

SSI, Medicaid and Housing

SPECIAL NEEDS
PLANNING RULES
ON THE HOME
AND OTHER REAL
PROPERTY
ISSUES

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Sometimes a house is not a home
and creates chaos more than help

- Unplanned inheritance – when it counts as a resource
- Can real property be used to avoid the transfer penalty
- Excess property – how to get rid of it, have it not count, and keep SSI and Medicaid health insurance in the interim
- What happens when fire, hurricane or flood damages property and it takes several years to repair
- When is it better to hold property, even the exempt home, in the name of the trust instead of the individual or his guardianship account

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INITIAL PRESENTATION QUESTIONS:

- ▶ Married Bob is applying for SSI and SSI-Medicaid
- ▶ Bob lives in couple's family home in Miami.
- ▶ Mary, separated for 5 years from Bob, lives in their condo in N.C.
- ▶ **SSA denied the SSI claim** – saying Bob is joint owner with Mary on two properties, but his exempt principal resource is only the Miami home.

How do we win the appeal?

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INITIAL PRESENTATION QUESTIONS:

- ▶ Bill and Jane divorce. Bill moves out of home to a rental apartment.
- ▶ Bill needs to apply for SSI benefits.
- ▶ Divorce judgement awards exclusive use for the children until age 18 of the home, with parents' joint ownership continuing until then.
- ▶ **SSI denied** because Bill owns a home he doesn't live in.

How do we win this appeal?

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INITIAL PRESENTATION QUESTIONS:

- ▶ Valerie Payne on SSI lives with her sister & sister's husband in Miami.
- ▶ Mom dies, her Will gives \$185,000 home to Valerie; but sister wants the house.
- ▶ Sister cannot qualify for a mortgage to buy mom's old family home.
- ▶ Valerie cannot just give house to sister due to Transfer Penalty.

How do we fix the situation?

To avoid the Transfer Penalty. "Compensation may be in cash, real or personal property, assumption of a legal debt, personal service contract, or ISM for a term, or ISM for life" per POMS SI 01150.005.C.

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INITIAL PRESENTATION QUESTIONS:

- ▶ Bob Warfield on concurrent SSI and SSDI benefits, settles Worker's comp claim and is awarded a **\$50,000** via a "**Medicare Set-Aside (MSA) agreement**" in a bank account in Bob's name that Bob uses to pay medical claims for WC-related injuries.
- ▶ **SSA denies SSI**, counting the \$50,000 bank account solely in Bob's name.

How do we win the SSI case?

POMS SI 01120.010.D.5 on resources says if an insurance settlement restricts use to medical expenses only, therefore, Bob is actually but not legally free to use them for support and maintenance, and therefore bank account is not a resource.

Same applies to **USDOJ Vaccine-related Injury Settlement in Reversionary Trust** with no Medicaid payback at death. Reversionary trust is an asset but not a resource.

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**Every resource is an asset,
but not every asset is a resource:**

Concepts	Definition in POMS ^a	Core Principles ^a
Assets	Any real or personal property that an individual has an ownership interest in. ^a	Broad category: Includes everything you legally own, regardless of whether you can access, spend, or sell it. ^a
Resources	Cash, or any other real or personal property, that an individual owns AND can convert to cash to use for their support and maintenance . ^a	Subset of assets: Property that meets specific legal and operational criteria allowing it to be used for basic needs (food and shelter). ^a

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**The Three-Part Criteria for an Asset
to be a Countable Resource:**

1. **Ownership:** the individual (or spouse) holds legal ownership or interest in the property.
2. **Liquidation Power:** The individual has the legal right, authority, or power to convert the property into cash.
3. **Usage Capability:** the individual is not legally restricted from using the property or its liquidate proceeds for their own food and shelter.

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**The SSA Five General Policies for an
Asset to be a Countable Resource:**

1. **Ownership Interest** – Bank account “Ted Hart by Ted Hart or John Hart” is not a resource for disabled John although he can take funds for emergencies
2. **Legal Right to Access (Spend or Convert property)** – divorce case
3. **Legal Ability to Use for Personal ISM** – bank account in claimant's name DOJ reversionary trust, MSA agreement, PI settlement for future medicals only
4. **Access via an Agent** – still does count as resource if Rep Payee or Legal Guardian have access, even after court petition
5. **Access Only via Litigation** – co-owner blocks sale like non-divorce case, siblings inherited real farm but at least one blocks sale

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► The Home Exclusion SI 01130.100 in general (summary covered by Ken Brown)

- serves as "the one and only" principal place of residence; including all land and all buildings; includes sailboats, motor boats, RVs, tents, S.F. homes, condos, mobile home parks;
- can be just ownership of land but not the shelter, or ownership of shelter without the land;
- continues when absent but claimant has "intent to return";
- even if no "intent to return" as long as spouse and "dependent relative" live there (adult or minor child, stepchild, grandchild, parent, stepparent, grandparent, aunt, uncle, niece, or nephew, siblings including step and half, cousins, or in-laws);
- includes equitable ownership including documents OR by having made mortgage payments, making or paying for additions or improvements on the shelter;
- Never add another joint owner to excluded home deed but can transfer life estate.

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► The Home Exclusion (frequent SSI issues in our practice regarding "homes")

- SSA asking the wrong question – Frequently asked at SSI interview by SSA staff "Do you own any other real property?" "No" (but name appears on deed with elderly mother) -- the right question: "Does your name appear on any other property?"
- Claimant blurting out the wrong response:
 - ❖ Maria Garcia #1, alleges Buenos Aires home as my "family home" (actually owned by her parents) – SSA denies claim for having second home – Issue: how to prove no "home" is your home in Argentina
 - ❖ Maria Garcia #2 – SSA Claims Specialist finds pages in Miami phonebook filled with Maria Garcia's owning lots of properties in Miami, Florida, and denies SSI claim
- Foreign property – like out-of-state property, it counts, no exceptions for additional homes, but for some reason, clients frequently don't think so

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- Claimant blurting out the wrong response:
 - ❖ "Maria Garcia" #1, blurts out "screw you, I'm returning to my Buenos Aires home" (actually owned by her parents) – SSA denies claim for having second home – Issue: how to prove no "home" is your home in Argentina before SSA's Miami Chief ALJ
 - ❖ "Maria Garcia" #2 – SSA Miami Claims Specialist finds multiple pages in Miami phonebook filled with "Maria Garcia" owning lots of properties in Miami, Florida, and denies SSI claim
- Foreign property – like out-of-state property, it counts, no exceptions for additional homes, but for some reason, clients frequently don't think so

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What to do with unwanted property

1. Cannot keep it if CMV causes excess resources
2. Cannot give it away - Transfer Penalty POMS SI 01150.001
3. Cannot Disclaim – POMS SI 01150.110.E on prohibited refused inheritance
4. Can transfer property - payment for "ISM for Life" or "ISM for term of years" without conversion to cash, sale and mortgage ("Valerie Payne" transfers \$185,000 to sister)
5. Can Use SSA's "Conditional Benefits Agreement"

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SSA's "Conditional Benefits Agreement"

1. Per POMS SI 01150.200 and Statute – SSA pays claimant's SSI benefits during attempt to sell excess resources
 - ▶ Must list with realtor and must make listing continuous
1. Initial period is 9 months but subject to extension for "good cause" listed in SSA examples, and per SI 01130.140 extra extension NOT subject to additional overpayments other than the original nine months
2. When period ends the 9 month SSI payments are overpayments

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Home destroyed by fire, flood, hurricane, etc.

- ▶ POMS SI 01130.630 Cash and In-Kind Items Received for the Repair or Replacement of Lost, Damaged, or Stolen Excluded Resources describes how insurance payouts, disaster relief grants, and assistance funds are provided
- ▶ Disaster Assistance is mostly excluded from income or resources for periods of time
- ▶ Good Cause Extensions for Major Disasters - Initial 9-month window can be extended for "good cause"
- ▶ Presidentially-Declared Major Disasters have a maximum exclusion period of 30 months
- ▶ Private insurance excluded for 9-Month – but with Extensions potentially much longer.

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Treatment of underlying land if home is obliterated and cannot be rebuilt?

- Physical house gone but exclusion for land remains - underlying land remains classified as an excluded primary residence as long as the recipient still owns it, considers it their home, and intends to re-build as primary dwelling.
- Keep stating intent to rebuild until you can't
- Nine month initial timeline to rebuild but extendable potentially for years
- Asset not resource? - If zoning change prevents rebuilding ever the land becomes an asset but not a resource
- Is value below resource limit? SSA defines equity value and CMV less encumbrances
- If over resource value, sell land under SSA conditional benefits agreement

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Pros and Cons of SNT Ownership

Should a Trust own a home that the beneficiary lives in?

These are some Factors that create real challenges in balancing the pros and cons of whether the trust will own the beneficiary's home or it is deeded to the beneficiary.

Medicaid lien in d4A SNT v. Probate lien

Homestead protection against creditors – Florida
Equitable ownership for property tax purposes (Florida)

Liability issues (d4A vs. 3rd party)

Minor or diminished capacity/incapacitated beneficiaries

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Pros and Cons of SNT Ownership

Medicaid lien in d4A SNT v. Probate lien

A d4A is a mandatory payback Trust, even if the property of the trust is a home. There are different rules for Medicaid Estate recovery.

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Pros and Cons of SNT Ownership

Homestead protection against creditors – Florida

In Florida, constitutional homestead protection shields an individual's home from general creditors, including Medicaid recovery, if upon the death of the individual the property passes directly to a statutory "heir-at-law" (such as a spouse, child, or sibling).

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Pros and Cons of SNT Ownership

Equitable ownership for property tax purposes (Florida)

To secure a Florida homestead property tax exemption for a beneficiary for property owned in a trust, including a first party d4A special needs trust or a third party trust, the trust or the deed to the trust must be explicitly structured to grant the beneficiary an equitable title and a permanent right to reside on the property for life.

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Pros and Cons of SNT Ownership

Liability issues (d4A vs. 3rd party)

Self settled Trusts (d4A) are generally not creditor protected during life.

Third Party Trusts are generally creditor protected – with exceptions

Very state specific – see Uniform Trust Code

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Pros and Cons of SNT Ownership

Minor or diminished capacity/incapacitated beneficiaries
In a situation where the beneficiary of the trust may be incapacitated or a minor leads to certain challenges for the special needs trust trustee. The decision of either to continue to title a home in the trust or to the beneficiary raises several issues.

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Pros and Cons of SNT Ownership

Pros and Cons of Special Needs Trust Owning Home

Issue	Pro	Con
Medicaid Trust Lein	Irrelevant with a Third Party SNT	d4A is always subject to Medicaid lein, may be forced to sell property to satisfy if insufficient other funds available. If owned by beneficiary many federal exemptions to Home included in Estate Recovery, also Florida Homestead creditor protection

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Pros and Cons of SNT Ownership

Pros and Cons of Special Needs Trust Owning Home

Issue	Pro	Con
Tax exemptions - Florida	Available for both d4A and Third Party trusts	Exact language requirement in trust instrument and/or deed for the exemption to apply
		Beneficiary has equitable title and right to live on property for life, possibly limiting trustee's options to sell property if necessary

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Pros and Cons of SNT Ownership

Pros and Cons of Special Needs Trust Owning Home

Issue	Pro	Con
Creditor's ability or inability to attach to property	With a third party trust: if valid spendthrift clause very difficult to force third party trust trustee to satisfy claims, with exceptions	With a d4A trust: No creditor protection under UTC, no Homestead creditor protection under Florida Law

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Pros and Cons of SNT Ownership

Pros and Cons of Special Needs Trust Owning Home

Issue	Pro	Con
Minor beneficiary	No guardianship /conservatorship and its related expenses court intervention required.	
Diminished or incapacitated beneficiary	Property is financially maintained, taxes paid etc.	
	Protection from beneficiary harming themselves financially including, selling or mortgaging the home, adding a co-owner	

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Questions?

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