



DISABILITY LAW COLORADO™

Protecting the rights of Coloradans of all ages since 1976

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November 8, 2019

Amanda Moorer, President
Medical Services Board
303 East 17th Ave.
Denver, CO 80203

Dear Medical Services Board Member:

I am writing to express Disability Law Colorado's strong opposition to the proposed changes to the pooled trust regulations. Disability Law Colorado contains the protection and advocacy system for people with disabilities, the Office of the State Long-Term Care Ombudsman and the Colorado Legal Assistance Developer. Our mission is to protect and promote the rights of people with disabilities and older people through direct legal representation, advocacy, education and legislative analysis.

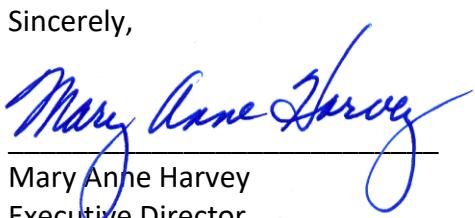
The Department of Health Care Policy and Financing (the Department) has proposed regulatory changes that will eliminate the use of pooled trusts for individuals over the age of 65 and take 50% of the remainder of any pooled trust subaccount upon the death of the beneficiary. Currently the remainder funds go to a charitable fund operated by the Colorado Fund for People with Disabilities (CFPD). Specifically, we oppose these changes for the following reasons:

- There is no requirement in state or federal law that requires the Department to make this change. Colorado Revised Statute 15-14-412.9 does not set an age limit for the establishment of a pooled trust and, at the federal level, 42 USC §1396p d(4)(c) does not limit the age for the establishment of a pooled trust. Based on our research **no state has lost federal matching funds because individuals over the age of 65 utilize the pooled trusts.** This change is unnecessary and places an undue burden on older people with disabilities, who now lose a benefit simply because they are over 65.
- The Department is overstepping its rulemaking authority and attempting to legislate. Under the State Administrative Procedure Act "any rule or amendment to an existing rule issued by any agency ... which conflicts with a statute shall be void." C.R.S. § 24-4-103(8)(a). The proposed regulations seek to modify the Colorado Probate Code. Colorado statute allows the pooled trust administrator to retain the remainder value of the trust for use in a charitable fund. C.R.S. § 15-14-412.9(2)(e). The Department cannot amend the statute by declaring that it can receive any amount of the remainder interest it wishes. Similarly, Colorado statute does not impose any age limit on the use of a pooled trust. C.R.S. § 15-14-412.9(2)(c). By attempting to impose an age limit through rulemaking the Department is again attempting to legislate.

- State and federal laws clearly allow the pooled trust to retain the remainder when the beneficiary dies. 42 U.S.C.A. § 1396p(d)(4)(C); CRS § 15-14-412.9. The Omnibus Reconciliation Act of 1993 (OBRA '93), created three types of trusts in the same section of the statute: Self-settled trusts, Miller Income trusts, and pooled trusts. A pooled trust is also the only of these OBRA '93 trusts that is not required to reimburse Medicaid on the death of the beneficiary. If congress intended to mandate the amount that the pooled trust could retain it would have written that into the statute as it did with self-settled trusts and Miller income trusts. See 42 U.S.C.A. § 1396p(d). Instead Congress chose to allow the non-profit organizations administer pooled trusts to retain the remainder.
- The Department seeks to collect remainder funds which currently go to a charitable fund that provides critical services such as case management services, representative payee services, and other programs to over 1,200 low-income individuals with disabilities across the state. The importance of these services cannot be overstated, and we do not know of another charity that will be able to fill the service void that this taking will create. To be clear, based on the Department's own responses in stakeholder meetings, the funds taken from a charitable fund will be used to pay for administrative costs within the Third-party Liability and Recoveries Section; they will not be used to assist individuals with disabilities impacted by the loss of services. However, the financial costs of the loss of services will likely return to the state through increased Medicaid costs. Taking 50% of the remainder value of the pooled trust subaccounts is harmful on both human and financial levels.

The proposed changes to the pooled trust regulations are unnecessary, improper and a direct threat to the well-being of people with disabilities and older people. Disability Law Colorado objects to the proposed changes in the strongest possible terms. We ask that the Medical Services Board reject the proposed changes to the pooled trust regulations.

Sincerely,

A handwritten signature in blue ink that reads "Mary Anne Harvey".

Mary Anne Harvey
Executive Director
Disability Law Colorado