

# PS 18-007 Legacy Enhancement Master Pooled Trust Agreement

Date: October 13, 2017

## 1. Syllabus

This Regional Chief Counsel opinion concludes that the Legacy Trust is a valid, pooled trust because its provisions comply with all five conditions of the pooled trust exception for counting resources for Supplemental Security Income (SSI) purposes. Furthermore, the number holder's (NH) subaccount is exempt from the agency's resource counting rules for SSI purposes because it is irrevocable. Therefore, the NH's subaccount is eligible for the pooled trust exception and should not be considered a resource for SSI purposes.

## 2. Opinion

### QUESTION PRESENTED

You asked whether the Legacy Enhancement Master Pooled Trust Agreement (Legacy Trust), and the accompanying Joinder Agreement for T~ (NH), qualify as a pooled trust under section 1917(d)(4)(c) of the Social Security Act (Act), as codified at 42 U.S.C. § 1396p(d)(4)(C). If the Legacy Trust qualifies as a pooled trust, you also inquired whether the NH's subaccount, established with her own funds after January 1, 2000, would be exempt from the Social Security Administration (agency's) resource counting rules for Supplemental Security Income (SSI) purposes.

### ANSWER

We believe that there is support for the agency to conclude that the Legacy Trust qualifies as a pooled trust under section 1917(d)(4)(c) of the Act because its provisions comply with all five conditions for qualification for the pooled trust exception for counting resources for SSI purposes. See 42 U.S.C. § 1396p(d)(4)(C). Furthermore, we believe there is support for the agency to find that the NH's subaccount in the Legacy Trust established with the NH's own funds after January 1, 2000, is exempt from the agency's resource counting rules and should not be considered a resource for SSI purposes.

### BACKGROUND

Legacy Enhancement is a Texas domestic nonprofit corporation. Legacy Enhancement created the Legacy Trust on May 18, 2016 "to establish a pooled trust fund to benefit individuals with disabilities," as defined by 42 U.S.C. § 1382c(a)(3), pursuant to 42 U.S.C. § 1396p(d)(4)(C). Legacy Trust, introductory paragraph. Article 1(B) also states that the Trustee retained the "sole and absolute discretion" to use the principal and income in a subaccount to provide a beneficiary with "items, benefits and services that the Trustee believes are reasonable and not otherwise available to him or her from any other source." Legacy Trust at art. 1(B). The Trust contains a choice-of-law provision indicating that it should be interpreted pursuant to the laws of Texas. See Legacy Trust, art. 11(D). T~ opened a subaccount in the Legacy Trust on her own behalf on February XX, 2017, via the Joinder Agreement.

## ANALYSIS

### I. Federal Law and Agency Policy: Trusts as SSI Resources

SSI is a general public assistance program for aged, blind, or disabled individuals who meet certain income and resource restrictions and other eligibility requirements. See 20 C.F.R. §§ 416.110, 416.202. “Resources” include cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his or her support and maintenance. See 20 C.F.R. § 416.1201(a). “If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual . . . .” 20 C.F.R. § 416.1201(a)(1); see Program Operations Manual System (POMS) [SI 01120.010](#)(B).

When determining a claimant’s eligibility for SSI, in general, pursuant to section 1613(e) of the Act (codified at 42 U.S.C. § 1382b(e)), the agency considers trusts created on or after January 1, 2000, from a disabled beneficiary’s assets to be a resource to the extent that the trust is revocable, or, in the case of an irrevocable trust, to the extent that any payments can be made from the trust for the benefit of the disabled beneficiary. See 42 U.S.C. § 1382b(e)(3); POMS [SI 01120.201](#). However, the rules in section 1613(e), as codified at 42 U.S.C. § 1382b(e), do not apply to trusts described in section 1917(d)(4) of the Act, as codified at 42 U.S.C. § 1396p(d)(4), the Medicaid trust exceptions, which are commonly known as special needs and pooled trust exceptions. See 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(A), (C); POMS [SI 01120.201](#), [SI 01120.203](#). This legal opinion focuses upon the pooled trust exception.

A pooled trust is a trust that contains many different individuals’ assets, segregated into separate subaccounts. POMS [SI 01120.203](#)(B)(2)(a). As stated, a pooled trust that qualifies as a Medicaid payback trust under section 1917(d)(4)(C) is exempt from the Act’s normal rules for counting trust assets as a resource. See 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(C); POMS [SI 01120.203](#)(B)(2). To qualify for the pooled trust exception under the Act, a trust must contain assets belonging to a disabled beneficiary and must satisfy all of the following conditions:

1. The trust must be established and managed by a non-profit association;
2. A separate account must be maintained for each disabled beneficiary of the trust; but, for purposes of investment and management of funds, the trust may pool these accounts;
3. Accounts in the trust must be established solely for the benefit of disabled individuals (as defined in section 1382c(a)(3) of the Act);
4. Accounts in the trust must be established by the parent, grandparent, or legal guardian of such disabled beneficiaries, by such disabled beneficiaries, or by a court; and
5. The trust must provide that to the extent that any amounts are remaining in the disabled beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust must pay to the State the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the disabled beneficiary under the State Medicaid plan.

42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(C); POMS [SI 01120.203](#)(B)(2).

If a trust qualifies as a pooled trust under 42 U.S.C. § 1396p(d)(4)(C), we also consider whether the sub-account is excluded under the regular resource counting rules. See POMS [SI 01120.200](#), [SI 01120.203](#). Under the regular resource counting rules, the agency considers a trust a resource, attributable to the beneficiary, if the beneficiary has the legal authority to revoke or terminate the trust and then use the funds to meet his or her food or shelter needs, if the beneficiary can direct the use of the trust principal for his or her support and maintenance under the terms of the trust, or if the beneficiary can sell her beneficial interest in the trust. See 20 C.F.R. § 416.1201(a); POMS [SI 01120.200\(D\)\(1\)\(a\)](#). We next apply the pooled trust exception and regular resource rules to the Legacy Trust.

## II. Application of the Pooled Trust Exception to the Legacy Trust

### A. Condition One: Trust established and managed by a non-profit association.

The Legacy Trust satisfies the first condition that the trust be established and managed by a non-profit association. See 42 U.S.C. § 1396p(d)(4)(C)(i); POMS [SI 01120.203\(B\)\(2\)](#). Legacy Enhancement established the Legacy Trust. As stated above, Legacy Enhancement is a non-profit corporation and has submitted letters from the United States Internal Revenue Service and the Texas Office of the Secretary of State documenting its non-profit status. Consequently, the Legacy was established by a non-profit association, as required by the first condition.

Although the Legacy Trust permits the trustee to appoint a fund manager, Article 8(C) specifies that “the Trustee shall maintain ultimate managerial control” and “[t]he use of for-profit entities is always subordinate to the non-profit Trustee.” Legacy Trust at art. 8(C). POMS [SI 01120.225\(E\)](#) states that the agency will not routinely question the relationship between a non-profit entity and contracted, for-profit entities. Under these circumstances, the Legacy Trust complies with POMS 01120.225(D)’s requirement that any for-profit entity retained to help manage the trust must always be subordinate to the non-profit managers of a pooled trust. Accordingly, the Legacy Trust satisfies the first condition of 42 U.S.C. § 1396p(d)(4)(C) and POMS [SI 01120.203\(B\)\(2\)](#).

### B. Condition Two: Separate accounts maintained for each beneficiary.

The Legacy Trust satisfies the second condition, which requires that separate accounts be maintained for each beneficiary, even though funds may be pooled for investment and management purposes. See 42 U.S.C. § 1396p(d)(4)(C)(ii); POMS [SI 01120.203\(B\)\(2\)](#). Article 3(A) establishes that the Trustee must maintain separate accounts, which the Trustee may pool solely for investment and management purposes, for each beneficiary. Legacy Trust at art. 3(A). Accordingly, this condition is satisfied.

### C. Condition Three: Trust must be established solely for the benefit of disabled individuals.

We also find that the Legacy Trust satisfies the third condition, which requires that accounts in a trust solely benefit disabled individuals. See 42 U.S.C. § 1396p(d)(4)(C)(iii); POMS [SI 01120.203\(B\)\(2\)](#). The Legacy Trust specifically invokes 42 U.S.C. § 1396p(d)(4)(C) and states that it is intended “to establish a pooled trust fund to benefit individuals with a disability [as defined under 42 U.S.C. § 1382c(a)(3)].” Legacy Trust at Introduction (brackets in original). Only an individual with a disability may submit a Joinder Agreement and thus join the pooled trust. Legacy Trust at art. 2.

We do note that the Legacy Trust permits the Trustee to amend it at any time, which under different circumstances might trigger concerns about the potential for the Legacy Trust to benefit non-disabled individuals, but here amendment is permitted only “to comply with changes in federal and state laws and regulations.” Legacy Trust at art. 4(B); see also art. 2 (noting that Joinder Agreements are irrevocable but subject to amendment for well-being of beneficiary or as required under federal or state law or regulations). Furthermore, the Legacy Trust specifies that such an amendment may not “change or affect the interests or rights of a sub-account beneficiary.” Id. Thus, we do not believe the Trustee has the authority to amend the trust so as to impermissibly benefit non-disabled individuals. As a result, there is support for the agency to conclude that the Legacy Trust satisfies the third condition.

D. Condition Four: Accounts established by the individual, parent, grandparent, legal guardian, or court.

The Legacy Trust satisfies the fourth condition that accounts in the trust are established by the individual, a parent, grandparent, legal guardian, or the court. See 42 U.S.C. § 1396p(d)(4)(C)(iii); POMS [SI 01120.203](#)(a), (f). The Legacy Trust only permits parents, grandparents, legal guardians, beneficiaries themselves, and courts to complete and sign a Joinder Agreement. See Legacy Trust at art. 2.

E. Condition Five: State reimbursed for medical expenses upon death of beneficiary.

The Legacy Trust satisfies the fifth condition, which requires that upon a beneficiary’s death, a trust reimburse the State for medical expenses paid on behalf of the disabled beneficiary under the State Medicaid plan, to the extent the funds are not retained by the trust. See 42 U.S.C. § 1396p(d)(4)(C)(iv); POMS [SI 01120.203](#)(a), (g). Here, the Legacy Trust explicitly states that it will “pay to the State(s) the amounts remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan(s)” to the extent funds are not retained by the Legacy Trust. Legacy Trust at art. 7(d). Furthermore, the expenditures that take priority over Medicaid reimbursement—taxes due to the state or federal government and reasonable administration fees—are permissible under POMS [SI 01120.203](#)(B)(3)(a) (permitting expenditures for state and federal taxes and reasonable administration fees prior to Medicaid reimbursement). See Legacy Trust at art. 7(a), (b).

Accordingly, we believe that there is support for the agency to conclude that the Legacy Trust’s provisions comply with all five conditions under 42 U.S.C. § 1396p(d)(4)(c) and that it qualifies as a pooled trust. If a trust qualifies as a pooled trust under 42 U.S.C. § 1396p(d)(4)(C), we also consider whether the sub-account is excluded under the regular resource counting rules. See POMS [SI 01120.203](#)(B)(2)(a) (“CAUTION: A trust which meets the exception to counting the trust under the SSI 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.”). Thus, we address this issue next.

### III. Application of the Agency’s Regular Resource Counting Rules for SSI to the NH’s Subaccount

The NH opened a subaccount in the Legacy Trust on her own behalf on February 26, 2017, via the Joinder Agreement. The NH’s subaccount is exempt from the SSI statutory trust provisions because the Legacy Trust, in combination with the Joinder Agreement, qualify for the pooled trust exception, as explained above. See 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(C); POMS [SI 01120.203](#)(B)(2). However, we must still evaluate whether the subaccount qualifies as a countable resource under the regular resource counting rules pursuant to POMS [SI 01120.200](#). See POMS [SI 01120.203](#)(B)(2)(a). The agency applies the

regular resource rules to determine whether a trust that is established with a beneficiary's own assets is a resource. See POMS [SI 01120.200\(D\)](#).

Under the regular resource counting rules, the agency considers a trust a resource, attributable to the beneficiary, if the beneficiary has the legal authority to revoke or terminate the trust and then use the funds to meet his or her food or shelter needs, if the beneficiary can direct the use of the trust principal for his or her support and maintenance under the terms of the trust, or if the beneficiary can sell her beneficial interest in the trust. See 20 C.F.R. § 416.1201(a); POMS [SI 01120.200\(D\)\(1\)\(a\)](#).

Here, the NH's subaccount does not qualify as a resource under our resource counting rules. The NH's subaccount is irrevocable. See Legacy Trust at arts. 2, 4(A); see also Joinder Agreement at art. 1. Thus, the beneficiary does not have the legal authority to revoke or terminate the trust and use the funds to meet his or her food or shelter needs. See POMS [SI 01120.200\(D\)\(1\)\(a\)](#).

Furthermore, the Legacy Trust contains a spendthrift provision stating that none of the principal or income of a beneficiary's sub-account can be anticipated, assigned, encumbered, or otherwise subject to creditors' claims; that beneficiaries have no right to direct their subaccount's funds or compel payments from the subaccount; and that neither the principal nor income may be made available to beneficiaries. See Legacy Trust at arts. 6(A), (B), (C); see also Joinder Agreement at art. 2 & art. 2(e), (g). Beneficiaries do not have any right to mandatory, periodic payments; rather, distributions are made at the sole judgment and discretion of the Trustee. See Legacy Trust at art. 5(B), (C); see also Joinder Agreement at art. 2(e), (g). Thus, the beneficiary cannot direct the use of the trust principal for his or her support and maintenance under the terms of the trust, and cannot sell her beneficial interest in the trust. POMS [SI 01120.200\(D\)\(1\)\(a\)](#). Because the trust is irrevocable and the beneficiary cannot direct the use of the trust principal for her support or sell her beneficial interest in the trust, the NH's subaccount is exempt from the agency's resource counting rules and should not be considered a resource for SSI purposes.

## CONCLUSION

We believe that the agency may reasonably conclude that the Legacy Trust is a valid, pooled trust under 42 U.S.C. § 1396p(d)(4)(c) because its provisions comply with all five conditions for the pooled trust exception for counting resources for SSI purposes. Furthermore, the NH's subaccount is not a resource under the agency's regular resource counting rules pursuant to POMS [SI 01120.200\(D\)\(1\)\(a\)](#). Therefore, the NH's subaccount is eligible for the pooled trust exception and should not be considered a resource for SSI purposes.