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***EARLY TERMINATION
PROVISIONS IN SELF-SETTLED
SPECIAL NEEDS TRUSTS AND
SELF-SETTLED POOLED
TRUSTS***

Stone Harbor, NJ
Princeton, NJ
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On June 25, 2010, the Social Security Administration (SSA) issued clarification to the POMS relating to Early Termination Provisions and Trusts.^[1] It should be noted that these provisions are not effective until October 1, 2010. Until that date, this POMS is to be considered informational only.

The new POMS clarifies what is an early termination provision. It states, “An early termination provision or clause would allow a trust to terminate before the death of the beneficiary. Commonly, such provisions or clauses provide for a termination of the trust when, for example, the beneficiary is no longer disabled or otherwise becomes ineligible for Supplemental Security Income (SSI) and Medicaid, or when the trust fund no longer contains enough assets to justify its continued existence.” Under the previous POMS^[2] a trust could not be terminated during beneficiary’s lifetime, because if the document provided that the remaining assets in the trust be distributed to a third party then this was considered to be a violation of the “sole benefit of” rule and,

therefore, the assets in the trust would not be a Self-Settled Special Needs Trust. If the trust provided that distributions on termination were to be made to the beneficiary, then this was held to violate the “any circumstances rule.” Under the any circumstances rule, if there are any circumstances by which the beneficiary of the trust could ever regain access to the trust assets, no matter how remote those circumstances are, the assets in the trust would be held to be available to the beneficiary and, therefore, countable assets.

This new POMS solves that problem. The new POMS has three requirements:

1. Upon early termination there must be a payback to the State Medicaid Agency(ies) up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid Plan(s);
2. No entity may benefit from the early termination except for the trust beneficiary;
3. The trust beneficiary may not have the power to terminate the trust. That power must be vested in someone other than the beneficiary.

The same POMS dealt with Pooled Trusts. The new POMS indicates that a Pooled Trust may continue to retain amounts in the trust upon termination, even if that termination occurs during lifetime.

The new POMS further states that when assets are transferred from one Pooled Trust to another the rules pertaining to early termination do not apply. The Early Termination Clause must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the second Pooled Trust before any expenses other than taxes due from the trust for the State(s) or Federal government due to the termination of the trust and reasonable fees and administrative expenses associated with the termination of the trust.

There are frequently reasons to terminate a Self-Settled Special Needs Trust or a Self-Settled Pooled Trust during the beneficiary's lifetime and this new POMS gives clarification as to how such early terminations are to be treated.

[1] POMS SI 01120.199.

[2] POMS SI 01120.200 B 20; POMS SI 01120.200 D 16.

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