

## Working with SSA: Tips on How to Avoid the Appeal

15<sup>th</sup> Annual Changes and Trends Affecting  
Special Needs Trusts  
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## **I. Introduction**

In many areas of law, the draftsman of documents must only be concerned that the document covers the format set forth by the Court for filing of pleadings or motions. These requirements are typically set forth in local rules promulgated by the Court in which the proceeding is pending. Other requirements for pleadings can be found in the various codes that govern the granting of the relief sought, such as specific requirements needed to admit a will to probate or to prove jurisdiction in the Court in which the lawsuit is filed.

In court proceedings, drafting pleadings to obtain the relief sought is not always a difficult process. Simply follow the aforementioned local rules, ensure the requirements set forth in the particular code are included, file the lawsuit, and then proceed to prove your case by evidence that conforms to the pleadings.

The drafting of a special needs trust is not quite so simple. There are statutes that set out the requirements for special needs trusts, but the statutes only set out minimal requirements.<sup>1</sup> As any special needs trust draftsman knows, there are many other requirements that must be met other than just those found in the statute. There are sometimes competing goals with which the drafter is confronted while trying to craft a trust that contains clear and concise language so that the trust is easy to understand and administer by the Trustee. Sometimes, requirements of state codes can complicate issues -- particularly when the trust must be created and approved by a guardianship court or other court.

But all of the time and energy and study and drafting and redrafting is for naught if the trust does not pass muster when the Social Security Administration (SSA) field office technician (FO) examines the trust. This paper will describe how a trust should be submitted to the SSA and how to work with the SSA's own rules to assist the FO in quickly approving the trust.

## **II. Why You Should Report The Trust**

The author, many years ago, was researching special needs trust issues. The time frame was shortly after the changes in the statute that came about as a result of the OBRA 1993 law.<sup>2</sup> As part of the research, the author reached out to some attorneys who had drafted special needs trusts for clients who were receiving Supplemental Security Income (SSI) benefits. Inquiry was made, and it was determined that several of these attorneys were not reporting the existence of the trust to the SSA, nor were they informing their clients to report the creation and funding of special needs trusts. The attorneys were not aware that there was a reporting requirement.

When an applicant for SSI signs an application for SSI payments, they<sup>3</sup> indicate that the information on the application is true. If information contained in the application changes, they likewise agree to notify the SSA of the changes.<sup>4</sup> A beneficiary must report any changes that

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<sup>1</sup> 42 U.S.C.A. § 1396p(d)(4)(A).

<sup>2</sup> OMNIBUS BUDGET RECONCILIATION ACT OF 1993, PL 103-66, August 10, 1993, 107 Stat 312.

<sup>3</sup> Our firm deliberately uses the generic singular "they." Doing so permits us to avoid specifying a gender when it may be irrelevant, inappropriate, or needlessly restrictive. It also has the advantage of accurately representing people who use "they" as their gender pronoun. In using the singular "they," we hope to foster and encourage inclusion in the legal profession.

<sup>4</sup> 42 U.S.C.A. § 1383; 20 C.F.R. § 416.708.

may affect their benefits immediately, and no later than 10 days after the end of the month in which the change occurred. If the changes are not reported, the applicant can receive a penalty or be sanctioned. If the applicant is penalized, it means that they didn't report a change to the SSA timely. A penalty can cause a loss of money from SSI checks. This amount can range from \$25 up to \$100. If the SSA determines that the applicant gave false information or withheld important information, an applicant can be sanctioned. If the SSA determines that the applicant gave false information or withheld information on purpose, the SSA can stop a beneficiary's payments from 6 to 24 months.<sup>5</sup>

As stated above, some drafters do not report trusts to the SSA. Aside from the responsibility of the beneficiary to report changes in assets and income, there is the question of what, if any, consequences flow from the failure to report? How would the SSA find out about the trust and the assets it contains if no report of the trust is made to the SSA? Twenty years ago, clients began to show up at our office after receiving notices from the SSA that their eligibility for SSI was being terminated for excess income or resources. When we developed the facts of these cases, a pattern emerged. These clients were the beneficiaries of special needs trusts that were created several years before that but were never reported to the SSA. The trusts contained assets that were being held in interest-bearing accounts or other accounts that produced income. The income was being reported on the social security number of the Beneficiary. Over a period of time—in some cases, years—the IRS reported through a tape match system that makes income reported on the social security number of an SSI beneficiary available to the SSA.<sup>6</sup> The Social Security worker, while reviewing the reported income and assets of a beneficiary, would then be faced with a situation where the IRS showed that a beneficiary had income produced by assets that had not been reported to the SSA.

In some cases, once the Social Security worker was made aware of the income from these assets, they would notify the Beneficiary that they needed to come to a meeting with the worker to explain why there was unreported income or assets based on the report that they had received from the IRS.

This is the methodology by which the SSA learned of the existence of trusts that were not reported at the time they were created and funded. This scenario resulted in very unpleasant outcomes for certain beneficiaries. In some cases, once the existence of the trust was explained, the trust document was examined by the SSA and found to meet the requirements of the law. The assets in the trust were not considered an available resource to the beneficiary and when there was no finding that there was an intentional withholding of information about the trust, no negative consequences resulted from the failure to report. However, in some of these cases, once the SSA examined the trust, the agency made a determination that the trust did not satisfy all the requirements of the law and the assets in the trust were considered to be an available resource to the Beneficiary. Therefore, the assets disqualified the beneficiary and resulted in a large overpayment.

### **III. How and Where to Report.**

The SSA publications and rules explain to beneficiaries that they can report changes in assets or income by several methods. Changes can be reported by calling the SSA's toll-free

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<sup>5</sup> Doug Walker, *Reporting Changes is Your Responsibility*, Social Security Administration (Dec. 10, 2015), [blog.ssa.gov/reporting-changes-is-your-responsibility](http://blog.ssa.gov/reporting-changes-is-your-responsibility); 42 U.S.C.A. §§ 1382c, 1383; 20 C.F.R. 416.701-14.

<sup>6</sup> 42 U.S.C.A. §§ 1382c, 1383.

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