

New 2018 SNT POMS – Section 203 with substantive additions and deletions (removing mere grammatical changes) as selected by David Lillesand, and inserting a Table of Contents. May 6, 2018

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

A. Introduction to Medicaid trust exceptions

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

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

There are two types of Medicaid trusts to consider:

- Special Needs Trusts; and
- Pooled Trusts.

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

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

1. General rules for special needs trusts established prior to ~~be a strict special needs trust~~ December 13, 2016

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

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

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

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

2. Under age 65

To qualify for the special needs trust exception; the trust must be established for the benefit of a disabled individual under age 65. This exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

3. Additions to trust after age 65

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

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

4. Disabled

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act at the time the trust was established.

In cases where you need to develop for disability (for example, a special needs trust beneficiary files for SSI aged benefits), obtain a disability determination from the disability determination services (DDS) following procedure in SI 01150.121D.2. Develop disability as of the date on which the trust was established (unless you need to develop for an earlier period for another purpose).

If DDS determines that the trust beneficiary was:

- disabled as of the date the trust was established, the special needs trust meets the disability requirements for exception;
or
- not disabled as of the date the trust was established, evaluate the trust under instructions in SI 01120.201. Since the trust provisions take precedence over the transfer provisions (see SI 01150.201D.5.), depending on the terms of the trust, the trust may count as a resource or the transfer penalty may apply (see SI 01150.121.).

5. Definition of established

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

6. Established for the benefit of the individual

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

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

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

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

7. Who established the trust

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

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

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

8. Court-established trusts

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. ~~Approval of for the exception in section 1917(d)(4)(A) of the Act to apply. The special needs trust exception can be met when a court approves a petition and establishes a trust by a court order, as long as the creation of the trust has not been completed before the order is issued by the court.~~ Court approval of an already created special needs trust is not sufficient ~~for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust.~~ An individual if any of the individual's (or the individual's spouse) assets are transferred to the trust other by will. Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be “established by” an individual who does not provide the corpus of the trust, or transfer any of his/her assets to the trust, but rather someone who took action to establish the trust. To avoid confusion, we use the phrase “established through the actions of” rather than “established by” when referring to the individual who physically took action to establish a special needs or pooled trust. [is permitted to petition a court for the present establishment of a trust or may use an agent to do so. The court order establishes the trust, not the individual's petition. Petitioning a court to establish a trust is not establishment by an individual.](#)

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

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

John is a legally competent adult who inherited \$250,000 in January 2015, and is an SSI recipient. His sister, Justine, petitioned the court to create and order the funding of the John Special Needs Trust. Justine also provided the court with an unsigned draft of the trust document. A month later, the court approved the petition and issued an order requiring the creation and funding of the trust. This trust meets the requirement in [SI 01120.203B.8.](#) in this section. The fact that the trust beneficiary is a competent adult and could have established the trust himself, is not a factor in the resource determination.

b. Example of a court-established trust

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

c. Example of a court-approved trust

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

d. Example of a court-approved trust

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

9. Legal authority and trusts

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

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

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

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

10. State Medicaid reimbursement requirement

To qualify for the special needs trust exception, the trust must contain specific language that provides that, upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in SI 01120.203D.1, in this section.

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

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

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

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

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

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

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

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

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

2. Who established the trust

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

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

a. Power of attorney

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

b. Use of a seed trust

If the legally competent, disabled adult does not establish the trust, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money or, if State law allows, an empty or dry trust. After the seed trust is established, the legally

competent, disabled adult may transfer his or her own assets into the trust, or another individual with legal authority (such as a power of attorney) may transfer the individual's assets into the trust. To determine if the individual had legal authority, see SI 01120.203C.9. in this section.

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

3. Legal authority and trusts

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

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

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

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

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

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

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

1. General rules for pooled trusts

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

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

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

- The pooled trust is established and maintained/managed by a **nonprofit association**;
- **Separate accounts** are maintained for each beneficiary, but assets are pooled for investing and management purposes;
- Accounts **are established solely for the benefit of the disabled individuals**;
- The account in the trust is **established through the actions of the individual, a parent, a grandparent, a legal guardian, or a court**; and
- The trust provides that, to the extent that any amounts remaining in the beneficiary's account, upon the death of the beneficiary, are not retained by the trust, **the trust will pay to the State(s)** from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).

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

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

2. Disabled

To qualify for the pooled trust exception, the individual whose assets were used to establish the trust account must be disabled for SSI purposes under section 1614(a)(3) of the Act at the time the trust was established. This also includes individuals age 65 and older.

In cases where you need to develop for disability (for example, a pooled trust beneficiary files for SSI aged benefits), obtain a disability determination from the Disability Determination Services (DDS) following procedure in [SI 01150.121D.2](#). Develop disability as of the date on which the trust account was established (unless you need to develop for an earlier period for another purpose). If DDS determines that the trust beneficiary was:

- disabled as of the date the trust account was established, the trust account meets the disability requirement for exception; or
- **not** disabled as of the date the trust account was established, evaluate the trust under instructions in [SI 01120.201](#). Since trust provisions take precedence over the transfer provisions (see [SI 01120.201D.5](#)), depending on the terms of the trust, the trust might count as a resource or the transfer of penalty may apply (see [SI 01150.121](#)).

3. Nonprofit association

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

4. Separate account

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

5. Established for the sole benefit of the individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (For a definition of sole benefit, see [SI 01120.201F.2](#).) Other than the payments described in [SI 01120.201F.2.b](#) and [SI 01120.201F.2.c](#), this exception does not apply if the trust account:

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

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

6. Who established the trust account

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

- the disabled individual himself or herself;
- the disabled individual's parent(s);
- the disabled individual's grandparent(s);
- the disabled individual's legal guardian(s); or
- a court.

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

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

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

7. Court-established trusts

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

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

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

b. Example of a court-established trust account

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

c. Example of a court-approved trust account

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

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

8. State Medicaid reimbursement provision

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses, except as listed in [SI 01120.203D.1](#), in this section.

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

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

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

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

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

1. Allowable administrative expenses

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

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

2. Prohibited expenses and payments

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

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

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

3. Applicability

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

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

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

G. Policy for waiver for undue hardship

1. Definitions

a. Undue hardship

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

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

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

b. Loss of shelter

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

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

2. Application of the undue hardship waiver

a. Applicability

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

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

NOTE: If the trust is revocable by the individual, the requirements for undue hardship cannot be met if because the individual established a revocable can access the trust funds for his or her support and maintenance.

b. Suspension of resource counting

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

c. Resource counting resumes

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

3. Available funds

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

a. Income

Income includes the following:

- All countable income received in the month(s) for which undue hardship is an issue;
- All income excluded under the Act received in the month(s) for which undue hardship is an issue. For a list of unearned and earned income exclusions, respectively, provided under the Act, see [SI 00830.099](#) and [SI 00820.500](#); and
- The value of in-kind support and maintenance (ISM) being charged, i.e., the presumed maximum value (PMV), the value of the one-third reduction (VTR), or the actual lesser amount.

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

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

b. Resources

Resources include the following:

- All countable liquid resources as of the first moment of the month(s) for which undue hardship is at issue. (for a definition of liquid resources, see [SI 01110.300](#)); and
- All liquid resources excluded under the Act as of the first moment of the month(s) for which undue hardship is at issue (for a list of resource exclusions under the Act, see [SI 01130.050](#)).

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

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

4. Example

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

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

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

1. When to use this procedure

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

2. Recontact period

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

3. Documentation

At each recontact:

- Obtain on a DROC the individual's statement, either signed or recorded, that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;
- Determine whether total income and liquid resources exceeded the FBR plus any State supplement for each prior month;
- If undue hardship continued for the prior period and is expected to continue in the future period, continue payment and tickle the case for the next recontact, per [SI 01120.203H.4](#), in this section; and
- If undue hardship did not continue through each month, clear the **excluded amount** and **exclusion reason** entries on the **ROTH** screen for each month that undue hardship did not apply. Process the excess resources overpayment for those months. If undue hardship stops due to a continuing change in the individual's situation, such as income or resources, do not tickle the file to follow up. The individual must recontact SSA and make a new allegation of undue hardship.

4. Recontact controls

- For SSI Claims System cases, use the DWO1 and establish a tickle to control the case for recontact when the individual is eligible for SSI based on undue hardship. (Use the Modernized Development Worksheet (MDW) for non-SSI Claims System cases.) If MDW is applicable, set up an MDW screen using instructions in MSOM MDW 001.001 and the following MDW inputs:
- In the **ISSUE** field: input TRUST;
- In the **CATEGORY** field: input T16MISC;
- In the **TICKLE** field: input the date by which the individual should be recontacted to redevelop undue hardship; and
- In the **MISC** field: input information (up to 140 characters) about the trust undue hardship issue including issues to be aware of and anything else the CS deems appropriate. If additional space is needed, use **REMARKS**.

I. Procedure for developing exceptions to resource counting

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

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

<u>STEP</u>	<u>ACTION</u>
<u>1</u>	<p><u>Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See SI 01120.203B.2. in this section.)</u></p> <ul style="list-style-type: none"> • <u>If yes, go to Step 2.</u> • <u>If no, go to Step 9.</u>
<u>2</u>	<p><u>Does the trust contain the assets of a disabled individual? (See SI 01120.203B.4. in this section.)</u></p> <ul style="list-style-type: none"> • <u>If yes, go to Step 3.</u> • <u>If no, go to Step 9.</u>
<u>3</u>	<p><u>Is the disabled individual the sole beneficiary of the trust? (See SI 01120.203B.5. in this section.)</u></p> <ul style="list-style-type: none"> • <u>If yes, go to Step 4.</u> • <u>If no, go to Step 9.</u>
<u>4</u>	<p><u>Did a parent, grandparent, legal guardian, or court establish the trust? (See SI 01120.203B.6. in this section.)</u></p> <ul style="list-style-type: none"> • <u>If yes, go to Step 5.</u> • <u>If no, go to Step 9.</u>
<u>5</u>	<p><u>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.9. in this section?</u></p>

<u>STEP</u>	<u>ACTION</u>
	<ul style="list-style-type: none"> • <u>If yes, go to Step 6.</u> • <u>If no, go to Step 9.</u>
6	<p>Verify if the trust contains any early termination provisions as described within SI 01120.199. If the trust does not contain any early termination provisions, go to Step 7.</p> <p>If the trust contains any early termination provisions, does it meet the early termination criteria in SI 01120.199F that would make early termination acceptable?</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 7.</u> • <u>If no, go to Step 9.</u>
7	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.3. in this section.</p> <p>Go to Step 8 for treatment of assets placed in trust prior to age 65.</p> <p>Go to Step 9 for treatment of assets placed in trust after attaining age 65.</p>
8	<p>Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.</p>
9	<p>The trust (or portion thereof) does not meet the requirements for the special needs trust exception.</p> <p>Consider if the pooled trust exception in SI 01120.203D in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under SI 01120.203K in this section.</p>

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

<u>STEP</u>	<u>ACTION</u>
1	<p>Does the trust contain the assets of an individual who was under age 65 when the trust was established? (See SI 01120.203B.2. in this section.)</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 2.</u> • <u>If no, go to Step 9.</u>
2	<p>Does the trust contain the assets of a disabled individual? (See SI 01120.203B.4. in this section.)</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 3.</u> • <u>If no, go to Step 9.</u>
3	<p>Is the disabled individual the sole beneficiary of the trust? (See SI 01120.203B.5. in this section.)</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 4.</u> • <u>If no, go to Step 9.</u>
4	<p>Did the individual, a parent, a grandparent, a legal guardian, or a court establish the trust? (See SI 01120.203B.6. in this section.)</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 5.</u> • <u>If no, go to Step 9.</u>
5	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.9. in this section?</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 6.</u> • <u>If no, go to Step 9.</u>

<u>STEP</u>	<u>ACTION</u>
6	<p>Verify if the trust contains any early termination provisions as described in SI 01120.199. If the trust does not contain any early termination provisions, go to Step 7.</p> <p>If the trust contains any early termination provisions, does it meet the early termination criteria in SI 01120.199F that would make early termination acceptable?</p> <ul style="list-style-type: none"> • If yes, go to Step 7. • If no, go to Step 9.
7	<p>The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual's attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.3. in this section.</p> <p>Go to Step 8 for treatment of assets placed in trust prior to age 65.</p> <p>Go to Step 9 for treatment of assets placed in trust after attaining age 65.</p>
8	<p>Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.</p>
9	<p>The trust (or portion thereof) does not meet the requirements for the special needs trust exception.</p> <p>Consider if the pooled trust exception in SI 01120.203D in this section applies. If neither exception applies, determine whether the undue hardship waiver applies under SI 01120.203K in this section.</p>

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

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

<u>STEP</u>	<u>ACTION</u>
1	<p>Does the trust account contain the assets of a disabled individual? (See SI 01120.203C.2. in this section.)</p> <ul style="list-style-type: none"> • If yes, go to Step 2. • If no, go to Step 8.
2	<p>Is the pooled trust established and managed by a nonprofit association? (See SI 01120.203C.1., SI 01120.203C.3., and development instructions in SI 01120.203F in this section.)</p> <ul style="list-style-type: none"> • If yes, go to Step 3. • If no, go to Step 8.
3	<p>Does the trust pool the funds yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (See SI 01120.203C.4. in this section.)</p> <ul style="list-style-type: none"> • If yes, go to Step 4. • If no, go to Step 8.
4	<p>Is the disabled individual the sole beneficiary of the trust account? (See SI 01120.203C.5. in this section.)</p> <ul style="list-style-type: none"> • If yes, go to Step 5. • If no, go to Step 8.
5	<p>Did the individual, (a) parent(s), (a) grandparent(s), (a) legal guardian(s), or a court establish the trust account? (See SI 01120.203C.1. and SI 01120.203C.6. in this section.)</p> <ul style="list-style-type: none"> • If yes, go to Step 6. • If no, go to Step 8.

<u>STEP</u>	<u>ACTION</u>
6	<p>Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203C.8. in this section?</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 7.</u> • <u>If no, go to Step 8.</u>
7	<p>The trust meets the Medicaid pooled trust exception; however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.</p>
8	<p>The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203I. in this section.</p>

J. Procedure to verify nonprofit associations when evaluating pooled trusts

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

K. Procedure for development of undue hardship waiver

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

<u>STEP</u>	<u>ACTION</u>
1	<p>Is the trust irrevocable?</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 2.</u> • <u>If no, go to Step 8.</u>
2	<p>Would counting the trust result in excess resources?</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 3.</u> • <u>If no, go to Step 8.</u>
3	<p>Does the individual allege, or information in the file indicate, that not receiving SSI would deprive the individual of food or shelter according to SI 01120.203G in this section?</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 4.</u> • <u>If no, go to Step 8.</u>
4	<p>Obtain the individual's signed statement (on the DPST screen in the SSI Claims System or, in non-SSI Claims System cases, on a SSA-795 faxed into NDRed) as to whether:</p> <ul style="list-style-type: none"> • <u>Failure to receive SSI payments would deprive the individual of food or shelter;</u> • <u>The individual's total available funds are less than the FBR plus any federally administered State supplement;</u> • <u>The individual agrees to report promptly any changes in income and resources; and</u> • <u>The individual understands that he or she may be overpaid if, for any month, available funds exceed the FBR plus any State supplement or if other situations change.</u> • <u>Go to Step 5.</u>
5	<p>Does the trust contain language that specifically prohibits the trustee from making disbursements for the individual's support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for the individual's support and maintenance?</p> <ul style="list-style-type: none"> • <u>If yes, go to Step 6.</u>

<u>STEP</u>	<u>ACTION</u>
	<ul style="list-style-type: none"> • <u>If no, go to Step 8.</u>
6	<p><u>Add up all of the individual's income, both countable and excludable (see SI 01120.203G.3.a. in this section). Do not include any SSI payments received or items that are not income, per SI 00815.000. If the individual is receiving ISM, include as income the ISM being charged (the PMV, VTR, or actual amount, if less).</u></p> <p><u>Add up all of the individual's liquid resources, both countable and excludable (see SI 01120.203G.3.b. in this section).</u></p> <p><u>Does the total of the income and the liquid resources equal or exceed the FBR plus any federally administered State supplement?</u></p> <ul style="list-style-type: none"> • <u>If yes, go to Step 8.</u> • <u>If no, go to Step 7.</u>
7	<p><u>Suspend counting of the trust as a resource for any month in which all requirements above are met (see SI 01120.203G.2. in this section).</u></p> <ul style="list-style-type: none"> • <u>In the SSI Claims System, document the findings of undue hardship and applicable months on the DROC screen.</u> • <u>On paper forms, document the information in the REMARKS section. For further documentation, see SI 01120.202C and SI 01120.202D; and for follow-up instructions, see SI 01120.203H in this section. STOP.</u>
8	<p><u>Undue hardship does not apply. However, in some instances where income and resources are currently too high, unless the trust is revocable, undue hardship may apply in future months.</u></p>

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

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