

SPECIAL NEEDS TRUST
ATTORNEY REVIEW AND STATEMENT

This document provides guidance on the creation of a Special Needs Trusts for purposes of eligibility for the Maryland Medical Assistance Program and compliance with COMAR 10.09.24.08-2C. The local departments of social services will not count trust assets as an available financial resource for purposes of determining the applicant or recipient's financial eligibility for Medical Assistance benefits if the trust document conforms to the regulations.

Initial Approval: You may submit a Special Needs Trust to the Office of the Attorney General (OAG) for review to confirm that it complies with COMAR 10.09.24.08-2C and 42 U.S.C. § 1396p(d)(4)(A). OAG's approval, however, is not required to create a valid Special Needs Trust. To obtain approval, the trust document and a completed and signed copy of this *Attorney Review and Statement* should be submitted to:

Special Needs Trust Attorney
Office of the Attorney General
Room 302
300 West Preston Street
Baltimore, Maryland 21201

We recommend that the trust document be final, but unexecuted, in the event that OAG suggests revisions.

Amendments: The OAG's initial approval that a trust is compliant with COMAR 10.09.24.08-2C and 42 U.S.C. § 1396p(d)(4)(A) is no longer effective if the trust is amended without OAG approval of the amendment. A trust that OAG initially approved but has since been amended without OAG approval shall not be represented to the local departments of social services as having been approved by OAG.

Amendments may be submitted to OAG at the address above. To obtain OAG review of a trust amendment, submit a clean copy of the amended trust, a copy of the original trust bearing OAG's stamp and trust reviewer initials, and either: (1) a blacklined copy of the amended trust that shows the changes to the original trust, or (2) a concise explanation of the changes to the trust that identifies the provisions of the trust that have been amended.

Questions may be addressed to Wendy Ferrell at wendy.ferrell@maryland.gov.

Trust Name/Beneficiary _____

Instructions: In the blank to the left of the numbered line, provide the page numbers where the criteria are addressed in the trust document.

- _____ (1) The trust is irrevocable.
- _____ (2) The trust states that the beneficiary is disabled as defined by COMAR 10.09.24.05-4B.
- _____ (3) The beneficiary of the trust is younger than 65 years old at the time the trust is established and funded.
- _____ (4) The trust has been established by the beneficiary's parent, grandparent, legal guardian, or a court.
- _____ (5) The trust provides that all states which have provided medical assistance benefits to the beneficiary shall be paid their proportionate share of the total amount of medical assistance benefits paid on behalf of the beneficiary by all states, up to the amount of assets remaining in the trust upon the death of the beneficiary, after administrative expenses related to the termination of the trust.
- _____ (6) The trust specifies that it will not be terminated under any circumstances while the beneficiary is alive;

- OR -

The trust states that if the trust is terminated while the beneficiary is alive:

- _____ (i) upon termination all states which have provided medical assistance benefits to the beneficiary shall be paid their proportionate share of the total amount of medical assistance paid on behalf of the beneficiary by all states, up to the amount of assets remaining in the trust at the time of termination, after administrative expenses related to the termination of the trust;
 - _____ (ii) other than amounts paid to the states as reimbursement for medical assistance benefits and payment of administrative expenses and reasonable compensation to the trustee for trust management, all trust proceeds must immediately and directly be distributed to the beneficiary; and
 - _____ (iii) the power to terminate the trust is vested in someone other than the beneficiary.
- _____ (7) The trust provides that additions may not be made to the trust after the beneficiary is 65 years old.

- _____ (8) The trust provides that expenditures from the trust shall be used for the sole benefit of the beneficiary and shall be directly related to the beneficiary's health care, education, comfort, or support.
- _____ (9) The trust provides that the trust beneficiary may not serve as trustee, cotrustee, trust protector, trust advisor, or in any other capacity that would allow the beneficiary to influence or exercise authority or control over distributions from the trust.
- _____ (10) The trust provides that the trustee shall administer the trust in accordance with the provisions of Estates and Trusts Article, § 15-502, Annotated Code of Maryland, and may not:
- _____ (i) Have an interest in trust assets;
 - _____ (ii) Have discretion to use trust assets for the trustee's own benefit;
 - _____ (iii) Self-deal by selling trust assets to the trustees or buying trust assets from the trustee; or
 - _____ (iv) Loan trust assets to the trustee.
- _____ (11) The trust provides that compensation to the trustee shall be limited in accordance with the provisions of Estates and Trusts Article, § 14.5-708, Annotated Code of Maryland.
- _____ (12) The trust provides that any leases or mortgages that the trust may hold will terminate or become due and payable upon the death of the beneficiary or termination of the trust.
- _____ (13) The trust provides that if the trust owns titled property that is valued at more than \$500, the property shall be titled in the name of the trust, except for securities, which may be held in the name of a nominee.
- _____ (14) The trust provides that any assets jointly owned shall be owned as tenants in common, and the ownership agreement shall provide that, upon termination of the trust, the property shall either be sold for fair market value or the other owners shall purchase the trust's interest in the property for fair market value.
- _____ (15) The trust provides that trust assets may not be held as an ongoing business or enterprise, or as investments in new or untried enterprises.
- _____ (16) The trust provides that trust distributions may not be used to supplement medical assistance payments to any health care provider delivering goods or services to the beneficiary.
- _____ (17) The trust provides that trust assets may not be used to purchase gifts.

- _____ (18) The trust provides that trust assets may not be used to purchase a life insurance policy on the life of the beneficiary.
- _____ (19) The trust provides that trust assets may only be used to purchase a life insurance policy on the life of someone other than the trust beneficiary if the trust is the only beneficiary of the life insurance policy.
- _____ (20) If an annuity on the life of the beneficiary has been or will be purchased from trust funds, the trust provides that if the beneficiary dies before the final payments from the annuity have been made, the remaining payments are paid to all states which have provided medical assistance benefits to the beneficiary according to those states' proportionate share of the total medical assistance benefits that have been provided, until the total medical assistance benefits paid on behalf of the beneficiary have been reimbursed.
- _____ (21) The trust provides that the trust may not loan trust assets without security, which may include an interest in real or personal property of at least equivalent value.
- _____ (22) The trust provides that the trust may only make loans if the loan agreement provides for immediate repayment in the event of the death of the beneficiary or termination of the trust for any other reason.
- _____ (23) The trust provides that the only real property in which the trust may invest is in a single home property, which is used as the residence of the beneficiary and is titled in the name of the trust.
- _____ (24) The trust provides that the trust may not disburse more than \$100,000 for the purchase of property without the approval of the State circuit court in the jurisdiction in which the beneficiary resides.
- _____ (25) The trust provides that an annual accounting of the trust, including a listing of current assets, income, and itemized distributions during the previous year, shall be sent to the Maryland Medical Assistance Program, Division of Recoveries and Financial Services, at 2nd Floor, 201 West Preston Street, Baltimore, Maryland 21201.
- _____ (26) The trust provides that trust assets may not be used to pay funeral expenses of the beneficiary but may be used to purchase an irrevocable burial contract for the beneficiary to cover the beneficiary's funeral and burial expenses.

_____ (27) If the trust is or will be entitled to receive payments from a structured settlement or an annuity that was purchased by funds that are not part of the trust, the trust requires that if the beneficiary dies before the annuity or settlement is fully paid, the balance of the annuity or settlement will be paid to all states which have provided medical assistance benefits to the beneficiary according to those states' proportionate share of the total medical assistance benefits that have been provided, until the total medical assistance benefits paid on behalf of the beneficiary have been reimbursed.

The following notices should be included in the trust document.

_____ (28) A copy of the trust shall be sent to the Maryland Medical Assistance Program, Division of Recoveries and Financial Services, at the address noted above, and if any amendments are made to the trust, the amendments shall comply with COMAR 10.09.24.08-2C and a copy of the amendments shall also be sent to the Division of Recoveries and Financial Services.

_____ (29) If the trust agreement fails to comply with any provision of COMAR 10.09.24.08-2C, the full value of the assets of the trust shall be considered available resources of the trust beneficiary for Medical Assistance eligibility purposes.

Please answer the following questions. Explain any *Yes* answers in the space provided for comments or in an attachment.

No **Yes** Does the trust contain provisions that conflict with the policies set forth under this regulation?

No **Yes** Does the trust permit distribution of trust assets upon termination of the trust that would hinder or delay reimbursement to the Department and other states under § C(6) and (7) of COMAR 10.09.24.08-2?

No **Yes** Does the trust place time limits, or any other limits, on the Department and other states' claims for reimbursement under § C(6) and (7) of COMAR 10.09.24.08-2?

COMMENTS

Attorney

Date

*Form prepared by the Maryland Office of the Attorney General
September 2016*