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## **Memorandum**

To: Special Needs Trust Committee, Florida Bar's Elder Law Section

From : David J. Lillesand, Chair

Date: February 12, 2009

Re: New POMS on Special Needs Trusts; and  
Notice of Committee Meeting March 19<sup>th</sup> to Review POMS Changes

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### **Introduction**

Approximately two weeks ago, the Social Security Administration (SSA) issued new POMS on the three most important trust sections. I would like you, as a member of the Special Needs Trust Committee, to review the changes. We will have a meeting on March 19<sup>th</sup> to discuss them. I am including some general comments below.

Unfortunately, the new POMS were issued as usual without the kind of notations we see with proposed legislation or federal regulation that contains language deleted by strikethroughs, and language added by underlining. This is your lucky day – I went through each of the three POMS and compared the new language with the old, word by word, and created the strikethroughs and underlining that will highlight the differences for you. I am therefore attaching a clean version of the new POMS (50 pages), and one that highlights the changes (57 pages).

The three sections (which will be referred to by their last three numerical numbers, as Sections 200, 201 and 203) are:

- SI 01120.200: [Trusts - General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613\(e\) of the Social Security Act](#)
- SI 01120.201: [Trusts Established with the Assets of an Individual on or after 1/1/00](#); and
- SI 01120.203: [Exceptions to Counting Trusts Established on or after 1/1/00](#)

No changes were necessary in sections 202 and 204, SI 01120.202: [Development and Documentation of Trusts Established on or after 1/1/00](#) and SI 01120.204: [Notices for Trusts Established on or after 1/1/00](#). Those two sections are not substantive and merely tell SSA's 65,000 staff members how to enter data into the system, call up computer-generated Notices to mail to claimants, and other things that do not concern us as attorneys.

Also no changes were made in the POMS that describe SNTs as permissible exceptions to the anti-transfer of resources penalty, SI 01150.121: [Exceptions--Transfers to a Trust](#).

The other sections allowing permissible transfers to avoid the penalty are also not affected:

- SI 01150.122: [Exceptions--Transfer of a Home](#)
- SI 01150.123: [Exceptions--Non-Home Transfers to Certain Family Members](#)
- SI 01150.124: [Exceptions--Transferred Resource Returned](#)
- SI 01150.125: [Exceptions--Transfers for Purposes Other Than to Obtain SSI](#)
- SI 01150.126: [Exceptions--Undue Hardship](#)

It is significant to note that SSA did not make any changes in the POMS relating to the application of the transfer of resources penalties established by the 1999 legislation, and the alternatives to Special Needs Trusts and other favorable provisions contained in the POMS, SI 01150.005: [Determining Fair Market Value](#), which contain the examples and suggestions for personal service contracts, prepayment of food and shelter, and other important alternatives.

There continue to be no federal regulations on trusts as countable "resources." The underlying operating instructions are still found only the POMS sections cited above. As you know, the United States Supreme Court applied the *Skidmore Doctrine* and elevated POMS to the force of law in the absence of federal regulations. See *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U. S. 371 (2003), found at <http://laws.findlaw.com/us/000/01-1420.html>.

### **The New POMS – general comment**

As a introductory comment, the new POMS are favorable to SSI claimants' interests. Furthermore, the POMS codify many of the legal opinion letters that have been issued by the federal SSA regional legal office staff that have been released over the years that interpret the statute, the POMS and apply them to particular trusts submitted by claimants and their attorneys over the years. These Regional Chief Counsel precedents, as they are called, are a separate section of the POMS available to us on the Internet. From the POMS Table of Contents page, click on [PS - Title XVI Regional Chief Counsel Precedents](#), then on PS 018: [PROGRAM REQUIREMENTS -- Resources](#), and then on PS 01825.000: [Trusts - Table of Contents](#), Unfortunately, the RCC Precedents are not organized by topic, but by State. To assist, I am attaching an analysis I have done in table format of these legal opinion letters, as well as the opinion letters from 2006 through 2008, in one PDF format document.

In looking at the new POMS we notice that first, SSA has included at the front of each of the three sections, a table of topics and hyperlinks to the 8 to 13 subsections in Sections 200, 201 and 203.

For discussion purposes, I have divided the POMS changes into two topic areas – changes affecting the management of a trust and changes affecting the drafting of trusts.

### **Changes affecting the management of trust assets**

The trust distribution changes affect all trusts. Distributions from trusts can disqualify a non-disabled elder over age 65 or a disabled person under age 65 receiving SSI if the distributions from a Third Party Special Needs Trust (e.g., grandmother leaving an inheritance for grandchild), or a first party Special Needs Trust under 42 USC 1396p(d)(4)(A) or (C), violate the SSI income rules. Even if we have properly drafted the TP-SNT or the d4A or d4C trust and the trust document itself does not disqualify an SSI recipient on application of the SSI resource rules, the trustee could violate the monthly SSI income rules when making a distribution for the benefit of the elderly or disabled beneficiary.

The primary sections to focus on are Section 200.E. which talks about a general principal that the trust's purchase of non-cash items are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained the next month. Section 201.I.1 contains extensive additional language on disbursements that are income, are not income, and detailed instructions (limitations) on the use of credit cards and gift card and gift certificates.

Another section that affects trust administrators as well as trust drafters/attorneys is clarification of "additions to trusts after age 65" found in Section 203.B.1.c.

Finally, for both trust administrators and for drafting attorneys, SSA has clarified and strengthened its section describing after-death "allowable and prohibited expenses." See Section 203.B.3. The goal is to make sure that Medicaid gets paid. Specifically, SSA makes clear that on the list of prohibited expenses prior to the Medicaid reimbursement, are "taxes due from the estate of the beneficiary other than those rising from inclusion of the trust in the estate" and "inheritance taxes due for residual beneficiaries." Many of us have used language in our trust documents regarding the types of after-death taxes that can be paid from the trust, prior to Medicaid reimbursement, that have been found improper by RCC opinion letters, and are now codified in this trust revision.

### **Changes affecting the drafting of Special Needs Trusts**

When SSA evaluates a d4A or d4C trust they apply two standards: does it meet the special rules of d4 trusts in Section 203 (following the Step-Action Chart at Section 203.D.), and also does the trust meet the general rules for non-countable trusts found in Section 200.

In the new POMS, SSA has done the following:

- Strengthened the language regarding the necessity of a **spendthrift clause** in every trust that seeks to be a non-countable resource Section 200.A.16;

- Defined the rules on **revocation** and **termination** of trusts, Sections 200.A.19 and A.20; Section 200.D.1.a and b. and Section.200.a.2;
- Substantially changed the language on **grantor trusts** and the Doctrine of Worthier title ("revocability of grantor trusts"), Section 200.A.3 and 200.L.3; NOTE: Last year our Special Needs Trust Committee successfully secured a revision of the POMS, found in the POMS at SI ATL01120.201 "Trust Property" to exempt Florida trusts based on the new Florida Trust Code revision in 2007;
- Added a provision that disbursements from a countable resource trust, that are not to ro for the disabled beneficiary, can be **violations of the 1999 anti-transfer** of resources statute, Section 200.E.2.b;
- Specifically approved of and allowed **child support** and **alimony** Special Needs Trusts if the payments are properly assigned to the SNT; NOTE: this has always been the case, and was the subject of many approvals in RCC legal opinions, but now we have a national POMS support child support and alimony trusts; Section 200.G.1.d and Section 201.C.2.b;
- Re-defined the concept of establishing trusts with "the **assets of an individual**" so that it is clear that the d4A and d4C Medicaid payback applies, even if the "grantor" of the trust is a third party, Section 201.B.7 and 201.C.1 – "with the assets of an individual"
- Clarified that the pooled trust's right to a retention of a percentage of the funds is "upon the death of the beneficiary," Section 201.H.2;
- Added new provisions on **Burial Contracts**, Section 201.H.1.b;
- Completely revised the "**Disbursements from Trusts**" sections, mentioned above, at Section 201.I.1.
- Clearly labeled the d4A and d4C **terminology** of such trusts as "Medicaid Trust Exceptions" for Special Needs Trusts and Pooled Trusts, even though the rules clearly apply to SSI eligibility; Section 203.A.;
- Added a provision that the irrevocable assignment of **annuities** when the beneficiary was under age 65, will continue the beneficiary's SSI eligibility after age 65 and not disqualify the trust from the SNT exception due to "additions to Trust After Age 65", Section 203.B.1.c;
- Added new language regarding "**sole benefit**" in the context of establishing a d4A or d4C trust, Section 203.B.3.e;
- Added new language explaining when and why a "**seed trust**" is required for parents and grandparents establishing a d4A or d4C trust **for a competent but disabled adult**, Section 203.B.3.f and g, including why a power of attorney will not work in that context;
- Clearly stated in new language that disabled persons, over age 65, cannot join a pooled trust, without paying the anti-transfer penalty imposed by the 1999 anti-transfer of resources amendments to the Social Security Act, Section 203.B2.a;

- Limits the **flexibility of pooled trusts to benefit other disabled person's** with the funds deposited by the disability account holder, Section 203.B.2.e;
- Clearly stated that an individual and a pooled trust **"approved" by a court**, as grantor, will be **disallowed unless** it is **"established" by a court**, Section 203.B.1.f and 203.B.2.f;
- Requires that the trust must state that **Medicaid reimbursement/payback** will be made not just to Florida Medicaid, but **to all states** who provided medical assistance, Sections 203.B.1.h and Section 203.B.2.g; and
- **Medicaid payback is required for all medical assistance** (Medicaid) provided during the individual's lifetime, not just since the creation of the individual or pooled Special Needs Trust, Sections 203.B.1.h and 203.B.2.g; and
- Changed the language of the important individual and pooled trust **Step-Action checklists** in Sections 203.D.1 and 2.

I'm making my list of things that I wish the POMS would have addressed, such as the validity of a "savings clause" in case we inadvertently violate a POMS provision, a discussion of the structured settlement annuity as resource, and other things approved in the RCC legal opinion letters but not yet included in the POMS. Please make your own holiday wish-list.

Please review the entire document. We will discuss the changes at our Special Needs Trust Committee meeting on March 19<sup>th</sup>. See the Notice of Meeting following.

### **Notice of Special Needs Trust Committee Meeting**

We will have a Special Needs Trust Committee meeting on **Thursday, March 19, 2009, at 5:00 p.m.** at the **Renaissance International Plaza Hotel**, 4200 W. Columbus Drive, **Tampa, FL 33607** (tel. 1-813-877-9200) to go over the new POMS. This meeting is on the eve of the Elder Law Section's 2009 Annual Public Benefits CLE program (Friday) and the Fundamentals of Elder Law II CLE program on Saturday. The Elder Law Section's Executive Council will be meeting Friday evening.

David Lillesand  
Chair