

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 553
Judiciary

(Delegates Smigiel and McDermott)

Judicial Proceedings

**Estates and Trusts - Special and Supplemental Needs Trusts - Regulations by
State Agencies**

This bill specifies that regulations adopted by certain State agencies that provide public benefits to individuals with disabilities may not be more restrictive than State statutes, regulations, or common law regarding trusts and may not require disclosure of a beneficiary's personal or confidential information without consent. In addition, the regulations must allow specified funds to be retained by a pooled asset special needs trust. These and other existing requirements applicable to special needs, supplemental needs, and pooled asset special needs trusts may not be interpreted to require a court order to authorize a disbursement from a special or supplemental needs trust. Finally, a regulation regarding pooled asset special needs trusts must apply only to trust beneficiaries who are State residents or who receive State-funded benefits.

Fiscal Summary

State Effect: The bill is not expected to affect State finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The bill specifies that regulations adopted by a State agency that provides public benefits to individuals with disabilities of all ages through means-tested programs, including Medicaid, may not:

- (1) be more restrictive than State statutes, regulations, or common law regarding trusts, including the reasonable exercise of trustee discretion, guardianship of the property, or conservatorship of an alleged disabled adult; or
- (2) require disclosure of a trust beneficiary's personal or confidential information without the consent of the beneficiary.

The adopted regulations must allow a pooled asset special needs trust, authorized under the federal law governing state Medicaid programs, to retain funds remaining in an individual beneficiary's account after the death of the beneficiary, without limit. The bill specifies that these requirements as well as existing requirements applicable to regulations regarding special needs trusts, supplemental needs trusts, or pooled asset special needs trusts may not be interpreted to require a court order to authorize a disbursement from a special or supplemental needs trust.

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

Current Law:

Chapters 561 and 562 of 2011

Chapters 561 and 562 of 2011 established provisions in State law relating to special needs, supplemental needs, and pooled asset special needs trusts, upon which the bill expands. Pursuant to Chapters 561 and 562, it is the policy of the State to encourage the use of a special needs trust or supplemental needs trust 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. Each State agency that provides public benefits through means-tested programs to individuals of all ages with disabilities, including Medicaid, is required to 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 specified trusts defined under federal law governing state Medicaid programs.

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, distributions 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.

A "special needs trust" and a "supplemental needs trust" include a trust funded by a trust beneficiary or by a third party.

Chapters 561 and 562 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. In addition, a State agency may not impose additional requirements on an organization for the purpose of qualifying or disqualifying the organization from offering a pooled asset special needs trust.

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 under 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.

A state plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a state, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value within a specified period prior to applying for Medicaid or while receiving Medicaid, the individual is ineligible for Medicaid for specified services for a certain period of time (referred to as a "transfer penalty"). A person may not be ineligible, however, for a transfer to a trust established solely for the benefit of an individual's blind or disabled child or a trust established solely for the benefit of an individual under age 65 who is disabled.

Department of Health and Mental Hygiene Medicaid Regulations

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.

Similar to federal law, under DHMH regulations addressing the disposal of assets for less than fair market value with respect to Medicaid eligibility, a person may not be ineligible

for Medicaid due to a transfer of assets to a trust established for the sole benefit of the individual's child who is blind or disabled or a transfer of assets to a trust established for the sole benefit of a disabled individual younger than age 65.

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.

Background:

Special/Supplemental Needs Trusts and Pooled Asset Special Needs Trusts

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.

DHMH Draft Regulations

DHMH proposed regulations in January 2011 to amend existing regulations addressing special needs trusts and pooled trusts, but subsequently withdrew the proposed regulations in March 2011. The proposed regulations included requirements applicable to special needs trusts and pooled trusts that addressed certain issues in a manner that SB 888 and HB 1277 of 2011 (enacted as Chapters 561 and 562 of 2011) appeared to be intended to prevent.

DHMH indicates that it has again drafted regulations related to pooled trusts. A notice was published in the Maryland Register for informal comment on the draft regulations and DHMH has since amended the draft regulations after receiving comments. The department expects to continue to work with stakeholders and continue the regulation promulgation process. The draft regulations appear to be consistent, to at least a certain extent, with the bill's provisions. DHMH indicates that the bill will simply bind the department to existing State and federal requirements and that the draft regulations do not conflict with any provision of the bill that could have a material fiscal impact.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Frigon, Bradley J., Kuhn, W. Eric, *Which SNT, When, and Why?*, 5 NAELA J. 1 (2009); Department of Legislative Services

Fiscal Note History: First Reader - February 14, 2012
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