



ISSUE BACKGROUND

Application of Transfer of Assets Penalty for Pooled Trusts

The future of special needs trusts is in jeopardy for seniors with disabilities over age 65. On May 12, 2008, the Center for Medicare & Medicaid Services (CMS) issued a regional policy bulletin advising all State Medicaid Agencies to change their policy regarding elderly (65 or older) individuals with disabilities. Under the new rule, a transfer penalty will be imposed for funds transferred into a pooled trust for less than fair market value.

According to CMS, a pooled trust (a sub-account within the trust) can be established for a disabled individual under the authority of Section 1917(d)(4)(C) of the Social Security Act and is exempt from the normal Medicaid trust rules in Section 1917 (d) of the Act. Although a pooled trust may be established for beneficiaries of any age, the bulletin issued by CMS in May 2008 claims that the Social Security statute provides an exception from a transfer penalty only for those individuals with a disability who are age 64 and under, not for disabled individuals over 65. Pursuant to the CMS bulletin, several states are reviewing their policies. California and Wisconsin have reviewed their policies, and determined to continue to allow special needs trusts for disabled persons of all ages.

Special needs trusts are a critical estate planning tool for thousands of seniors with disabilities. Excluding seniors over age 65 from participating in such trusts would be profoundly unfair and harmful. Pending discussions with CMS, NAELA is considering asking Congress to clarify that a pooled trust established by an individual age 65 and older is exempt from the transfer of assets provisions.

The purpose of a pooled trust (run by a non-profit organization) is to allow any individual with a disability to place some of his or her assets into a trust to pay for anticipated and unanticipated special needs that are not covered by government benefits. Simply put, it is a trust to enhance quality of life only. The funds are carefully spent to assist a vulnerable disabled person and allow them to live their remaining years in dignity. A disabled individual may have a need for such a trust regardless of her or his age. This May 2008 CMS policy change is inherently discriminatory in that it creates a two-tiered system based simply and arbitrarily on a person's age.

Upon the death of the disabled beneficiary, the balance remaining in the trust account is used to pay back to the State Medicaid Agency an amount equal to the cost of medical assistance paid by the state.

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