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SSI AND SPECIAL NEEDS TRUSTS: WHAT PRACTITIONERS NEED TO KNOW

I. SSI: WHAT IS IT?

A. Overview of SSI:

SSI,¹ is a federal program that provides a cash stipend to the aged, blind and disabled whose available resources and income do not exceed the guidelines of the program. An individual eligible for SSI automatically qualifies for Medicaid in New York State. The resource level for SSI is \$2000 for a single individual and \$3000 for a couple or family.

For individuals with a disability under the age of 65, no ineligibility period for SSI will be assessed to transfers of their own assets into a trust for their benefit which provides a payback to the State for the lifetime of Medicaid provided² or to a pooled trust³. For individuals with a disability over the age of 65, the funds in the pooled trust are protected after the expiration of an ineligibility period.

For 2010, the federal benefit level for SSI for an individual residing in his own household is \$674/month. New York State provides an optional state supplement of \$87/month, bring the amount to \$761/month. When computing the monthly SSI payment, the Social Security Administration considers other income received by the SSI recipient. Unearned income, such as that provided by a trust, given in cash to the SSI

recipient, will be deducted from the SSI stipend.⁴ However, bills paid directly to the supplier of services other than food and shelter will not result in a reduction of the SSI benefit.⁵

B. SSI and Children

The financial eligibility of the child for SSI depends upon the economic situation of the parents. The parents' assets and income are deemed available to the child when computing eligibility for SSI for the disabled child. The larger the size of the household, the larger the size of the income that may be earned without eliminating SSI. Both earned and unearned income of the parent will affect the child's SSI monthly benefit. Unearned income of a parent has an even greater impact on the child's SSI benefits than earned income.⁶

II. SSI POMS

A. Overview

Social Security issues internal instructions for its case workers instructing them on SSA policy regarding many issues. It issued POMS pertaining to trusts in 2002. In January, 2009 the Social Security Administration revised its POMS pertaining to Trusts.⁷ These POMS give direction concerning the establishment of SNTs, drafting of SNTs, the effect of the use of trust assets on SSI benefits, permissible uses for the benefit of the beneficiary, and termination of the SNT upon the death of the beneficiary. Although not regulations, the POMS may be given deference when the enabling statute has not spoken on the issue addressed. The POMS address the following:

B. Establishing an SNT

1. A Representative Payee may transfer SSI benefits to an SNT or fund an existing SNT,⁸ so long as these are not retroactive SSI benefits for a child under 18, as these must be held in dedicated accounts.⁹

2. When the Representative Payee is funding an SNT, the Representative Payee must determine that the trust is in the best interest of the beneficiary, and that it will be used exclusively for him/her and that s/he is the sole beneficiary during lifetime.¹⁰

3. In the New York Region, a recent opinion letter issued by SSA Regional Office advised that parents holding UTMA and UGMA accounts may establish an SNT, referencing Section 12b of UTMA Act, which restricts limitations on investments as found in other statutes concerning fiduciaries, and Section 13a, which gives the custodian all of the rights that an unmarried adult would have as to those assets.

4. Income irrevocably assigned to the trust from an annuity, or support payments made when the beneficiary was less than 65 and which continue after the age of 65 remain protected by the trust.¹¹

5. Income from the Trust paid directly TO the beneficiary, or to his/her guardian or legal representative is countable unearned income that reduces the SSI benefit dollar for dollar.¹²

6. What does “establish” mean? When there is a legally competent, disabled adult, a parent or grandparent may establish a seed trust using a nominal amount of his or her own money, or even establish an empty or dry trust if allowed under State law.¹³

7. When an SNT is established through the actions of a court, the creation of the trust must be required by a court order. The trust may not merely state that the trust has been approved by the Court.¹⁴

8. The individual establishing the trust must have legal authority to act with respect to the assets of the individual with a disability. A POA gives legal authority with respect to the assets.¹⁵

9. An individual who is not a parent, grandparent or legal guardian may not establish a trust with a POA.¹⁶

C. Drafting Considerations

1. Spendthrift clause: include language that does not allow the beneficiary to sell or assign his/her interest in the trust or direct how the trust is used.¹⁷

2. Third party SNTs may be revocable, so long as the beneficiary does not have the authority to revoke the trust.¹⁸

3. Having the Medicaid agency as a remainder beneficiary makes the trust irrevocable.

4. Include language that does not allow the beneficiary to revoke or terminate the trust and use the principal for his/her own support and maintenance.¹⁹

5. Include language that prohibits the voluntary and involuntary alienation of trust payments.²⁰

D. Use of trust assets

1. Home

a. A home owned by an SNT is not a countable resource for SSI purposes, even if the beneficiary does not reside in the home, as it is a trust asset.²¹

b. If the trust owns the home, there is no in-kind support and maintenance if the trust does not pay housing costs.²² However, the purchase of the home by the trust will be considered in-kind support and maintenance (1/3 reduction of SSI) in the month of purchase.²³

c. If the SNT purchases a home without a mortgage, that purchase will result in in-kind support and maintenance in the month of purchase only.²⁴

d. If the SNT purchases a home subject to a mortgage, and the monthly mortgage payments are made by the SNT, these monthly payments result in in-kind support and maintenance, providing Shelter expenses that reduce the SSI monthly benefit by 1/3 each month in which they are made.²⁵

e. If the SNT pays for shelter or household operating expenses or household costs, this results in in-kind support and maintenance.²⁶

f. If the SNT pays for accommodations to the home to make it handicapped accessible or for renovations that increase the value of the home, this does not result in in-kind support and maintenance that results in a 1/3 reduction of the SSI monthly benefit.²⁷

g. Shelter costs include mortgage costs, including property insurance required by the mortgage holder, real property taxes, heating fuel, gas, electricity, water, sewer and garbage removal.²⁸

h. extra mortgage payments to reduce the principal owed and extra insurance coverage not required by the mortgagee are not household costs resulting in in-kind support and maintenance when paid by the SNT.²⁹

i. QUERY: May the home be purchased with SNT funds but owned by the individual outside of the SNT?

New York regulations, that require that notice be given to DSS in advance of transactions for less than fair market value,³⁰ appear to contemplate this type of transaction. The benefit for the family is that if a person with a disability owns a home and passes away prior to age 55, there will be no estate recovery against the home.³¹

2. What is Countable Income for SSI?

a. use of the trust to purchase items that are not excluded resources will result in countable income for SSI purposes in the month made, and countable resources in the next month.³²

b. Use of trust assets to pay for food and shelter results in in-kind support and maintenance, resulting in 1/3 reduction of SSI benefit.³³

c. Disbursements that are not cash and which do not result in in-kind support and maintenance are not income. Examples given by the POMS include payments to third parties for education, therapy, medical services not covered by Medicaid, recreation, entertainment and phone bills. Payments made to third parties for items such as household goods that are not considered a resource do not result in income for the beneficiary in the month that they are paid for.³⁴

d. SNT earnings such as interest or dividends are not income to the beneficiary if retained in the trust and not paid to the beneficiary.³⁵

e. Additions to trust principal made directly to the trust are not income to the beneficiary if such payments have been irrevocably assigned to the SNT.

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1. Child support payments irrevocably paid directly to a trust as a result of a court order are not income.³⁷

2. Alimony payments irrevocably paid directly to a trust as a result of a court order are not income.³⁸

f. Income that, by its own provisions, may not be irrevocably assigned to the SNT include monthly payments from Social Security, public assistance

(TANF or AFDC), Veterans benefits, federal employee retirement payments, and ERISA private pensions.³⁹

g. Cash paid directly to the trust beneficiary is unearned, countable income that reduces SSI benefits dollar for dollar.⁴⁰

h. Payments for credit card bills are not income if the credit card was used to pay for items other than food or shelter or countable assets.⁴¹

i. Credit card bills paid by the trust for restaurants will result in in-kind support and maintenance, subject to a 1/3 reduction.⁴²

j. If the trust assets are used to pay for gift cards and gift certificates, this will be considered unearned income in the month of receipt, even if the gift certificate is to a store that does not sell food or shelter items if the individual could sell/exchange the card for cash.⁴³

k. Income paid directly TO the beneficiary, or to his/her guardian or legal representative is countable unearned income that reduces the SSI benefit dollar for dollar.⁴⁴

3. What are Countable Resources?

a. Countable resources are resources that can be converted to cash to be used for an individual's support and maintenance.⁴⁵

b. If the individual does not have the right to liquidate the asset it is not a countable resource for SSI.⁴⁶

c. Household goods, i.e., items of personal property found in or near the home used on a regular basis, are not countable resources.⁴⁷ These items include, but are not limited to furniture, appliances, electronic equipment such as personal computers and televisions, dishes, cooking equipment, etc.⁴⁸

d. Personal effects include items of personal property ordinarily worn or carried by the SSI recipient, such as personal jewelry, educational or recreational items such as books or musical instruments.⁴⁹

e. Items acquired or held for their value, such as collectibles, gems and jewelry that is not worn or owned due to family significance are countable resources.⁵⁰

E. Trusts Established for the Sole Benefit v. For the Benefit of the Beneficiary

The permissible use of trust assets vis a vis the Medicaid agency often turns on whether the trust must be used for the benefit of the beneficiary, a broad view, or a more restrictive use of assets, for the sole benefit of the beneficiary. The POMS addresses this issue as follows:

1. For the Benefit of:

a. A trust is established for the benefit of the SSI/trust beneficiary if payments are paid to another person or entity so long as the trust beneficiary derives “some benefit from the payment.”⁵¹

b. Payments are made on behalf of, or to or for the benefit of the trust beneficiary if payments are made to another person or entity so that the trust beneficiary derives “some benefit from the payment.”⁵²

2. For the Sole Benefit of:

a. A trust is established for the sole benefit of an individual if it benefits no one but that individual at the time the trust is established or at any time for the remainder of the individual’s life.⁵³

b. Trust income or principal paid to an individual other than the trust beneficiary is not for the sole benefit of the individual unless the trust beneficiary receives goods or services as a result of that transaction.⁵⁴

c. Reasonable compensation for trustees as well as investment, or legal services with regard to the trust are expenditures considered for the sole benefit of the beneficiary.⁵⁵

d. Reimbursement to the state after the beneficiary's death for Medicaid expenditures is considered for the sole benefit of the individual.

e. A pooled trust may be considered a sole benefit trust, as retention of funds in a pooled trust after the death of the individual are considered for his/her sole benefit.⁵⁶

f. Transfer of remaining trust assets to a remainder beneficiary after the death of the trust beneficiary is considered a sole benefit trust.⁵⁷

g. N.B. There is no language in the POMS about actuarially sound distributions of assets to the trust beneficiary during lifetime or a payback provision to make the trust a sole benefit trust.⁵⁸

h. HCFA Transmittal 64 states that self-settled payback trusts established by a parent, grandparent, legal guardian or court order must be used for the sole benefit of the beneficiary.⁵⁹

i. Although the special needs trust exception by statute requires that the trust be established for and used for the benefit of the individual with a disability,⁶⁰ "SSA has interpreted this provision to require that the trust be for the **sole** benefit of the individual."⁶¹

3. Must Self-settled SNTS be FOR THE SOLE BENEFIT OF the Beneficiary or just FOR THE BENEFIT OF the Beneficiary

a. Self-Settled Trusts FOR THE BENEFIT OF the Beneficiary:

Federal law⁶² authorizes a person with a disability to place his/her own assets into a trust for his/her own benefit without any transfer penalty so long as upon death there is a payback to the State for the Medicaid provided during his/her lifetime. The statute does NOT require that the trust be used SOLELY for the benefit of the person with a disability. Hence, the federal statute does not preclude the use of trust assets for items that may also benefit family members, such as a vacation, or home. If the SNT is for the benefit of the beneficiary, a parent's SNT should be able to be used to support a minor child or pay for college of a child over 18 or have the SNT pay for all of the expenses of a house that it owns.

b. Sole Benefit Trusts

1. When a Third Party's assets fund a trust for a person with a disability under the age of 65 or a trust for a child with a disability of any age so that the Third Party will receive Medicaid benefits immediately, that trust must be used for the SOLE BENEFIT of the person with a disability, as two generations, in essence, will be receiving benefits without any transfer penalty.⁶³

2. Pursuant to CMS State Medicaid Manual⁶⁴ and New York Administrative Directive,⁶⁵ a "sole benefit trust" must either provide a payout over the life expectancy of the disabled individual or a payback to the State upon the death of the beneficiary for Medicaid expended during his/her lifetime. It must be used SOLELY for the benefit of the disabled beneficiary during lifetime.

3. Applying the sole benefit standard to a self-settled payback trust appears to conflict with the federal enabling statute.⁶⁶

4. State laws requiring that a sole benefit trust, established with the assets of one person for the sole benefit of a person with a disability under the age of 65 in which both generations receive Medicaid, provide a payback to the State or be used on an actuarially sound basis for the beneficiary during his/her lifetime, consistent with CMS State Medicaid Manual⁶⁷ are more restrictive than the SSI POMS, which merely require that no one else during the lifetime of the beneficiary benefits from the trust.⁶⁸

F. Termination Upon Death

1. The trust must contain language that the states 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.⁶⁹

2. The trust must provide payback for any states that may have provided medical assistance under the State Medicaid plans and may not be limited to any particular states.⁷⁰

3. Medicaid payback may not be limited to any particular period of time, i.e., may not be limited to Medicaid provided after the funding of the SNT.⁷¹

4. Reimbursement to the State must occur prior to payment of taxes due from the estate of the beneficiary.⁷²

5. Taxes arising from inclusion of the trust in the estate MAY be paid prior to reimbursement to the State.⁷³

6. Funerals, debts owed to third parties, inheritance taxes due for remainder beneficiaries and payment to remainder beneficiaries must be paid after reimbursement to the State.⁷⁴

7. Taxes due from the trust to the state or federal government because of the death of the beneficiary and reasonable fees for administration of the trust estate such as accountings to the court, and completing and filing of documents may be paid prior to reimbursement to the State for Medicaid.⁷⁵

8. The Trust agreement may not limit reimbursement to a specific state or for Medicaid expenditures made only after the trust account was funded or established.⁷⁶

G. Pooled Trusts

1. A nonprofit organization is one established and certified under a State nonprofit statute or defined in Section 501(c) of the IRC and that also has tax-exempt status under section 501(a) of the IRC.⁷⁷

2. The trust must maintain separate accounts for each beneficiary, but assets may be pooled for investment and management purposes.⁷⁸

3. The account must be established solely for the benefit of the individual with a disability.⁷⁹

4. There is no age restriction for this exception.⁸⁰

5. A transfer of resources to a trust for an individual age 65 or over will result in a transfer penalty for SSI.⁸¹

6. The trust must provide that to the extent any amounts remaining in the beneficiary's account upon his/her death are not retained by the trust, the trust will pay to the states the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the state Medicaid plan.⁸²

7. The pooled trust account must not provide a benefit to any other individual or entity other than the beneficiary or allow for the termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity.⁸³

8. A legally competent adult establishing the trust account has legal authority to act on his/her own behalf.⁸⁴

III. CONCLUSION

SNTs provide opportunities for persons with disabilities to maximize their potential while still retaining eligibility for government entitlements that provide a floor, not a ceiling, to their quality of life. SNTs are an important tool to prevent the premature institutionalization of those with disabilities. The POMS present the Social Security Administration's view of the interrelationship between SNTs and the SSI program. They clarify the Agency's position on establishing a Trust, using Trust assets, home ownership and termination of the Trust. Although POMS are not duly promulgated regulations, they present a useful framework for attorneys to both embrace and challenge in order to advocate for their clients.

¹ 42 U.S.C. § 1381.

² 42 U.S.C. § 1396p(d)(4)(A).

³ 42 U.S.C. § 1396p(d)(4)(c); 42 U.S.C. § 1382b(e)(5).

⁴ 20 C.F.R. § 416.1123.

⁵ 20 C.F.R. § 416.1103(g).

⁶ 20 C.F.R. 416.1160.

⁷ SI 01120.200, SI 01120.201 and SI 01120.203 contain the Executive Branch's interpretation of the federal statutes authorizing "exception trusts", 42 U.S.C. 1396p(d)(4)(A), (C).

⁸ GN 00602.075(A).

⁹ GN 00603.025(B).

¹⁰ GN 00602.075C(1).

¹¹ SI 01120.203B(1)(c).

¹² See Id.

¹³ SI 01120.203 B(1)(f). "After this seed trust has been established, the competent person may transfer his or her own assets to the trust or another with legal authority (e.g. power of attorney) may transfer the individual's assets into the trust." Id.

¹⁴ Id. Emphasis supplied.

¹⁵ SI 01120.203B(1)(g).

¹⁶ Id.
¹⁷ SI 01120.200B(16); SI01120.200D(1)(a).
¹⁸ SI 01120.200B(19).
¹⁹ SI 01120.200J(1)(a).
²⁰ Id.
²¹ SI 01120.200F(1).
²² SI 01120.200F(2).
²³ SI 01120.200F(3).
²⁴ SI 01120.200F(3)(a).
²⁵ SI 01120.200F(3)(b).
²⁶ SI 01120.200F(3)(c).
²⁷ Id.
²⁸ SI 00835.465D(1). See 20 C.F.R. 416.1133(c).
²⁹ SI 00835.465D(2),(3).

³⁰ 18 NYCRR §360-4.5(b).
³¹ See N.Y. Soc.Serv.L. §369, limiting estate recovery to Medicaid provided after age 55.
³² SI 01120.200E(1)(a).
³³ SI 01120.200E(1)(b).

³⁴ SI 01120.200E(1)(c). See also SI 01120.201I(c).
³⁵ SI 01120.200G(1)(a).
³⁶ SI 01120.200G(1)(b).
³⁷ SI 01120.200G(1)(d).
³⁸ Id.
³⁹ SI 01120.200G(1)(c).
⁴⁰ SI 01120.201I(1)(a).
⁴¹ SI 01120.201I(1)(d).
⁴² Id.
⁴³ SI 01120.201I(1)(e).
⁴⁴ See SI 01120.201D(3)(a).
⁴⁵ 20 C.F.R. §416.1201(a).
⁴⁶ Id. at (a)(1).
⁴⁷ 20 C.F.R. §416.1216(a)(1).
⁴⁸ 20 C.F.R. §416.1216(a)(2).
⁴⁹ 20 C.F.R. §416.1216(b)(2).
⁵⁰ Id.
⁵¹ SI 01120.201F(1). Emphasis supplied.
⁵² Id. Emphasis supplied.
⁵³ SI 01120.201F(2) Emphasis supplied.
⁵⁴ Id.
⁵⁵ Id.
⁵⁶ Id.
⁵⁷ Id.
⁵⁸ Id. Cf. HCFA Transmittal 64, Section 3257.6 (1994), which states that for the trust to be considered for the sole benefit of the beneficiary, the trust must provide for a spending of the funds on an actuarially sound basis based upon the life expectancy of the beneficiary. Id.
⁵⁹ CMS State Medicaid Manual, Section 3259.7A at 3-3-109.30 (Nov. 1994) [HCFA Transmittal 64]. Emphasis supplied.
⁶⁰ See 42 U.S.C.1396p(d)(4)(A).
⁶¹ SI 01120.203B(1)(e). See discussion in Section III, infra.
⁶² 42 U.S.C. §1396p(d)(4)(A).
⁶³ 42 U.S.C. §1396p(c)(2)(B)(iv); N.Y. Soc. Serv. Law § 366(5)(d)(3)(ii)(D); 18 NYCRR § 360-4.4(c)(2)(iii)(c)(iv).
⁶⁴ §3257(B)(6) at 3-3-109.1(Nov. 1994) [HCFA Transmittal 64].
⁶⁵ 96 ADM-8 at 7-8
⁶⁶ 42 U.S.C. §1396p(d)(4)(A).

⁶⁷ §3257(B)(6) at 3-3-109.1(Nov. 1994) [HCFA Transmittal 64].

⁶⁸ SI 01120.201F(2).

⁶⁹ SI 01120.203B(1)(h).

⁷⁰ Id.

⁷¹ Id.

⁷² SI 01120.203B(3)(b).

⁷³ Id.

⁷⁴ Id.

⁷⁵ SI 01120.203B(e)(a).

⁷⁶ SI01120.203B(2)(g).

⁷⁷ SI 01120.203(B)(2)(c).

⁷⁸ SI 01120.203B(2)(a).

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

⁸³ SI 01120.203B(2)(e).

⁸⁴ SI 01120.203B(2)(f).