

What is new in the Social Security Administration's Approach to Special Needs Trusts

By Philip Mondschein

Chapter 1: Establishing a Self-Settled Special Needs Trust Is Easier Said Than Done: A Two-Step Process

Under the POMS, the resource counting provisions of Section 1613(e) do not apply to a trust:

1. Which contains the assets of a disabled individual under 65 years of age;
2. Which is established for the benefit of such individual “through the actions of” a parent, grandparent, legal guardian, or a court;
3. Which provides that the State(s) will receive all amounts remaining in the trust upon the death of the individual equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan. POMS SI 01120.203B.1.a.

Establishing the Self-Settled Trust

To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust “established through the actions of” the disabled individual’s parent(s), grandparent(s), legal guardian, or a court. POMS SI 01120.203B.1.f.

- (a) In the case of a legally competent, disabled adult, a parent or grandparent may establish the trust by executing the trust instrument as settlor or grantor, and thereafter, transfer a nominal amount of their own money to the trust, known as a “seed” trust. Some states may permit a trust to be established

without the transfer of a nominal amount of money, referred to as an “empty” or “dry” trust under the POMS.

The Social Security Administration has issued a number of Regional Chief Counsel Precedents in which it decided that an empty or dry trust is not valid under the laws of Arizona, California, Colorado, Hawaii, Nevada, and South Dakota.

Practice Tip: In funding a self-settled special needs trust, the drafter may wish to include language which states that the trust is initially being funded with the assets of the parent and refer to this amount in schedule A of the trust. Regional Chief Counsel Precedent PS 01825.046 South Dakota

- (b) Under federal law, a guardian is one of the individuals who is permitted to establish a self-settled special needs trust. However, as a practical matter, it will be necessary for the guardian to petition a court for authority to establish a trust on behalf of the ward, as well as fund the trust with the assets of the ward.
- (c) In the case of a trust established through the actions of a court, the creation of the trust must be “required” by the court order. It is not sufficient for the court order to merely approve the creation of the trust. POMS SI 01120.203B.1.f.
- (d) A Representative Payee is not one of the enumerated parties who is authorized to establish a trust.

Funding the Self-Settled Trust

Once the trust is established through the actions of a parent, grandparent, legal guardian, or a court, the trust must be funded with the assets of the disabled individual. This may be accomplished by:

- (a) A legally competent adult beneficiary, transferring his or her own assets to the trust.

- (b) An individual, such as a parent, acting under a power of attorney executed by the disabled adult beneficiary, transferring the disabled individual's assets to the trust.
- (c) A guardian acting under a court order granting legal authority to the guardian to transfer the Ward's assets into the trust.
- (d) A Representative Payee is permitted to transfer SSDI and SSI benefits to a self-settled special needs trust where the trust allows the funds to be used exclusively for the beneficiary's current needs such as food, clothing, housing, medical care and personal comfort items, or for reasonably foreseeable needs. See GN 00602.075 and GN 00602.001.

Chapter 2: Treatment of Disbursements from Trusts

Although trust principal may not be considered an available resource to the beneficiary, disbursements from the trust may be considered income to the SSI recipient (trust beneficiary), depending on the nature of the disbursements. The following rules apply to both self-settled and third party Special Needs Trusts.
POMS SI 01120.201I.1

1. Disbursements Which are Treated as Income.

- (a) Disbursements of cash paid directly from the trust to the beneficiary are considered unearned income and result in a dollar-for-dollar reduction in benefits in the month received. POMS SI 01120.201I.1.a
- (b) Disbursements from the trust to a third party that result in the beneficiary receiving non-cash items (other than food and shelter) are considered in-kind income in the month received, if the items would not be an excluded resource in the following month. The POMS give an example of a second car,

which would be considered income in the month of receipt, since it would not be an excluded resource in the following month. See SI 00815.550 for a list of excluded resources.

2. Disbursements Which Result in Receipt of In-Kind Support and Maintenance.

Disbursements from a trust by the trustee to a third party, which result in the beneficiary receiving food and shelter, are considered income in the form of in-kind support and maintenance (ISM) and are valued under the presumed maximum value (PMV) rule. POMS SI 01120.201I.1.b and SI 00835.300 for rules pertaining to the PMV rule.

3. Disbursements Which are Not Treated as Income.

(a) Disbursements from the trust paid directly to third parties that do not result in the receipt of support and maintenance are not considered income to the beneficiary. Under the POMS, such disbursements may take the form of educational expenses, uncovered medical expenses, telephone bills, recreational and entertainment expenses, etc. POMS SI 01120.201I.1.c, See also POMS SI 00815.400

(b) Disbursements from the trust to a third party that result in the beneficiary receiving non-cash items (other than food and shelter) are not considered income in the month received, if the items would be an excluded non-liquid resource in the following month. The POMS gives the example of a trust purchasing a computer for the trust beneficiary, which would be excluded as household goods in the following month, and therefore, the computer is not income to the beneficiary in the month received. POMS SI 01120.201I.1.c, See also POMS SI 01130.430

4. Disbursement to Pay Credit Card Bills.

(a) Disbursements from a trust to pay a credit card bill for items of food and shelter are considered income to the beneficiary in the form of in-kind support and maintenance in the month the credit

card bill is paid, and are valued under the presumed maximum value rule. Payment of restaurant charges would be considered ISM.

(b) Disbursements from a trust to pay a credit card bill for items that are not food or shelter are not considered income to the beneficiary as a result of the payment, unless the items would be included as a resource in the following month. If the credit card bill includes the purchase of clothing, payment of clothing is not income to the beneficiary, since the clothing would be an excluded resource if retained into the following month. POMS SI 01120.2011.1.d

5. Disbursements for Gift Cards and Gift Certificates.

Gift cards and gift certificates are considered the equivalent of cash if the card can be used to buy food or shelter, or if the card does not have a legally enforceable prohibition on the individual selling the card for cash. The card is considered unearned income in the month of receipt, and any unspent balance on the card is a resource in the following month. POMS SI 01120.2011.1.e

6. Reimbursement to Third Parties from Trusts.

Where a third party purchases items for a trust beneficiary, other than food and shelter, and thereafter is reimbursed directly from the trust for such expenditures, the Social Security Administration is now taking the position that such reimbursement is “in-kind income” to the SSI recipient in the month the reimbursement is made, and will reduce the beneficiary’s monthly benefit dollar-for-dollar with no limit.

In order to avoid this result, the trust should pay the retailer directly, or if a third party purchases items, other than food and shelter, on a credit card, the trust should pay the credit card company directly for the purchases made on behalf of the beneficiary.

7. Effect of Distributions from Trusts.

Under the POMS, the Social Security Administration will reduce the income of the SSI recipient either dollar-for-dollar with no limitation, or no more than \$264.33 per month in 2016 under the presumed maximum value (PMV) rule, depending on the nature of the distribution as described above.

Under Section 416.571 of the Code of Federal Regulation, the Social Security Administration will recoup the overpayment due to excess income by reducing the beneficiary's monthly benefit by no more than 10% of the beneficiary's total income for the month.

Chapter 3: Third Party Vendor Payments on Behalf of the Disabled Individual

When a third party, such as a family member, makes a payment directly to a vendor who provided goods or services to the disabled individual, this is known as a third party vendor payment (TPVP). POMS SI 00835.360A.

The vendor might be the seller of goods or services (e.g. a merchant, retailer, or contractor); or a person or entity who takes the place of the vendor such as a bank or credit card company.

In general, third party vendor payments that result in the individual receiving in-kind support and maintenance are considered unearned income when the individual first has use of the item and the reduction in SSI benefits is evaluated under the presumed maximum value rule.

However, if an individual obtains food or shelter using his or her own credit, and a third party later makes a payment for the items as a gift, in-kind support and maintenance resulting from the third party vendor payment is treated as income in the month of payment.

The POMS give an example of a parent purchasing food using a line of credit at the store in the month of August. The parent receives help from his son in the month of September when the bill arrives. The parent is charged with receiving in-kind support and maintenance in the month of September when payment is made, rather than when the parent first received use of the item in August. POMS SI 00835.360D.1.

Chapter 4: Revisiting the “Sole Benefit Rule”

Under Social Security Administration rules, a self-settled special needs trust must be established “for the sole benefit of” the individual. A trust is considered established for the sole benefit of an individual if the trust benefits no one other than beneficiary at the time the trust is established or at any time during the beneficiary’s lifetime. Section SI 01120.201F.2 of the POMS

1. The following disbursements from the trust are considered to be “for the sole benefit of” the individual.
 - (a) Payments to a third party that result in the receipt of goods or services by the beneficiary are considered for the sole benefit of the beneficiary.
 - (b) Payment of reasonable compensation for trustees to manage the trust, as well as reasonable costs associated with investment, legal, or other services rendered on behalf of the individual with regard to the trust.
 - (c) Reimbursement to the State(s), upon the death of the beneficiary, for medical assistance paid on behalf of the beneficiary, as well as transfer of the remaining trust corpus to a residual trust beneficiary after the beneficiary’s death, are also permitted.

2. Travel Expenses of Third Parties.

Under Section SI 01120.201F.2, Example 1, of the POMS, effective May 17, 2012, a trust which includes a provision permitting the trustee to use trust funds to pay travel expenses for the SSI recipient's family members to visit will be considered invalid. The trust is deemed to violate the sole benefit rule, since it permits the trustee to use trust funds in a manner that will financially benefit the SSI recipient's family.

Notwithstanding the above, effective December 18, 2012, Example 1, has been deleted from this Section of the POMS.

3. Family Caregivers.

Under Section SI 01120.201F.2, Example 2, of the POMS, effective May 17, 2012, a trust may include a provision permitting a trustee to use trust funds to pay for attendant care needed by the SSI recipient on a daily basis. This provision will not violate the sole benefit rule since payments made for attendant care are considered payments to a third party for goods or services.

However, the POMS further provide that compensation paid to a third party should not routinely be questioned unless compensation is being paid to a family member or the examiner has some reason to question the reasonableness of the compensation. SSA officials have indicated to some practitioners that there will be greater scrutiny of trust language authorizing compensation to both family and non-family caregivers.

On October 18, 2012, in a video telecast, Eric Skidmore, the head of Program Policy at the Office of Income Security Programs at the Social Security Administration, stated that there are no formal requirements that family members have any special training to be paid as a caregiver, so long as the services are provided for the sole benefit of the individual. However, other practitioners have been told that trust provisions authorizing payment to caregivers must contain language that limits

payments to caregivers who are " medically certified, medically trained, or approved to provide care," with approval coming from the state Medicaid agency to be valid.

Notwithstanding the above, effective December 18, 2012, Example 2, has also been deleted from this Section of the POMS.

Chapter 5: "Savings Clauses" are of No Help Under the POMS

In drafting a special needs trust, many practitioners include a "null and void" or "savings" clause in the document. These clauses operate to cure defects in a trust and preserve the remaining trust provisions. They prevent the trust from being determined to be invalid by removing the offending language from consideration.

Under the newly enacted Section SI 01120.227 of the POMS, a null and void clause will not cure an otherwise defective trust instrument.

1. A null and void clause cannot nullify a provision that would make the trust a countable resource.
2. A null and void clause cannot overcome missing or conflicting trust provisions.

For a trust to be exempted from the SSI resource counting provisions, the trust must meet the provisions of the POMS, without regard to the presence or absence of a null and void clause. Any trust provision that fails to meet any of the required criteria must either be amended or removed, in order that the trust not be considered an available resource. Section SI 01120.227B, D, and E of the POMS.

3. 90-Day Remedial Amendment Period.

A trust that was originally approved by the Social Security Administration, and upon review is found to be defective, will continue to be exempt if the trust is amended within 90 days. The 90-day period begins on the day the trust beneficiary or representative payee is informed that the trust contains provisions that must be amended. Each previously approved trust is granted only one 90-day amendment period. This 90-day grace period only applies to trusts that were previously submitted to the Social Security Administration for approval. Section SI 01120.227A.2 of the POMS.

It does not appear that the 90-day remedial amendment period will extend to previously drafted trusts that were never submitted to the Social Security Administration for approval.

Chapter 6: Retroactive Amendment of Trust – Nunc Pro Tunc – Not Likely to be Accepted by SSA

In reviewing an existing special needs trust, the Social Security Administration may determine that the trust fails to comply with one or more SSA rules and regulations. This may occur, for example, where the trust permitted the payment of funeral and burial expenses prior to reimbursing the Medicaid program.

To correct these deficiencies, the parties have gone into court and obtained a court order amending the trust “nunc pro tunc,” that is, effective as of the date the trust was created. In reviewing a number of these court orders, the Social Security Administration has determined that although the court had authority to amend the trust as of the date of the court order, the court did not have the authority under

applicable state law to enter an order modifying the trust effective as of the date the trust was originally created.

In reviewing existing case law, the Social Security Administration has determined that a court may only modify a trust “nunc pro tunc” to correct mistakes, clerical errors, or omissions arising from the actions of the court, not those of the attorney or parties. Under these rulings, the Social Security Administration has made it even more difficult to retroactively correct an inadvertent mistake in an existing trust.

In a Tennessee case a self-settled special needs trust was established pursuant to court order to hold the proceeds from the sale of the disabled individual’s residence. However, the parties never submitted the trust to the Social Security Administration for review. Upon review several years later, the trust was found to be defective because it permitted the trustees to pay for funeral and burial expenses before reimbursing the states for medical assistance paid on behalf of the trust beneficiary. The Social Security Administration found that although the court’s order effectively amended the trust as of the date of the court order, the court did not have authority to amend the trust effective as of the date the trust was originally created. Regional Chief Counsel Precedent PS 01825.047 Tennessee

In a Florida case, a father created a support trust for the benefit of his daughter under his Will. Seven years after the father’s death, the trustee obtained a court order reforming the trust effective as of the death of the father. The Social Security Administration examined the Florida Trust Code and determined that although the court had authority to modify the trust as of the date of the court’s order, the court did not have authority to modify the trust effective as of the date the trust was originally created. Regional Chief Counsel Precedent PS 01825.011 Florida.

Chapter 7: Special Needs Trust Termination Provisions under the POMS

The Social Security Administration has always had rules regarding disbursement of funds from a self-settled special needs trust upon the death of a beneficiary. They have recently added additional provisions regarding the early termination of a self-settled special needs trust during the lifetime of the beneficiary.

1. Termination of Trust Upon the Death of the Beneficiary.

For a self-settled special needs trust to qualify as a valid Section 1396p(d)(4)(A) trust, the trust must contain specific language that provides that upon the death of the individual, the State will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid Plan. The terms of the trust must provide payback for any State that may have provided medical assistance under that State's Medicaid plan and may not be limited to any particular State, nor to any particular period of time. Thus, medical assistance received by an individual prior to establishing the trust will be subject to the payback provisions of the trust. Section SI 01120.203B.1.h of the POMS

In the event there are insufficient assets in the trust to reimburse all the states in full, they will each receive a proportionate share of the remaining trust assets.

2. Allowable Expenses of the Trust.

(a). Lifetime Expenses.

During the lifetime of the beneficiary, the trustee is permitted to pay fees and trust administration expenses, as long as the trustee is permitted to do so under the terms of the trust agreement.

Section SI 01120.203B.3.c of the POMS.

The trust will not violate the “sole benefit rule” if the trust provides for the payment of reasonable compensation for trustees to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust.

Section SI 01120.201F.2 of the POMS

Upon the death of the beneficiary, the trustee is not permitted to pay debts owed to third parties, other than provided below, and funeral expenses before the Medicaid lien is fully satisfied.

Therefore, the trustee should endeavor to keep all bills current, as well as purchase a prepaid burial contract for the beneficiary when the trust is created.

(b). Allowable Administration Expenses at Death.

Upon the death of the beneficiary, the Trustee is permitted to pay certain administrative expenses prior to reimbursement to the State(s) to satisfy the Medicaid lien. These expenses include:

1. Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary, and
2. Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. Section SI 01120.203 B.3.a of the POMS.

(c). Prohibited Expenses and Payments at Death.

Under the POMS, the trust is prohibited from paying the following expenses prior to the reimbursement of the State(s) for medical assistance. Section SI 01120.203 B.3.b of the POMS.

1. Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate,
 2. Inheritance taxes due for residual beneficiaries,
 3. Payment of debts owed to third parties,
 4. Funeral expenses, and
 5. Payments to residual beneficiaries.
3. Termination of Trust During the Lifetime of the Beneficiary.

A trust may contain a clause that permits the trust to terminate before the death of the beneficiary.

This is known as an “early termination provision.” Such provisions commonly provide for the early termination of a trust when, for example, the beneficiary is no longer disabled or no longer eligible for public benefits or when the trust no longer contains sufficient funds to justify the continued administration of the trust.

For purposes of SSI eligibility, a trust that contains an early termination provision will be considered an available resource unless the trust provides:

- (a) Upon the early termination of the trust, the State(s) in which the beneficiary received medical assistance will receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State(s) Medicaid Plan(s). Section SI 01120.199 F.1 of the POMS
- (b) However, prior to reimbursement of the State(s), the trust may provide for the payment of any taxes due from the trust to the State(s) or Federal government due to the early termination of the trust, as well as reasonable fees and administration expenses associated with terminating the trust. The early termination provisions make reference to Section SI 01120.203 B.3 of the

POMS, which give the allowable and prohibited expenses upon the death of the beneficiary.

Section SI 01120.199 F.3 of the POMS

(c) After payment of allowable expenses and reimbursement to the State(s), all remaining funds must be distributed to the beneficiary.

(d) The early termination provision may only be exercised by someone other than the trust beneficiary. Section SI 01120.199 F.1 of the POMS

4. 90-Day Remedial Amendment Period.

A trust that was originally approved by the Social Security Administration and upon review is found to be defective, will continue to be exempt if the trust is amended to comply with the newly enacted early termination provision within 90 days. The 90-day period begins on the day the trust beneficiary or representative payee is informed that the trust contains an early termination provision that must be amended. Each previously exempted trust is permitted only one 90-day amendment period. Section SI 01120.199 A.2 of the POMS.

If you want to learn more about Special Needs Planning and Trusts, call our Miami office for a FREE telephone consultation now!