

 STETSON LAW

**2021 National Conference on Special Needs Planning
and Special Needs Trusts**

**SSI Trust POMS Update: Changes Since 2018
Presented by Ken Brown**

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STETSON UNIVERSITY
UNIVERSITY OF SOUTHERN FLORIDA
ACADEMY OF GRADUATE FINANCIAL ADVICE

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Outline of Today's Presentation

- Brief Overview of the April 2018 SSI Trust POMS Rewrite
- New Supplemental Security Income (SI) Trust POMS policy issuances since April 2018
- New Title XVI Regional Chief Counsel Precedents (PS) POMS issuances

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Scope of the Trust POMS Rewrite

The POMS sections covered in the April 2018 rewrite are:

- **SI 01120.200:** Information on Trusts, Including Trusts Established Prior to January 01, 2000, 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
- **SI 01120.202:** Development and Documentation of Trusts Established on or After 01/01/00
- **SI 01120.203:** Exceptions to Counting Trusts Established on or after 1/1/00

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Scope of the Trust POMS Rewrite

POMS sections not changed in 2018 included:

- **SI 01120.195:** Trusts Established under the Indian Gaming Regulatory Act (IGRA) for Minor Children and Legally Incompetent Adults (IGRA Trusts)
- **SI 01120.199:** Early Termination Provisions and Trusts
- **SI 01120.204:** Notices for Trusts Established on or after 1/1/00
- **SI 01120.225:** Pooled Trusts Management Provisions
- **SI 01120.227:** Null and Void Clauses in Trust Documents

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Summary of Changes to SI 01120.200

- Three-tiered trust review process
 - Field office technician
 - Regional trust reviewer
 - Regional trust lead
- 90-day amendment period for posteligibility changes
 - One 90-day amendment period
 - Permits a good cause extension
 - Trust not counted as a resource during amendment period
 - If problem is not fixed, trust may count as a resource retroactively
- Miscellaneous changes
 - Indian Gaming Revenue Act Trusts can be third party trusts
 - ABLE Act accounts are not trusts
 - Assignment of payments

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Summary of Changes to SI 01120.201

- The sole benefit rule and exceptions for third party payments
 - Payments to a third party that result in the receipt of goods or services by the trust beneficiary.
 - Payment of third party travel expenses to accompany the trust beneficiary and provide services or assistance that is necessary due to the trust beneficiary's medical condition, disability, or age.
 - Payment of third party travel expenses to visit a trust beneficiary.
- Distributions from a trust to an ABLE account are excluded from income.
- Administrator-managed prepaid cards.
- 90-day amendment period for posteligibility changes.

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Summary of Changes to SI 01120.202

- Reopening trust determinations
- Manual notices
 - When applicable, SSA will issue a manual notice for trusts as required per SI 01120.204. For such notices, SSA will specify each reason the trust is countable (why it does not meet the exception or other requirements).
 - The notice must cite:
 - the applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue;
 - the POMS citation that contains the policy requirements on that subject; and
 - where the POMS can be found on-line.
- Posteligibility events – Do not reevaluate trusts in most cases
- Pooled trust precedents – Field offices should use established precedents in evaluating pooled trusts.

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Summary of Changes to SI 01120.203

- Incorporates the **21st Century Cures Act** (P.L. 114-255) – an individual may establish a (d)(4)(A) trust.
- Rules on court-established trusts.
- Additional clarifications.
 - Use of a power of attorney
 - When an individual establishing a trust must be disabled

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New Supplemental Security Income (SI) Trust POMS Policy Issuances Since April 2018

- Transmittal 55, October 17, 2018 SI 01120.195
- Transmittal 56, April 09, 2019 SI 01120.203
- Transmittal 57, May 14, 2019 SI 01120.200
- Transmittal 58, June 26, 2019 SI 01120.203
- Transmittal 59, September 25, 2019 SI 01120.204
- Transmittal 63, July 10, 2020 SI 01120.200
- Transmittal 64, October 22, 2020 SI 01120.199
- Transmittal 65, January 30, 2021 SI 01120.203

There have been several other Quick Action Transmittals to correct administrative issues such as cross-references and formatting. These contain no changes to policy or procedure.

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**Transmittal 55, October 17, 2018
SI 01120.195**

Indian Gaming Regulatory Act (IGRA) for Minor Children and Legally Incompetent Adults

On October 17, 2018, SSA issued TN 55 (10-18) to POMS Section SI 01120.195, Trusts Established under the Indian Gaming Regulatory Act for Minor Children and Legally Incompetent Adults (IGRA Trusts) .

This transmittal restructured the 2014 POMS which implemented a change in position and added detailed instructions on a new precedent-based review system similar to that used for pooled trusts.

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**Transmittal 56, April 09, 2019
SI 01120.203**

Policy Change to Age 65 Determination

On April 09, 2019, SSA issued TN 56 (04-19) to POMS Section SI 01120.203. This transmittal revised, for special needs trust purposes, the longstanding policy that an individual attains age 65 on the day preceding their 65th birthday. The new policy states that for special needs trusts, an individual attains age 65 on the anniversary date of his or her birth.

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Policy Change – Age 65

**SI 01120.203 Exceptions to Counting Trusts Established on or after January 1, 2000
B. Policy for special needs trusts established under section 1917(d)(4)(A) of the Act before December 13, 2016**

2. Under age 65

To qualify for the special needs trust exception, the trust must be established for the benefit of a disabled individual under age 65. For special needs trusts, an individual attains age 65 on the anniversary date of his or her birth. The special needs trust exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

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**Transmittal 57, May 14, 2019
SI 01120.200**

Quick Action Transmittal

On May 14, 2019 SSA issued a Quick Action Transmittal (no change to policy or procedure) to POMS SI 01120.200 that revised and moved the following NOTE from section SI 01120.200N.2.a. to sections SI 01120.200J and I.1.

NOTE: If the SSI recipient is the beneficiary of an unfunded third-party trust (e.g., the trust will be funded upon the death of a parent), it is not necessary to review and submit the unfunded trust to SSITMS for SSI eligibility purposes until it is funded.

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**Transmittal 58, June 26, 2019
SI 01120.203**

Revised policy - Disabled Individual

In June 2019, SSA issued revised instructions to SI 01120.203 under TN 58, that changed the applicable date for consideration of when the individual must be determined to be disabled for trust purposes from "the date the trust was established" to "the date on which the trust's resource status could affect the individual's SSI eligibility." They also added two examples to explain this policy change.

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Trust Policy Change - Disability

Prior policy - Disabled Individual

When the SSI Trust POMS rewrite was issued in April 2018 (TN 53 (04-18)), Section SI 01120.203B.4. titled "Disability" required:

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act at the time the trust was established.

Develop disability as of the date on which the trust was established (unless you need to develop for an earlier period for another purpose).

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Trust Policy Change - Disability

SI 01120.203 Exceptions to Counting Trusts Established on or after January 1, 2000

B. Policy for special needs trusts established under section 1917(d)(4)(A) of the Act before December 13, 2016

4. Disabled

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act as of the date on which the trust's resource status could affect the individual's SSI eligibility.

Develop disability as of the date on which the trust's resource status could affect SSI eligibility.

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Trust Policy Change - Disability

- **Example Scenario 1:** Mark, a special needs trust beneficiary whose trust was established in 2015, applies for SSI Aged benefits in 2019. Even though disability is not a requirement for SSI Aged benefits, we must develop disability as of Mark's SSI application date in 2019 for purposes of the Medicaid trust exception.
- **Example Scenario 2:** Sally has a special needs trust that was established in 2010 when she was 10 years old. At the time, she was not eligible for SSI Child benefits because of her deeming parents' income and resources. However, she applies for SSI Adult benefits in 2018. We must develop disability as of Sally's SSI application date in 2018. 2010 is not relevant because the trust did not present as a resource issue until the SSI application date in 2018.

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Transmittal 59, September 25, 2019

SI 01120.204

Revised policy – Trust Notices

In September 2019, SSA issued a rewrite of POMS SI 01120.204, Notices for Trusts Established on or after 1/1/00, under TN 59 (09-19). This section had not been rewritten since it was issued in 2001 and was last updated in 2014.

The rewrite updated this section to incorporate use of the current SSA notices system, the Document Processing System (DPS). Some previously manual notice language has been automated. This rewrite incorporates the requirements of SI 01120.202A.1.g. when eligibility is denied due to a trust.

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Required Explanation of Why a Trust is Countable

In each situation where a notice is required because a trust is considered a countable resource, the following applies.

In the notice, specify using free-form text each reason the trust does not meet the exception or other requirements in POMS. You must cite:

- the applicable section of the trust (or any joinder agreement, if applicable) containing the problematic language or issue; and
- the POMS citation that contains the policy requirements on that subject.

For example, "Section _____ of the trust does not comply with Program Operations Manual System (POMS) SI _____."

Additionally, provide the following language indicating where the POMS can be found online: "You can find the Program Operations Manual System (POMS) on the Social Security website at <https://secure.ssa.gov/poms.nsf/Home?readform>."

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**Transmittal 64, October 22, 2020
SI 01120.199**

Revised Policy – Early Termination

On October 22, 2020, SSA issued a rewrite of POMS SI 01120.199, Early Termination Provisions and Trusts.

- Added "decanting" to the glossary of terms,
- Provides clarification regarding distribution to the trust beneficiary following early termination
- Revised policy regarding rollovers to a secondary trust following early termination.
- Provides revised examples of acceptable and unacceptable early termination provisions.

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Revised Policy – Early Termination

Decanting

Trust decanting generally refers to the distribution or transfer of trust property from one trust to one or more other trusts, usually with more favorable terms. Decanting may involve the early termination of the first trust, or the effect of decanting may be materially the same as the effect of an early termination. In such a situation, we generally evaluate the decanting provision under the instructions on early termination in this section. However, decanting can be complex and can vary depending on applicable State law. It may be appropriate for the RO to seek input from the office of the RCC.

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Revised Policy – Early Termination

Previous SI 01120.199F.1.-

Other than payment for those expenses listed in SI 01120.199F.3, in this section and SI 01120.201F.4, 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);

Revised SI 01120.199E.1.-

Other than payment for the administrative expenses listed in this section and in SI 01120.201F.4, no individual or 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 so as solely to benefit the trust beneficiary);

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Revised Policy – Early Termination

Rollover

Previous Policy - SI 01120.199F.2.-

For pooled trusts established under Section 1917(d)(4)(C), an early termination clause does not need to meet the above criteria if the clause solely allows for a transfer of the beneficiary's assets from one Section 1917(d)(4)(C) trust to another Section 1917(d)(4)(C) trust. The early termination clause must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary Section 1917(d)(4)(C) trust or to pay for the expenses listed in SI 01120.199F.3 in this section and SI 01120.201F.4.

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Revised Policy – Early Termination

Rollover

Revised Policy - SI 01120.199E.2.-

An early termination provision in a Section 1917(d)(4)(A) special needs trust or Section 1917(d)(4)(C) pooled trust does not need to meet the above criteria if the provision allows solely for a transfer of the beneficiary's assets to a secondary Section 1917(d)(4)(A) or Section 1917(d)(4)(C) trust of which the same individual is the beneficiary.

The early termination provision must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary Section 1917(d)(4)(A) or Section 1917(d)(4)(C) trust or to pay for the administrative expenses listed in SI 01120.199E.3 in this section and in SI 01120.201F.4.

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Revised Policy – Early Termination

What Types of Rollovers Are Permitted?

SI 01120.199G.2.–

EXAMPLE 2: A pooled trust contains an early termination provision stating that, upon early termination, trust assets may solely be transferred to a secondary Section 1917(d)(4)(A) trust, or a secondary Section 1917(d)(4)(C) trust, where the beneficiary of the original trust also is the beneficiary of the secondary trust.

Treatment: This early termination provision does not meet the regular criteria for an acceptable early termination provision outlined in SI 01120.199E.1 in this section. However, it meets the exception to the regular criteria, set out in SI 01120.199E.2 in this section, by allowing solely for a transfer of the beneficiary's assets to a secondary Section 1917(d)(4)(A) trust, or a secondary Section 1917(d)(4)(C) trust, of which the same individual is the beneficiary.

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Transmittal 65, January 20, 2021 SI 01120.203

On January 20, 2021, SSA issued changes to POMS SI 01120.203, Exceptions to Counting Trusts Established on or after January 1, 2000.

- Clarifying that, when sending cases to the DDS, technicians should use a potential onset date as of the first of the month in which the trust's resource status could affect SSI eligibility (to coincide with the first-of-the-month rule for making resource determinations in SI 01110.600).
- Removing a cross-reference to procedure in SI 01150.121D and replacing it with the current procedure for developing disability.
- Adding an instruction to follow instructions in DI 11011.001 for all potential collateral estoppel claims (i.e., cases with a current T2 medical allowance).
- Clarifying how the resource transfer provisions apply to resource transfers to a trust.

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Title XVI Regional Chief Counsel Precedents

Over the past almost three and one-half years since the trust POMS rewrite was issued, there have been quite a few Regional Chief Counsel trust-related precedent opinions issued and posted to the PS section of POMS.

These opinions have primarily concentrated on the following subjects:

- Medicaid payback provisions
- Early termination
- Sole benefit
- Pooled trust management provisions
- Decanting

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Medicaid Payback Provisions

- Restrictive Language
- Prepayment of Medicaid Expenditures
- Improper Expenses

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Medicaid Payback Provisions

Restrictive Language

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PS 01825.015 Idaho, TN 175 (02-20)

B. PS 20-0006 Analysis of the National Foundation for Special Needs Integrity Pooled Trust for the State of Idaho – Medicaid Payback

- The Master Trust and the Joinder Agreement provide that to the extent that amounts remaining in the sub-account upon the death of the Trust Beneficiary are not retained by the Trust, the Trust will pay the State, or states as may be the case, from such remaining amounts in the sub-account, equal to the total amount of government assistance benefits paid to or on behalf of the Trust Beneficiary during the Beneficiary's lifetime.
- The Trust does not meet the Medicaid reimbursement requirement in POMS SI 01120.203.D.8 because the lifetime spending limit restricts the amount paid back to the states to funds conceivably less than the "total amount" contemplated by Section 1396p(d)(4)(c). Since a beneficiary could conceivably have received services prior to their death that are due to be paid by the State of Idaho but have not yet been paid, the lifetime spending limit prevents the Trust from meeting the Medicaid reimbursement requirement.

Accord - **The National Foundation for Special Needs Integrity Pooled Trust for the State of Louisiana** (December 9, 2020) (Louisiana).

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PS 01825.006 California, 06/2018

D. PS 18-105 Does the NH's account in the SMB Special Needs Pooled Trust (SMB Trust) meet the criteria for an exception to resource counting for SSI?

The Joinder, however, provides that the California Department of Health Services is "the primary beneficiary" upon the beneficiary's death and is entitled to an amount "equal to the total medical expenses paid on the beneficiary's behalf after the Beneficiary attained the age of fifty-five (55)." The Joinder impermissibly limits the reimbursement to "the California Department of Health Services" and to the period after the beneficiary attained the age of fifty-five. Accordingly, the Joinder does not contain an acceptable Medicaid reimbursement language, compliant with POMS SI 01120.203.D.8.

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PS 01825.011 Florida (08/20)

E. CPM 20-083 Resource Status of a Trust to Determine Eligibility for Supplemental Security Income—Florida Number holder S. S~ - August 31, 2020

The Trust is composed of three separate subtrusts for dividing assets: the Settlement Protection subtrust, the Special Needs subtrust, and the Medicare Set-Aside subtrust, which is administered as part of the Special Needs subtrust. The Settlement Protection subtrust is a vehicle to hold funds, manage investments, and enrich the life of NH.

Only the Special Needs subtrust contains a State Medicaid agency reimbursement clause, stating expressly that any such reimbursement will come from "all monies and assets remaining in the Special Needs subtrust." The Trustee administers the Medicare Set-Aside subtrust as part of the Special Needs subtrust, and thus, it presumably falls under this reimbursement provision. In contrast, the Settlement Protection subtrust contains no corresponding Medicaid reimbursement provision.

Coupling this exclusion of Settlement Protection subtrust assets from state Medicaid agency reimbursement with the unfettered discretion of the Trustee regarding Trust Asset allocation among the three subtrusts, any interpretation that the Trust meets the requirements of a valid special needs trust is further undermined.

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PS 01825.011 Florida (01/21)

C. PS 21-001 Validity of Purported Pooled Trust - January 6, 2021

The Joinder states that the Trustee will use property in a deceased beneficiary's IBA not retained by the Trust to pay administrative expenses and thereafter, the Trustee shall distribute such remaining Trust property to each state in which the beneficiary received government assistance. Joinder § 12(b). The Joinder further states that the Payback Amount shall only be for medical assistance paid on behalf of the Trust beneficiary during the Payback time period.

However, the POMS explain that the payback provision within the trust cannot be limited to any particular time period. See POMS SI 01120.203.D.8. Because the Joinder appears to set a limit on the time period for calculating the amount to pay back to the states, the Joinder is not policy-compliant.

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PS 01825.016 Illinois (03/19)

E. CPM 19-068 Review of The Patriot Pooled Payback Trust - March 27,2019

However, with respect to the statement in the Trust Agreement that the Society “may rely on a statement from the Illinois Department of Healthcare and Family Services regarding claims received or from a similar agency in another state,” we note that this language could be read to suggest that the Trust’s reliance on inaccurate or incomplete information provided by a state agency could waive the Trust’s obligation to reimburse the State(s) for Medicaid benefits. We caution that there is no statutory authority for such a reading and that the Trust must ensure that it fully carries out its Medicaid repayment obligations.

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PS 01825.036 North Carolina (03/21)

B. PS 20-017 Validity of Purported Pooled Trust Established by Corporation of Guardianship, Inc. - March 18, 2021

Here, the Trust Declaration states that ... the trustee will satisfy from the balance of assets comprising the sub-account all proper state claims for reimbursement of medical assistance paid on behalf of the beneficiary under a state plan. However, the trustee also has the discretion to refuse state claims for reimbursement of medical assistance paid on behalf of the beneficiary under a state plan, if he determines that all of the money or any portion of the money transferred by a grantor to the sub-account did not consist of the beneficiary’s own property.

Under this provision of the Trust Declaration, a grantor may defeat the state plan payback provision of the Act. Specifically, the grantor could proactively transfer assets not belonging to the beneficiary to the sub-account before the beneficiary’s death. Should a grantor do so, this provision would allow the trustee to exercise its discretion to refuse reimbursement claims under an otherwise qualifying state plan. Because the trustee has the discretion to make determinations enabling the Trust to avoid the repayment provisions of the Act, the Trust does meet the fourth requirement for as a qualifying pooled trust.

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PS 01825.046 South Dakota (05/17)

A. PS 17-090 Reconsideration of the Third Restated South Dakota Pooled Advocate Trust - May 30, 2017

The Trust contains specific language providing that, to the extent that amounts remaining in a beneficiary’s account after his or her death are not retained by the Trust, the Trust pays to the State(s) an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s).

However, the Trust requires states seeking reimbursement to “claim[] a lien enforceable under state or federal law and in conformity with A.R.S.D. § 67:46:05:32:03(2)” in order to receive Medicaid reimbursement. In January 2016, we determined that this language was inconsistent with the POMS, because it placed the burden on the State(s) to request reimbursement and to do so in a specific form—a lien enforceable under South Dakota law.

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Medicaid Payback Provisions

Prepayment of Medicaid Expenditures

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PS 01825.002 Alaska (05-19)

D. PS 19-082 Analysis of the Fifth Alaska Amendment to the Secured Futures Pooled Special Needs Trust Agreement, dated November 2, 2016

[T]he trust contains an advanced payment provision allowing the trustee "to make advance payments on the Beneficiary Trust Share's obligation to repay Medical Assistance upon the Beneficiary's death." But, advance reimbursement of medical assistance to one or more states during the beneficiary's lifetime does not consider that other states may also be entitled to repayment in the future based on providing Medicaid services. Therefore, the advance payments made may prevent the trust from making reimbursements to multiple state Medicaid programs upon the death of the beneficiary or the termination of the Trust. Hypothetically, Alaska could be repaid completely while there may be no money remaining to repay state B. The fact that the trustee may make advance payments to states during the beneficiary's lifetime does not comport with the statute or the POMS's requirement that any states providing assistance be reimbursed on termination.

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Medicaid Payback Provisions

Improper Expenses

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PS 01825.006 California, 05/2018

E. PS 18-095 Was the Special Needs Trust Validly Established by the "Conservator of the Person" and Does it Qualify for Exemption

Although Article VI, as amended, provides for reimbursement to the State(s), the Trust still does not ensure that the State(s) is listed as the first payee and will receive priority over other debts and expenses. See POMS SI 01120.203.B.10. Furthermore, Article I, upon the Claimant's death, the trustee "shall pay the expenses of the last illness, funeral, and burial of the beneficiary" and then distribute remaining assets as provided in Article VI. Article IV reiterates that Trust assets may be used to pay last illness and funeral expenses upon Claimant's death, with no indication that the State(s) shall first be reimbursed for Claimant's medical assistance.

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Medicaid Payback in a Nutshell

- Follow required Medicaid payback language in the statute or POMS SI 01102.203. That is what SSA wants and what they look for.
- Deviation frequently results in problems.
- SSA does not award points for creative writing or improvisation. Stick to the script.
- Do not add qualifications or conditions on payback.

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Early Termination

- Rollover Provisions
- Contingent Beneficiaries
- Sole Benefit

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Early Termination Rules

Where a trust can be terminated during a beneficiary's lifetime, the following criteria must be met (POMS SI 01120.199):

- (1) the State(s) receives all amounts remaining in the trust up to an amount equal to the amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s);
 - (2) other than payment of allowable administrative expenses, after reimbursement to the State(s), all remaining funds are distributed to the sole benefit of the trust beneficiary, and
 - (3) the power to terminate is given to someone other than the trust beneficiary.
- The trust exceptions do not apply if the trust account allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity.
 - An early termination clause, however, need not meet the foregoing criteria if it solely allows for a transfer of the beneficiary's assets from a §1917(d)(4)(A) special needs or §1917(d)(4)(C) pooled trust to a secondary §1917(d)(4)(A) or §1917(d)(4)(C) trust of which the same individual is the beneficiary. Must also contain limiting language.

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PS 01825.011 Florida, TN 202 (10/20)

A. PS 20-082 Validity of a Purported Pooled Trust, August 19, 2020

The Trust Declaration's early termination clause permits Trustee to terminate a Trust sub-account before the Beneficiary's death and disburse the funds in the Trust sub-account in three ways. None of the three options involve transferring the funds to another section 1917(d)(4)(C) trust.

Trustee may disburse the funds as if the Beneficiary has died, but the two options by which funds are disbursed if a Beneficiary dies do not require the reimbursement of the state(s) for medical assistance, nor do those options require that the remaining funds be used only for allowable administrative expenses, reasonable compensation to the trustee, or distributions to the trust Beneficiary.

Trustee also can choose to disburse the Trust sub-account's assets to a Grantor, which may not be the Beneficiary.

Trustee also could "continue to administer the Trust sub-account under separate agreement with the affected Beneficiary," but it does not specify that assets may be transferred only to another trust that meets the requirements of section 1917(d)(4)(C).

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PS 01825.016 Illinois (03/19)

E. CPM 19-068 Review of The Patriot Pooled Payback Trust - March 27,2019

The second early termination provision involves the termination of the entire trust. Upon termination of the entire trust, the contents of all subaccounts are to be transferred to the State of Illinois. TA Art. 13, § 1. This provision appears inconsistent with POMS SI 01120.199(F)(1) for two reasons. First, the provision does not require that each state that provided Medicaid benefits "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)." POMS SI 01120.199(F)(1).

Second, this provision allows for payment of the trust corpus to another entity (the State of Illinois) prior to the participant's death, which is inconsistent with the requirement that another entity not benefit from the early termination.

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Early Termination

Rollover Provisions

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PS 01825.015 Idaho, TN 175 (02-20)

A. PS 20-0006 Analysis of the National Foundation for Special Needs Integrity Pooled Trust for the State of Idaho

- The NFSNI Trust contains a problematic termination clause. The termination clause allows for transfer to "a qualified private or geographically appropriate and qualified not-for-profit pooled special needs trust."
- First, the term "qualified" is not sufficiently clear. [Additionally, even if it were clear that qualified indicated compliance with the law and policy relevant to the agency's evaluation, the statement could contemplate not only the possibility of transfer to a (d)(4)(C) trust (account) but also the possibility of transfer to a (d)(4)(A) trust ("a qualified private . . . special needs trust"). To the extent that that is the intended meaning, the POMS does not allow for transfer to a (d)(4)(A) trust.]

Accord, **CPM 19-105 Whether the National Foundation for Special Needs Integrity Pooled Trust is a Resource for SSI Purposes** (August 21, 2019)(Indiana) and **CPM 20-036 Whether the National Foundation for Special Needs Integrity Pooled Trust is a Resource for SSI Purposes** (April 10, 2020) (Ohio).

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PS 01825.041 Oregon (12/19)

A. CPM 19-220 Analysis of Oregon Special Needs Trust as Amended (November 15, 2019)

The Joinder Agreement states distributions may cease until "appropriate arrangements can be made, within the sole discretion of the Trustor, including, but not limited to" transfer of assets to another comparable pooled trust. Because this clause contemplates total decanting, it is construed as an early termination provision.

[T]he language in the Joinder Agreement contemplates transferring the trust assets "to a comparable 501(c)(3) tax-exempt pooled trust." Without more, this description of the secondary trust does not meet the requirement that the secondary trust be a qualifying Section 1917(d)(4)(C) trust.

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PS 01825.020 Kentucky (07/19)

A. PS 19-095 Validity of a Purported Pooled Trust – Bluegrass Senior Assist Pooled Special Needs Trust

The Trust’s early termination clause provides the Trustee may transfer the assets in a Beneficiary’s sub-account to a “qualified not-for-profit pooled special needs trust.” However, that provision does not qualify under the exception in POMS SI 01120.199.F.2 because it does not specify that assets may be transferred only to another trust that meets the requirements of section 1917(d)(4)(C).

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PS 01825.002 Alaska, (05/19)

PS 19-082 Analysis of the Fifth Alaska Amendment to the Secured Futures Pooled Special Needs Trust Agreement, dated November 2, 2016

The Alaska Amendment’s provision governing trust termination under court order does not satisfy the criteria of POMS SI 01120.199.F.2 because it does not restrict the transfer of trust assets to a 42 U.S.C. § 1396p(d)(4)(C) trust. Rather, the trust permits transfer of trust assets to a “recognized Medicaid trust approved by the State of Alaska Department of Health and Social Services” without restriction. Under the Alaska Administrative Code, a “recognized Medicaid trust” can be a trust authorized not only under 42 U.S.C. § 1396p(d)(4)(C), but also under 42 U.S.C. § 1396p(d)(4)(A) or (B).

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PS 01825.025 Michigan

CPM 19-208 Review of Elder Law of Michigan Inc. Pooled Trust - October 16, 2019

Under the third early termination option, the trustee may administer the sub-account under a new agreement with the affected beneficiary that “consider[s] the tax and Medicaid and other public benefit consequences to the beneficiary of any particular distribution.” Under this option, the terms of the new trust are unknown, and there is no requirement that the new trust be a qualifying pooled trust, that the trust will benefit only the disabled individual during his or her own lifetime, or that the States must be reimbursed for medical assistance on the death of the individual.

Likewise, POMS PS 01825.017 (PS 18-085 Review of the Southwestern Indiana Regional Council on Aging, Inc.) (May 14, 2018).

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PS 01825.017 Indiana (09-19)

CPM 19-105 Whether the National Foundation for Special Needs Integrity Pooled Trust is a Resource for SSI Purposes - August 21, 2019

The Declaration of Trust provides for early termination of the Trust on a designated date—January 1, 2095—to avoid the rule against perpetuities. This could conceivably terminate the Trust during the lifetime of a beneficiary. Because this provision permits NFSNI to distribute all of the Trust property to NFSNI “or its successor(s)” to create a new identical trust, the provision violates the agency’s guidance regarding early termination because the Declaration of Trust does not specify that the “successor(s)” must be a qualifying non-profit special needs pooled trust under §1917(d)(4)(C).

Accord -PS 01825.039, CPM 20-036 Whether the National Foundation for Special Needs Integrity Pooled Trust is a Resource for SSI Purposes (April 10, 2020)(Ohio).

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Early Termination

Contingent Beneficiaries Sole Benefit

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PS 01825.017 Indiana

C. PS 18-085 Review of the Southwestern Indiana Regional Council on Aging, Inc. (SWIRCA) Pooled Trust - May 14, 2018

- Under the SWIRCA Trust, early termination is permitted for a number of reasons.
- In each case, after reimbursement to the appropriate State Medicaid agencies, remaining funds are refunded to the grantor. If payment cannot be made to the grantor for any reason, then payment may be made in accordance with the Joinder Agreement, and if that cannot be carried out, to SWIRCA to be used for charitable purposes. Under the Joinder Agreement, 50% of the funds remaining in the sub-account after payment to the State Medicaid plan(s) would be retained by SWIRCA and the remainder would be distributed to designated remaindermen.
- This is not acceptable because it allows for the possibility of other contingent beneficiaries during the beneficiary’s lifetime.

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PS 01825.026 Minnesota

C. PS 18-106 Does an early termination clause in a Special Needs Trust meet SSA policy requirements for continued eligibility for SSI - June 28, 2018

At issue is Article 2.4.3 of the Trust Agreement, which states:

2.4.3 Distribution to a trust for the sole benefit of J~: Following early termination and payment of expenses in paragraphs 2.4.1 [Taxes and Fees] and 2.4.2 [State Medicaid Reimbursement Requirement] above, the trustee shall pay any remaining trust assets to First Capital Surety & Trust Company as trustee of a trust established for the sole benefit of J~. The trustee may not distribute the entire corpus outright to J~ until she is at least 40 years of age.

The question is whether this provision complies with the second requirement in POMS SI 01120.199F.1 that, except for allowable administrative expenses, "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)."

(Continued)

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PS 01825.026 Minnesota

PS 18-106 Does an early termination clause in a Special Needs Trust meet SSA policy requirements for continued eligibility for SSI - June 28, 2018

The Trust's requirement to pay the remaining assets to the second trust and the restriction on disbursement directly to J~ arguably are inconsistent with the parenthetical in this POMS provision, which might be read to require that all remaining funds be disbursed immediately and directly to the trust beneficiary.

Because all remaining trust assets are distributed so as to solely benefit J~ (whether into a trust established for her sole benefit or directly to her), the main part and the intention of the second requirement of POMS SI 01120.199F.1. are satisfied. Thus, the parenthetical should be read in light of the main part of the POMS provision, particularly given that the instruction follows principally from the sole-benefit requirement of the special needs trust exception under 42 U.S.C. § 1396p(d)(4)(A).

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PS 01825.006 California (10/19)

D. PS 18-105 Does the NH's account in the SMB Special Needs Pooled Trust (SMB Trust) meet the criteria for an exception to resource counting for SSI? - June 28, 2018

- In the event of such early termination, section 7.1 provides that the trustee has an option to treat the sub-account as if the beneficiary had died and distribute the sub-account in accordance with the provisions in Article 6 of the Master Trust.
- However, section 6.2 of the Master Trust and section 4.03 of the Joinder allow the beneficiary to distribute the remaining funds in his sub-account after reimbursing the state(s) to person(s) other than himself through his last will. To the extent that the beneficiary does not effectively exercise his special power of appointment, the foregoing provisions also allow the trustee to use the remaining funds in the beneficiary's sub-account for the benefit of other beneficiaries and disabled persons.
- Accordingly, because section 6.2 of the Master Trust and section 4.03 of the Joinder permit early termination of a beneficiary's sub-account and distribution of the remaining funds to person(s) other than the beneficiary, the provisions violate the "sole benefit" requirement of the pooled trust exception.

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PS 01825.039 Ohio (05/20)

C. CPM 20-047 The Community Fund Management Foundation Pooled Medicaid Payback Trust - May 1, 2020

[T]he second termination provision does not appear to be in compliance with SSA policy. This provision states that if a sub-account is counted as a resource, the Trustee will terminate the sub-account and administer and distribute the funds in the sub-account according to the provisions for termination upon death. The termination upon death provisions, in turn, allow the beneficiary to choose between two options for distribution: (1) allow the Trust to retain all funds; or (2) pay allowable administrative expenses and reimburse the state(s) for medical assistance paid on behalf of the beneficiary, then distribute any remaining funds to any individuals or entities listed as remainder distributees. If the remainder distributees do not survive the beneficiary or are not in existence, the remaining funds are retained by the Trust. Thus, the second early termination provision appears to violate POMS SI 01120.199F.1 because it allows payment of the corpus to another individual or entity....

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Early Termination in a Nutshell

- Follow the POMS requirements.
- For rollovers:
 - Specifically state you are rolling over to another 1917(d)(4)(A) or (d)(4)(C) trust.
 - Include required limiting language in POMS SI 01120.199E.2. “The early termination provision must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust or to pay for the administrative expenses....”
- SSA does not reward creative writing.
- Contingent beneficiaries – do not follow or cross refer to “upon death” procedures. Take the time to address early termination separately.
- SSA takes sole benefit requirements seriously.

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Sole Benefit

Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life.

- **Apportionment of Costs in Pooled Trusts**
- **Improper Payments and Distributions**

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Sole Benefit

Apportionment of Costs in Pooled Trusts

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PS 01825.011 Florida (09/18)

PS 19-011 Validity of Purported Pooled Trust - Florida, Supplemental Opinion – Sole Benefit

- The Master Trust stated: “Associated costs, if any, shall be a proper expense of the Trust and may be apportioned on a pro rata basis to all Trust sub-accounts or charged only against the Trust sub-account about which the Trustee seeks such advice or assistance.” The relevant POMS section, however, provides that only cost for investment, legal, or other services rendered “on behalf of the individual with regard to the trust” do not violate the sole benefit rule. POMS SI 01120.201.F.2.c. Accordingly, we concluded this provision of the Master Trust contemplated the potential use of assets in a beneficiary’s sub-account for the benefit of others besides the beneficiary.
- The Amended Master Trust provides that “Any associated costs that affect the Trust as a whole may be apportioned on a pro rata basis to all Trust sub-accounts, but any associated costs that affect individual sub-accounts shall only be charged against the Trust sub-account about which the Trustee seeks such advice or assistance.” As such, the Amended Master Trust now complies with the requirement that sub-accounts be established solely for the benefit of individuals who are disabled.

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PS 01825.025 Michigan (11-19)

CPM 19-208 Review of Elder Law of Michigan Inc. Pooled Trust - October 16, 2019

The trust declaration provides that the “costs and expenses of defending the Trust from any claim, demand, legal or equitable action, suit, or proceeding may, in the sole discretion of the Trustee, either be apportioned on a pro rata basis to all Trust sub-accounts” or “be charged only against the Trust sub-account as to the affected Beneficiary.”

Thus, the trust declaration appears to contemplate using money from one sub-account to defend a lawsuit that does not affect that sub-account’s beneficiary. If a legal issue affected the trust as a whole, as opposed an individual sub-account, it could be in each beneficiary’s interest for the Trustee to defend the Trust and share the cost of defense on a pro rata basis, such that each individual beneficiary would, in theory, receive a benefit in proportion to her costs. (Continued)

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PS 01825.025 Michigan (11-19)

CPM 19-208 Review of Elder Law of Michigan Inc. Pooled Trust - October 16, 2019

However, there is no requirement for the Trustee to determine that it is in the best interest of the other trust beneficiaries to share in the cost of defending the trust. This is inconsistent with agency policy that accounts be held for the sole benefit of that individual.

Likewise, PS 01825.025 (CPM 19-094 Review of the Michigan Arc Pooled Amenities Trust and Joinder Agreement) (July 29, 2019)

PS 01825.017 (CPM 18-085 Review of the Southwestern Indiana Regional Council on Aging, Inc. Pooled Trust) (May 14, 2018)

PS 01825.026 (CPM 20-234 Review of the 2019 Amended and Restated Lutheran Social Service of Minnesota Pooled Trust) (December 31, 2019)

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PS 01825.017 Indiana (09-19)

CPM 19-105 Whether the National Foundation for Special Needs Integrity Pooled Trust is a Resource for SSI Purposes – Sole Benefit

The Trust also includes a provision that allows NFSNI to apportion extraordinary expenses or legal fees for the defense of the Trust Pool as a whole among all Trust sub-accounts. If there are extraordinary expenses or a legal challenge attributable to a specific sub-account, that sub-account will bear the expenses or costs, unless the Trustee determines that the expenses or costs "may materially affect the integrity or administration of other sub-accounts, in which case said costs shall be apportioned pro-rata between all sub-accounts that may be materially affected by said issue giving rise to extraordinary administrative expenses or said claim, litigation, or challenge."

Since a beneficiary's funds would only be used if that particular beneficiary would be materially affected, this would satisfy the requirement that funds be used for the sole benefit of that individual.

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Sole Benefit

Improper Payments and Distributions

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PS 01825.045 South Carolina (08-18)

PS 18-104 Does the Purported Pooled Trust for Disabilities Foundation of Charleston County, Inc. (DFCC) meet the requirements for a pooled trust for SSI - June 22, 2018

In addition to problems with the trust’s management and Medicaid payback provisions, the trust is not structured for the sole benefit of the beneficiary.

- As written, the Trust permits the Trustee to make payments to a beneficiary’s dependents with the consent of the beneficiary.
- Trust allows for travel of family, friends, and others, to visit the beneficiary, regardless of whether it is to oversee a beneficiary’s living arrangements where he is residing in an institution or similar facility and regardless of whether it is for the beneficiary’s safety or medical well-being.

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PS 01825.006 California (05/18)

PS 18-095 Was the Special Needs Trust Validly Established by the “Conservator of the Person” and Does it Qualify for Exemption - May 30, 2018

- Under Article III, the trustee may use Trust funds for various purposes that do not benefit Claimant, including, e.g., paying taxes on the grantor’s estate; advancing Trust funds to the executor or administrator of the grantor’s estate; and making gifts of any part of the Trust assets to unspecified recipients. The trustee also may cause Trust assets to be issued, held, or registered in the trustee’s own name, contrary to agency policy requiring that items purchased by the trust be registered in the beneficiary’s name; POMS SI 01120.201.F.3.b.
- Additionally, under Article I, the grantor “directs” that Trust funds be used to pay for a companion to accompany the beneficiary on vacation “if requested.” However, the payment of third-party travel expenses is not for the beneficiary’s benefit unless the third party provides assistance or services that are necessary due to the beneficiary’s medical needs, disability, or age. See POMS SI 01120.201.F.3.b. Because the Trust does not limit the payment of the third-party travel expenses to individuals providing necessary assistance or services, such payments are not for the Claimant’s sole benefit.

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PS 01825.025 Michigan (07/20)

PS 20-035 Review of the Second Amendment and Restatement to the Pooled Accounts Trust of the Arc of Midland - April 2, 2020

[T]he Joinder Agreement as currently written contemplates a single sub-account containing funds belonging to multiple beneficiaries. (Grantor may “enroll more than one Beneficiary under one Trust sub-account” by executing an additional agreement). Nothing in the Joinder Agreement stipulates that the funds in such a sub-account would be reserved pro rata exclusively for each beneficiary’s benefit, or otherwise kept track of to ensure that none of the funds belonging to one beneficiary would be used for the benefit of another of that sub-account’s beneficiaries. Accordingly, the Trust does not meet the requirements of 42 U.S.C. § 1396p(d)(4)(C)(iii) and POMS SI 01120.203(D)(5).

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Sole Benefit in a Nutshell

- On apportionment of costs – trustee can have discretion, but make sure only affected accounts are charged with costs.
- Two identified qualifications
 - Best interest – Trustee determines it is in the beneficiary's best interest to share in the expense, or
 - The subject action materially affects the integrity of other accounts or the trust as a whole.
- SSA liberalized the sole benefit policy. Don't try to take advantage of it.

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Pooled Trust Management Provisions

- **The Trust Must be Established and Managed by a Non-Profit Association.**
- **Successor Trustees and Co-Trustees**

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Pooled Trust Management Provisions SI 01120.225

If a non-profit association employs the services of a for-profit entity, the non-profit association must maintain ultimate managerial control over the trust. The for-profit entity may handle certain trust functions on behalf of the non-profit association; however, the use of a for-profit entity must always be subordinate to the non-profit managers of a pooled trust under section 1917(d)(4)(C).

For example, the non-profit association must be responsible for:

- determining the amount of the trust corpus to invest;
- removing or replacing the trustee; and
- making the day-to-day decisions regarding the health and well-being of the pooled trust beneficiaries.
- For example, a pooled trust may not meet the criteria in section 1917(d)(4)(C) if the trust includes a provision that allows the for-profit entity to determine whether to make discretionary disbursements from the trust.

NOTE: This list is not intended to be exhaustive. These are a few examples of the type of authority that must vest in the non-profit association.

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Pooled Trust Management Provisions

The Trust Must be Established and Managed by a Non-Profit Association

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PS 01825.002 Alaska (08/19)

PS 19-097 Analysis of whether the J~ Irrevocable Asset Trust, which is established by Alaska's Office of Public Advocacy, qualifies as a pooled trust under 42 U.S.C. § 1396p(d)(4)(C), August 8, 2019

J~'s court appointed guardian, V~, Public Guardian for the Office of Public Advocacy (OPA), executed the First Restatement of the J~ Trust.

- Congress did not define "non-profit association" when it enacted the pooled trust provision at 42 U.S.C. § 1396p(d)(4)(C) in 1993, and it has not since amended the statute to provide such a definition. Thus, we look to state law to define "non-profit" association.
- OPA established and is Trustee of the J~ Trust. OPA is an Alaska state governmental body charged with providing guardian services to state residents. Under Alaska law, governmental bodies charged with providing guardian services to state residents are "nonprofit associations" when establishing and managing pooled trusts. Alaska Admin. Code tit. 7, § 100.614(b). OPA is accordingly a nonprofit association within the meaning of 42 U.S.C. § 1396p(d)(4)(C)(i).

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PS 01825.017 Indiana

PS 18-085 Review of the Southwestern Indiana Regional Council on Aging, Inc. Pooled Trust - May 14, 2018

SWIRCA, a non-profit association, established and manages the SWIRCA Pooled Trust. The Trust Declaration designates the Trustee as Old National Wealth Management. Notably, Old National Wealth Management is a for-profit entity.

SWIRCA is charged with preparing and providing projected disbursement levels for each sub-account to the Trustee, and shall serve as an advisor to the Trustee. However, the Trust Declaration states that the Trustee may "pay or apply for the benefit of each Beneficiary such amounts from the principal or income, or both, of the Trust sub-account maintained for such Beneficiary, up to the whole thereof, as the Trustee, in its sole discretion may from time to time deem necessary or advisable for the satisfaction of that Beneficiary's Supplemental Need." It also states that the Trustee, in its sole discretion, or as directed by SWIRCA, may make any payment under the trust directly to a beneficiary or any person deemed suitable by the Trustee.

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PS 01825.017 Indiana

PS 18-085 Review of the Southwestern Indiana Regional Council on Aging, Inc. Pooled Trust - May 14, 2018 (Continued)

- Further, it indicates that the Trustee shall have full power and authority in its absolute discretion to do all acts and things necessary to accomplish the purposes of the Trust. These provisions could violate the agency policy that the non-profit association must maintain ultimate managerial control over the pooled trust.
- The Trust Declaration also allows the Trustee to delegate to an agent or agents, any of the fiduciary powers expressed directly or by implication in the Trust. And it allows the Trustee to designate a Co-Trustee or Co-Trustees to serve at the Trustee's pleasure. A Co-Trustee is defined as a person or entity selected by the Trustee to assist with the "management, administration, allocation, and or disbursement of Trust assets and property." Thus, it appears that the Trustee could potentially delegate core managerial responsibilities to other for-profit entities.

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PS 01825.037 North Dakota (02-20)

PS 20-223 Lutheran Social Service of Minnesota's North Dakota Self-Settled Pooled Trust (February 5, 2020) and PS 18-102 (June 8, 2018)

The original Trust was problematic because it appeared to provide a Trust Fund Manager with authority exceeding the limits set forth in POMS SI 01120.225. The Trust seemed to impermissibly allow the Trust Fund Manager to determine the amount of the Trust corpus to invest. Moreover, the provision allowing the Trustee to delegate such powers and duties to the Trust Fund Manager as it saw fit was overly broad. For the pooled trust exception to apply, the Trustee must retain ultimate managerial control over the Trust, and certain responsibilities may not be delegated.

The Amended Trust now appears to comply with this requirement. Under the Amended Trust, the Trustee may rely on the services of an "Investment Firm," but it now makes clear that the Investment Firm operates under the direction and overall management of the Trustee. The trust has been revised to clearly indicate that the Trustee maintains ultimate managerial control over the Trust.

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PS 01825.049 Utah TN 186 (05-20)

PS 20-031 Secured Futures Pooled Special Needs Trust & the Utah Amendment (March 23, 2020)

While the Trust was established by a nonprofit corporation, it also provides that "the Trustee has the power to delegate to a corporate fiduciary the exercise of any powers, with the same effect as if the Trustee had joined in the exercise of such power." Pursuant to POMS SI 01120.225(D), a nonprofit corporation may employ a for-profit entity such as an investment advisor if the nonprofit corporation maintains ultimate managerial control over the Trust.

The delegation of authority authorized by the Trust appears overly permissive; certain responsibilities cannot be delegated. Assuming that the corporate fiduciary is a for-profit entity, it raises the possibility that the delegation of authority could exceed the limits set forth in POMS SI 01120.225. For example, the delegation provision does not make clear that Secured Futures, as Trustee, must be responsible for determining the amount of the Trust corpus to invest.

Accord – PS 01825.002 (PS 20-068 Analysis of the Sixth Alaska Amendment to the Secured Futures Pooled Special Needs Trust Agreement)(October 23, 2019)(Alaska).

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PS 01825.055 Wisconsin (03/19)

PS 19-079 Review of Life Navigators, Inc. Amended Master Trust Agreement for Trust II Pooled Trust - March 8, 2019

We previously found that the First Restatement of Trust II did not meet the first condition of the pooled trust exception because it delegated the management of Trust II to the for-profit Trustee (Prairie Financial Group of the Waukesha State Bank). However, the amendments make clear that the Trustee's powers are subordinate to the Trust Manager.

The Second Restatement explicitly limits the authority of the for-profit Trustee and makes it clear that the Trust Manager (Life Navigators, Inc.) retains ultimate managerial authority. The trust now provides, for example:

- a list of examples of the types of discretionary payments that may be made "by the Trust Manager or the Trustee under the management of the Trust Manager." It later reiterates that the list is nonexhaustive and that it is meant "to illustrate for the Trustee certain items which the Trustee may, under the management of the Trust Manager, wish to provide for the Beneficiary."
- "Powers of the Trustee" includes express language limiting the Trustee's authority such that it cannot act without the consent of the non-profit Trust Manager, Life Navigators.
- that "all of the foregoing authorities that may be exercised by the Trustee are with the consent of Life Navigators, Inc. pursuant to their managerial duties per 42 U.S.C. § 1396p(d)(4)(C)."

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Pooled Trust Management Provisions

Successor Trustees and Co-Trustees

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PS 01825.025 Michigan (07/19)

CPM 19-094 Review of the Michigan Arc Pooled Amenities Trust and Joinder Agreement - July 29, 2019

Here, Arc, a non-profit association, established and manages the Arc Pooled Trust. The Trust Declaration designates Arc as the "sole Trustee." However, the Trust Declaration also defines "Trustee" to include "any successor Trustee or Trustees." This suggests that, although Arc Michigan is currently the sole trustee, a successor trustee could be named, and the Trust Declaration does not require that a successor Trustee to Arc be a non-profit association or entity. Since the Trust appears to allow for designation of a for-profit successor trustee, the trust does not satisfy the agency's policy that a non-profit association must maintain managerial control over the pooled trust.

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PS 01825.017 Indiana (09/20)

PS 20-076 The New Leaf National Foundation Special Needs Pooled Trust -August 11, 2020

The language in Section 6.2(D) of the Trust Agreement is also problematic. It provides that the Trustee may "employ care managers, attorneys, appraisers, accountants, investment advisors . . . and other agents or advisors to assist Trustee, and to act without independent investigation upon their recommendations, and instead of acting personally, to employ one or more agents to perform any act of administration, whether discretionary or not." T.A. § 6.2(D). We are concerned that this broad language could permit NLNF to cede too much managerial control of the Trust to a for-profit entity. As such, we recommend that NLNF clarify this provision to make it clear that the nonprofit association maintains ultimate managerial control over the Trust. POMS SI 01120.225(D).

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PS 01825.025 Michigan (11/20)

D. PS 20-097 Review of the Third Amendment and Restatement to the Pooled Accounts Trust of the Arc of Midland - November 12, 2020

However, upon further review we note that the Trust Declaration as currently written appears to allow for the possibility that a for-profit entity acting as a substitute Trustee could manage the Trust or execute core managerial duties with respect to any Trust property. The Trust Declaration empowers the Trustee to "transfer the situs of any Trust property to any other jurisdiction as often as [the] Trustee deems it advantageous to the Trust, appointing a substitute Trustee to act with respect to that property." Nothing prohibits the Trustee from selecting a for-profit entity as a substitute Trustee.

Significantly, the Trust Declaration provides that the Trustee "may delegate to the substitute Trustee any or all of the powers given to Trustee[.]" As such, a substitute Trustee, which could be a for-profit entity, would hold the same powers as the Trustee and could potentially execute core managerial duties as to the portion of the Trust property over which that substitute Trustee has authority.

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Pooled Trust Management in a Nutshell

To qualify for exception under the provisions of section 1917(d)(4)(C), a pooled trust must be managed by a non-profit association. All of the following for-profit entities must be subject to managerial control of the non-profit association:

Trustee	Managers	Appraisers
Co-trustee	Agents	Accountants
Successor trustee	Investment manager	
Substitute trustee	Care manager	
Replacement trustee	Attorney	
Distribution trustee	Corporate fiduciary	

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Decanting

- Trust decanting generally refers to the distribution or transfer of trust property from one trust to one or more other trusts, usually with more favorable terms. Decanting may involve the early termination of the first trust, or the effect of decanting may be materially the same as the effect of an early termination. In such a situation, we generally evaluate the decanting provision under the instructions on early termination in this section. However, decanting can be complex and can vary depending on applicable State law. It may be appropriate for the RO to seek input from the office of the RCC. (POMS SI 01120.199D.7.)
- Although the common law of every jurisdiction recognizes trust decanting, many states have codified this right through statute, expressly authorizing trustees to decant from one trust to another. According to ACTEC, as of 2020, thirty-two States have enacted decanting statutes.

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PS 01825.016 Illinois (Indiana, Michigan, Minnesota, Ohio, Wisconsin) TN 162 (09-19)

A. CPM 19-103 Six State Survey on Decanting Statutes within Region V

All six states in OGC Region V have decanting statutes that permit a trustee, with requisite authority, to distribute part or all of the principal of a trust in favor of a trustee of a second trust . In particular, the Illinois and Wisconsin decanting statutes discuss trusts for disabled beneficiaries.

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PS 01825.026 Minnesota (06/18)

PS 18-106 Does an early termination clause in a Special Needs Trust meet SSA policy requirements for continued eligibility for SSI - June 28, 2018

At issue is Article 2.4.3 of the Trust Agreement, which states:

2.4.3 Distribution to a trust for the sole benefit of J~: Following early termination and payment of expenses in paragraphs 2.4.1 [Taxes and Fees] and 2.4.2 [State Medicaid Reimbursement Requirement] above, the trustee shall pay any remaining trust assets to First Capital Surety & Trust Company as trustee of a trust established for the sole benefit of J~. The trustee may not distribute the entire corpus outright to J~ until she is at least 40 years of age.

It was suggested that Article 2.4.3 of the Trust Agreement describes decanting from one trust to another. This raised questions as to whether a decanting provision is allowed under applicable State law and whether it meets SSA policy requirements. Based on our review of applicable law, and after consulting with the Office of Program Law, we believe that Article 2.4.3 appears to contemplate only early termination, and not decanting.

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PS 01825.026 Minnesota (06/18)

PS 18-106 Does an early termination clause in a Special Needs Trust meet SSA policy requirements for continued eligibility for SSI - June 28, 2018

- Minnesota authorizes trust decanting by statute. See Minn. Stat. § 502.851 (effective January 1, 2016). Under the statute, decanting is a type of special power of appointment where an authorized trustee appoints some or all of the trust property in one trust, called an invaded trust, to a new trust, called an appointed trust.
- Here, however, Article 2.4.3 explicitly states that the distribution to the second trust follows early termination. In other words, at the point of distribution, the first trust has been terminated and no longer exists. This seems inconsistent with decanting, since at the point of the would-be decanting, there would exist no first trust from which to decant. And indeed, Minnesota’s decanting statute defines an invaded trust as “any existing irrevocable inter vivos or testamentary trust whose principal is appointed.” Minn. Stat. § 502.851(1)(f)

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Decanting in a Nutshell

- Since formal decanting policy consists of a definition and a note that decanting will generally be treated as an early termination, there are many unanswered questions.
- We have seen that early termination may not permit decanting and vice versa. Make sure you follow State law.
- Will SSA require that trusts have early termination clauses to permit decanting?
- Will trusts permitting decanting have to have POMS rollover limiting language?

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Miscellaneous

- Effective Date of Amendment to a Special Needs Trust
- Trust Establishment

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Miscellaneous

Effective Date of Amendment to a Special Needs Trust "Nunc pro tunc"

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PS 01825.036 North Carolina (02-20)

PS 20-0007 Effective Date of Amendment to Special Needs Trust - January 27, 2020

- SSA found the Trust a countable resource because it did not comply with the early termination policy and determined that the Trust's value rendered Recipient ineligible for SSI due to excess resources effective July 2019.
- On September 18, 2019, Trustee executed an Amendment, which explains, "Grantor wishes to amend and relate back the Trust to its original date of execution, the 21st day of March, 2019." The Amendment further states, in relevant part, "I hereby revoke Article E 'Termination of Trust for Other Reasons' in its entirety, effective as of the 21st day of March, 2019."
- We believe the Amendment is effective as of September 18, 2019 under North Carolina law, not March 21, 2019. (continued)

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PS 20-0007 Effective Date of Amendment to Special Needs Trust - January 27, 2020

- No published court decision in North Carolina has directly addressed reformation of a trust. See N.C. Gen. Stat. Ann. § 36C-4-415, N.C. Comment (West 2019). However, dicta from the North Carolina Supreme Court in *Edmisten v. Sands*, 300 S.E.2d 387 (N.C. 1983) indicates reformation of a trust cannot be retroactive.
- Subsequent to *Edmisten*, North Carolina adopted the Uniform Trust Code (UTC) where a court has power to reform the terms of a trust to conform to the settlor's intent if the terms of the trust are ambiguous and the terms of the trust were affected by a mistake of fact or law. Although the UTC contemplates a court reforming a trust due to ambiguity or a mistake of fact or law, it does not provide for retroactive reformation. (continued)

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PS 20-0007 Effective Date of Amendment to Special Needs Trust - January 27, 2020

- Even if North Carolina permitted retroactive reformation of the Trust, we do not believe it would affect the agency's consideration of the Trust as a countable resource. The Court of Appeals for the Seventh Circuit held that reformation of a trust to correct a mistake related back to the date of the original document as to the parties, but it did not affect the rights of non-parties, including the federal government. *Van Den Wymelenberg v. U.S.*, 397 F.2d 443, 445 (7th Cir. 1968).
- In *Van Den Wymelenberg*, taxpayers sought to retroactively amend a trust to reduce their tax liability. The Court explained that federal tax liabilities would remain unsettled for years after their assessment if private persons or state courts were empowered to retroactively affect tax consequences. Similarly, eligibility for SSI would remain unsettled if individuals could retroactively amend trusts to render them compliant with the agency's income resource exception for such trusts. Therefore, *Van Den Wymelenberg* suggests retroactive trust amendments, even if valid, would not affect the rights of the agency to consider trusts as countable resources prior to the date of amendment.

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PS 01825.055 Wisconsin (01/19)

PS 19-026 Whether to Apply Wisconsin Statute § 701.0410(3) Regarding Retroactive Amendments to Trusts - January 15, 2019

This opinion provides a good historical review of prior opinions on the subject of retroactive amendments in other States.

In 2013, the Wisconsin State Legislature substantially updated its trust law by adopting a modified version of the Uniform Trust Code, creating Wisconsin Statute § 701.0410. However, Section 701.0410 also added a new third subsection, which authorizes a court to modify a trust retroactively so that the trust does not count as a resource. The provision states in relevant part:

- A court may modify the terms of a trust for an individual with a disability with retroactive effect or reform the terms of such trust to achieve the settlor's objective or, if because of circumstances not anticipated by the settlor, to otherwise further the purposes of the trust so that it does not result in the trust property being countable as resources or income of the individual with a disability for purposes of public assistance.

Here, the Wisconsin State Legislature has explicitly granted its courts the authority to modify trusts retroactively within the context of Social Security benefits. Accordingly, we believe that SSA should consider valid a Wisconsin court order that retroactively modifies the terms of a trust for a disabled individual so that it does not count as a resource for SSI purposes, and give it retroactive effect.

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PS 01825.047 Tennessee

D. PS 10-114 Effect of a Tennessee State Court Order Entered Nunc Pro Tunc Deleting Language in Trust Created for a Supplemental Security Income Recipient - July 1, 2010

In this case, the information provided indicates the "scrivener's error" the court corrected in its January 2010 order was the result of an error or negligence by Recipient's parents or the attorney for Recipient's parents who prepared the Trust document. The court noted the prohibited language allowing for the payment of funeral or burial expenses before reimbursement of State medical assistance payments was "inserted originally by error" and it entered its order nunc pro tunc to reflect "the parties' original intent." Nothing in the court's order suggests that the error was due to a mistake by the court, as required for entry of an order nunc pro tunc. See *Blackburn v. Blackburn*, 270 S.W.3d 42, at 50, 54-55 (Tenn. 2008); *Deweese v. Sweeney*, 947 S.W.2d 861, 864; *Contrell v. Humana of Tenn., Inc.*, 617 S.W.2d 901, 902 (Tenn. Ct. App. 1981). Moreover, the information provided, including the court order and the Trust document, does not provide clear and convincing evidence that the court intended the Trust to exclude the prohibited language when the Trust was originally created. See *Blackburn*, 270 S.W.3d at 50; *Deweese*, 947 S.W.2d at 864. The court could not enter its order nunc pro tunc in an attempt to make the Trust reflect what should have been omitted when the Trust was originally created, rather than what was actually included in the Trust. See *Blackburn*, 270 S.W.3d at 55-56. Therefore, we believe the court did not have the authority to enter its order nunc pro tunc.

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PS 01825.047 Tennessee

We recognize SSA's policy that although SSA is not bound by the decision of a State court in a proceeding to which SSA was not a party, SSA is not free to ignore an adjudication of a State court where the following prerequisites are found: (1) an issue in a claim for Social Security benefits previously has been determined by a State court of competent jurisdiction; (2) this issue was genuinely contested before the State court by parties with opposing interests; (3) the issue falls within the general category of domestic relations law; and (4) the resolution by the State trial court is consistent with the law enunciated by the highest court in the State. See Social Security Ruling (SSR) 83-37c (adopting Gray v. Richardson, 474 F.2d 1370 (6th Cir. 1973)). However, the order in this case does not meet all of the prerequisites in SSR 83-37c. The court's order was not genuinely contested by parties with opposing interests, and the issue addressed by the court's order did not fall within the general category of domestic relations law. Moreover, as discussed above, the court's entry of a nunc pro tunc order was not consistent with Tennessee law. Thus, SSA was not bound under SSR 83-37c, or any other legal authority, to accept the nunc pro tunc aspect of the court's order.

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PS 01825.039 Ohio

A. PS 21-015 The Anchor For Special Needs Trust, Inc. Pooled Special Needs Trust Agreement - April 27, 2021

Initially, we note that the terms of the Trust appear to allow a retroactive amendment. The Trust Agreement states that Anchor has the right to amend the Trust Agreement "at the discretion of the Trustee and in writing." It also states:

"Unless otherwise specified, any amendment shall apply to the beneficiary trust accounts so existing at the time of the amendment, as well as to beneficiary trust accounts established after the amendment is adopted and shall apply prospectively, except as otherwise stated and if necessary to ensure the Trust's compliance with applicable federal or state regulations."

In other words, although the Trust Agreement indicates that amendments will generally be applied prospectively, it also allows them to apply retroactively if the amendment states otherwise and if necessary to comply with applicable federal or state regulations.

We did not find any Ohio statutory or case law that addresses a settlor's ability to amend a trust retroactively without a court order. However, in general, at common law the settlor of a trust has the right to amend or modify a trust to the extent the terms of the trust provide, if the terms of the trust outline particular amendment procedures, the settlor can only exercise its right to amend by substantial compliance with the prescribed method. See id. Ohio case law recognizes this common law principle.

Thus, in the absence of any Ohio law that prohibits a retroactive amendment of a trust, we believe that an amendment may be retroactively applied if the terms of the Trust allow it.

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Miscellaneous Establishment of a Trust

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PS 01825.045 California (05/18)

PS 18-095 Was the Special Needs Trust Validly Established by the "Conservator of the Person" and Does it Qualify for Exemption - May 30, 2018

Under California's Probate Code, a court may appoint a conservator of the person for an individual who is unable to provide properly for her own health, food, clothing, or shelter needs. As a general rule, a conservator of the person is responsible for the care, custody, control, and education of the conservatee.

A court may appoint a conservator of the estate for an individual who is unable to manage her own financial resources. A conservator of the estate is responsible for management and control of the conservatee's personal property and real property. A conservator of the estate has powers including, e.g., endorsing, cashing, or depositing checks payable to the conservatee or her estate.

Here, the Court appointed G~ as conservator of the person for Claimant. Through the Conservator Orders, the court specifically limited G~'s powers to determining Claimant's place of residence; transporting Claimant as needed for intensive treatment; placing Claimant in a residential care facility, nursing facility, or psychiatric hospital as appropriate; and requiring Claimant to accept treatment and medication. Thus, G~ was acting outside the scope of her authority as conservator of the person when she cashed checks payable to Claimant, deposited the funds into a bank account, and purportedly placed those assets into the Trust. Because G~ did not have the authority to create or fund the Trust using Claimant's assets, the Trust was invalid and void since inception, and the Claimant retained the legal title to her assets.

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PS 08125.025 Michigan (04/21)

A. PR 21-024 Review of Third Amendment to the Pooled Accounts Trust of the Hope Network Foundation April 5, 2021

[T]he Declaration of Trust contains two definitions of "Grantor." The Declaration of Trust provides that a Grantor means a Beneficiary, his or her parent, grandparent, guardian, agent acting under a power of attorney, or a court. However, the Declaration of Trust also allows a Grantor to be "any person or entity that contributes his, her, or its own assets or property to the Trust for the benefit of a Beneficiary."

In turn, it provides that the Trust will become effective as to any Beneficiary "upon execution of a Joinder Agreement by a Grantor, or by court order," subject to the Trustee's approval. The Declaration of Trust does not specify to which definition of Grantor it is referring. This is problematic because under the second definition, the Trust would allow any individual or entity, not just those permitted under the statute, to establish a Trust sub-account.

Likewise - PS 08125.026 (C. PS 20-041 Review of the Minnesota Charities Pooled Trust and Joinder Agreement) (Minnesota) April 28, 2020

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SSI POMS Update

Questions?

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