

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 217

(Senator Kelley)

Judicial Proceedings

Health and Government Operations

Special or Supplemental Needs Trusts - Authorization to Fund

This bill clarifies that a statute requiring certain State agencies to adopt specified regulations to encourage the use of special supplemental needs trusts, may not be interpreted to require a court order to authorize the *funding* of a special or supplemental needs trust.

Fiscal Summary

State Effect: This bill does not affect State operations or finances.

Local Effect: This bill does not affect State operations or finances.

Small Business Effect: None.

Analysis

Current Law/Background:

Special and Supplemental Needs Trusts

Regulations adopted by State agencies that provide public benefits to specified individuals may not be interpreted to require a court order to authorize a *disbursement* from a special or supplemental needs trust. The law is silent, however, as to whether a court order is needed for the *funding* of a special or supplemental needs trust. Special (or supplemental) needs trusts are intended to hold funds for the benefit of a disabled individual for purposes other than those provided for by Medicaid or other public benefits, without affecting the individual's eligibility for the public benefits. A pooled asset special needs trust is a trust that collectively invests and manages funds of multiple individuals who are disabled, reducing the costs of trust administration. The assets of a disabled individual used to fund

a special needs trust may come from a source such as a personal injury settlement or an inheritance of the individual.

Chapters 561 and 562 of 2011, as amended by Chapter 455 of 2013, established that it is the policy of the State to encourage the use of a special needs trust or supplemental needs trust, including trusts funded by a trust beneficiary or by a third party, by an individual of any age with disabilities to preserve funds to provide for the needs of the individual not met by public benefits and to enhance quality of life. State agency that provides public benefits to individuals of any age with disabilities through means-tested programs, including the Medical Assistance Program, must adopt regulations that:

- are not more restrictive than existing federal law, regulations, or policies with regard to the treatment of a special needs trust or supplemental needs trust including other trusts specified under federal law;
- are not more restrictive than any State law regarding trusts, including any State law regarding the reasonable exercise of discretion by a trustee, guardian, or conservator in the best interests of the beneficiary; and
- do not require disclosure of a beneficiary's personal or confidential information without the consent of the beneficiary.

The adopted regulations must allow:

- an individual account in a pooled asset special needs trust to be funded without financial limit;
- a fund in a special needs trust, supplemental needs trust, or pooled asset special needs trust to be used for the sole benefit of the beneficiary including, at the discretion of the trustee, distribution for food, shelter, utilities, and transportation;
- an individual to establish or fund an individual account in a pooled asset special needs trust without an age limit or a transfer penalty;
- an individual to fund a special needs trust or supplemental needs trust for the individual's child with disabilities without a transfer penalty and regardless of the child's age; and
- all legally assignable income or resources to be assigned to a special needs trust, supplemental needs trust, or pooled asset special needs trust without limit.

Chapters 561 and 562, as amended by Chapter 455, also specify that a determination of the Internal Revenue Service regarding the nonprofit status of an organization operating a pooled asset special needs trust is sufficient to satisfy a federal requirement that such trusts be established and managed by a nonprofit association. A State agency may not impose additional requirements on such an organization for the purpose of qualification or disqualification of the organization from offering a pooled asset special needs trust. In

addition, a regulation adopted by a State agency regarding pooled special needs trusts will apply only to those trust beneficiaries who are State residents or who receive public benefits funded by the State.

Federal Medicaid Provisions

Medicaid is a federal entitlement program authorized under Title XIX of the Social Security Act that helps low-income individuals who fall into one of several categories to cover some or all of their medical bills.

Under federal law governing state Medicaid programs, provisions governing the treatment of trusts for purposes of determining an individual's eligibility for, or amount of, benefits under a state plan for Medicaid, treat certain special needs trusts and pooled asset special needs trusts established for a disabled individual as "not available to the individual" and not affecting the individual's eligibility, subject to certain conditions.

Specifically, federal law treats as not available to an individual the assets in a special needs trust that contains the assets of an individual younger than age 65 who is disabled and is established for the benefit of the individual by a parent, grandparent, legal guardian of the individual, or a court. A state, however, must receive all amounts remaining in the trust upon the death of the individual up to the total amount of medical assistance paid by the state on behalf of the individual.

Also treated as not available to an individual are the assets of an individual in a pooled asset special needs trust containing the assets of an individual who is disabled that meets the following conditions: (1) the trust is established and managed by a nonprofit association; (2) a separate account is maintained for each beneficiary of the trust, although the accounts may be pooled for investment and funds management; (3) accounts in the trust are established solely for the benefit of individuals who are disabled by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court; and (4) 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 the total amount of medical assistance paid on behalf of the beneficiary.

Under federal law, a person is considered to be disabled generally if he or she is unable to engage in any substantial gainful activity by reason of any 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 at least 12 months. The determination of whether a person is considered to be disabled, however, is also subject to more specific provisions and other considerations.

Department of Health and Mental Hygiene Medicaid Regulations

The Department of Health and Mental Hygiene (DHMH) administers the Medicaid program in the State. DHMH regulations address the treatment of trusts with respect to medical assistance eligibility and, in accordance with federal law, do not count certain special needs trusts and pooled asset special needs trusts in determining eligibility for Medicaid. The regulations specify various criteria that special needs trusts must meet in addition to the federal requirements that the beneficiary be younger than age 65; that the trust is established by a parent, grandparent, legal guardian of the individual, or a court; and that the State receive all amounts remaining in the trust upon the death of the beneficiary, up to the total amount of Medicaid benefits paid on behalf of the beneficiary. The regulations do not, however, impose criteria on pooled asset special needs trusts beyond those specified under federal law.

Maryland Discretionary Trust Act

A discretionary trust, with respect to which the trustee has sole discretion over trust property expenditures, may be created under the Maryland Discretionary Trust Act. A trust cannot be created under the Act by a transferor for the benefit of the transferor.

The Act states that a trust created under the Act may be used to assure that trust property is available to provide for the needs of the beneficiary to the extent not provided for by other sources, including public and private benefit programs for which the beneficiary would or might be eligible if the trust did not exist. The Act further states that trust property may not be considered property or an available resource of the beneficiary and that no part of the trust property may be subject to claims for costs of care provided to the beneficiary by a state.

A trust is created under the Act generally by expressly indicating that the property is transferred or held in trust under the Act. The Act does not limit other means of declaring trusts or transferring property in trust.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Disabilities, Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Register of Wills, Black's Law Dictionary, Social Security Administration, Department of Legislative Service

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