie M~ does not defeat his ownership interest in the property because the statute nevertheless requires his signature or separate conveyance to sell the homestead.

Although Bettie M~ Has An Ownership Interest In Wisconsin Property, It Is Not Her Principal Place Of Residence.

Bettie M~ lived with her husband Rufus M~ on the subject property from at least August 1992 through June 1993. They separated in June 1993, and Bettie M~ moved out to live in an apartment. Rufus M~ remained in the home, but on September 18, 1994, he quitclaimed his interest in the property to Bettie M~, leaving the home in her name only.

This information appears to have been derived from the April 13, 1995, Report Of Contact, appended to the cover memorandum. Although Rufus M~ at that time suggested that he and Mrs. M~ held the property as co-owners and completed a form indicating that sale of the home would cause "hardship," the local office observed that all available records showed Bettie M~ as sole owner of the property, including the September 18, 1994, quitclaim deed. Thus, the evidence clearly suggests that Bettie M~ has an ownership interest in the Wisconsin property.

But, Bettie M~ moved off of the property and into an apartment in June 1993, and indicated that she never intends to return to live on the property. As a general rule, for the home to be excludable, the individual must not only retain an ownership interest in the property, but the property must serve as her principal place of residence. *See* 20 C.F.R. 416.1212(a). The home becomes a countable resource, because "it is no longer the individual's principal place of residence," when an individual moves out of her home "without the intent to return." 20 C.F.R. 416.1212(c). Thus, Bettie M~'s Wisconsin property, barring the application of certain exceptions, would not be excludable as a home.

Rufus M~ Appears To Retain An Ownership Interest In Wisconsin Property That Falls Within An Exception To The General Rule.

Because Bettie M~ does not use the home as her principal place of residence, and because she has expressed no intent to return to live on the property, as a general rule, the home would cease to be excludable. The POMS, however, does provide exceptions to the general rule. The POMS states that even if an individual leaves the home without the intent to return, the property remains an excludable resource for as long as either (a) a spouse or dependent relative of the individual continues to live there while the individual is institutionalized; or (b) its sale would cause undue hardship, due to loss of housing, to a co-owner of the property. POMS SI 01130.100A.6.b. (7/90). Rufus M~ has indicated that the sale of the property would cause him hardship. Whether Rufus M~ retains an ownership interest in the property under Wisconsin's homestead statute, therefore, determines the applicability of the second exception.

Under Wisconsin's homestead statute and case law, it does not appear that Rufus M~'s ownership interest is defeated by his September 1994 quitclaim deed to Mrs. M~. The homestead statute provides that each spouse's signature or separate

conveyance is required to effect the sale of any interest in homestead property, excepting conveyances between spouses and purchase money mortgages pledging the property as security. Wis. Stat. Ann. 706.02(1) (West 1981 Supp. 1995). Here, Rufus M~ quitclaimed his interest in the property to his wife in September 1994, which the statute allows as a conveyance between spouses. But, the fact that one spouse has quitclaimed his interest in the homestead to the other spouse does not necessarily mean that he need no longer join in the conveyance of homestead property to third parties by signature or separate conveyance. In fact, the tenor of recent Wisconsin case law suggests that so long as the objecting spouse continues to use the property as his homestead, a conveyance without his consent is invalid.

The fact that Bettie M~ indicates that she will never return to live on the property does not compromise Rufus M~'s homestead rights, because he continues to live there. In *Schapiro v. Security Sav. and Loan Ass'n,* 441 N.W.2d 241 (Wis. Ct. App. 1989), review denied, 443 N.W.2d 310 (Wis. 1989), the Wisconsin Court of Appeals upheld the validity of a quitclaim deed signed by one spouse, no longer residing on the property, to his sister after the other spouse abandoned the property. By contrast, in this case, Mr. M~, rather than moving away in the same manner as his wife, and rather than attempting to convey the property to a third party like Mr. S~, quitclaimed his interest in the property to his wife alone, but continued to reside there. Thus, at no point did Mr. M~ abandon his homestead rights to the property. Thus, his rights would not appear to have been compromised by the quitclaim deed to his wife.

In *Elfelt v. Cooper,* 485 N.W.2d 56 (Wis. 1992), cert. denied, 113 S. Ct. 1251 (1993), the Supreme Court of Wisconsin determined that the Internal Revenue Service (IRS) did not have the authority to transfer Mr. C~ ownership interest in the C~' homestead to the E~ in the manner and form accomplished. Because the property was a jointly held homestead, it could only be sold with Mrs. C~ consent or by a court order in the absence of Mrs. C~ consent. The court observed that "[t]here is no way to convey any interest in a jointly held spousal homestead in Wisconsin without both spouses' consent except through court proceedings, such as a divorce, bankruptcy, or lien foreclosure." 485 N.W.2d at 62. In reaching this conclusion, the court in E~, 485 N.W.2d at 61, quoted from Cumps, 80 N.W. at 939:

The policy of the statute indicated is not to give the wife a mere personal right for her personal benefit which she may waive, or be estopped by her conduct from insisting upon, but to protect the home for the benefit of the family and every member of it, ...

Here, although Mr. M~ has quitclaimed his interest to Mrs. M~, the tenor of the court's ruling in E~ suggests that this may not be sufficient to subvert his homestead rights the purpose of the homestead statute was to "protect the home for the benefit of the family and every member of it."

In conclusion, although Bettie M~ no longer resides on the property, her husband's homestead rights persist so long as he continues to reside there. Furthermore, Mr. M~'s 1994 quitclaim deed to Bettie M~ was expressly allowed by the homestead statute and does not compromise his homestead rights, given the case law which appears to support the proposition that one spouse may void an attempted conveyance of land held solely by the other spouse. Thus, Rufus M~ must consent to any conveyance of homestead property, and his hardship given any sale renders the property excludable under the POMS exception.

E. PS 00-319 Wisconsin Life-Insurance-Funded Burial Agreements: Betty U~, ~ - Wisconsin Funeral Assurance Plan (Your July 17, 1991 Request) (Your ref: S2D5B2, SI 2-1-4); Rose A. S~, ~ - Gold Key Life Insurance (Your August 28, 1991 Request) (Your ref: S2D5B2, SI 2-1-4); Lorena M~, ~ - Gold Key Life Insurance (Your October 30, 1991 Request) (Your ref: S2D5B2, SI 2-1-4); National Security Memorial Plan - Monumental Life Insurance

DATE: October 28, 1992

1. SYLLABUS

This opinion provides criteria for evaluating life insurance funded burial arrangements in the State of Wisconsin. It supersedes prior opinions.

2. OPINION

By memoranda dated August 28, 1991 and February 24, 1992, we advised you that the life insurance-funded burial programs offered by the Wisconsin Funeral Assurance Plan and the Gold Key Plan were not valid under Wisconsin law, and that the purchase price should therefore be counted as a resource of the purchaser for SSI purposes to the extent that it is not subject to any other exclusion. OGC-V (Hughes) to ARC, Programs, "Life Insurance Funded Burial Agreements in Wisconsin, Betty U~, ~" (August 28, 1991); OGC-V (Michaelson) to ARC, POS, "Wisconsin Gold Key Life Insurance- Funded Burial Agreements, Rose A. S~, ~ and Lorena M~, ~" (February 24, 1992).

We did note, however, that the Attorney General's office had found at least one plan to be valid even though in our opinion it violated the legal principles the Attorney General appeared to establish for evaluating such plans. We therefore asked you to seek further clarification of the matter under Wisconsin law from the Wisconsin Attorney General and the Wisconsin Commissioner of Insurance, and offered to help you reevaluate the matter in light of the State's response. You submitted to the State, with copies to us, examples of the Wisconsin Funeral Assurance Plan package, the Gold Key Plan package, and the National Security Memorial (NSM) Plan package.

On October 15, 1992, William H. W~, Assistant Attorney General, State of Wisconsin Department of Justice, issued a legal opinion to the Wisconsin Office of the Commissioner of Insurance regarding the legality under Wisconsin law of three prepaid funeral plans: (1) Wisconsin Funeral Assurance Plan; (2) Gold Key Plan; and (3) National Security Memorial (NSM) Plan. We have now reviewed the State's opinion. For the reasons that follow, we now conclude that so long as the facts are consistent with those assumed in the State's opinion, each of these plans is valid under Wisconsin law.

The controlling Wisconsin statute is contained at W.S.A. 632.41(2), which states:

Burial insurance. No contract in which the insurer agrees to pay for any of the incidents of burial or other disposition of the body of a deceased may provide that the benefits are payable to a funeral director or any other person doing business related to burials.

In our previous opinions involving this matter, we referred to a series of opinions issued by the Wisconsin Attorney General's office, and concluded that the critical distinction between valid and invalid arrangements is "linkage." That is, it appeared that the Attorney General concluded that where there is no connection between a life insurance policy and a burial agreement, these separate agreements are independently valid under State law. However, if there exists a link, direct or indirect, between the life insurance policy and provisions for funeral or burial services, the arrangement violates Wisconsin law. *See* OAG 35-89 (October 27, 1989).

The Attorney General's office has now specifically evaluated three plans. (William H. W~, Assistant Attorney General, to Diane R~, Office of the Commissioner of Insurance (October 15, 1992).

With regard to the Wisconsin Funeral Assurance Plan, the Attorney General's office concluded that the plan is valid under Wisconsin law. The client agrees to fund his or her funeral expenses, either in whole or in part, with the proceeds of a life insurance policy. The funeral director does not market the insurance policy on behalf of an insurer, although the funeral director may provide the client with information on securing insurance. The client is free to assign an existing policy or to secure an insurance policy from an insurer of the client's own choosing. In our opinion, the Wisconsin Funeral Assurance Plan package you submitted for our review is consistent with the facts assumed by the Attorney General's office.

With regard to the Gold Key Plan, the Attorney General's office concluded that the plan is valid under Wisconsin law if: (1) a funeral provider is not named as a beneficiary in the insurance policy that is issued, but, instead, the insured makes an assignment of the policy to a person or entity, not the funeral provider, who is free to select any funeral provider to fund the client's funeral needs at the time of death; and (2) the pre-need contract that the client receives from the funeral home does not contain a requirement that the client or assignee/beneficiary engage the funeral home at the time of death. The opinion specifically addressed and dismissed several "troublesome" aspects of the Gold Key plan that we previously questioned. In our opinion, the Gold Key Plan package you submitted for our review is consistent with the facts assumed by the Attorney General's office.

With regard to the National Security Memorial (NSM) Plan, the Attorney General's office concluded that the plan is valid under Wisconsin law if: (1) a funeral provider is not named as a beneficiary in the insurance policy that is issued; and (2) the subsequent assignment of the proceeds of the policy is not made to the funeral provider. Again, the opinion specifically

addressed several "troublesome" aspects of the NSM plan. In our opinion, the NSM Plan package you submitted for our review satisfies these factual prerequisites. Since we have seen only one NSM package, you may wish to confirm that the package we reviewed is typical in that a funeral director was not named as either a beneficiary or assignee of the insurance policy.

We have been informed that your central office has made a policy choice to defer to a State's interpretation of its law regarding life-insurance-funded burial agreements so long as the State's interpretation is defensible.

After review of the State's position, we now conclude that the State's interpretation is a permissible reading of the State statute. It would therefore be an appropriate policy choice for SSA to find that the Wisconsin Funeral Assurance Plan, Gold Key Plan, and NSM Plan you submitted to us for review are valid under State law. Absent other considerations, the packages should therefore not be counted as a resource for SSI purposes.

As we have discussed, you will have to take action regarding several specific individuals whose claims were affected by our office's previous advice. You will also have to revise the advice you have given to your Field Offices regarding life insurance funded burial agreements in Wisconsin.

F. PS 00-206 SSI - Wisconsin - Review of Irrevocable Funeral Trust Agreement for Elizabeth D~

DATE: November 22, 1999

1. SYLLABUS

This opinion concerns whether some or all of the funds in an irrevocable funeral trust agreement are excludable or countable resources.

The grantor deposited $4,245 in a funeral trust agreement for future payment of the cost of her own funeral services. The agreement designates as irrevocable the first $2,000 of the trust principle and provides that the nature and type of funeral services shall be agreed upon and the cost of services and merchandise determined at the date of her death. The agreement does not provide for, or otherwise represent, the purchase of a particular burial space, container, or casket.

The trust at issue is partially revocable and partially irrevocable. Consistent with Wisconsin law, the agreement designated the first $2,000 of trust funds as irrevocable. Thus, it is unavailable for the individual's support and maintenance and is not a countable resource for SSI purposes. However, the rest of the trust is revocable and the individual has the legal authority to liquidate it. Thus, the remaining $2,245, together with interest or dividends, constitutes a resource for SSI purposes. In addition, the $2,000 in irrevocable trust funds uses up the burial fund exclusion and does not allow any of the remaining funds to be excluded under that exception. Since the funeral trust agreement is neither a contract for a specific burial space, nor does it represent the individual's ownership or possession of a burial space, the funds do not qualify for the burial space exclusion under regulations section 416.1231(a).

Thus, the first $2,000 in trust funds is excluded from resources and the remaining $2,245 in funds is a resource for SSI purposes.

2. OPINION

INTRODUCTION

You have asked for our assistance in determining whether the funds held in the claimant s "Irrevocable Funeral Trust Agreement" should be treated as countable resources for purposes of SSI eligibility. For the following reasons, we believe that: (1) the first $2000 of the $4245 trust fund are excludable; and (2) the remaining $2245 in funds are countable resources.

FACTS

You provided copies of two separate funeral trust agreements. The first document, dated June 24, 1994, includes assets in the amount of $4245. The second agreement is dated August 21, 1993, and also contains assets in the amount of $4245. You indicated that the August 1993 agreement was actually created after the June 1994 agreement, but backdated to reflect an earlier date. You also suggested that the intention of the parties to these two agreements was to replace the June 1994 agreement with the August 1993 agreement. Although it is unclear from the face of the documents themselves, consistent with the facts provided, we will assume for purposes of this discussion that the June 1994 agreement has been rescinded and the only trust agreement now in effect is the August 1993 agreement.

The August 1993 agreement is captioned as an "Irrevocable Funeral Trust Agreement." The agreement indicates that Ms. D~ (the grantor) deposited $4245 with a depository institution (the trustee) for future payment of the cost of her own funeral services. Accordingly, Ms. D~ is both the grantor and the sole beneficiary of the trust. The agreement designates as irrevocable the first $2000 of the trust principle, and provides that the "nature and type of funeral service" shall be agreed upon as of the date of Ms. D~ death. It further provides that the cost of services and merchandise provided by the pre-designated funeral home shall be determined as of the date of her death. The agreement does not provide for, or otherwise represent, the purchase of a particular burial space, container, or casket.

DISCUSSION

For purposes of determining SSI eligibility, a "resource" is any cash or other liquid asset or any real or personal property that an individual owns and can convert to cash to be used for her support and maintenance. *See* 20 C.F.R. 416.1201(a). If the individual has the right, authority or power to liquidate the property, it is a resource. *Id.* Accordingly, trust assets are resources if the individual can revoke the trust and use the funds to meet her needs for food, clothing and shelter. *See* POMS SI 01120.200(D)(1). However, if an individual does not have the legal authority to revoke the trust or direct the use of the trust funds for her own support and maintenance, then the trust principal is not a resource for SSI purposes. *See* POMS SI 01120.200(D)(2).

The trust at issue here is partially revocable and partially irrevocable. Consistent with Wisconsin law, the agreement designated the first $2000 of trust funds as irrevocable. Thus, the first $2000 is unavailable for Ms. D~ support and maintenance and not a countable resource for SSI purposes. However, the balance of the trust is revocable, and Ms. D~, as the trust grantor, has the legal authority to liquidate any or all of the remaining $2245 without limitation on the purpose for which it may be used. Accordingly, the $2245 balance, together with interest or dividends, constitutes a resource for SSI purposes (unless otherwise excludable). *See* 20 C.F.R. 416.1201(a); POMS SI 01120.200(D)(1).

As you suggested in your memorandum, the regulations provide exclusions for burial spaces and certain funds set aside for burial expenses. *See* 20 C.F.R. 416.1231 et. seq. These are two distinct exclusions. *See* SI POMS 01130.400(A)(2). The burial space exclusion is unlimited; the burial funds exclusion is limited to $1500. *See* 20 C.F.R. 416.1231. Burial funds include amounts held in revocable burial contracts or revocable burial trusts. *See* 20 C.F.R. 416.1231(b)(3). Clearly, the funds in the revocable portion of the trust were set aside for burial expenses that qualify under 416.1231(b). However, any funds from a revocable trust that might otherwise qualify as an exclusion from resources must be reduced by any amounts in an irrevocable trust available to meet burial expenses. *See* 20 C.F.R. 416.1231(b)(5). Since the irrevocable portion of the trust here already contains $2000, and thus exceeds the $1500 limitation, none of the revocable portion of the trust qualifies as a 416.1231(b) exclusion from resources. In short, the $2000 in irrevocable trust funds uses up the burial fund exclusion and does not allow any of the remaining funds to be excluded under that exception.

The burial space exclusion provides that the value of burial spaces including plots, gravesites, containers, and caskets may also be excluded from resources. *See* 20 C.F.R. 416.1231(a). A burial space is defined as a space that is "owned by the individual or held for his or her use." 20 C.F.R. 416.1231(a)(2). A burial space is "held for" an individual when the individual has title to and/or possession of the space or has a contract with a funeral service company for a specified space. *See* POMS SI 01130.400(B)(4). The subject trust agreement provides that the nature and type of funeral services and merchandise will be determined at Ms. D~ death. Thus, the agreement is neither a contract for a specific burial space, nor does it represent Ms. D~ ownership or possession of a burial space. The revocable trust funds therefore do not qualify for the burial space exclusion under 416.1231(a) of the SSI regulations.

You suggested in your memorandum that if the trust document would have specifically earmarked the revocable portion of the trust for a burial space, such as a casket and vault, then some or all of the additional $2245 of funds might have been excludable under 416.1231(a). We believe that such a designation would be ineffective under the terms of this agreement to transform otherwise countable trust assets into excludable resources. The fact that funds are held in trust for the specific purpose of purchasing a burial space in the future is not equivalent to owning or possessing a burial space in the present. Since current ownership, or right to possess, is an essential condition of the burial space exclusion, it would be very difficult, if not impossible, to design a trust agreement that would qualify under 20 C.F.R. 416.1231(a).

CONCLUSION

In sum, we concur with your conclusion that it would be appropriate to consider the first $2000 in trust funds as an exclusion from resources and the remaining $2245 in funds as countable resources.

A. PS 00-313 Assignment of Income for Bethany L~, ~; Your reference S2D5B51

DATE: September 6, 1995

1. SYLLABUS

Under Wisconsin law, an individual can assign his/her income from an annuity to the State for his/her care at a group home. Thus, the money from the annuity is not considered income for SSI purposes.

2. OPINION

Under Wisconsin law, an individual can assign his/her income from an annuity to the State for his/her care at a group home. Thus, the money from the annuity is not considered income for SSI purposes. This is with reference to your June 5, 1992 inquiry concerning whether Bethany L~ could under Wisconsin law irrevocably assign her income from an annuity to the Winnebago County Department of Community Programs so that the funds would not be considered income to her and she would be eligible for SSI and Medicaid. We conclude that the assignment appears valid under Wisconsin law, but that the validity of the assignment may be controlled by the law of another state.

Background

Bethany, a minor, was burned in a fire in a group home where she lived, and a lawsuit was filed on her behalf for the injuries she sustained. As part of a court-approved settlement of that action, the group home and its insurance company were required to purchase an annuity contract, underwritten by the Transamerica Occidental Life Insurance Company, that would pay Bethany $679.00 per month. With this income, Bethany would be ineligible for SSI.

Bethany is now under state care and lives in a county group home. Because she has excessive medical expenses, the County would like to entitle her to medical assistance. Accordingly, Bethany (through her guardian) assigned her income from the annuity to the County. The assignment provides that it will terminate and all future proceeds will revert to Bethany if she is removed from the care of the Winnebago County Department of Community Programs. Also, the assignment will terminate and the future proceeds revert to Bethany's estate or her heirs on her death. The assignment states that it is given "for valuable consideration," presumably her care at the group home.

Discussion

As a general rule, payments under an annuity contract are assignable, by contract or by gift, unless prohibited by contract or by statute. See Restatement (Second) of Contracts § 317(2) (1981) (contractual right can be assigned unless forbidden by statute or agreement, or there is a material change in obligations, burdens, or risks); id. § 321 comment a (the right to payment that has not yet matured is assignable); 4 Am. Jur. 2d Annuities § 21 (annuity can be assigned); 6 Am. Jur. 2d Assignments § 90 (assignment of personal property may pass by gift or contract); cf. also 6 Am. Jur. 2d Assignments § 16 (the right to receive money due or to become due under a contract may be assigned). Here, the contract apparently permits such assignment, since the underwriter of the annuity has accepted the assignment and has been making payments to the County in accordance with the assignment. And under Wisconsin statutes, "the owner of any rights under a[n] ... annuity contract may assign any of those rights. See Wis. Stat. Ann. § 632.47(1) (1995). We think it likely that Bethany would be considered the "owner" of the right to receive payments under the annuity contract for the purposes of this statute. But compare Allstate Ins. Co. v. American Bankers Ins. Co., 882 F.2d 856, 859 (4th Cir. 1989) (annuitant could not assign his interest in annuity because policy stated Allstate Insurance was owner of the annuity). Even if she were not, however, we found nothing in Wisconsin law that would prohibit such an assignment.

Bethany's written assignment, executed by her guardian, that expresses her intent to assign her right to receive the annuity payments and that was delivered to and accepted by the county appears sufficient to effectuate the assignment. See 6 Am. Jur. 2d Assignments § 91.

Once such payments are assigned, the assignee (here, the county) obtains all of the rights and remedies possessed by or available to the assignor. See 6 Am. Jur. 2d Assignments §§ 102, 105. Thus, Bethany has no right to the income after the assignment, unless she is removed from the group home.

We note that there is a possibility that another state's law would govern the assignability of Bethany's interest. It is likely that another state also would uphold the assignment in this case. See Restatement (Second) of Contracts §§ 317(2), 321 comment a;

4 Am. Jur. 2d Annuities § 21; 6 Am. Jur. 2d Assignments §§ 16, 90; but see Allstate Ins. Co., 882 F.2d at 859-60 (annuitant could not assign payments because he was not owner of annuity policy issued as part of structured settlement of personal injury claim and because it would not be a valid legal assignment of existing right). But you may wish to resubmit the issue for further evaluation if you should determine that the annuity contract provides that another state's law applies; that the contract was issued or executed in a state other than Wisconsin; or that another state may have substantial contacts with the annuity agreement or assignment.

Conclusion

We conclude that the assignment of Bethany's payments under the annuity contract is valid under Wisconsin law. If it should come to your attention that another state's law might apply in this case, however, you may wish to resubmit the question for further evaluation.

A. PS 04-150 Review of the Assignment of Annuity Payments Belonging to Raymond W~ (Your Ref. No. S2D5G3))

DATE: November 13, 2000

1. SYLLABUS

This opinion concerns annuity payments that are assigned by the annuitant to a company that has purchased the right to receive these payments. In 1997, the annuitant sold rights to $175.00 per month for 240 months in exchange for a lump sum payment of $10,000. The annuitant retained the right to receive $109.00 per month from the annuity. The opinion concludes that, under Wisconsin law, the annuitant is entitled to assign his right to the $175.00 payment to another party. Under this agreement, the annuitant assigned away all rights to these payments. Therefore, the $175.00 payments being made to the company are not countable as the annuitant's income. The $109.00 payments still received by the annuitant are countable income for SSI purposes. The $10,000 lump sum payment received by the annuitant, if retained, would be a resource for SSI purposes beginning in the month after the month it was received.

2. OPINION

You have asked whether Mr. W~ assignment of certain annuity payments to Singer Asset Finance Company ("Singer Asset") constituted a total relinquishment of his rights to the payments, or whether Mr. W~ transaction with Singer Asset should be considered a loan. For the following reasons, it is our opinion that Mr. W~ assignment of certain annuity payments was a sale and should be considered a total relinquishment of his rights to the payments.

FACTS

In May of 1984, Mr. W~ entered into a settlement agreement with American Family Insurance Company ("American Family"). Pursuant to the settlement agreement, American Family established an annuity with National Fidelity Life Insurance Company ("National Fidelity"), which, beginning June 1, 1984, was to pay Mr. W~ $284 a month for life with forty years being guaranteed. James T. W~, Mr. W~ father, was named as the beneficiary of this annuity.

On August 27, 1997, Mr. W~ entered into an agreement ("the Assignment Agreement") with Singer Asset to assign $175.00 out of 240 of the monthly payments due to him under the annuity issued by National Fidelity. The monthly payments assigned to Singer Asset were those beginning in October 1, 1997 and continuing through September 1, 2017. In return for this assignment, Mr. W~ received a payment of $10,000 from Singer Asset. Mr. W~ was also to receive the remaining $109.00 ($284.00 minus $175.00) of each monthly payment.

The Assignment Agreement provides that it was the intention of the parties that the provisions of the agreement constitute the purchase and sale of the seller's right, title, and interest in and to the assigned assets, and not a loan secured by the assigned assets. Assignment Agreement at 2. However, the Assignment Agreement further provides that, in the event that a court of competent jurisdiction holds the transaction is a loan and not a purchase and sale, it is the intention of the parties to conform strictly to the usury laws now or hereafter in effect in any state which laws are applicable to the transaction. *Id.*

The Assignment Agreement required that Mr. W~ deliver a letter of instructions to American Family and National Fidelity directing that all payments to be made in relation to the assigned assets be sent directly to Singer Asset or its assignee; and

deliver another letter of instructions to Singer Asset addressed to American Family and National Fidelity directing that all payments made in relation to the assigned assets after his death be made directly to Singer Asset or its assignee, and changing the beneficiary of the assigned assets to the Estate of Mr. W~ or as otherwise instructed by Singer Asset as sole beneficiary. *Id.* The Assignment Agreement also required that Mr. W~ deliver to Singer Asset an irrevocable power of attorney appointing Singer Asset or its assignees as his attorney-in-fact to make further changes to the payee instructions and beneficiary designations as it so elects; another irrevocable power of attorney transferring ownership to Singer Asset or its assignee of all assigned payments by way of endorsement of payments instructions or otherwise; and an acknowledgment that he was waiving and abandoning any and all rights to receive the assigned payments and assigning the same irrevocably to Singer Asset. Assignment Agreement at 2-3.

DISCUSSION

Under Wisconsin law, the owner of any rights under a life insurance policy or annuity contract may assign those rights. *See* Wis. Stat. § 632.47. Although an annuitant (i.e., the party entitled to receive payments under an annuity contract) does not own the annuity policy, he or she does have the right to receive payments and, accordingly, may transfer that right. *See Valley Bank v. Guyette*, 1994 WL 613014, * 4 (Wis. Ct. App. 1994) (unpublished disposition) (an annuitant may transfer what she does own, her rights to receive payments under the annuity). Mr. W~ was therefore entitled, under Wisconsin law, to assign his right to receive payments under the annuity issued by National Fidelity to another party.

Because Mr. W~, as a matter of law, had the right to assign his right to receive payments under the annuity contract with National Fidelity, we examined the contract with Singer Asset to determine whether the assignment of his monthly payments under the annuity was part of a genuine sale and purchase, or a secured loan. The Assignment Agreement provides that it shall be governed, construed, and enforced in accordance with the substantive laws of the State of Florida, Assignment Agreement at 10. Nonetheless, both Florida and Wisconsin law require that a contract should be interpreted to reflect the intent of the parties who entered into the agreement. *See St. Augustine Pools, Inc. v. James M. Barker, Inc.*, 687 So.2d 957, 958 (Fla. 5th DCA 1997); *Heritage Mut. Ins. Co. v. Treech Ins. Exchange*, 516 N.W.2d 8, 9 (Wis. Ct. App. 1994). Florida and Wisconsin law also provide that the best evidence of the parties' intent is the language of the contract itself. *See Jacobs v. Petrino*, 351 So.2d 1036, 1039 (Fla. 4th DCA 1976); *Central Auto Co. v. Reichert*, 273 N.W.2d 360, 364 (Wis. Ct. App. 1978). Here, the Assignment Agreement provides that "[i]t is the intention of the parties hereto that the provisions of this Agreement and Related Documents constitute the purchase and sale of all of [Mr. W~] right, title and interest in and to the Assigned Assets, and not a loan secured by the Assigned Assets." Assignment Agreement at 2. Although there is also language in the agreement describing the transaction as loan, this language was explicitly included so that the transaction would comply with usury laws in the unintended event that a court of competent jurisdiction held the transaction was a loan. Thus, the language of the document indicates that it was the parties' intent to relinquish all of Mr. W~ rights and interest in the assigned payments, as opposed to merely creating a security interest in the assigned payments.

In addition to the parties' explicit declaration of intent, other provisions of the Assignment Agreement also suggest that the transaction was a sale and purchase, and not a loan. Specifically, the agreement provides that Mr. W~ must waive and abandon any and all rights in the assigned payments, execute a special irrevocable power of attorney appointing Singer Asset or its assignee as his attorney-in-fact to make further changes to the payee instructions and beneficiary designations as it so elects, and execute another special irrevocable power of attorney to transfer ownership to Singer Asset of all assigned payments by way of endorsement of payment instruments or otherwise. Assignment Agreement at 2-3. The Terms Rider to the Assignment Agreement further defines the assigned assets as all right, title, and interest of Mr. W~ to receive the assigned payments due to him under the annuity. Terms Rider at 1. The Assignment Agreement thus establishes that it was the parties' intent that Mr. W~ have no control, interest, or other rights with respect to the payments that were assigned to Singer Asset, and he has no right to revoke the assignment of the payments to Singer Asset.

Based on the information provided to us, Mr. W~ sold his rights to the annuity. Therefore, only $109.00 per month should be counted as monthly income from the annuity. The $10,000 which Mr. W~ received from Singer Asset, however, would be considered Mr. W~ resource if he retained it to the following month. *See* 20 C.F.R. § 416.1103(c).

CONCLUSION

For the above stated reasons, it is our opinion that, based on the documents provided to us, Mr. W~ assignment to Singer Asset of $175.00 of 240 of the monthly payments due to him under the annuity issued by National Fidelity to Singer Asset was a sale and total relinquishment of his right to those portions of payments. The portion of the annuity should therefore not be considered as income to Mr. W~.

Thomas W. C~
Chief Counsel, Region V

by:_____
Rick D. Y~
Assistant Regional Counsel

4.38 WYOMING

A. PS 08-012 Treatment of Trust for SSI Purposes - Michael N. G~

DATE: October 19, 2007

1. SYLLABUS

This opinion contains a very concise description of the requirements of a Special Needs Trust whereby it was determined that this particular trust did not meet all of the criteria. Specifically, this trust does not provide a provision for Medicaid reimbursement to any state other than Wyoming making it a countable resource. The opinion also offers a suggestion for revising the language of the trust so that it would meet the criteria and could, therefore, be a non-countable resource.

2. OPINION

Questions Presented

You have asked for an opinion on whether the Trust created for Michael N. G~ (hereinafter Mr. G~ or the Beneficiary) meets the requirement for a special needs trust under section 1917(d)(4)(A) of the Social Security Act (the Act). More specifically, you questioned whether the term "heirs" in the "After Beneficiary's Death" clause is sufficient under Wyoming law to provide for reminder interests, which would make the Trust irrevocable; whether the Trust terms, limiting Medicaid reimbursement to the state of Wyoming only, is sufficient; and, if not, whether the Trust's "voiding language" could apply to the Medicaid reimbursement clause, thereby curing any defect.

Short Answer

The Trust is irrevocable under Wyoming law, because the Trust expressly provides that it is irrevocable. Moreover, under Wyoming law, the term "heirs" is sufficient to provide for remainder interests after the death of the Beneficiary, also making the Trust irrevocable. Nonetheless, the Trust does not qualify as a special needs trust, because the Trust limits Medicaid reimbursement to the state of Wyoming only and does not permit reimbursement to any other state for Medicaid payments made on behalf of the Beneficiary. Therefore, the Trust assets would be considered a resource. While the Trust's "voiding language" may cure the Medicaid reimbursement defect, Mr. G~'s legal Guardian, would need to go to court to have the language at issue judicially severed. Alternatively, the Guardian could revise the Trust to remove language limiting Medicaid reimbursement to the state of Wyoming.

Facts

According to the documents attached to your opinion request, Mr. G~, the Beneficiary, is under the age of 65 and suffers from paranoid schizophrenia (*see* Petition For Establishment Of Special Needs Trust And Authorization To Transfer Assets To Trust). On December 5, 2006, Mr. S~, Mr. G~ legal Guardian, petitioned the court to create a special needs trust for Mr. G~, using his own assets, which consisted of real property valued at $75,000.00 (*see* Exhibit A, Warranty Deed). On December 5, 2006, in an Order Authorizing and Establishing the Trust, District Judge John C. B~ for Sheridan County, Wyoming, appointed Mr. S~ as Trustee.

The stated purpose of the Trust is to provide for the administration and disposition of the trust estate during and after Mr. G~'s lifetime (*see* Article II, paragraph 2.1), to provide supplemental care over and above that which the government provides, and to continue Mr. G~'s eligibility for Medicaid (*see* Article II, paragraph 2.2). The Trust contributions are to consist of only Mr. G~'s assets. During Mr. G~ lifetime, the Trustee can pay or apply for Mr. G~'s benefit amounts from the principal or income as may

from time to time be necessary for the satisfaction of his needs. In no event, however, shall any income or principal of the trust be paid or applied for Mr. G~ basic living needs (*see* Article IV, paragraph 4.1). Any income not distributed shall be accumulated and added to the principal, but in no event shall any cash or assets readily convertible into cash be distributed directly to the Beneficiary (*see* Article IV, paragraph 4.5).

According to Article VIII of the Trust, it is irrevocable. Mr. G~ has no rights to anticipate, sell, assign, mortgage, pledge or otherwise dispose of or encumber all or any part of the trust (see Article V, paragraph 5.1). And the grantor, in this case Mr. Thomas as Mr. G~'s legal Guardian, "expressly waive[d] all rights and powers, whether alone or in conjunction with others . . . to alter, amend, revoke, or terminate the trust, or any terms of the agreement, in whole or in part" (*see* Article VIII, paragraph 8.1).

Upon Mr. G~'s death, Article IV, paragraph 4.11 provides that:

[T]he trust assets shall be paid to the State of Wyoming, its agent, designee, or successor up to the total amount Medicaid payments made to or on behalf of [Mr. G~] under the State of Wyoming Medicaid plan. Any remaining trust assets shall be distributed by the Trustee to such persons or beneficiary, including his own assets, in whole or in part, in such proportions and manners, as [Mr. G~] by his Last Will shall direct, limit, and appoint, by specific reference to this power. If [Mr. G~] shall fail to exercise his general power of appointment over the remaining trust assets, the same shall be distributed by the Trustee to [Mr. G~'s] heirs as determined by the laws of intestate succession of the State of Wyoming.

The trust also provides that if any provision of the trust is inconsistent or contrary to the intent and provisions of the above-referenced federal law, it shall be deemed void and of no further force or effect (*see* Article II, paragraph 2.2).

Applicable Federal Law

In the case of an irrevocable trust, if payments from the trust could be made to or for the benefit of the individual or the individual's spouse, that portion of the trust from which a payment could be made that is attributable to the individual is a resource, *see* 42 U. S.C. § 1396p(d)(3)(B), unless an exception applies. If a trust qualifies as a special needs trust, it will not be counted as a resource. See id. § 1396p(d)(4)(A). In order to qualify as a special needs trust, three requirements must be met: (1) the trust must contain the assets of an individual under age 65 who is disabled; (2) the trust must be established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court; and (3) the trust must provide for a Medicaid reimbursement provision, that upon the death of such individual, the state will receive up to an amount equal to the total amount of medical assistance paid on behalf of the individual under that state's Medicaid plan. *See id.*

Legal Analysis

Effective July 1, 2003, Wyoming enacted the Uniform Trust Code, which provides that a trust is presumed revocable, unless the trust terms provide otherwise. *See* Wyo. Stat. Ann. § 4-10-602 (2003) ("[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust"). Although the Trust is a grantor trust (Mr. G~ is both the settlor and the sole beneficiary of the trust during his lifetime), the Article VIII states that "[t]he Trust shall be irrevocable." *See id.* Furthermore, there is a contingent remainder interest that exists upon the death of the Beneficiary. Thus, Mr. G~ is not the sole beneficiary of the Trust. *See* Article IV, paragraph 4.11. According to Wyoming law, the words "heirs" or "any similar reference used after the grant of a life estate" merely designate the remaindermen. *See Crawford v. Barber*, 385 P.2d 655, 657 (Wyo. 1963). Because the Trust names a residual beneficiary, it is irrevocable. A primary beneficiary cannot unilaterally revoke the trust; he needs the consent of the residual beneficiary. *See* POMS SI 01120.200(B)(2), 01120.200(D)(3).

Although the Trust is irrevocable, an irrevocable trust established on or after January 1, 2000, is a resource if payments from the trust principal could be made to or for the benefit of the individual or the individual's spouse, unless the trust qualifies as a special needs trust. *See* 42 U.S.C. § 1396p(d)(4)(A); *see also* POMS SI 01120.201(D)(2). While the Trust at issue satisfies the first two requirements-it was established with the assets of a disabled individual under age 65 by his legal guardian-the Trust does not satisfy the third requirement number. The Trust limits reimbursement of Medicaid payment made to or on behalf of Mr. G~ to the state of Wyoming. Thus, contrary to the statute, the Trust does not provide for Medicaid reimbursement to any other state where Mr. G~ may live. In a June 11, 2007 memorandum, the Office of Income Security Programs advised that the Agency does not believe this type of provision satisfies the statutory requirement, because it would frustrate any other state's ability to receive medical assistance paid to the beneficiary during his lifetime. *See* Memorandum from OGC Region V to Management and Operations Support, SSA-Region V, *SSI-Illinois-review of the David C~ f/k/a K~ Supplemental Care and Needs Trust*, p.3, June 11, 2007. Therefore, although irrevocable, the Trust does not qualify as a special needs trust.

The terms of the Trust provide "voiding language" that states if "any provision[] is inconsistent or contrary to the intent and provisions of the above-referenced federal law [it] shall be deemed to be void and of no further force or effect." (*See* Article II, paragraph 2.2). Under Wyoming law, if an improper provision can be judicially severed and the remaining contract enforced, a finding of total illegality is not required. *See Dixon v. Williams*, 584 P.2d 1078, 1081 (Wyo. 1978). While the "voiding language," could remedy the problem with the Trust's state Medicaid reimbursement provision, Mr. G~l egal Guardian would need to go to court to have the language at issue judicially severed. Alternatively, the most practical approach would be for the legal Guardian to revise the Trust to remove the language limiting Medicaid reimbursement to the state of Wyoming.

CONCLUSION

In sum, we conclude that, while the Trust is irrevocable, it does not meet the state Medicaid reimbursement requirement necessary to satisfy the special needs trust under section 1917(d)(4)(A) of the Act, 42 U.S.C. § 1396p(d)(4)(A). Limiting reimbursement to the state of Wyoming would frustrate any other state's ability to receive medical assistance paid to the beneficiary during his lifetime. While the Trust's "voiding language" may remedy this defect, Mr. G~l egal Guardian would need to go to court to have the language at issue judicially severed. A more practical alternative, however, would be for the Guardian to revise the Trust and remove the language limiting Medicaid reimbursement to the state of Wyoming.

Deana R. E~-L~
Regional Chief Counsel, Region VIII
By: _____
Carolyn C~
Assistant Regional Counsel