

5160:1-3-05.2 **Medicaid: trusts.**

(A) This rule defines the treatment of a trust for determining eligibility for medical assistance programs. This rule is only enforceable to the same extent as section 5163.21 of the Revised Code.

(B) Definitions.

(1) "Beneficiary" means any person benefiting in some way from the trust. The beneficiary can be the grantor or another person. There may be more than one beneficiary of a trust.

(2) "Grantor" means any person who creates a trust. For purposes of this rule, the term grantor includes:

(a) An individual;

(b) An individual's spouse;

(c) A person, including a court or administrative body, with legal authority to act in place of, or on behalf of, an individual or the individual's spouse; and

(d) A person, including a court or administrative body, acting at the direction or upon the request of an individual or the individual's spouse.

(3) "Irrevocable trust" means a trust that cannot be revoked by the grantor or terminated by a court. A trust terminating only upon the occurrence of an event outside the control or direction of the beneficiary or the grantor is irrevocable.

(4) "Legal instrument or device similar to a trust" means any legal instrument, device, or arrangement that is not called a trust under state law, but is similar to a trust. This includes, but is not limited to, escrow accounts, investment accounts, partnerships, contracts and other similar arrangements. To constitute a legal instrument or device similar to a trust, all of the following must be present.

(a) There must be a person holding, managing, retaining, or administering the property. For the purposes of this rule, the person holding, managing, retaining or administering the property is referred to as the trustee.

(b) The trustee must have an equitable, legal, or fiduciary duty to hold, manage, retain, or administer the property for the benefit of another person. For the purposes of this rule, this other person is referred to as the beneficiary.

(c) The trustee must hold identifiable property for the beneficiary.

- (5) "Payment" means any disbursement from the principal or income of the trust. A payment may include actual cash, non-cash or property disbursements, or the right to use and occupy real property.
- (6) "Payments to or for the benefit of the individual" means any payment to any person resulting in any direct or indirect benefit to the individual.
- (7) "Person" has the same meaning as set forth in section 1.59 of the Revised Code and includes an individual, corporation, business trust, estate, trust, partnership and association.
- (8) "Revocable trust" means a trust that can be revoked by the grantor or the beneficiary. For the purposes of the medicaid program, the following trusts are "revocable trusts" even if the terms of the trust state it is irrevocable:
- (a) A trust providing the trust can be terminated only by a court; or
 - (b) A trust terminating upon the happening of an event, if the event can occur at the direction or control of the grantor, the beneficiary, or the trustee.
- (9) "Testamentary trust" means a trust that is established by a will. This type of trust does not take effect until after the death of the person (testator) who created the trust.
- (10) "Trust", for the purpose of this rule, means any arrangement in which a grantor transfers property (real or personal) to a trust with the intention that it be held, managed, or administered by a trustee(s) for the benefit of the grantor or certain designated individuals (beneficiaries). In this rule, the term trust includes any legal instrument or device that is similar to a trust.
- (11) "Trustee" means any person who manages a trust. A trustee manages a trust's principal and income for the benefit of the beneficiaries.

(C) The five categories of trusts.

- (1) Category one: self-settled trusts established before August 11, 1993, also referred to as medicaid qualifying trusts.
- (a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets all the following criteria:
 - (i) The trust was established before August 11, 1993;
 - (ii) The trust was not established by a will;
 - (iii) The trust was established by the individual;

(iv) The individual is or may become the beneficiary of all or part of the trust; and

(v) Payment from the trust is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

(b) The amount of the trust deemed to be an available resource to the individual is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the individual, assuming the full exercise of discretion by the trustee or trustees. The maximum amount includes only amounts that may be, but are not, distributed from either the income (interest) or principal of the trust.

(c) Amounts actually distributed to the beneficiary for any purpose are treated under the rules governing income.

(d) The availability of a trust in this category shall be considered whether or not:

(i) The medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medicaid, or medicare premium assistance programs described in rule 5160 :1-3-02.1 of the Administrative Code; and

(ii) The trustee actually exercises discretion.

(2) Category two: self-settled trusts established on or after August 11, 1993.

(a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets all of the following criteria:

(i) The trust was established on or after August 11, 1993;

(ii) The assets of the individual were used to form all or part of the corpus of the trust;

(iii) The trust was not established by a will; and

(iv) The trust was established by the individual, the spouse of the individual, a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or on behalf of the spouse of the individual, or a person, including a court or administrative body, acting at the direction or upon the request of the individual or the spouse of the individual.

(b) Revocable trusts in this category are treated as follows.

- (i) The corpus of the trust is considered a resource available to the individual.
- (ii) Payments from the trust to, or for the benefit of, the individual are considered unearned income.

(c) Irrevocable trusts in this category are treated as follows.

- (i) If there are any circumstances under which payment from the trust could be made to, or for the benefit of, the individual, the portion from which payments could be made is considered a resource available to the individual. The administrative agency shall not take into account when payments can be made. A payment that can be made only in the future satisfies this provision.
- (ii) Any payments actually made to, or for the benefit of, the individual from either the corpus or income are considered unearned income.

(d) Where a trust is funded with assets of another person or persons, as well as assets of the individual, the rule provisions governing this category of trust applies only to the portion of the trust attributable to the individual.

(e) The availability of a trust in this category is considered without regard to:

- (i) The purpose for which a trust is established;
- (ii) Whether the trustees have or exercise any discretion under the trust;
- (iii) Any restrictions on when or whether distributions may be made from the trust; and
- (iv) Any restrictions on the use of distributions from the trust.

(3) Category three: exempt trusts. The principal or income from any one of these trusts is exempt from being counted as a resource.

(a) Special needs trusts are not countable resources. A trust qualifies as a special needs trust if the following conditions are met.

- (i) The trust contains the assets of an individual under age sixty-five. The trust may also contain the assets of other individuals.
- (ii) The individual is disabled as defined in rule 5160:1-3-02 of the

Administrative Code.

- (iii) The trust is established for the benefit of the individual by the individual, a parent, grandparent, legal guardian, or a court.
- (iv) The trust requires, 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.
- (v) When such a trust was established for a disabled individual under age sixty-five, the exception for the trust continues even after the individual becomes age sixty-five, provided the individual continues to be disabled as defined in rule 5160:1-3-02 of the Administrative Code. However, with the exception of income earned by the trust, such a trust cannot be added to or otherwise augmented after the individual reaches age sixty-five.
- (vi) Cash distributions to the individual are counted as unearned income. All other distributions from the trust are treated under the rules governing in-kind income.
- (b) Qualified income trusts (QIT) are not countable resources. A trust qualifies as a QIT if the trust meets the requirements in rule 5160:1-6-03.2 of the Administrative Code.
- (c) Pooled trusts are not countable resources. A trust qualifies as a pooled trust only under all of the following conditions.

 - (i) The trust contains the assets of an individual of any age who is disabled as defined in rule 5160:1-3-02 of the Administrative Code.
 - (ii) A separate account is maintained for each beneficiary of the trust but, for purposes of investment and management of funds, the trust pools the funds in these accounts.
 - (iii) Accounts in the trust are established by the individual, the individual's parent, grandparent, or legal guardian, or a court solely for the benefit of individuals who are disabled.
 - (iv) To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the state the amount remaining in the account equal to the total amount of medical assistance paid on behalf of the beneficiary. To meet this requirement, the trust must include a provision specifically providing for such payment.

- (v) Cash distributions to the individual are counted as unearned income. All other distributions from the trust are treated under the rules governing in-kind income.
- (d) Supplemental services trusts are not countable resources. A trust qualifies as a supplemental services trust only if it meets the requirements of section 5815.28 of the Revised Code.
- (i) Any person may establish a trust under section 5815.28 of the Revised Code only for another person who is eligible to receive services through one of the following agencies: the department of developmental disabilities; a county board of developmental disabilities; the department of mental health and addiction services.
- (A) The administrative agency shall not determine eligibility for another agency's program.
- (B) An individual must provide documentation from one of these agencies establishing that the individual was determined to be eligible for services from that agency at the time of the creation of the trust.
- (C) An individual may provide an order from a court of competent jurisdiction that states the individual was eligible for services from one of the agencies at the time of the creation of the trust.
- (ii) At the time the trust is created, the trust principal does not exceed the maximum amount permitted. In 2006, the maximum amount permitted was two hundred twenty-two thousand dollars. The maximum amount each year thereafter is the prior year's amount plus two thousand dollars.
- (iii) The administrative agency shall review the trust to determine whether it complies with the remaining provisions of section 5815.28 of the Revised Code.
- (iv) Payments from supplemental services trusts are exempt as long as the payments are for supplemental services as defined in section 5815.28 of the Revised Code. All supplemental services shall be purchased by the trustee, not through direct cash payments to the beneficiary.
- (e) If a trust is represented to be an exempt trust, but the administrative agency determines that it does not meet the requirements for one of the

exempt trusts, then it is not an exempt trust and will fall under one of the four other categories of trusts.

(4) Category four: trusts established by someone else for the benefit of the individual.

(a) A trust, or legal instrument or device similar to a trust, falls under this category if it meets the following criteria:

(i) The trust is created by someone other than the individual;

(ii) The trust names the individual as a beneficiary; and

(iii) The trust is funded with assets or property that the individual never held an ownership interest in prior to the establishment of the trust.

(b) Any portion of a trust in this category is an available resource only if the trust permits the trustee to expend principal, corpus or assets of the trust for the individual's medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes. The trust is still considered an available resource even if the trust contains any of the following types of provisions:

(i) Any provision prohibiting the trustee from making payments that would supplant or replace medicaid or public assistance, or other government assistance;

(ii) Any provision prohibiting the trustee from making payments that would impact or affect the individual's right or ability or opportunity to receive medicaid, or public assistance, or other government assistance; or

(iii) Any provision attempting to prevent the trust or its corpus or principal from counting as an available resource under this rule.

(c) A trust in this category normally considered as an available resource is not counted as an available resource under the following circumstances.

(i) If the trust contains a clear statement requiring the trustee to preserve a portion of the trust for another beneficiary or remainderman, then that portion of the trust is not counted as an available resource. Terms of a trust granting discretion to preserve a portion of the trust do not qualify as a clear statement requiring the trustee to preserve a portion of the trust.

(ii) If the trust contains a clear statement requiring the trustee to use a

portion of the trust for a purpose other than the medical care, care, comfort, maintenance, welfare, or general well-being of the individual, then that portion of the trust is not counted as an available resource. Terms of a trust that grant discretion to limit the use of a portion of the trust do not qualify as a clear statement requiring the trustee to use a portion of the trust for a particular purpose.

(iii) If the trust contains a clear statement limiting the trustee to making fixed periodic payments, then the trust is not counted as an available resource; however, the payments are treated under the rules governing income. Terms of a trust that grant discretion to limit payments do not qualify as a clear statement requiring the trustee to make fixed periodic payments.

(iv) If the trust contains a clear statement requiring the trustee to terminate the trust if it is counted as an available resource, then it is not counted as an available resource. Terms of a trust granting discretion to terminate the trust do not qualify as a clear statement requiring the trustee to terminate the trust.

(v) If any person obtains a judgment from a court of competent jurisdiction expressly preventing the trustee from using part or all of the trust for the medical care, care, comfort, maintenance, welfare, or general well-being of the individual, then the trust or that portion subject to the court order is not counted as a resource.

(vi) If the trust is specifically exempt from counting as an available resource by this rule, another rule, the Revised Code, or the U.S. Code, it is not counted as a resource.

(vii) If the individual presents a final judgment from a court demonstrating that he or she was unsuccessful in a civil action against the trustee to compel payments from the trust, then it is not counted as an available resource.

(viii) If the individual presents a final judgment from a court demonstrating that in a civil action against the trustee the individual was only able to compel limited or periodic payments, then it is not counted as an available resource; however, the payments are treated under rules governing income.

(ix) If the individual provides written documentation showing the cost of a civil action brought to compel payments from the trust are cost prohibitive, then it is not counted as an available resource.

(d) For trusts under this category, even if the trust is not counted as an

available resource, any actual payments from the trust to the individual are treated under the rules governing income.

(5) Category five: trusts established by will for the benefit of a surviving spouse.

(a) A trust, or legal instrument or device similar to a trust, can be established by the will of a deceased spouse.

(i) If there are any circumstances under which payment from the trust could be made to, or for the benefit of, the surviving spouse, the portion from which payments could be made is considered an available resource. The administrative agency shall not take into account when payments can be made. A payment that can be made only in the future satisfies this provision.

(ii) Any payments actually made to, or for the benefit of, the surviving spouse from either the corpus or income are considered unearned income.

(D) This rule supersedes all previous rules governing trusts and the administrative agency shall apply it prospectively to all determinations and renewals of eligibility for all individuals. Any determination or renewal made in accordance with this rule shall not be affected by or governed by any prior eligibility determinations made under former rules governing trusts nor shall this rule be applied retroactively to determine an individual's eligibility or liability for any prior period.

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