What SSA Looks at When Evaluating Whether a Trust is a Countable Resource

Presentation by

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I. Introduction

Francesco Benavides worked at the Office of General Counsel (OGC) for the Social Security Administration for 10 years. He was the lead of legal opinions for Region IX, and he had oversight over the review of trust resource evaluations.

Under the new business process implemented by Region IX, OGC has responsibility for reviewing every trust submitted in connection with an SSI claim to determine whether the trust is a countable resource. This varies from the old business process and the process still common in other regions, where OGC only provides a handful of trust opinions throughout the year after receiving a formal opinion request from the Center for Disability and Program Support.

II. Evaluating a Trust

A. Determining who funded the Trust

Determining who funded the trust might be the most important factor the agency looks at when deciding whether a trust is a countable resource. It is a threshold matter that must considered before a claims representative or OGC attorney can apply the appropriate legal framework.

If the claimant funded the trust with his or her own assets, then the trust is self-settled. Pursuant to Social Security Act § 1613(e), 42 U.S.C. § 1382b(e), a self-settled trust established on or after January 1, 2000 is a countable resource unless an exception under section 1917(d)(4)(A) or (C) applies. This is true whether or not the trust purports to be irrevocable.

If someone other than the claimant funded the trust, then the agency (Social Security Administration) will find that the trust is a third-party trust. Under these circumstances, section 1613(e) does not apply. Rather, the agency will evaluate whether the trust is a countable resource based on the provisions contained under Program Operations Manual System (POMS) SI 01120.200(D), sometimes referred to as "the regular resource rules" for evaluating trusts.

POMS SI 01120.200(D) provides that a trust is a countable resource to the claimant if the claimant has power to revoke or terminate the trust and use the funds to meet his or her food or shelter needs, or if the claimant has power to direct use of the trust principal for his or her support and maintenance, or if the claimant can sell his or her beneficial interest in the trust.

1. When was the Trust funded?

Section 1613(e) only applies to self-settled trusts established on or after January 1, 2000. If a trust was initially established and received *some* funding prior to January 1, 2000, the agency will still find that section 1613(e) does not apply even if the trust received additional funding on or after January 1, 2000. *See* POMS SI 01120.201(C)(1).

Self-settled trusts established prior to January 1, 2000 will be evaluated in the same manner as third-party trusts, using the criteria of POMS SI 01120.200(D).

2. What if the trust is funded with assets of both the claimant and a third-party?

When a trust contains mixed assets, some originating from the claimant and others originating from a third-party, the agency will trace the assets and apply section 1613(e) to that portion of the trust that is self-settled.

A common scenario is for a family member to seed a trust with a nominal amount and then subsequently fund the trust with the claimant's assets. In this situation, the seed amount is largely immaterial. The agency will find the trust to be self-settled based on the fact that the trust was almost entirely funded with the claimant/beneficiary's assets.

3. Determining who funded the trust can be tricky.

It is common for a family member to create a living trust with a testamentary distribution to a disabled claimant. This testamentary distribution might then be used to fund a trust for the disabled claimant's benefit. The language of the living trust will be very important in evaluating whether the claimant's trust is considered a self-settled or third-party trust.

Example 1: Aunt Betty establishes a living trust and funds it with her assets. The trust provides that upon Aunt Betty's death 25% of the trust estate shall be distributed to a special needs trust for John, a disabled individual. According to the terms of the living trust and the special needs trust, John does not have power to terminate the trust and use the trust assets for his own shelter and food needs. Additionally, he does not have power to direct use of trust assets for his own support and maintenance, and he does not have power to sell his beneficial interest in the trust. Both the living trust and the special needs trusts are considered to be third-party trusts. Because John does not have power to terminate the trust or direct trust distributions, the agency will not count the trust as a resource when evaluating John's eligibility for SSI.

Example 2: Same scenario except that Aunt Betty's living trust provides that, upon her death, John shall receive 25% of the trust estate outright. Aunt Betty then dies. The trustee, Uncle Joe, decides not to distribute John's share outright because John is disabled. Instead, Uncle Joe successfully petitioned a court to establish a special needs trust for John and fund it with John's share of Aunt Betty's living trust. In this scenario, the agency would find that John's trust was self-settled with John's assets.

42 U.S.C. § 1382b(e)(6) and POMS SI 01120.201(B)(1) define an "asset" as an individual's income or resources, as well as any other payment or property to which the individual is entitled but does not receive or have access to because of an action by the individual, a person or entity (including a court) with legal authority to act on behalf of the individual, or a person or entity acting at the direction of the individual. In Example 2, upon Aunt Betty's death, John was *entitled* to outright distribution of his share of the trust estate. Thus, these assets belonged to John whether or not he actually received them.

Example 3: Aunt Betty establishes and funds a UMTA (Uniform Gifts to Minors Act) account for John when he is a child. Pursuant to the terms of the UMTA account, John will have access to the account funds when he turns 18 years old. When John is 16 years old, Bob, John's father and the custodian of his UMTA account, transfers the UMTA account funds to a trust he establishes for John. In this scenario, the agency will find John's trust is self-settled.

Agency policy provides that a UMTA account constitutes an irrevocable transfer from a donor to a minor. The money in the account is in the possession of the custodian, but the account funds are assets of the minor beneficiary, though not a *resource* to the beneficiary until he or she reaches the age of majority. *See* POMS SI 01120.205. Thus, when someone transfers UMTA account funds to a trust established for the account beneficiary, the agency will find that the trust is self-settled.

> Note: A 529 college savings account is not an asset of the minor because the donor retains legal ownership and can withdraw funds from the 529 account. *See* POMS SI 01140.150.

> Example 4: Family members make cash gifts to John while he is growing up. John's parents collect the cash and deposit it into a bank account. Eventually, John's parents use the money in this account to establish a trust for John. The agency would likely find that the money constituted John's assets and was merely held by his parents prior to the money being deposited into his trust. A statement from John's parents (SSA Form 795) might be the only evidence as to the source of the trust funds. Careful consideration should be given to the wording of the statement.

> Example 5: John's father, Bob, lists John as a beneficiary to his life insurance policy. John's parents establish a trust for John. The trust's schedule of assets references the proceeds of Bob's life insurance policy. Bob dies, and John's mother deposits the proceeds of the life insurance policy into John's trust. The agency is likely to find that the portion of John's trust funded with the life insurance proceeds is self-settled because the life insurance policy listed John, and not John's trust, as a beneficiary.

B. Evaluating whether a self-settled trust meets the requirements of section 1917(d)(4)(A) or (C) of the Social Security Act.

1. Special Needs Trust requirements (section 1917(d)(4)(A))

The beneficiary must be disabled and under 65 years of age. The beneficiary must be disabled as of the date when the trust resource status would affect his or her eligibility for SSI. The beneficiary must be under 65 years old when the trust is established. If the claimant turns 65 years old after the trust is established, the trust will continue to satisfy this requirement of section 1917(d)(4)(A), but additions to the trust made after the beneficiary turns 65 years old will not meet the exception.

The Trust must be for the "sole benefit" of the disabled beneficiary during his or her lifetime.

Prior to December 13, 2016, the Trust must be established by the beneficiary's parent, grandparent, legal guardian, or a Court. On or after December 13, 2016, a beneficiary can establish a special needs trust through his or her own actions.

The Trust must contain language ensuring Medicaid payback to the State(s).

a. "Sole benefit" requirement

The agency might find that an early termination provision, *i.e.*, termination prior to the beneficiary's death, violates the "sole benefit" requirement of section 1917(d)(4)(A). Pursuant to POMS SI 01120.199(E), an early termination clause must provide for Medicaid payback to the State(s) and then, other than permissible administrative expenses outlined in POMS SI 01120.199(E)(3), all remaining funds must be disbursed solely for the benefit of the disabled beneficiary, and the disabled beneficiary must not have power over the trust's termination.

Recently, the agency began allowing an exception to the above criteria if the early termination provides solely for a transfer of the beneficiary's assets to a secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust.

> Note: The transfer to a secondary trust upon early termination must contain "specific limiting language" that precludes early termination from resulting in disbursements other than to the secondary trust or to pay for permissible administrative expenses. *See* POMS SI 01120.199(E)(2). OGC has issued several precedent opinions advising that a trust did not satisfy POMS SI 01120.199(E) because it provided for transfer to a secondary trust without this "specific limiting language." *See e.g.,* POMS PS 01825.025 (21-024); POMS PS 01825.026 (20-086).

Examples of Problematic Language:

- After Medicaid payback to the State(s) the trust provides for distributions to the beneficiary's family members. The family members are instructed to preserve the funds and utilize them for the disabled beneficiary's special needs. This language does not create any enforceable obligations on the family members. Therefore, the agency would find that the distribution to the family members resulted in a violation of POMS SI 01120.199(E).
- The trust provides for distribution upon early termination in the same manner as if the beneficiary died. This is a very common mistake. The early termination is likely to provide for remainder distribution to individuals and entities other than the beneficiary.
- Open ended early termination provisions are problematic. These occur when the trust provides that a Court has power to terminate the trust during the beneficiary's lifetime but does not specify how the trust corpus will be distributed in such event. The agency is likely to assume that the termination on death provisions apply, which would likely result in distribution of the trust remainder to someone other than the beneficiary in violation of POMS SI 01120.199(E).

In addition to early termination provisions, the agency previously found that the "sole benefit" requirement might be violated insofar as the trust provided for payments to "companions." POMS SI 01120.201(F)(3) now provides that payments to third persons for goods and services (including companion services) do not violate the "sole benefit" requirement so long as the payment is primarily for the benefit of the beneficiary, even if the payment provides collateral benefit to another person. For example, if the trust buys a house for the beneficiary, it does not mean that no one other than the beneficiary can live in the house.

POMS SI 01120.201(F)(3) contains specific rules for third-party travel. Payment for third parties to accompany the beneficiary on travel must be *necessary* due to the beneficiary's medical condition, disability, or age. The agency will also allow payment for third parties to visit the beneficiary in limited circumstances if such travel is for the purpose of overseeing the beneficiary's living arrangement at an institution or care facility, or for a trustee, trust advisor or successor to exercise fiduciary duties or ensure the well-being of the beneficiary.

b. Who establishes the trust

Prior to December 13, 2016, a beneficiary could not establish a section 1917(d)(4)(A) trust on his or her own behalf. Rather, only a parent, grandparent, legal guardian, or a court could do so. A court "establishes" a trust even if the court order merely "approves" a petition for establishment of a trust so long as the trust was not already in existence prior to the court order.

c. Medicaid payback

The trust must provide that, upon the beneficiary's death or early termination of the trust, the State(s) receive reimbursement for medical assistance paid on the beneficiary's behalf under the State Medicaid plan(s). *See* POMS SI 01120.203(B)(10). Additionally, the Medicaid payback provision must clearly identify the State(s) as the first payee(s).

The Medicaid payback language cannot restrict reimbursement to any particular state(s). This is true regardless of whether the beneficiary never lived in another state. Additionally, reimbursement cannot be limited to any particular timeframe. That is, the trust cannot limit when the State can seek or obtain reimbursement following the trust's termination, and the trust cannot limit reimbursement to specific periods that the claimant received Medicaid.

> Example 1: The trust provides that "upon the beneficiary's death, the trustee shall reimburse <u>the State of California</u> for medical assistance the beneficiary received under <u>Medi-Cal</u>.
>
> This language clearly restricts reimbursement to the State of California.
>
> Example 2: Upon the beneficiary's death, the trustee shall reimburse the State(s) for medical assistance the beneficiary received under a Medicaid program(s) <u>as of the date of the execution of this agreement</u>.
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> This language restricts reimbursement to only those Medicaid benefits received after the execution of the trust agreement.

Prior to Medicaid reimbursement, the agency allows payment of permissible expenses under POMS SI 01120.203(E)(1). These permissible expenses include only (1) State or Federal taxes due from the trust because of the beneficiary's death, and (2) reasonable fees for administration associated with termination and wrapping up of the trust. The agency will find that a trust does not satisfy the requirements of section 1917(d)(4)(A) if it provides for any of the following expenses prior to Medicaid reimbursement to the State(s): payment of third-party debts, funeral expenses, payment to residual beneficiaries. *See* POMS SI 01120.203(E)(2).

2. Pooled Trust requirements (section 1917(d)(4)(C))

Section 1917(d)(4)(C) provides that a pooled trust must be established and managed by a non-profit association. Additionally, the trust must contain separate accounts for each beneficiary, though the assets from the accounts can be pooled for investing and management purposes. Like a section 1917(d)(4)(A) trust, a pooled trust account must be established solely for the benefit of the disabled beneficiary, and the trust must provide for Medicaid reimbursement to the State(s).

Additionally, the Trust must be established through the actions of the beneficiary, a parent, grandparent, legal guardian, or a court. Unlike section 1917(d)(4)(A) trusts, a beneficiary could establish an account in a section 1917(d)(4)(C) through his or her own actions even prior to December 13, 2016.

a. Medicaid reimbursement and the trust's remainder share.

Like a section 1917(d)(4)(A) trust, a pooled trust must provide for Medicaid reimbursement to the State(s) from a beneficiary's trust account upon his or her death, or upon early termination of the trust account. *See* POMS SI 01120.203(D)(8). Unlike a 1917(d)(4)(A) trust, a pooled trust can retain a "remainder share" upon a beneficiary's death prior to Medicaid reimbursement to the State(s). Moreover, this remainder share can be as much as 100% of the assets remaining in the trust account upon the beneficiary death. However, in the event of early termination of the trust account, the pooled trust cannot retain a remainder share.

b. Management by a non-profit organization.

POMS SI 01120.225(D) provides that, if a non-profit association employs the services of a for-profit entity, the non-profit must maintain "ultimate managerial control over the trust." The for-profit entity can handle certain functions on behalf of the non-profit, but the use of the for-profit entity "must always be subordinate to the non-profit managers" of the pooled trust. POMS SI 01120.225(D). The POMS identifies specific duties that the non-profit must be responsible for, including (1) determining the amount of the trust corpus to invest, (2) removing or replacing the trustee, and (3) making the day-to-day decisions regarding the health and well-being of the pooled trust beneficiaries. *Id.* Additionally, the for-profit entity cannot have power to determine whether to make discretionary disbursements from the trust. *See* POMS SI 01120.225(E).

Whether a for-profit entity exercises too much managerial control has been an issue identified in many OGC precedent opinions in the past few years. *See e.g.*, POMS PS 01825.016 (19-073); POMS SI 01825.016 (19-068); POMS PS 01825.016 (19-052); POMS PS 01825.025 (21-008); POMS PS 01825.026 (PS 20-041). Thus, the drafters of a pooled trust should be particularly careful to ensure that the language of the trust does not delegate too much managerial control from the non-profit organization that establishes and manages the trust to a for-profit entity. The trust should contain explicit language that the non-profit maintains ultimate managerial control, especially with respect to those responsibilities set forth in POMS SI 01120.225(D) & (E).

c. Early termination.

An early termination provision in a section 1917(d)(4)(C) trust cannot provide for the master trust to retain a remainder share prior to Medicaid payback to the State(s).

As with a section 1917(d)(4)(A) trust, POMS SI 01120.199(E) permits early termination of a 1917(d)(4)(C) trust account without Medicaid payback if the assets in the trust account are transferred to a secondary 1917(d)(4)(A) or 1917(d)(4)(C) trust.

The transfer to a secondary trust must contain “specific limiting language” that precludes early termination from resulting in disbursements other than to the secondary trust or to pay for permissible administrative expenses. *See* POMS SI 01120.199(E)(2).

d. Consistency with joinder agreement.

Variations between a master trust agreement and a joinder agreement might result in the agency finding that the trust account does not satisfy the requirements of section 1917(d)(4)(C). This might be particularly problematic when the master trust agreement is restated or amended to rectify an error, but the account beneficiary does not execute a new joinder agreement incorporating the changes in the master agreement. Language in a joinder agreement providing for adoption of all future changes of the master trust agreement is helpful in avoiding this dilemma.

C. Regular resource rules.

Even if a trust satisfies the requirements of sections 1917(d)(4)(A) or (C), the agency will still apply regular resource rules to determine whether the trust is a countable resource. *See* POMS SI 01120.203(A). That is, the agency will evaluate whether the beneficiary has power to terminate the trust and use the account funds for his or her shelter and food needs, or if the beneficiary can direct use of trust property for his or her own support and maintenance. *See* POMS SI 01120.200(D).

Even if the trust is expressly irrevocable, the agency will generally find that a person has power to revoke or terminate a self-settled trust if he or she is the grantor and the sole beneficiary. *See e.g.*, POMS SI CHI01120.200(C); POMS SI KC01120.200(A); *but see* POMS SI NY01120.200(A). Therefore, as a general rule, it is a good idea for a trust to identify at least one identifiable residual beneficiary or class of beneficiaries.

Additionally, the agency might find that a beneficiary has power to sell his beneficial interest in the trust if the trust does not contain a spendthrift provision. This appears to be the case whether or not the applicable state laws provide that a spendthrift provision in a self-settled trust is unenforceable. Therefore, it is generally a good practice to include a spendthrift provision in a self-settled trust.

D. 90-day amendment period.

Where the agency previously found that a trust met an exception to resource counting but then changed its determination, the agency may allow 90 days for amendment of the trust without interruption of benefits. The 90-day period begins on receipt of the notice that trust did not meet the requirements of the exception.

A common misconception is that the 90-day period applies whenever the agency finds that a trust does not meet the requirements of sections 1917(d)(4)(A) or (C). In fact, the 90-day amendment allowance is very limited. The exception only applies when agency first finds that a trust is not a countable resource but later determines that the trust is a countable resource because of problematic language involving (1) an early termination provision, (2) third party travel expenses, (3) a pooled trust management provision, or (4) a null and void clause.

III. Contact Information

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