Recent Activity Concerning the Sole Benefit Rule and Compensation of Family Members

On May 17th, 2012, POMS SI 01120.201F.2 was revised with a focus on redefining the "sole benefit of" rule within a self-settled trust, with a special focus on compensation made to family members. Subsequently, in January 2013, the Social Security Administration removed the language that was added only 7 months earlier, with no explanation. And on May 15, 2013, the Social Security Administration issued POMS SI 01120.201F.2.b and 2.c. In addition, there are several court cases, such as the recent Lewis V. Alexander case in the Third Circuit, that are struggling with defining what "sole benefit" really means.

See http://www.ca3.uscourts.gov/opinarch/113439p.pdf.

Definition of Sole Benefit

One of the basic concepts of a self-settled special needs trust as well as a sole benefit special needs trust is that distributions must be made for the sole benefit of the beneficiary. As we analyze the concept of sole benefit, one needs to distinguish between self-settled trusts, sole benefit special needs trusts and the typical estate planning or 3rd Party special needs trust.

A self-settled trust, whether it is a d4A or d4C trust, by statute requires a lien upon the death of the beneficiary for any Medicaid spent on behalf of the beneficiary for medical care. In addition, the d4A and d4C statutes are exceptions to the Foster Care Independence Act that penalizes transfers for less than fair market value if an SSI recipient disposes of assets for less than fair market value. Therefore, the Social Security Administration ("SSA") and the Center for Medicare and Medicaid Services ("CMS") are concerned about a self-settled trust making gifts to a third party.

A sole benefit special needs trust is typically used when a parent transfers his/her assets to qualify him/herself for Supplemental Security Income ("SSI") or Medicaid benefits to his/her disabled child as a way of taking advantage of the statutory exception to the penalty period rules applicable when there has been a disposal of assets for less than fair market value. SSA and CMS rightfully have a concern if the funds are transferred to a special needs trust for a parent's disabled child, and then the trustee makes gifts to third parties. A third party special needs trust has no such lien or limitation and therefore should not be subject to the sole benefit restriction.

The POMS defines a trust for the sole benefit of another individual as follows (SI 01120.201F.2):

> 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. However, the trust may provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. . . .

This section goes on to say:

> This should not routinely be questioned **unless compensation is being provided to a family member**. . . .

Areas of Concern

The major concern of this POMS is the focus on compensation of family members. For instance, the new section that was revised on May 17, 2012—and subsequently removed in January 2013—stated the following:

> **Example 1—Trust provision that is not for the sole benefit of the trust beneficiary**
>
> An SSI recipient is awarded a court-ordered settlement that is placed in an irrevocable trust of which he is the beneficiary. The trust document includes a provision permitting the trustee to use trust funds in order to pay for the SSI recipient's family to fly from Idaho and visit him in Nebraska. The trust is not established for the sole benefit of the trust beneficiary, since it permits the trustee to use trust funds in a manner that will financially benefit the SSI recipient's family.

Recommended Approach

Drafting of d4A and d4C Trusts

Keeping in mind that the POMS is merely guidance for eligibility workers to deal with situations they are unfamiliar with and does not have the force of law, the POMS has a great influence on the special needs trust community for the drafting attorney and the trustee trying to make sense of this. There is a danger of overreacting and this issue is by no means resolved. In addition, some states, like California, have not seen intense focus on this either by the SSA or Medi-Cal departments, while other states, like New Mexico with the *Hobbs* case, have become battleground states.

For Self Settled Trusts—Less May be More

There is a trend of administrative agencies to try to define what the agencies believe is a "special need." This trend can be troubling, and as advocates there are some that would urge that we should not surrender early. Thus, in a 3rd party trust where the sole benefit rule is not an issue, the practitioner should do his or her best in the trust document and supporting documents to define what the objective of the grantor is, and be as specific as possible as far as what constitutes a "special need."

For statutory trusts like d4A, d4C, or sole benefit trusts, it may be best to rely on statutory mandates. For instance, some practitioners have not found the use of the special needs trust laundry list—an attempt to list every single item that might constitute a "special need"—particularly useful. This is the long list that usually begins, "a special need includes . . . ." First, these practitioners argue, it opens up discussions about what is or what is not a special need, when in fact there is no such thing as a special need. A special

need is whatever need the beneficiary might have; ideally delivered in a manner that is not income and not a countable resource as far as any needs based benefit the beneficiary might be eligible for. Further, we know that SSA has "issues" with the laundry list, on the basis that it feels that the list is usually boiler plate and not tailored to the unique needs of the particular trust beneficiary and somehow gives the trustee too much freedom with regard to trust distributions.

On the other hand, some practitioners argue that when the trustee deals with 3rd parties (for example, the Probate Court or the Trust Accounting Review Unit within Medicaid, or "loving" family member remainder beneficiaries who would very much like to prevent the trustee from making distributions so that they can be assured of receiving remaining funds at the beneficiary's death), there can be questions as to whether the trustee has the authority to make a particular distribution if it is not more-or-less spelled out in the trust document; ergo, the laundry list. In addition, inclusion of the laundry list helps make it clear that the trust is not a "maintenance and support" trust but rather is intended to provide only for special or supplemental needs.

One concern is that if some kind of list is not included in the trust document itself, this may make it easier to restrict trustee discretionary authority to provide for special needs. In terms of accounting reviews, it can be extremely helpful to be able to find provisions in the trust document that make it clear that a particular type of distribution was contemplated at the time of establishment of the trust, even though it may appear in what is apparently boilerplate language.

Should the Trustee Stop Making Distributions to Family Members?

The most disturbing part of the POMS language added in May 2012—then removed in January 2013—is the following example:

> **Example 1—Trust provision that is not for the sole benefit of the trust beneficiary**
>
> An SSI recipient is awarded a court-ordered settlement that is placed in an irrevocable trust of which he is the beneficiary. **The trust document includes a provision permitting the trustee to use trust funds in order to pay for the SSI recipient's family to fly from Idaho and visit him in Nebraska.** The trust is not established for the sole benefit of the trust beneficiary, since it permits the trustee to use trust funds in a manner that will **financially benefit the SSI recipient's family**.

As an advocate, some practitioners are not ready to stop making distributions or counsel their clients to stop making distributions to family members in every case. They believe that we need to document why compensating for value a family member to provide services above and beyond their legal duties is not only appropriate, it is highly desirable depending on the case.

As the example from the 2012 POMS suggests (removed from the POMS as of January 2013), all cases where a family member comes to visit their disabled loved one is presumed to be a financial benefit to that family member and not for the sole benefit of the beneficiary. Nebraska, the state being visited in the POMS example, is a fine place—but, quite frankly, if a family member must take time from his or her life to do a safety

check on the disabled sister, one can argue that expenditures that are directly connected with that duty are appropriate. If a family member were to take advantage of the situation by having the sister's special needs trust pay all the expenses for a fun filled vacation to beautiful Nebraska, primarily to spend a week at a dude ranch, and the family member drops in to see his or her sister for 15 minutes, that could be a problem. On the other hand, if the family member takes time out of life to take a couple of days to visit his or her sister to ensure that she is safe—especially if there is a recommendation from an independent third party, like a doctor or care manager, that the visit is necessary to ensure her safety—and the family member self-pays for the cost of the dude ranch, an argument can be made that expenditure is appropriate, legal, and moral.

The reality is that there are compelling reasons depending on the situation why a trustee should pay for a family member to fly to Nebraska to visit a disabled sister especially if the sister is vulnerable to abuse or neglect. First and foremost is that the key to prevention of abuse and neglect is avoiding having a vulnerable disabled person from being isolated.[1] The best way to do this is to have someone that is in tune with the disabled person's behavior to do spot checks on the individual, ideally unannounced.

This has never been more important than in the present day. For instance, even where a case manager for a person with developmental disabilities is involved, it is not unusual for a case manager to have a case load of 80 or more cases. It simply is unrealistic to expect that the case worker is going to make spot safety checks on every person they oversee and ensure that the person is safe and not subject to abuse and neglect. In fact, it is likely that the case manager will not see the majority of their people in their residential or day program setting. The reality is that many persons in residential programs have no effective oversight to identify when a resident might be subject to abuse or neglect.

In many states there is almost no system to protect persons with mental illness and all too often family are the only support system to protect this population from abuse and neglect. So to deny a family member from visiting his/her sister who has a severe mental illness may have terrible consequences compromising that the sister's safety.

Further, family may be the ideal person or entity to pay to make a safety check. Family familiar with the baseline behavior of their disabled family member are often in tune with behavioral changes. For instance, if brother goes to the residence, and his sister with a disability puts his hands over his head in a defensive manner that indicates he is trying to protect himself, then this is a compelling clue that something is wrong especially if she never exhibited that behavior before. If brother observes that his sister seems to be overmedicated, or is restrained in a chair in front of a TV set in a language that the sister doesn't speak—then an outright ban of paying for family visits will compromise that person's safety.

[1] It should be noted that the disability community is diverse and many persons with disabilities are effective at being their own advocates. On the other hand, persons with disabilities and seniors with cognitive impairments or difficulty communicating warrant a greater need for oversight.

Document, Document, Document

The important thing is to document the need when a trustee is considering compensating a family member for providing care or advocacy. Some practitioners utilize a professional care manager to write the assessment. That assessment should include the need for advocacy, what it would cost to pay for the service privately, what is the level of care that family member is giving as well as what that level of care would cost on the open market.

For readers of this help screen that are not familiar with care managers, they can be located at www.caremanager.org . Beware, not every care manager is familiar with the needs of persons with disabilities, but many are. The practitioner needs to interview the care manager and make sure they have the background needed. The primary focus of most care managers is on seniors, but many care managers have experience with a wide variety of disabilities, including mental health and developmental disabilities. On the other hand, this relationship is invaluable and with the increased need for documentation is rapidly becoming a necessity.

Educate Trustees and Family Members about the Change in Focus

There can be many requests from family members to have payments made from self-settled trusts to do safety visits to the special needs trust beneficiary. Trustees and family members need to be informed that payment for family visits or services provided by families are suspect and having the self- settled special needs trust pay for family providing services has a greater risk. They need to be informed that if the trustee decides to make the expenditure, more documentation is needed than ever before, and there is a greater risk that an eligibility worker following the former language contained in this POMS section may go as far as invalidating the trust. For a trust funded with a substantial amount of assets, one may take the position that this is a worthwhile expenditure notwithstanding the risks and be willing to defend the expenditure should it be challenged. Although we thought this issue would need to be litigated if we were unable to convince the SSA to change the POMS language, the SSA removed the offensive language in January 2013. If the new language should find its way back into the POMS, we may need to rely on the courts to further interpret this example as it is then contained in the POMS. For a smaller trust, the disruption could be too much to endure. Common sense needs to be the rule here, and being a good trustee always involves managing risk.

If Trust Distributions are Challenged, Solicit Help from the Advocacy Community

As an advocate for the rights of persons with disabilities and their families, there is a huge issue that needs to be addressed within the POMS example if it is returned to the POMS section—or even if it is not returned and the SSA challenges a trust distribution using the reasoning of the now-removed POMS example—as it relates to payments to family members. We in the special needs planning community must bring this to the attention of disability organizations like the ARC, NAMI, and the World Institute on Disabilities, to solicit their input to better educate the SSA about why this interpretation needs to be revised to reflect the reality of the world we live in.

Almost universally across the country there is a reduction in government based service providers that traditionally served to protect our disabled loved ones. More and more families are being called to fill in those gaps. The POMS – no matter how well intentioned to comply with the law – is not only incorrect but also has serious consequences to the safety and quality of life to the special needs trust beneficiaries.

This is an opportunity to build meaningful dialog about a greater issue – how are we as a nation going to provide the necessary support for persons with disabilities to ensure that they have quality of life in an environment of decreasing supports for our most vulnerable citizens. This POMS section, given the recent addition and subsequent deletion of the two examples noted above, needs to be redone to reflect the real issue: when is an expenditure for the sole benefit of a self-settled trust or sole benefit trust, and when is the expenditure to family really a gift? The good news is that the SSA staff responsible for writing these POMS is quite open to dialog. So our challenge is to not only look for the short term how to counsel our clients or manage their trust, but to engage all the stakeholders in meaningful dialog and not only change this directive, but stimulate systemic changes.

In that regard, there have been ongoing discussions with key staff at the SSA concerning the concept of "sole benefit" in self-settled special needs trusts, including d4A and d4C trusts, and on May 15, 2013, the SSA issued a new POMS section SI 01120.201F.2.b and 2.c, which read as follows:

> **b. Exceptions to the sole benefit rule for third party payments**
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> Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:
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> - Payments to a third party that result in the receipt of goods or services by the trust beneficiary;
> - Payment of third party travel expenses which are necessary in order for the trust beneficiary to obtain **medical** treatment; and
> - Payment of third party travel expenses to visit a trust beneficiary **who resides in an institution, nursing home, or other long-term care facility** (e.g., group homes and assisted living facilities) or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement. The travel must be for the purpose of ensuring the **safety and/or medical well-being** of the individual.
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> **NOTE:** If you have questions about whether a disbursement is permissible, please request assistance from your regional office.

With respect to the first bullet above, it is clear that the sole benefit rule includes payments made to third parties that result in the receipt of goods or services by the person who is disabled. What is unclear is whether this would include a trip that is recreational, such as a trip to Sea World or a baseball game.

With respect to the second bullet above, it is unclear what is meant by the term "medical treatment". For example, would medical treatment include visits to the dentist? What

about a visit to a psychologist or other form of mental health treatment? The SSA did not define the term medical treatment, leaving it open to interpretation as to what does and what does not constitute medical treatment for purposes of the above rule.

The third bullet item above in rule F.2.b would seem to severely restrict payment of travel expenses for third parties (such as family members) to situations where the beneficiary is institutionalized.

c. Exceptions to the sole benefit rule for administrative expenses

The trust may also provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust.

NOTE: You should not routinely question the reasonableness of a trustee's compensation. However, you should consider whether compensation is being provided to a family member or if there is some other reason to question the reasonableness of the compensation.

Please keep in mind that the concept of "sole benefit" has never been clearly defined, and comes from two federal laws: OBRA '93, which among other things extended the existing lookback period for impermissible transfers of assets for seniors to qualify for Medicaid from 30 to 36 months; and the Foster Care Independence Act of 1999, which created for the first time a transfer penalty for SSI recipients that transferred their property for less than fair market value. Self-settled special needs trusts are a creation of statute as an exception to these rules, and any expenditure that is a "gift" to a third party thwarts the objectives of these two statutes.

Travel

Even though travel for persons other than the trust beneficiary is no longer forbidden, it is wise to advise trustees to document the need with an eye towards supporting that the visit was for the beneficiary's "sole benefit". For instance, if the travel is for a guardian or conservator in the course of his/her duties, the need is very clear. If a beneficiary requires an attendant to travel because of his/her disability, then it is wise to have documentation about the level of need of the beneficiary, and that the expenditure for the attendant reflects the level of assistance the attendant is giving. Paying for travel for companionship alone is still risky, and in the example recently retracted where a brother comes to visit his disabled sibling presumably to make a social visit with no other reason for the trip could still run afoul of the sole benefit rule.

Family Caregivers

SSA's national office has announced publicly that it views payments to family caregivers as a violation of the sole benefit rule unless the family member was "certified" as a caregiver. SSA has never issued a definition of what is meant by a "certified" caregiver, and although we can expect clearer rules about the qualifications needed for a family

member to render care to a disabled individual, officially nothing has changed. Therefore, it is wise to counsel trustees to document the level of care being provided by care givers, and whether the care given is beyond the normal parental duty of support. One way of providing this documentation is by engaging a professional care manager to do an assessment of the care being given, and what the care would cost if a care giver was hired to give the same level of care that the family member is providing.

Laundry Lists—Incorporating Long Examples of What are Special Needs

We have made some changes to the ElderCounsel d4A software in response to the previous version of POMS SI 01120.201F concerning travel and related declarations at the 2012 Stetson SNT Conference in October 2012. It is not necessary to wholesale remove so-called "laundry lists" setting forth examples of what constitutes special needs from existing trusts. Yet, there is a danger when drafting these trusts if long lists of examples of what is a "special need" are included. Self-settled special needs trusts are statutory trusts, and as with all statutory trusts, the primary object in drafting is to ensure that upon review by eligibility workers the document complies with their interpretation of the law. Trying to wholesale define what a special need is can be very hazardous and the defining by specific example of what is or is not a special need is subject to interpretation and reinterpretation.

In reality, there is no such thing as a "special need." A "special need" is whatever need the disabled beneficiary might have, ideally distributed in a manner that is not income for benefits purposes, or that provides the beneficiary with a resource that likewise does not cause ineligibility for needs based benefits. The following example is illustrative. Decades ago, an official with California's Department of Health Services (DHS) wanted to invalidate all self-settled trusts that allowed wholesale distributions for education. His reasoning was that paying for the beneficiary to go to Harvard Law School would not be a "special need." In the official's mind, a special need was narrowly limited to disability related expenditures such as wheelchairs and treatments. This official has been gone for many years, and the current DHS policy would not question such a distribution if well documented. Long laundry lists of examples of what a "special need" is can be problematic because if that particular expenditure is not on the laundry list, it opens the document to speculation by eligibility workers and government officials as to whether it was intended to constitute a special need, or by its exclusion to not constitute a special need.

Conclusion

We can expect further clarification of the concept of sole benefit over the coming months as SSA and advocates continue to meet, and we at ElderCounsel will do our best to keep the membership up to date. In the meantime, we hope this Memo helps practitioners in drafting self-settled special needs trusts as well as advising on trustee and distribution issues as new policy is being developed.

POMS SECTION WITH THE TWO EXAMPLES THAT WERE REMOVED IN JANUARY 2013

POMS section SI 01120.201F.2 (http://policy.ssa.gov/poms.nsf/lnx/0501120201#f) read as follows between May 2012 and January 2013:

> **2. Trust Established for the Sole Benefit of an Individual**
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> 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. However, the trust may provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust.
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> **NOTE**: This should not routinely be questioned unless compensation is being provided to a family member or the adjudicator has some other reason to question reasonableness of the compensation.
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> Do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual. However, payments to a third party that result in the receipt of goods or services by the individual are considered for the sole benefit of the individual. The following disbursements or distributions are also permitted:
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> - reimbursement to the State, after the individual's death, for medical expenses paid on the individual's behalf (see SI 01120.203B.1.f. and SI 01120.203B.2.g.);
> - upon death of the beneficiary, retention of a certain percentage of the funds in a "pooled trust" established through the actions of a nonprofit association in accordance with the trust agreement (see SI 01120.203B.2.); and
> - transfer of the remaining trust corpus to a residual trust beneficiary after the individual's death.
>
> **Example 1—Trust provision that is not for the sole benefit of the trust beneficiary**
>
> An SSI recipient is awarded a court-ordered settlement that is placed in an irrevocable trust of which he is the beneficiary. The trust document includes a provision permitting the trustee to use trust funds in order to pay for the SSI recipient's family to fly from Idaho and visit him in Nebraska. The trust is not established for the sole benefit of the trust beneficiary, since it permits the trustee to use trust funds in a manner that will financially benefit the SSI recipient's family.

Example 2—Trust provision that is for the sole benefit of the trust beneficiary

The guardian of an SSI recipient uses the recipient's savings to establish an irrevocable trust, naming the SSI recipient as the trust beneficiary. The trust document includes a provision permitting the trustee to use trust funds in order to pay for attendant care needed by the SSI recipient on a daily basis. The trust is established for the sole benefit of the trust beneficiary, since payments made for attendant care are considered a payment to a third party for goods or services.