

## **Chapter 36D.**

### **North Carolina Community Third Party Trusts, Pooled Trusts.**

#### **§ 36D-1. Title; findings.**

(a) This Chapter shall be known and may be cited as the "North Carolina Community Third Party Trusts, Pooled Trusts Act."

(b) The General Assembly finds that it is in the public interest to encourage activities by voluntary associations and private citizens that will supplement and augment those services provided by local, State, and federal government agencies in discharge of their responsibilities toward individuals with severe chronic disabilities. The General Assembly further finds that, as a result of changing social, economic, and demographic trends, families of persons with severe chronic disabilities are increasingly aware of the need for a vehicle by which they can assure ongoing individualized personal concern for a family member with a disability who may survive his or her parents or other family members, and provide for the efficient management of trust funds to be used for the benefit of that person with a disability. In a number of other states, voluntary associations have established foundations or trusts intended to be responsive to these concerns. Therefore, the General Assembly finds that North Carolina will benefit by the enactment of enabling legislation expressly authorizing the formation of Community Third Party Trusts and Pooled Trusts in accordance with 42 U.S.C. § 1396p(d)(4) and criteria set forth by statute and administered by the Secretary of State under Chapter 55A of the General Statutes.

(c) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies, which are, among others, to:

- (1) Repealed by Session Laws 2010-118, s. 1, effective July 20, 2010.
- (2) Ensure that Community Third Party or Pooled Trusts for the benefit of persons with severe chronic disabilities are established and administered properly and that the managing boards of the trusts are free from conflicts of interest.
- (3) Facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members, persons with disabilities, and others to pool resources in order to make professional management investment more efficient.
- (4) Provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated.
- (5) Assist in making guardians available for persons with severe chronic disabilities who are incompetent, when no other family member is available for this purpose.
- (6) Encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those that are not available from other sources.
- (7) Encourage the inclusion, as beneficiaries of Community Third Party or Pooled Trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust.
- (8) Remove the disincentives that discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by

ensuring that the interest of beneficiaries of trusts that meet the rules set forth by the Department are not considered assets or income that would disqualify them from any governmental or charitable entitlement program with an economic means test.

- (9) Require, pursuant to 42 U.S.C. § 1396p(d)(4), the payback of monies from Pooled Trusts up to an amount equal to the total amount of assistance paid for by the Department on behalf of or to the beneficiary from any funds remaining in the beneficiary's individual trust account upon the death of the individual or the termination of the individual trust account.

(d) Nothing in this Chapter shall affect the establishment, interpretation, or construction of Pooled Trust instruments which do not conform with the provisions of this Chapter, nor shall this Chapter impair the State's authority to be paid from or seek reimbursement from any Pooled Trust which does not conform with the provisions of this Chapter or to deem the principal or income of any nonconforming 36D Trust an available resource under any program of government benefits or assistance. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

### **§ 36D-2. Definitions.**

As used in this Chapter, unless the context clearly requires otherwise:

- (1) Beneficiary. – Any of the following persons:
  - a. Any person of any age with a severe chronic disability who has qualified as a member of the Community Third Party Trust, funded with assets of a third party or by will.
  - b. Any person who meets the definition of disability as defined in 42 U.S.C. § 1382c(a)(3) on whose behalf an individual Medicaid Pooled Trust subaccount was established by the parent, grandparent, or legal guardian of the individual, by the individual, or by a court.
- (2) Community Third Party Trust. – A trust funded with the assets of a third party for the benefit of a person of any age with severe chronic disabilities, that is administered by a nonprofit corporation that offers the following services:
  - a. Administration of trust funds for persons with severe chronic disabilities.
  - b. Follow along services.
  - c. Guardianship for persons with severe chronic disabilities who are incompetent, when no other family member or immediate friend is available for this purpose.
  - d. Information and referral services to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.
- (2a) Department. – The Department of Health and Human Services.
- (2b) Family members. – Persons who are related by blood or marriage within the sixth degree to the beneficiary.
- (3) Follow-along services. – Includes the following: (i) those services offered by Community Third Party or Pooled Trusts that are designed to ensure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, (ii) participation in the development of individualized plans

- being made by service providers for the beneficiary, and (iii) other similar services consistent with the purposes of this Chapter.
- (3a) Medicaid Pooled Trust, pooled trust, or umbrella pooled trust. – A trust pursuant to 42 U.S.C. § 1396p(d)(4)(C) and the rules set forth for pooled trusts by the Department that meets all of the following requirements:
- a. The trust is irrevocable.
  - b. The trust contains a separate subaccount for each beneficiary of the trust, but the funds in the accounts are pooled for the purpose of investment and management of funds. Investment of funds pursuant to this subdivision shall be in accord with G.S. 32-71, the Prudent Person rule.
  - c. The beneficiary is disabled as defined by 42 U.S.C. § 1382c(a)(3).
  - d. The trust is established solely for the benefit of the beneficiary by a parent, grandparent, legal guardian, by the beneficiary, or by a court.
  - e. The trust was created on or after April 1, 1994.
  - f. The trust provides that upon the death of the beneficiary the State will receive all amounts remaining in the beneficiary's account up to the total amount of medical assistance paid on behalf of the beneficiary as set forth in G.S. 36D-6.
  - g. Trust language governing each Medicaid Pooled Trust shall be approved by the Department.
  - h. A Medicaid Pooled Trust shall be established by a nonprofit corporation that offers any of the following:
    1. Administration of trust funds for persons with a disability as defined in 42 U.S.C. § 1382c(a)(3).
    2. Follow-along services.
    3. Guardianship for individuals with a disability pursuant to 42 U.S.C. § 1382c(a)(3) who are incompetent, when no other family member or immediate friend is available for this purpose.
    4. Information and referral services to persons who have been appointed as individual guardians of the persons or estates of persons with a disability pursuant to 42 U.S.C. § 1382c(a)(3).
- (4) Severe chronic disability. – A disability which impairs one or more areas of independent functioning.
- (5), (6) Repealed by Session Laws 2010-118, s. 1, effective July 20, 2010.
- (7) Sole benefit. – No individual other than the beneficiary benefits from the trust, either directly or indirectly.
- (8) Surplus trust funds. – All funds remaining in the trust upon termination of the trust, whether by death of the beneficiary or otherwise.
- (9) Trustee. – An original, additional, or successor trustee, and a cotrustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trust.
- (10) 36D Trust. – Any trust governed by this Chapter. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

### § 36D-3. Scope.

This Chapter applies to every Community Third Party Trust or Medicaid Pooled Trust established in this State. In addition to meeting the other requirements of this Chapter, every board that administers a Community Third Party Trust or Medicaid Pooled Trust shall incorporate as a nonprofit corporation under Chapter 55A of the General Statutes. Except as otherwise provided in this Chapter, Chapter 55A of the General Statutes applies to all trusts governed by this Chapter. Article 9 of Chapter 36C of the General Statutes, the Uniform Trust Code, applies to 36D Trusts in the same manner that it applies to trusts under the Uniform Trust Code, with the exception of the following: the trustee of a pooled trust is liable to the Department to the extent the trustee administers the trust in a way that is not for the sole benefit of the beneficiary, regardless of the terms of the trust. The terms of the trust shall not contradict the meaning of "sole benefit" as defined in G.S. 36D-2(7). (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

**§ 36D-4. Administration of Community Third Party and Pooled Trusts; powers and duties.**

(a) Every Community Third Party or Pooled Trust shall be administered by a board. The board shall be comprised of no less than nine and no more than 21 members, at least one-third of whom are parents or relatives of persons with severe chronic disabilities. No board member shall be a provider of habilitative, health, social, or educational services to persons with severe chronic disabilities or an employee of such a service provider. The board may, however, allow service providers to serve on the board in an advisory capacity. Board members shall be selected, to the maximum extent possible, from geographic areas throughout the area served by the trust.

The certificate of incorporation filed with the Secretary of State under Chapter 55A of the General Statutes shall, in addition to the requirements set forth in that Chapter, demonstrate that the requirements of this section have been met.

(b) Notwithstanding any other law, no trustee may be compensated for services provided as a member of the board of a Community Third Party or Pooled Trust. No fees or commissions shall be paid to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee and may receive indemnification as permitted under Chapter 55A of the General Statutes as it applies to nonprofit organizations.

(c) For every Community Third Party or Pooled Trust incorporated under this Chapter, the corporation itself is considered the trustee of any funds administered by it. No individual board member is considered to be trustee of any fund deposited on behalf of any individual beneficiary with severe chronic disabilities.

(d) The board shall adopt bylaws that include a declaration delineating the primary geographic area serviced by the trust and the principal services to be provided. The board shall file the bylaws with the Secretary of State.

(e) The board may retain paid staff as it considers necessary to provide follow along services to the extent required by each beneficiary.

(e1) The Community Third Party or Pooled Trust may authorize the expenditure of funds for any goods or services, including recreational services, which will promote the well-being and is for the sole benefit of the beneficiary. The Community Third Party or Pooled Trust may pay for the reasonable burial expenses of any beneficiary; however, if the beneficiary receives SSI benefits, burial expenses may be paid for only as allowed by Social Security Administration regulations. The Community Third Party or Pooled Trust however, may not expend funds for any goods or services of comparable quality to those available to any particular beneficiary through any governmental or charitable program, insurance, or other sources. The Community Third Party

or Pooled Trust may expend funds to meet the reasonable costs of administering the Community Third Party or Pooled Trust.

(f) The Community Third Party or Pooled Trust is not required to provide services to a beneficiary who is a competent adult and who has refused to accept the services. Further, the Community Third Party or Pooled Trust shall not provide services of a nature or in a manner that would be contrary to the public policy of this State at the time the services are to be provided. In either case, the Community Third Party or Pooled Trust may offer alternate services that are consistent with the purposes of this Chapter and in keeping with the best interests of the beneficiary.

(g) The Community Third Party or Pooled Trust may accept appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of any beneficiary. If the Community Third Party or Pooled Trust accepts appointment as guardian of the person of an individual, it shall assign a staff member to carry out its responsibilities as the guardian. The Community Third Party or Pooled Trust may, upon request, offer consultative and professional assistance to an individual, private or public guardian of any of its beneficiaries.

(h) The Community Third Party or Pooled Trust may accept contributions, devises, and designations under life insurance policies to the Community Third Party or Pooled Trust on behalf of individuals with severe chronic disabilities for the purpose of qualifying them as beneficiaries.

(i) At the time a contribution, devise, or assignment of insurance proceeds is made to a Community Third Party Trust, or to a beneficiary of a Pooled Trust, the trustor shall receive a written statement of the services to be provided to the beneficiary. The statement shall include a starting date for the delivery of services or the condition precedent, such as the death of the trustor, which shall determine the starting date. The statement shall describe the frequency with which services shall be provided and their duration, and the criteria or procedures for modifying the program of services from time to time in the best interests of the beneficiary. In addition, there shall be a properly executed trust agreement between the Community Third Party or Pooled Trust and the trustor.

(j) No trustee, board member, or paid staff member of a Community Third Party or Pooled Trust shall undertake legal representation or other professional services on behalf of the trust or its beneficiaries.

(k) The Department shall be given a minimum of 30 days notice if there is to be a change in trustee. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1; 2011-284, s. 46(a), (b).)

#### **§ 36D-5. Community Third Party and Pooled Trust accountability.**

(a) Along with the annual report filed with the Secretary of State under Chapter 55A of the General Statutes, the Community Third Party or Pooled Trust shall file an itemized statement that shows the funds collected for the year, income earned, salaries, other expenses incurred, and the opening and final trust balances. A copy of the annual individual accounting statement of each beneficiary's subaccount shall be made available by the trustee, upon request, to the Department, any beneficiary, guardian, trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's designee shall receive a detailed individual statement of the services provided to the trustor's beneficiary during the previous 12 months and the services to be provided during the following 12 months. The Community Third Party or Pooled Trust shall make a copy of the individual statement available to any beneficiary, upon request.

(b) The Department or its agents may perform annual audits of any Community Third Party or Pooled Trusts existing in the State. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

**§ 36D-6. Gifts, Community Third Party or Pooled Trust surplus trust funds.**

(a) Community Third Party and Pooled Trusts may accept gifts and use surplus trust funds to meet reasonable start-up costs and reduce the charges to the trust for the cost of administration and for the purpose of qualifying as beneficiary any indigent person whose family members lack the resources to make a full contribution on that person's behalf. A maximum of fifty percent (50%) of the surplus trust funds may be retained in the Community Third Party or Pooled Trust account for this purpose as well as to cover administrative costs. Gifts made to the Community Third Party or Pooled Trust for an unspecified purpose shall be used by the trust either to qualify indigent persons whose families lack the means to qualify them as beneficiaries of the trust or to meet any reasonable start-up or administrative costs that the trust incurs.

(b) For Community Third Party Trusts, remaining surplus trust funds may be distributed to additional beneficiaries as specified in the Trust Agreement.

(c) For Medicaid Pooled Trusts, upon termination of an individual trust account, the surplus trust funds remaining in the individual account shall be used to satisfy any claims or liens of the Department, up to an amount equal to the total medical assistance paid on behalf of or to the disabled individual by the Department. The amount retained by the trust shall be determined on a sliding scale calculation, based upon the number of years the disabled individual received services from the nonprofit corporation, but in no instance shall the trust retain more than fifty percent (50%) of the surplus trust funds, unless the claims or liens of the Department are less than fifty percent (50%) of the surplus trust funds.

(d) A Medicaid Pooled Trust may not distribute surplus trust funds to any remaindermen identified in the trust document unless there are funds remaining after all claims or liens of the Department have been satisfied, nor shall it use surplus trust funds to make any charitable contribution on behalf of any beneficiary or any group or class of beneficiaries. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

**§ 36D-7. Special requests on behalf of beneficiary.**

The Community Third Party Trust may agree to fulfill any special requests made on behalf of a beneficiary as long as the requests are consistent with this Chapter and provided that an adequate contribution has been made for this purpose on behalf of a beneficiary. The Medicaid Pooled Trust may only disburse subaccount trust funds if such disbursement is in the sole benefit of the beneficiary. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

**§ 36D-8:** Repealed by Session Laws 2010-118, s. 1, effective July 20, 2010.

**§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.**

The beneficiary's interest in any 36D Trust is not considered to be an asset for the purpose of determining income eligibility for any publicly operated program, nor shall that interest be reached in satisfaction of a claim for support and maintenance of the beneficiary. The Department shall not reduce the benefits or services available to any individual because that person is the beneficiary of

a 36D Trust. The Department may authorize termination of an individual's eligibility for medical assistance or impose sanctions as necessary for failure of a purported 36D Trust to comply with the requirements of this Chapter and any rules adopted by the Department pursuant to this Chapter. The Department may authorize termination of an individual's eligibility for medical assistance or impose sanctions as necessary for failure of the trustee to administer the 36D Trust in a manner consistent with this Chapter, the rules adopted by the Department pursuant to this Chapter, and federal law and policy. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

**§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.**

A 36D Trust shall not be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations of trusts. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

**§ 36D-11. Settlement; trustee limitations.**

(a) The trustee of a Medicaid Pooled Trust shall provide a final disbursement and accounting for an individual Pooled Trust subaccount to the Division of Medical Assistance, Third Party Recovery Section, within 30 days of the receipt of an accounting of charges from Medicaid, after the death of the beneficiary or other termination of the trust. An individual Pooled Trust subaccount shall terminate upon the death of the beneficiary and the satisfaction of all outstanding charges.

(b) At any time before the settlement of the final account, the Community Third Party or Pooled Trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of a nonprofit corporation in the superior court for the purpose of terminating the trust or merging it with another charitable trust.

(c) No trustee or any private individual is entitled to share in the distribution of any of the trust assets upon dissolution, merger, or settlement of the Community Third Party or Pooled Trust. Upon dissolution, merger, or settlement, the superior court shall distribute all of the remaining net assets of the Community Third Party or Pooled Trust in a manner that is consistent with the purposes of this Chapter. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3; 2010-118, s. 1.)

**§ 36D-12. Administrative rules.**

The Department shall adopt rules pursuant to Chapter 150B of the General Statutes governing the eligibility of beneficiaries for State medical assistance and State-County Special Assistance, and to supplement and expand upon the general requirements set forth in this Chapter, including, but not limited to, rules that may be more restrictive than the general requirements of this Chapter. With respect to Medicaid Pooled Trusts, a subaccount is irrevocable. The State shall be paid an amount up to the total medical assistance paid on behalf of the beneficiary by the Department from funds remaining in the individual trust subaccount upon the death of the beneficiary or termination of the trust as described in this Chapter. If the pooled trust is to be funded with the proceeds of a settlement of a lawsuit against a third party, the settlement proceeds are subject to the Department's subrogated rights of recovery as set forth in G.S. 108A-57, and all such subrogated rights of

recovery shall be satisfied in full prior to execution and judicial approval of the trust, or both.  
(2010-118, s. 1.)