

Early Termination Provisions in First Party Self Settled and Pooled Trusts – Recent Changes to the POMS

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The Social Security Administration (SSA) uses the Program Operations Manual System (POMS) as its primary source of information to process claims for Social Security benefits.¹ Special needs planning practitioners frequently refer to the POMS for guidance on the SSA's policy dealing with first party special needs trusts and pooled trusts issues.

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On June 25, 2010, the SSA issued new instructions noted in the POMS at SI 01120.199 regarding early trust termination provisions which were informational but were not to be applied prior to October 1, 2010. A subsequent notice was filed and effective September 15, 2010, incorporating a two-pronged approach to clarify how and when these policies are to be utilized in regards to existing trusts and those to be established in the future.

The initial notice set forth instructions applicable to both first party and pooled trusts established on or after January 1, 2000 that contain early termination provisions.²

The most recent notice is more specific and states:

Trusts that are newly formed or have not been excepted under section 1919(d)(4)(A) or (C) must meet the criteria established in this section (i.e. SI01120.199) prior to being excepted from resource counting. Trusts that were previously excepted from resource counting must be granted a 90-day amendment period to modify the trust.

In effect, trusts that were not previously excepted from resource counting and newly formed trusts must meet all the applicable criteria while those trusts that were previously determined to be exempt from resource counting under (d) (4) (A) or (C) are given a 90-day period to make the necessary amendments to comply with these new provisions.

The instructions state that the 90 day period commences on the date the recipient or representative payee is informed that the existing trust must be amended and the previously exempted trust is not to be counted as a resource for this period.

However, if the trust fails to meet the requirements after the expiration of this period, the trust will be counted as a resource. Only one 90 day period is permitted for a

previously excepted trust.

This article reviews the new POMS section as it relates to both first party and pooled trusts.

SI 01120.199 provides that an early termination provision allows a trust to terminate before the death of the beneficiary. A trustee, for example, may want to terminate the trust if the beneficiary is no longer disabled or eligible to receive means-tested government benefits, including Supplemental Security Income (SSI) and Medicaid; and/or the trust no longer has sufficient assets to warrant its continued existence.³

FIRST PARTY SPECIAL NEEDS TRUSTS

OBRA '93⁴ permits the income and resources of a trust to be disregarded for the purposes of determining Medicaid eligibility if it meets the following requirements:

1. The beneficiary must be under the age of 65 at the time the trust is funded;
2. The beneficiary must be disabled as defined in the Social Security Act.⁵
3. The trust must be established for the benefit of the beneficiary by the beneficiary's parent, grandparent, legal guardian, or the court; and
4. The trust agreement must provide a Medicaid "payback" provision requiring the state Medicaid agency to be reimbursed upon the death of the beneficiary up to an amount equal to the total Medicaid paid on behalf of the beneficiary.

These trusts, commonly referred to as "First Party," "Self Settled" or "(d)(4)(A)" Special Needs Trusts, have been widely used

³ SI 01120.199.B.

⁴ Social Security Act 42 U.S.C. 1396p(d)(4)(A); see also Social Security Law 366 (2)(b)(2)(iii) and 18 NYCRR 360-4.5(b)(5).

⁵ Social Security Act 42 U.S.C. 1382c(a)(3).

¹ <https://secure.ssa.gov/apps10/poms.nsf/aboutpoms>.

² SI 01120.199.

by special needs planning practitioners as a way to shelter a person's assets to protect current or future means-tested government benefits. The types of assets often transferred to first party trusts include settlements from personal injury actions, inheritances, and child support.

If a First Party Trust contains an early termination provision, the new POMS section provides that in order for the assets of the trust to be excluded for purposes of SSI eligibility, all of the following conditions must be met:⁶

1. If the trust is terminated early, the state(s) must receive all amounts remaining in the trust at the time of the termination up to an amount equal to the total Medicaid paid on behalf of the beneficiary.
2. Other than payment of taxes and allowable administrative expenses, as defined in SI 01120.199D.3 (and SI 01120.203B.3), only the beneficiary can benefit from the early trust termination. Meaning, that after reimbursement for Medicaid paid, taxes and allowable administration expenses, all of the remaining trust assets must be distributed to the beneficiary and not the remainder beneficiaries.
3. The beneficiary cannot have the power to terminate the trust. The power to terminate must be given to someone else, such as a trustee, or perhaps a trust protector or trust advisory committee.

POOLED TRUSTS

OBRA '93 also permits a second type of a First Party Trust often referred to as a "pooled trust" which, similar to the individualized trust can be established by a parent, grandparent, guardian or court. It can also be established by the disabled beneficiary of any age.⁷

The other requirements for a qualifying pooled trust are:

1. The trust must be established and managed by a non-profit organization;
2. There must be separate sub accounts for each participant although the organization may organize the accounts into a pool for purposes of investment and

- management;
 3. The sub-account must be maintained for the sole benefit of the disabled individual; and
 4. Upon the death of a beneficiary any balance remaining in the sub-account for that person that is not retained by the trust must be repaid to the State Medicaid program up to the amount of benefits paid on behalf of the beneficiary.
- A Pooled Supplemental Needs Trust is an alternative to a privately established First Party Trust and affords certain benefits that are not available to the individualized trust.

As mentioned above, the Pooled Trust can be established by the disabled beneficiary him/herself in instances which can be quite advantageous where the disabled beneficiary is over the age of 65 years (although there may be a transfer penalty if the disabled beneficiary is thereafter required to go into a nursing home⁸) or where there is no parent, grandparent or guardian, and the only alternative is to seek a court order which can be costly and time consuming. Additionally, since Pooled Trusts generally utilize a single Master Trust and a standard Joinder or Participation Agreement, there is no need to draft and execute a trust document.

For the most part, like with the individualized First Party Trust, a Pooled Trust is generally utilized where a disabled beneficiary receives a sizeable asset (usually cash money) and needs to somehow transfer the asset so as not to be "over-resourced" and consequently determined at some point to be ineligible for certain governmental benefits, usually Medicaid or Supplemental Security Income (SSI).⁹

Many of the pooled trusts have different administrative provisions dealing with items such as enrollment fees, minimum deposits, costs, administrative expenses, early termination and the disposition of the balance on hand upon the death of a beneficiary. Prior to joining a Pooled Trust, a prospective beneficiary and/or those assisting the beneficiary should investigate the various available

alternatives.¹⁰

POMS PROVISIONS APPLICABLE TO POOLED TRUSTS

Most practitioners in the field of elder and disability planning law are aware that along with applicable state law and legal principles, a number of different sections of the POMS must also be consulted when evaluating a pooled trust to ensure that deposits into such a trust will not negatively impact eligibility for various governmental programs.¹¹

In those pooled trusts that do not contain an early termination provision, the balance remaining in the disabled beneficiary's account at death must be used to pay back the state for medical assistance provided to the beneficiary during his/her lifetime.

However, notwithstanding this requirement, it has always been and continues to be permissible for a Pooled Trust to provide that rather than being used for such a "Medicaid payback" the remaining funds, or a portion thereof, may be retained by the trust.

Whether or not a particular pooled trust will have an early termination provision is, of course, dependent upon the decision of the non-profit organization that has established the trust.

However, in those instances where there has been such a determination and there is to be an early termination provision, for whatever reason and however implicated, these newly issued instructions now require the trust to contain certain specific provisions in order to be certain that transfers to such a trust will continue to be permissible and not negatively impact beneficiary eligibility.¹²

Initially, it should be noted that the Pooled Trust will continue to be considered as a non-countable resource if the trust simply provides that in the event of an early termination, the assets of the terminating beneficiary are thereafter transferred to another qualifying Pooled Trust.

However, in lieu of such a provision, the assets of the disabled beneficiary transferred to a Pooled Trust containing an early termination provision will still not be a countable resource only if the following criteria are met and contained in the trust document:

- 10 http://www.specialneedsanswers.com/resources/directory_of_pooled_trusts.asp.
- 11 See for reference SI 01120.200, SI 00120.201, SI 01120.202, SI 01120.203, SI 01150.100, SI 01150.121, SI 01730.048.
- 12 SI 01120.199.

6 SI 01120.199.D. Note that the June 25th instructions referred to trusts created on or after 01/01/2000 but the recent change does not contain similar language and refers to SI 01120.202 for the procedure for the development and documentation of trusts established on or after 01/01/2000.

7 Social Security Act 42 U.S.C. 1396p(d)(4)(C).

8 See GIS 08 MA/020 issued July 24, 2008.

9 In New York there are generally two different types of pooled trusts; those designed for deposits of single or multiple lump sums such as inheritances and tort awards and those that are designed to accept regular monthly deposits of income to avoid a Medicaid spenddown. For more information see NYSBA Elder Law Attorney, Spring 2010, Vol. 20, No. 2 pages 33-36.

1. Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would 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 Medicaid plan(s); and
2. Other than payment for certain enumerated expenses, such as taxes due from the trust and reasonable fees and administration expenses associated with the termination of the trust,¹³ no entity other than the trust beneficiary may

benefit from the early termination (i.e., After reimbursement to the state(s), all remaining funds are disbursed to the trust beneficiary); and

3. The early termination clause gives the power to terminate to someone other than the trust beneficiary.

CONCLUSION

Now that the SSA has issued these instructions clarifying that an early termination provision is permissible as long as the guidance is followed, practitioners may want to consider to what extent they want to insert such a provision in their trust documents.

If an early termination provision is included in a First Party or Pooled Trust, practitioners must take care in drafting the agreement to include the SI 01120.199.D requirements to ensure that the trust beneficiary maintains eligibility for means-tested government benefits. ■

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13 01120.199.D.3.