



# NEW YORK STATE BAR ASSOCIATION

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Lisa Sbrana

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NYS Department of Health

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Dear Ms. Sbrana:

We write to you on behalf of the New York State Bar Association's Elder Law and Special Needs Section. The purpose of this letter is to ask the New York State Department to reconsider two aspects of the February 4, 2019 General Information System message, "Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts" (GIS 19 MA/04), specifically:

- The creation of a policy requiring gifting authority for an agent acting under a Power of Attorney to establish a pooled income trust, which is contrary to the General Obligations Law; and
- Form OHIP-0119 "Explanation of the Effect of Trusts on Medicaid Eligibility," which fails to meet the requirements of the "Pooled Trust Notification Act."

### A. The Statutory Gifts Rider Requirement for Pooled Income Trusts

Requiring gifting authority for an agent acting under a Power of Attorney ("POA") to establish a pooled income trust is an incorrect and unnecessarily restrictive interpretation of New York's General Obligations Law, and is contrary to public policy underlying the federal and state statutes authorizing the use of pooled income trusts. This policy also violates the spirit of the 2018 "Pooled Trust Notification Act," which explicitly recognizes and promotes the use of pooled income trusts to enable Medicaid beneficiaries to live independently in a community setting (rather than in skilled care facility). GIS 19 MA/04 states that "If a trust is established by an agent acting under a Power of Attorney (POA), the powers granted under the POA must include permission to gift assets." The basis for this statement is not identified, but is presumably New York's General Obligations Law § 5-1514, which requires a simultaneously executed Statutory Gifts Rider ("SGR") to a POA to authorize gifts of the Principal's assets by an Agent. Below, we explain why the General Obligations Law does not require an SGR for an agent to establish a pooled income trust.

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Section 5-1514 of the General Obligation Law describes the formal requirements and statutory form (i.e. the Statutory Gifts Rider or “SGR”) required to authorize certain gift transactions by an Agent. This section provides, in relevant part:

1. If the principal intends to authorize the agent to make gifts other than gifts authorized by subdivision fourteen of section 5-1502I of this title [which deals with certain charitable gifts], the principal must expressly grant such authority either in a statutory gifts rider to a statutory short form power of attorney or in a non-statutory power of attorney executed pursuant to the requirements of paragraph (b) of subdivision nine of this section.

The section then goes on to describe the gifting authorities that may be granted to the Agent in an SGR, including a description of ways in which authorized gifts may be made, including by “creating, amending, revoking or terminating an inter vivos trust” (GOL 5-1514(3)(c)(8)). As explained below, establishing a pooled income trust does not require any of the types of gifting authority set forth in the statute.

a. Enrolling in Pooled Income Trust does not create, amend or revoke or terminate a trust

GOL 5-1514(3)(c)(8) contemplates the use of an SGR to make gifts by “creating, amending, revoking or terminating an inter vivos trust.” This provision is not applicable to pooled income trusts. When an individual enrolls in a pooled income trust she does so by signing a joinder agreement which subjects her to the terms of a so-called “master trust.” This “master trust” has already been created by a not-for-profit organization, pursuant to 42 U.S.C.A. § 1396p(d)(4)(c), and has both a Grantor/Settlor and Trustee (neither of whom are the trust enrollee herself). No new trust is created when the individual enrolls in a pooled income trust, nor does the signing of the joinder agreement amend, revoke or terminate the master trust. Therefore, enrollment with a pooled income trust is not trust transaction as envisaged by GOL 5-1514(3)(c)(8).

b. Even if enrolling in a Pooled Income Trust is a trust transaction, it is not a gift transaction

A Statutory Gift Rider is required only if the principal is making a gift by creating, amending, revoking or terminating a trust. The statute and the history of its revisions make clear that not every trust transaction is a gift. In 2010, a year after the new power of attorney law was enacted, the legislature made technical amendments that included revisions to the series of Construction Sections of the statute that provide a more expansive definition of the authorities listed briefly in the statutory Power of Attorney form (GOL 5-1502A through 5-1502N). These technical amendments added to most of the Construction Sections the power “to create, modify or revoke a trust unless such creation, modification or revocation is a gift transaction governed by section 5-1514 of this title.” For example, the construction of the term “real estate transactions” in the Power of Attorney form (conferring general authority with respect to such transactions) was amended to include authorization:

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2. To sell, to exchange, to convey either with or without covenants, to quit-claim, to release, to surrender, to mortgage, encumber, to partition or to consent to the partitioning, ***to create, modify or revoke a trust unless such creation, modification or revocation is a gift transaction governed by section 5-1514 of this title ...***

NY Gen Oblig L § 5-1502A (2) (emphasis added - bolded language in italics was added in 2010 amendments).

Similar language was added to the construction sections defining the terms for authorizing an agent to conduct chattel and goods transactions (§5-1502B), bond, share and commodity transactions (§5-1502C), personal and family maintenance transactions, (§ 5-1502I), and retirement benefit transactions (§ 5-1502L). As amended, these Construction Sections confer authority on an attorney-in-fact to make trust transactions without an SGR if they are not gift transactions. Thus, the plain language of this amendment means that the creation, modification or revocation of a trust is not always or necessarily a gift transaction.

Even if enrolling in a Pooled Income Trust is a trust transaction, it is not a gift transaction. “The elements of a valid inter vivos gift are an ‘intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee.’ [] ‘An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership.’” In re Katz, 154 A.D.3d 687, 62 N.Y.S.3d 441, 443 (App. Div. 2nd Dept. 2017) (internal citations omitted). When the donee of a gift accepts delivery of the gift, the donee becomes the individual who benefits from the property gifted. If an agent uses the authority of a Power of Attorney to create an inter vivos trust for the benefit of the principal’s daughter, or to change the beneficiary of an existing trust created by the principal, these transactions would be gifts that require an SGR. However, using a power of attorney to enable the principal to join a pooled income trust does not create a gift. When an individual utilizes a pooled income trust, her income is transferred to a non-profit trustee, to be held and used exclusively for the benefit of the individual enrollee (and not for the trustee’s own benefit). The trustee is bound by the trust agreement and state and federal law to use the principal’s funds solely for the benefit of the principal as beneficiary. Because the Principal retains the benefit of the funds transferred to the pooled income trustee (and because no other person or entity has any claim to them), the transfer of the funds is not a gift to the trustee or to any other party.

- c. Requiring a Statutory Gift Rider for Pooled Income Trusts established by an Agent under Power of Attorney defeats the legislative intent behind the 2009 amendments to the NYS Power of Attorney statute and to the laws governing Supplemental Needs Trusts

To require an SGR for an Agent under a POA to enroll the Principal into a Pooled Income Trust is not consistent with legislative intent both with respect to statutory gift riders and pooled trusts. Statutory Gift Riders were first mandated in 2009. The legislature was properly concerned with the prevalence of financial elder abuse and believed extra protections were needed when a Principal was authorizing an Agent to dispose of her resources via gift transactions. These additional protections are not necessary for pooled income trusts, the funds in which governing law and regulations require the trustee to hold and

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disburse only for the benefit of the person whose income is deposited. The not-for-profit organization operating the trust has a strong incentive to enforce these rules lest it lose its ability to sponsor qualified supplemental needs trusts. The not-for-profit organizations have clear guidance as to permissible disbursements – provided in their own Master Trusts, state and federal law and regulations, and sub regulatory guidance such as the Social Security POMS. Pooled Income Trusts generally preclude the possibility of self-dealing by the Agent, since the transferred funds must be used for the sole benefit of the enrollee and the Agent will not receive any undisbursed funds because “[t]o the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.” 42 U.S.C.A. § 1396p(d)(4)(c).

As recently as December 2017, the New York Legislature reiterated its recognition that pooled trusts are a valuable device to enable applicants to qualify for Medicaid and services that enable them to live independently. The new law requires the State Dept. of Health to:

...provide written notice to an applicant for or recipient of medical assistance who is or reasonably appears to be eligible for medical assistance except for having income exceeding applicable income levels ... in plain language, that in certain circumstances the medical assistance program does not count income... if it is placed in a trust .... The notice shall be included with the eligibility notice ...and shall reference where additional information may be found on the department's website....

N. Y. Social Services Law § 366, subd. 5(f), added by L. 2018, Ch. 475, enacting A 5175-A /S 1241-A.

When he signed the bill into law on December 18, 2017, Governor Cuomo stated in an Approval Memo, “This bill would help ensure that individuals with disabilities have more options to remain in the most integrated setting appropriate for their needs.” This provides strong evidence of legislative intent to promote pooled trusts, and not use an overly restrictive interpretation of the power of attorney statute to thwart the use of pooled trusts.

In light of the clear policy favoring the use of pooled income trusts, the requirement of an SGR is also illogical, to the extent that it precludes some Medicaid recipients from utilizing pooled trusts because the POA they executed when they had mental capacity lacks an SGR. Those who now lack capacity, and so cannot execute a new POA, must “spend down” in order to establish or maintain their eligibility. Pooled Income Trusts allow Medicaid beneficiaries to use their so-called excess income for non-medical necessities like shelter, food and clothing. This enables Medicaid beneficiaries to maintain themselves in their own homes, in the community, which is consistent with public policy that favors care in the least restrictive environment. Notably, there is no SGR required for an Agent to “spend down” the same amount of money on the Principal’s medical bills that would otherwise be placed into the pooled income trust. Without the ability to shelter funds in a pooled trust, many Medicaid beneficiaries would be forced to enter skilled care facilities in order to have their most basic needs for food and shelter met.

#### **A. OHIP-0119 Explanation of the Effect of Trusts on Medicaid Eligibility**

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Respectfully, Form OHIP-0119 “Explanation of the Effect of Trusts on Medicaid Eligibility,” attached to GIS 19 MA/04, fails to carry out the letter and spirit of the “Pooled Trust Notification Act,” which requires the Department to develop a new insert for eligibility notices sent to those who are or reasonably appear to be eligible for Medicaid with a spend-down. The notice must “...explain, in plain language, the rules for depositing income in a trust...” and “...include information on how to enroll in such a trust and how to request that the local social services district rebadged medical assistance based on participation in such a trust.” SSL Sec. 366, subd. 5(f), as added by L. 2018, ch. 475, eff June 16, 2018.

Form OHIP-0119 has numerous flaws that render it inadequate to comply with the statute. First, it uses complex legal-ese language, not the “plain language” required by the statute. Second, the statute solely concerns those who would be eligible for Medicaid “except for having income exceeding applicable income levels.” *Id.* Thus the fact sheet should only discuss supplemental needs trusts [“SNT”] as used to shelter excess income. Instead, OHIP-119 gives a broad description of all trusts, including those used to shelter assets – both irrevocable and revocable. By including extensive verbiage about trusts used for deposit of assets, the message about the availability of pooled or individual SNTs to eliminate a spend-down is buried. While it is true that federal law defines “assets” to include “income,” so that it may be legally accurate to define “income” as a type of “asset” – this arcane definition is hardly necessary in a consumer-oriented fact sheet. Again, discussion of assets in a fact sheet intended to inform consumers about the availability of pooled or individual SNTs to shelter income adds confusion and defeats the statutory language and intent.

Even while giving too much information about asset trusts, OHIP-119 fails to give enough of the required information about the use of trusts to eliminate the spenddown. OHIP-119 fails to include the two key pieces of information specifically required by the statute:

1. Information on how to enroll in such a trust, and
2. How to request that the local social services district re-budget medical assistance based on participation in such a trust.

As to the first element, there is no information on how to enroll in a pooled trust, or how to establish an individual SNT – except for the reference to language required in a Power of Attorney (which we disagree with as stated above). As to the second element, OHIO-119 does include an appropriate Question as part of its Q&A; however, the answer is wholly incomplete:

**How Do I Request that the Local Social Services District Rebudget My Income Once I have Created a Trust?**

You must provide a copy of the trust to your local social services district. You must include a written statement indicating the amount of monthly income that will be placed into the trust each month.

This response fails to mention that in addition to a copy of the trust, one must provide to the district proof that one is “disabled” as defined in the law. The fact sheet should explain that those individuals under age 65 who receive Social Security Disability benefits may submit proof of these benefits.

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For those age 65 and over, the fact sheet should reference the particular forms that are needed and how to obtain them - DSS-486T and LDSS-1151.

The last two paragraphs of the fact sheet are extremely confusing and contain errors. The purpose of the second to the last paragraph seems to be to make clear that SNTs may be used to eliminate the spend-down only for community Medicaid, not for people in a nursing home. That could be said more clearly. The last paragraph seems to say that married individuals in MLTC must choose between spousal impoverishment budgeting and using a trust. That could be said more clearly.

The allusion to spousal impoverishment budgeting as an alternative for reducing the spend-down suggests that it would be helpful for the fact sheet to list other alternatives for reducing the spend-down. If not listed on the fact sheet, a link to information online about these alternatives should be provided, including the following:

- Were you **recently discharged from a nursing home or adult home**, after staying there more than 30 days? If so, if you were enrolled in or will enroll in MLTC you could request the **Special Income Standard for Housing Expenses**.
- if you or your spouse can **work**, even part-time, you are eligible for special deductions from Earned Income. If you are under 65, disabled and can work even a minimal amount, you can have a higher income limit in the **Medicaid Buy-In for Working People with Disabilities**.
- Are you at least age 18 and receiving Social Security Disability under your **retired or deceased parent's earning record**, because you became **disabled before age 22**? If so, and your savings are under \$2000, and if you received SSI in the past, you may qualify for Medicaid "Disabled Adult Child" benefits and have no spend-down.
- Are you living with and caring for a child, grandchild or other relative under age 18 or under 19 and in school full time? If so, even if you receive Medicare – with no age limit -- you may qualify under the higher **"MAGI" income limits of the Affordable Care Act**, and you would have no limit on savings.

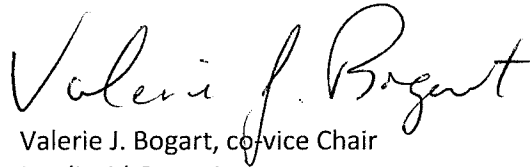
We ask the Department to convene a workgroup to solicit suggestions on revisions of the fact sheet from consumers and their representatives. Members of the NYSBA Elder Law and Special Needs Section would gladly serve on this workgroup. There are examples of more clear explanations of Pooled income trusts online that could be helpful in revising OHIP-0119, such as:

- <https://hpsny.org/learning-center/medicaid/pooled-income-trusts/>
- <https://www.nysarctrustservices.org/nysarc-trusts/pooled-trusts/community-trust-ii>
- <http://www.wnylc.com/health/entry/44/>
- <http://www.wnylc.com/health/download/4/>

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Thank you in advance for your consideration of the above-described matters. We would welcome an opportunity to discuss these issues with you further, and invite you to contact Valerie J. Bogart at [vbogart@nylag.com](mailto:vbogart@nylag.com) and Naomi Levin at [nlevin@gylawny.com](mailto:nlevin@gylawny.com) of our Medicaid Committee directly for that purpose.

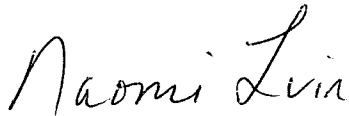
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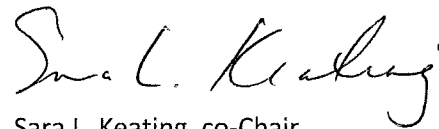
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