

RESOURCES

TRUST FUNDS

Description: A trust is a legal instrument by which an individual gives control over his/her assets to another (the trustee) to disburse according to the instructions of the individual creating the trust.

Policy: Trust funds are real or personal property held by a party known as the trustee. The trustee has the duty of administering such funds or property for the benefit of the beneficiary of the trust. The beneficiary does not own trust funds, either private or established by court order. They are under the control of a trustee who must carry out the conditions of payment as specified in the trust.

Trusts must be evaluated to determine if there is any countable income and/or resources and to determine if there has been a transfer of assets for less than fair market value. The treatment of trusts depends on who established the trust and what type of trust it is.

References:

SSL Sect.	366.2(b)
Dept. Reg.	360-4.4 360-4.5
ADMs	04 OMM/ADM-6 96 ADM-8 92 ADM-45 89 ADM-45 88 ADM-32

Interpretation: There are a number of different types of trusts, including escrow accounts and investment accounts.

- a. Annuity - An annuity is an investment vehicle whereby an individual establishes a right to receive fixed periodic payments, either for life or a term of years. To the extent to which the anticipated return is commensurate with the money invested, the purchase of an annuity by an A/R or an A/R's spouse is considered a compensated transfer of assets; to the extent that the anticipated return is less than the amount invested, it is considered a trust-related

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transfer for less than fair market value.

- b. Exception Trusts – Exception trusts are trusts established on or after August 11, 1993, which are required to be disregarded as available income and resources for the purposes of determining Medicaid eligibility. Income diverted directly to an exception trust or income received by an A/R and then placed into an exception trust is not counted as income to the A/R in the Medicaid eligibility determination process. Verification that the income was placed into the trust is required. In order to eliminate a monthly verification, the A/R is advised to have the income diverted directly to the exception trust. Any trust assets actually distributed to the A/R are counted as income in the month received and as a resource if retained into subsequent months. Exception trusts generally will conform to the definition of supplemental needs trust. There are two types of exception trusts:

- (1) One type of exception trust is a trust created for the benefit of a disabled person under the age of 65. It must:

be created with the individual's own assets;

be created by the disabled person's parent, grandparent, legal guardian, or by a court of competent jurisdiction; and,

include language specifying that upon the death of the disabled person, the local social services district will receive all amounts remaining in the trust, up to the amount of Medicaid paid out on behalf of the individual.

Once established, additional funds can be added to the trust until the person reaches age 65. However, any additions to the trust made after the person reaches age 65 would be treated as a transfer of assets, and may require the imposition of a penalty period. If a local district

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has imposed a Social Services Law Section 104-b or Section 369 lien against assets to be used to establish an exception trust, the lien is satisfied (or, in the district's discretion, compromise) before the trust is established.

- (2) The other type of exception trust is a trust created for the benefit of a disabled person of any age, and is a pooled trust, as described below:

the trust is established and managed by a non-profit association per Section 1917(d)(4)(C)(i) of the Social Security Act;

the assets are pooled with other assets and are managed by a non-profit organization which maintains separate accounts for each person whose assets are included in the pooled trust;

the disabled individual's account in the trust is established by the disabled individual, by the disabled individual's parent, grandparent or legal guardian, or by a court of competent jurisdiction;

the trust will be disregarded for Medicaid purposes regardless of the age of the individual when the pooled trust account is established, or when the assets are added to the pooled trust account; however, there is no exception to the transfer rules for transfers of assets to trusts created for the benefit of persons 65 years of age or older;

upon the death of the individual, the district's right of recovery is limited to those funds not retained by the non-profit organization; and

if the trust is subject to oversight by the NYS Attorney General's office, no bonding is required.

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NOTE: Although exception trusts created in accordance with the criteria set forth above are exempt as resources in the eligibility determination process regardless of the disabled individual's age, for purposes of the transfer provisions, any additions to the trust after the individual becomes 65 years of age are subject to applicable transfer penalties (See page 353).

It is the responsibility of the trustee of an exception trust to ensure that the funds are expended for the benefit of the chronically impaired or disabled person. In some cases, this disbursement of funds may indirectly benefit someone other than the beneficiary. Such disbursements are valid, as long as the primary benefit accrues to the chronically impaired or disabled person. For example, payment of travel expenses for a companion to a chronically impaired or disabled person going on vacation may be appropriate. Also, the abilities and capabilities of the person are taken into account. The purchase of sophisticated computer equipment to assist a physically disabled person to communicate would be considered appropriate, while purchase of the same type of equipment for an individual who could not be trained to use it, would not.

- c. Irrevocable Trust – An irrevocable trust is a trust created by an individual, over which the individual may or may not be able to exercise some control, but which may not be **cancelled** under any circumstances.

When an irrevocable trust is established by an A/R or the A/R's spouse on or after August 11, 1993, any portion of the trust principal, and income generated by the trust principal, from which no payments may be made to or for the benefit of the A/R or the A/R's spouse, is considered to be an asset transferred for less than fair market value for purposes of the transfer of assets rule (see page 353).

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1. Payments made from the trust to or for the benefit of the A/R or the A/R's spouse are considered available income in the month received.
 2. Any portion of the principal of the trust, or the income generated from the trust, which can be paid to or for the benefit of the A/R or the A/R's spouse, is considered an available resource. If the language of the trust specifies that the money can be made available for a specific event, that amount is considered an available resource, whether or not that event has occurred.
 3. Payments which are made from trust assets considered available to the A/R or the A/R's spouse, as described in paragraph (2) above, and which are not made to or for the benefit of the A/R or the A/R's spouse, are considered assets transferred for less than fair market value for purposes of the transfer of assets rule (see page 353).
- d. Revocable Trust – A revocable trust is a trust created by an individual, which the individual has the right to **revoke or** terminate.

When a revocable trust is established by an A/R or the A/R's spouse, the entire value of the trust is considered an available resource.

1. All payments made from the trust to or for the benefit of the A/R or the A/R's spouse are considered available income in the month received.
 2. All payments made from the trust fund to a person other than the A/R or the A/R's spouse are considered to be assets transferred for less than fair market value for purposes of the transfer of assets rule (see page 353).
- e. Supplemental Needs Trust (SNT) – A supplemental

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needs trust, as defined in Section 7-1.12 of the Estates, Powers and Trust Law, is a trust established for the benefit of an individual of any age with a severe and chronic or persistent impairment, designed to supplement government benefits for which the individual is otherwise eligible. Under the terms of such a trust:

1. the beneficiary does not have the power to assign, encumber, direct, distribute, or authorize distributions from the trust; and
2. the trust document generally prohibits the trustee from expending funds in any way that would diminish the beneficiary's eligibility for or receipt of any type of government benefit.

If a supplemental needs trust conforms to the rules of an exception trust, the trust is not counted for the purpose of determining the eligibility of the A/R who is the beneficiary of the trust (see Exception Trust). If the trust was created from the A/R's own assets and the trust is not an exception trust, the rules for irrevocable trust apply. Payments made to and for the benefit of a disabled person, other than for personal items, are considered available income. If a supplemental needs trust is created with the assets of someone other than the A/R and the trust is not an exception trust, the trust is a third party trust as defined below. Any distribution of trust assets actually made to the A/R is counted as income in the month received.

- f. Testamentary Trust – A testamentary trust is any trust established by will. Testamentary trusts are third party trusts, as defined below.
- g. Third Party Trusts – A third party trust is a trust established with the funds of someone other than the A/R. A third party trust may or may not be a supplemental needs trust, as defined in Section 7-1.12 of the Estates, Powers and Trust Law. For purposes of

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determining the eligibility of an A/R who is a beneficiary of a third party trust, the principal and accumulated income of the trust are not considered available to the A/R. However, any distributions of trust assets actually made to the A/R are counted as income in the month received.

- When to Verify:**
- (a) When the A/R states that s/he or a member of the household is the trustee of a trust fund;
 - (b) When the A/R states that s/he or a member of the household is the beneficiary of a trust fund;
 - (c) When the A/R states that s/he or a member of the household has created a trust;
 - (d) When the A/R states that s/he has a child who was injured in an accident.

Verification Process: The local district contacts the trustee, court or financial institution involved to obtain a copy of the trust, determine the terms of the trust, and whether or not it can be invaded.

Note: *Although Medicaid A/Rs who are not seeking coverage of long-term care services (Community Coverage without Long-Term Care) may attest to the amount of their resources (see page 303.4), they must provide documentation of any trust agreement in which the applicant is named the creator or beneficiary. This enables the district to determine the availability of any trust income/principal.*

- Documentation:** Sufficient to establish an audit trail:
- (a) Type of trust, name of trustee, name of beneficiary, amount of trust, amount and frequency of payments derived from the trust; **and**
 - (b) Name of person contacted for verification of trust, date of contact, determination of availability with reasonable explanation.