

## SOCIAL SECURITY CHANGES POMS RELATING TO SELF-SETTLED SPECIAL NEEDS TRUSTS

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On May 21, 2012, the Social Security Administration (SSA) republished a section of the POMS relating to Self-Settled Special Needs Trusts.<sup>1</sup> Under previous POMS, Examples of permissible distributions were included. These examples included: “Travel and transportation costs for beneficiary, and for such travel companions as may be necessary or appropriate, to and from any school or residential accommodation removed from the residence of beneficiary’s immediate family members or legal guardian of the person, as well as the reasonable out-of-pocket travel and lodging expenses for beneficiary’s immediate family members and legal guardian of the person, if any incurred with their periodic visits to beneficiary at his/her place of residence.”

The May 21, 2012, republication of the POMS contains the following language in the Example: “An SSI recipient is awarded a court-ordered settlement that is placed in an irrevocable trust of which he is the beneficiary. The trust document includes a provision permitting the trustee to use funds in order to pay for the SSI recipient’s family to fly from Idaho and visit him in Nebraska. The trust is not established for the sole benefit of the trust beneficiary, since it permits the trustee to use trust funds in a manner that will financially benefit the SSI recipient’s family.”

Revising the section of the POMS was an effort by SSA to tighten the interpretation of the “sole benefit of” rule requiring that distributions from a Self-Settled Special Needs Trust be made for the sole benefit of the beneficiary of the trust.

SSA has taken the position that if an existing trust contains language that violates the new Example (such as the language in the Example section from the prior POMS), the trust is invalid. If the trust is invalid, any SSI recipient who is a beneficiary of a trust would lose SSI benefits. If the beneficiary’s Medicaid is linked to SSI, he would also lose Medicaid.

The solution to this problem is to amend the trust nunc pro tunc.

In conversations with officials of SSA, this firm has been advised that SSA will review both existing and new trusts to ensure that the “sole benefit of” rule is followed. SSA officials have suggested that if trusts contain the old Examples, that all of the Examples be deleted.

The officials also indicated that SSA is looking at trust language authorizing compensation to caregivers - both family and non-family. SSA has indicated that the policy of SSA is to require that any trust authorizing payment to caregivers contain language limiting such

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<sup>1</sup> POMS SI 01120.201.2

payments to caregivers who are “medically certified, medically trained or approved to provide care”. The “approval” is to come from the State Medicaid Agency.

Scriveners should either delete caregiver language or limit caregiver compensation as required by SSA policy. SSA is reviewing old trusts when the beneficiary comes up for recertification. It is good practice for drafting attorneys to amend these trusts accordingly.

***Subscribers to the Special Needs Trust Handbook should modify the trust documents included in the book as follows:***

Delete the Section titled “Examples of Distributions”. This appears as Section 2.2.2. in *Appendix 6-6* and as Section 3.2.2. in *Appendix 11-7* and as Section 2.1.2.2. in *Appendix 12-1*.

Amend the paragraph titled “Professional Care Manager” to include language immediately after the words Professional Care Manager as follows:

“is medically certified, medically trained or approved to provide care.”

This Section appears as Section 4.2.2. in *Appendix 6-6*, Section 5.9. in *Appendix 11-7*, and Section 4.4.1.3. in *Appendix 12-1*.

Either delete the Section titled “Family Caregiver” or modify it by including after the word family members the following language:

“is medically certified, medically trained or approved to provide care.”

This Section appears as Section 4.2.3. in *Appendix 6-6*, Section 5.10. in *Appendix 11-7* and Section 4.4.1.4. in *Appendix 12-1*.

*Appendices 5-1 and 5-2* need not be modified, because the Asole benefit of@ rule does not apply to third party trusts.

***Subscribers to Representing the Elderly Client should modify the trust documents included in the book in the same manner as above as follows:***

*Appendix 12A-2* need not be changed, because this is a Third Party Special Needs Trust and the Asole benefit of@ rule does not apply.

The Sections requiring modification in *Appendix 12B-5* are Sections 2.2.2., 4.2.1.2. and 4.2.1.3.

The Sections requiring modification in *Appendix 12B-6* are Sections 2.3., 3.1.5.1. and 3.1.5.2.