



PORZIO
**Terminating
 Special Needs Trust**

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Self-Settled Special Needs Trust

42 U.S.C. §1396p(d)(4)(A):

“State will receive all amounts remaining in the trust *upon the death of such individual* up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 U.S.C. § 1396 et seq.]”

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State statutes requiring reimbursement upon death

“The trust shall specifically state that, *upon the death of the primary beneficiary*, the State will be notified, and shall be paid all amounts in the trust up to the total value of all medical assistance paid on behalf of the beneficiary.”

N.J.A.C. 10.71-4.11(g)(1)(xii)

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“Commonwealth will receive the amounts remaining in the trust *upon the death of the individual*, up to an amount equal to the total of MA benefits paid on behalf of the individual.”

55 Pa Code § 178.7

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“any amount remaining in the trust (up to the amount expended by the Department on medical assistance) shall be paid to the Department upon the death of the person.”

89 Ill. Admin Code, Ch. 1, Sect. 120.347(d)(1)

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State statutes requiring reimbursement before and after death

“Specific language that ... names the administration or the state Medicaid agency as the primary beneficiary of the trust *if the trust is terminated before or on the death of the member.*”

A.R.S. § 36-2934.01

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“The trust provides that, *upon the death of the beneficiary or termination of the trust during the beneficiary's lifetime, whichever occurs sooner*, the department of health care policy and financing receives any amount remaining in the trust up to the total medical assistance paid on behalf of the individual.”

C.R.S. § 15-14-412.8

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Early termination

- Trust ends before the death of the beneficiary.

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Reasons for early termination

- Avoid payback upon death of beneficiary.
- Beneficiary no longer qualifies or needs SSI or Medicaid.
- Trust no longer contains sufficient assets to justify continued trust administration.

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**Program Operations Manual System
("POMS")**

- Used by SSA employees as primary source of information in processing claims.

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POMS SI 01120.199

- Exempts SNT which contains an early termination provision if certain conditions are met.

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- (a) state is primary assignee,
- (b) state is reimbursed after payment of reasonable fees and allowable expenses,
- (c) trust is for the sole benefit of the disabled beneficiary and no one else can benefit from the early termination and
- (d) trust gives the power to terminate the trust to someone other than the beneficiary.

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- Applies to new trusts.
- Applies to old trust provided that such trusts are amended within 90 days of notice to do so.
- Does not apply to third party SNTs.

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Permissible expenses before payback

- POMS SI 1120.203(B)(3)
 - Taxes due to state and federal governments due to trust termination.
 - Reasonable fees and administrative expenses associated with final accountings and wrapping up the administration.

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After payment of expenses and fees and payback to state, remaining trust assets may be distributed to the disabled beneficiary.

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Hoskins v. Astrue, Case No. 09 C 6098,
U.S. Dist. LEXIS 115296

- “The Trust assets remaining ... shall be paid to the appropriate State agencies, as reimbursement to the State ... for benefits provided ... during ... lifetime, except that the Trustee may with court approval and consistent with existing law first pay any outstanding, reasonable expenses for maintaining the existence of the Trust, and final bills, debts, expenses, taxes, fees, and funeral-related items.”

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Ruling:

SNT assets are countable because

- 1) Beneficiary could terminate trust and
- 2) Trust provided for payment of funeral expenses before payback.

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Do the POMS instructions pertaining to early termination apply if the SNT beneficiary receives Medicaid but not SSI benefits?

Arguably, they do not unless the state’s statutes or regulations provide otherwise.

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• Practitioners should consider whether they want to include early termination provisions in self-settled SNTs.

Early termination provisions should track the requirements set forth in SI 01120.199D.

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First-party SNT drafting issues

• Consider whether SNT should provide for transfer of trust assets into first-party pooled trust if amount of assets no longer justify trust administration.

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Status of beneficiary

Competent adult

SNT can include testamentary power of appointment and dispositive provisions in accordance with beneficiary's testamentary intent.

Incapacitated adult

Intestacy laws will dictate distribution.

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Minor beneficiary
Intestacy laws will apply but SNT can include testamentary power of appointment if minor may become competent adult.

Practice tip: Remember that testamentary power of appointment provision only applies if will is executed after beneficiary reaches age of majority.

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Post-Death Administration

- Review state statutes, regulations and policies for procedures governing notification and payment to the state.
- Request written statement from the state regarding balance due and calculation to ensure computation is correct.

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- Following payback, trustee should attend to
 - Preparation and filing of tax returns
 - Tax payments
 - Accountings
 - Distributions

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Estate Taxes

Assets in a first-party SNT are includable in the estate of the disabled beneficiary.

– I.R.C. § 2036(a)

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Structured Settlements

- Settlement should be structured to provide for potential tax liabilities.
- Purchase commutation rider so that estate taxes can be paid if disabled individual dies before guarantee period expires.
- Even if there is no federal estate tax due, state estate and/or inheritance taxes may be imposed.

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Third-party SNTS

- Early termination and termination at death issues are governed by trust document and state trust law.
- SI 1120.199 and SI 1120.203(b)(3) do not apply.

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Post-death administration

- File applicable tax returns
- Pay applicable taxes and final expenses
- Provide accounting if required
- Distribute assets to remainder beneficiaries

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Questions?

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