

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

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## About Me:

- Prior SSA OGC attorney.
- Worked with Regional Office to design and establish new business process for reviewing trusts in Region IX.
- Oversight over OGC Region IX's review of trusts from 2018-2020.
- Trained other OGC attorneys.

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## What does SSA look at when evaluating whether a trust is a resource?

- Who funded the trust?
  - First-party vs. third-party trusts.
  - Mixed trusts.
- Does the trust qualify for an exception to resource counting?
  - Special Needs Trusts (section 1917(d)(4)(A))
  - Pooled Trusts (section 1917(d)(4)(C)).
- Application of "regular resource rules."

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**Who funded the Trust:**

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- The beneficiary (self-settled)
- A third party (third-party)

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**Self-Settled Trusts**

- Funded with assets of the beneficiary
- If revocable, corpus of trust is a countable resource
- Even if irrevocable, the portion of the trust that *could* be paid to beneficiary is a countable resource

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**Third-Party Trusts**

- Funded with assets of a third party
- Trust principal is a resource if the beneficiary has power to:
  - Terminate trust and then use funds for food and shelter
  - Direct use of trust principal for his or her support and maintenance
  - Sell his or her beneficial interest in the trust.

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### Self-settled Trusts Established Prior to January 1, 2000

- 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).

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### Mixed Trusts

- 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.

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### 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.

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### 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.

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### Definition of "Asset"

- 42 U.S.C. § 1382b(c)(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.

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### 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.

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## UMTA Accounts

- 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.
- Compare: 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.

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## Example 4

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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.

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## Example 5

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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.

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**Exceptions to Counting Self-Settled Trusts as Resources**

- 42 U.S.C. § 1396p(d)(4) (Social Security Act § 1917(d)(4)), POMS SI 01120.203
- Two types:
  - Special Needs Trust (1917(d)(4)(A))
  - Pooled Trusts (1917(d)(4)(C))

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**Special Needs Trust Requirements**

- POMS SI 01120.203(B)&(C)
- Under 65 years old and disabled.
- Established for the "sole benefit" of the beneficiary.
- Established by the beneficiary, parents, legal guardian, or court (beneficiary cannot establish his or her own trust prior to December 13, 2016)
- Medicaid payback language

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**Early Termination Provisions**

- 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.
  - The transfer to a secondary trust upon early termination must contain "specific limiting language." See POMS SI 01120.199(E)(2).

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**Examples of Problematic Language**

- Upon early termination, 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.
- Upon early termination, the trust provides for distribution to residual beneficiaries in the same manner as if the beneficiary died.
- Open-ended early termination provision.

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**“Sole Benefit” Requirement: Other Considerations**

- The agency previously took issue with payments for “companions.”
- POMS SI 01120.201(F)(3) now provides that payments to third-persons are not a violation if for the primary benefit of the beneficiary.
- POMS SI 01120.201(F)(3) contains specific rules for third-party travel.

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**Who May Establish the Trust**

- Prior to December 13, 2016, a beneficiary could not establish the trust on his or her own behalf
- Parent, grandparent, legal guardian, or a Court
- Court “establishes” trust so long as trust was not in existence prior to Court order, even if:
  - Trust agreement not executed by Court.
  - Court merely “approves” petition to establish trust.

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### 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).
- The Medicaid payback provision must clearly identify the State(s) as the first payee(s).
- Cannot be restricted to any particular state(s).
- Cannot limit the timeframe
  - No limit on when State can seek or obtain reimbursement following trust's termination.
  - No limit on when beneficiary received Medicaid.

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### Examples of Problematic Language

- Example 1: The trust provides that "upon the beneficiary's death, the trustee shall reimburse the State of California for medical assistance the beneficiary received under Medi-Cal."
- 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) as of the date of the execution of this agreement.

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### Permissible Expenses

- POMS SI 01120.203(E)(1) permits two types of expenses prior to Medicaid reimbursement:
  1. State or Federal taxes due from the trust because of the beneficiary's death
  2. Reasonable fees for administration associated with termination and wrapping up of the trust

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## Prohibited Expenses

- Payment of debts owed to third parties.
- Funeral expenses (most common).
- Payments to residual beneficiaries.

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## Pooled Trust Requirements

- Section 1917(d)(4)(C) provides that a pooled trust must be established and managed by a non-profit association.
- 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).
- 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.

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## Trust 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.

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## Management by 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."
- 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).

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## Early Termination

- Termination of sub-account *or* termination of master trust, must provide for Medicaid reimbursement with distribution of the remainder to the beneficiary.
- 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).

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## Consistency of Master Trust with Joinder Agreement

- Considerations
  - Does new trust language conflict with provisions in Joinder agreement?
  - Does Joinder Agreement provide for application of such modifications to trust account?
  - Must the account beneficiaries execute a new joinder for the modification to apply to their account?
- If modification to master trust occurs after execution of joinder, agency likely to find modification does not apply to conflicting language in joinder agreement.

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## Regular Resource Rules

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- 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).
- 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.
- 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.

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## 90-day Amendment Period

- Applies when the agency previously found that a trust met an exception to resource counting but then changed its determination.
  - 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.
- The agency will 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.

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## Q & A

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