



Consider Sole Benefit Trusts for Medicaid Spend Down

By [Jane Skelton, Esq.](#)

Long-term care is expensive, and an older individual may consider Medicaid to pay for that care. If the individual has a family member or friend with a disability, a sole benefit trust could be considered. If drafted correctly, transfers of the individual's assets to a sole benefit trust would hasten Medicaid eligibility for the individual and not disrupt eligibility for means-tested benefits for the beneficiary of the trust.

Medicaid is a means-tested program with strict restrictions. As a general rule, an individual must have less than \$2,000 in countable assets to be eligible. When an application for long-term care benefits is filed, the Medicaid agency will do a five-year "look back." (The look back period is shorter in California.) The agency will ask whether the individual has transferred assets for which he or she received less than fair market value in return. If so, the agency will consider whether the transfer results in a transfer penalty, which is a period of ineligibility for Medicaid long-term care benefits.

Some transfers are exempt from this penalty, including transfers to the applicant's spouse and transfers to a child who is under age 21 or who is blind or has a disability. There is also an exemption for transfers to a trust for the sole benefit of any individual who is under 65 and who does or would meet the Social Security Administration's criteria for total and permanent disability.

A sole benefit trust for this purpose combines aspects of both first and third party special needs trusts (SNTs). Like a third party SNT, it is established with the funds of someone other than the beneficiary. Like a first party SNT, the beneficiary must be under the age of 65 and the trust must be for the "sole benefit" of the beneficiary.

Some states have interpreted the sole benefit requirement to mean that it must be a payback trust, meaning that upon the death of the beneficiary, remaining funds must be offered to any Medicaid agency which provided medical assistance.

Other states require that the trust be designed to be "actuarially sound" and to make distributions on a regular basis so that all the trust assets would be distributed during the beneficiary's actuarial life expectancy. In Maine, where I practice law, the Medicaid agency will approve a sole benefit trust which includes either payback provisions or actuarially sound provisions. Which is better to use depends on the beneficiary's circumstances. For example, an individual who is on SSI (Supplemental Security Income) would not be well-

served by a sole benefit trust requiring regular distributions which could be treated as income, thereby offsetting or eliminating SSI eligibility.

Families facing cross-generational support needs should consult a special needs attorney about creating a trust that's in the best interests of all parties.

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