

From Daniel Butler <Daniel.Butler@ct.gov>

To Lisa Davis <davis@sharinglaw.net>

Date 12 March 2020 8:12

Expires in 30 days

RE: Sole Benefit trust for applicant's disabled child

Attorney Davis: I reviewed your email and here are my thoughts. First, I believe that PLAN does not hold real property in its pooled trusts. You would need to confirm with PLAN but that is my experience.

As for the proposed transfer, I agree that 42 USC 1396p (c)(2)(B)(iii) and (iv) permit an individual to transfer, penalty free, assets, including a home, to a trust, including a special needs or pooled trust, established for the sole benefit of a disabled child (iii) or a disabled individual under age 65 (iv). The use of the parenthetical "(including a trust described in subsection (d)(4))" indicates to me that the type of trust is not limited to a special needs or pooled trust. I do not, however, see a definition of "sole benefit" in the definition section - 42 USC 1396p (e). Let me know if you are aware of a statutory definition of "sole benefit" for purposes of Medicaid transfers.

Looking to the State Medicaid Manual, section 3257 B.6. defines "For the Sole Benefit of" and provides that "a trust is considered to be established for the sole benefit of a spouse, blind or disabled child, or disabled individual, if the trust benefits no one but the individual, whether at the time the trust is established or at any time in the future. ... A transfer, transfer instrument or trust that provides for funds or property to pass to a beneficiary who is not the spouse, blind or disabled child, or disabled individual is not considered to be established for the sole benefit of one of these individuals. In order for a transfer or trust to be considered to be for the sole benefit of one of these individuals, the instrument or document must provide for the spending of the funds involved for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual involved. When the instrument or document does not so provide, any potential exemption from the penalty or consideration for eligibility purposes is void.

The SMM section B.6 provides further: "An exception to this requirement exists for trusts discussed in [section] 3259.7." (special needs and pooled trusts).

So my opinion is that a trust that meets the "For the Sole Benefit of" requirement of SMM 3257 B.6. would permit an individual to transfer assets penalty free to a trust for the benefit of a disabled child age 65 or older. I am willing to review a proposed trust.

Hope this response helps.

Dan

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-----Original Message-----

From: Lisa Nachmias Davis [mailto:davis@sharinglaw.net]
Sent: Wednesday, March 11, 2020 3:30 PM
To: Butler, Daniel T.
Subject: Sole Benefit trust for applicant's disabled child

Dear Mr. Butler,

My client requires long-term care but is very concerned about her extremely disabled child who is over 65 and has lived in the home his whole life. She does not want to make gifts outright to the child, who cannot manage them. She's also concerned about the house being in the child's name.

Federal law says that exempt transfers include transfers of assets 42 USC 1396p(c)(2)(B)

"(iii) to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II)[disabled]," [i.e. OF ANY AGE] and

(iv) to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1614(a)(3));

If child were under 65 then I have no doubt that DSS would allow transfer to a d4a trust for the child.

However, child is 65. Client does not want to transfer to a pooled trust for child since she doesn't know what PLAN would say about keeping the house up for the child to live in. 42 usc (c)(2)(B)(iii) only says a trust "established solely for the benefit of the individual's [disbled] child," and she would like to transfer to a trust for the disabled child managed by her other son, an attorney, who has been assisting her and his brother for decades.

1. Would the department consider this an exempt transfer, or dare I say it, give consent? Or is it the Department's position that a transfer for the sole benefit of the disabled child during the disabled child's lifetime does NOT meet the definition of a "trust established solely for the benefit" an individual's disabled child unless a d4a or d4c trust (and if so on what basis of course.)

2. Would the department consider it an exempt transfer if the trust met all the criteria for a d4a trust except that it is FBO someone who is over 65? Including a payback clause? The attorney brother is completely disinterested and doesn't care if he inherits anything, he just wants to help his brother.

If the answer is "maybe, depends on the trust" I could forward a trust of either type for your review. I think you may agree, in thinking of yourself and your friends, that 65 these days seems an awfully young cut-off point for giving gifts in trust for a disabled person, especially when the statute (iii) doesn't require it.

I would appreciate your reply.

Thank you.

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****NOTE CHANGED SUITE NUMBER #503 EFF 7/15/15****

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