

On or about April 12, 2021, DCF published the attached “January – March 2021 Summary of Changes” to the DCF Access Program Policy Manual (“the Manual”) purporting to report changes to several chapters, including chapter 1640 of the Manual which defines the requirements for determining eligibility based on assets for SSI-Related Medicaid, State Funded Programs. There was no prior notice or explanation for these purported changes. This Manual sets forth the Department’s policy on eligibility criteria, financial and non-financial, for all of Florida’s Medicaid and related programs including:

- Food Stamps
- Temporary Cash Assistance
- Family-Related Medicaid
- SSI-Related Medicaid, State Funded Programs
- Child in Care and
- Refugee Assistance

Specifically, the purported change to chapter 1640 of the Manual would result in a change to how the Department treats Pooled Special Needs Trusts for individuals over the age of 64 years. This would adversely affect thousands of vulnerable and disabled Floridians over 64 years of age. There are ambiguities created with this proposed change and it would appear to violate both federal law and the Florida Administrative Procedures Act.

The Manual has been in place for many years and followed by the Department but has never been adopted as a “rule” as that term is defined in chapter 120.52 of the Florida Administrative Procedure Act. The attached purported change in policy, should it be followed by the Department, will likely result in a formal challenge by stakeholders including the Florida Bar’s Elder Law Section and the Academy of the Florida Elder Law Attorneys to the proposed policy change or to the entire Program Policy Manual of the Florida Department of Children and Families as an unadopted rule under 120.54.

#### **120.54 Rulemaking.—**

##### **(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—**

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

#### 120.52 (definitions)

(16) “Rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.
2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
3. Contractual provisions reached as a result of collective bargaining.
4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

The Florida Administrative Code regarding SNT's has not been changed since 3-25-20

65A-1.702

(13) Trusts.

(a) The Department applies trust provisions set forth in §1902 of the Social Security Act.

(b) Funds transferred into a trust or other similar device established other than by a will prior to October 1, 1993, by the individual, a spouse, or a legal representative are available resources if the trust is revocable or if the trustee has any discretion over the distribution of the principal. Such funds are a transfer of a resource or income, if the trust is irrevocable and the trustee does not have discretion over distribution of the corpus, or if the individual is not the beneficiary. No penalty can be imposed when the transfer occurs beyond the 60 month look-back period. Any disbursements which can be made from the trust to the individual or to someone else on the individual's behalf shall be considered available income to the individual. Any language which limits the authority of a trustee to distribute funds from a trust, if such distribution would disqualify an individual from participation in government programs, including Medicaid, shall be disregarded.

(c) Funds transferred into a trust, other than a trust specified in 42 U.S.C. §1396p(d)(4), by a person or entity specified in 42 U.S.C. §1396p(d)(2) on or after October 1, 1993, shall be considered available resources or income to the individual in accordance with 42 U.S.C. §1396p(d)(3) if there are any circumstances under which disbursement of funds from the trust could be made to the individual or to someone else for the benefit of the individual. If no disbursement can be made to the individual or to someone else on behalf of the individual, the establishment of the trust shall be considered a transfer of resources or income.

(d) The trustee of a qualified income trust, qualified disabled trust, or a pooled trust shall provide quarterly statements to the Department which identify all deposits to and disbursements from the trust for each month during the eligibility period.

(e) Undue Hardship. A period of ineligibility shall not be imposed if the Department determines that the denial of eligibility based on counting funds in an irrevocable trust according to provisions in paragraph 65A-1.702(13)(b), F.A.C., would create an undue hardship on the individual. Undue hardship exists when application of a trust policy would deprive an individual of food, clothing, shelter or medical care such that their life or health would be endangered. This can be caused by legal restrictions or by illegal actions of a trustee. All efforts by the individual, or their legal spouse or representative, to access the resources or income must be exhausted before this exception applies.