PRESENTED AT

16th Annual Changes and Trends
Affecting Special Needs Trusts
February 13-14, 2020
Austin, Texas

A 2020 Update of "SSA ETHICAL RULES – MOUNTAINS OR MOLEHILLS"

With Special Attention to Where SSA May Be Going on the Issue of SSA Fee Approval for Special Needs Trust Attorneys

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The Social Security Administration has specific rules governing fees for attorneys and non-attorney representatives who represent claimants in proceedings before SSA. This paper will explore how those rules may or may not apply to attorneys or representatives who both create special needs trusts (SNTs) and those who counsel or represent claimants who are dealing directly with SSA in connection with those SNTs.

I. Caveat: New POMS and Their "Archiving."

As all of you are no doubt aware, on June 25, 2019, the Social Security Administration, without any prior notice, promulgated POMS GN 03920.007, entitled "Legal and Specialized Services Not Subject to Fee Authorization," attached as Exhibit C. Its introduction reads,

> Section 206 of the Social Security Act requires us to authorize a representative's fee when the representative's services are performed "in connection with" a claim before the agency. However, the statute does not specify what services might be considered to have been performed "in connection with" a claim.
>
> In this section, we provide examples of some services we believe do not generally implicate this statutory requirement and for which we do not need to authorize the representative's fee. Certain services are so specialized and unrelated to our processes (e.g., filing taxes or preparing adoption papers) that we generally will consider them not performed in connection with a claim. However, there may be some exceptions even with these types of services. If a representative performs one of the services identified in section B, below, but it is performed in connection with a claim before us, the representative or claimant must ask us to authorize the representative's fee ….

The POMS went downhill from there. It listed three examples which seem to dramatically change the rules. The first example looks innocuous at first glance. It says that an attorney may establish a trust for a person (Mrs. Smith) who is already

receiving SSD benefits without the need for fee authorization since the SNT was not established to protect continuation of SSI eligibility.

The second example says that Mrs. Smith later applies for SSI; she asks the attorney to amend the trust because she has changed her name and again, a month later, because SSA has notified her that the original trust does not meet the requirements for resource exclusion. The example says that amending the trust for the name change does not require fee authorization, since it is not being done in connection with a *pending claim or future claim,* but indicates that the second amendment of the SNT *does* require fee authorization since it affects her potential eligibility for benefits. That reference to a possible "future claim" is breathtakingly broad – it could require fee approval for any trust establishment, or amendment, for a disabled person who might ever qualify for SSI in the distant future. It also seems to contradict Example #1, which does not refer to the beneficiary's possible future entitlement to SSI.

The third example says that if a grandparent establishes a trust for a grandchild, fee approval may not be needed if the purpose of establishing the trust was unrelated to any claim before SSA, *though SSA may need to obtain an explanation from the representative if there is a question about the purpose of the trust*. However, even if the child was not receiving or applying for benefits at the time of the trust's creation, if the parents later apply for benefits for the child and hire a representative to "prepare or provide information to SSA" SSA would require fee authorization "for only those services provided in connection with a matter before us."

Note that the third example does not distinguish between a trust funded by the grandmother's money (a 3rd party trust) as opposed to one involving the child's own money (a 1st party trust). Also, if SSA needs to ascertain the purpose of the trust, even before the child has ever applied for SSI, does the creation of the trust require notice to SSA at the outset?

Examples 4, 5, and 6 are non-controversial. In Example 4, the POMS says that no fee approval is needed when a terminally ill disability claimant, Mr. Harris, hires an attorney to prepare paperwork for him to adopt his stepdaughter "to establish her right to inherit from his estate." SSA says this is a specialized legal service, not in connection with the disability claim. However, Example 5 says that when Mr. Harris subsequently hires another attorney to represent him in the disability claim, fee approval is needed for any fee that the attorney collects either from Mr. Harris or from the now-adopted stepdaughter, who will receive auxiliary benefits.

Title search: A 2020 Update of "SSA Ethical Rules - Mountains or Molehills"

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First appeared as part of the conference materials for the
16th Annual Changes and Trends Affecting Special Needs Trusts session
"New POMs Clarification on the Fee Approval Requirements"