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SSA DISALLOWANCE OF COVERAGE FOR FAMILIAL EMPLOYMENT

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SSA DISALLOWANCE OF COVERAGE FOR FAMILIAL EMPLOYMENT

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Attorneys and trustees handling Special Needs Trusts (SNTs) need to be aware of regulations which prohibit the awarding of quarters of coverage to certain family members for their services caring for other family members. These rules have been in existence for many years but may not have been widely enforced.

The situation we're dealing with here is that of personal care services being provided by a parent, an adult child, or a spouse. The disabled person has an SNT and the trustee (whether it's an independent trustee or a family member) has been paying a salary to the caregiver. Either the trustee has been withholding SS taxes for the caregiver, and duly paying those taxes to Uncle Sam, or the caregiver is being employed as an independent contractor and has been paying her own SS taxes. In either case, SSA can disallow the SS payments, depriving the caretaker of her "quarters of coverage", though, of course, not refunding the taxes she paid.

I. Statutory Authority re Family Employment

POMS RS 01901.250¹, entitled "Family Employment," which is based on 42 CFR 410(a)(3)(B), says that service performed for, and paid by, a spouse is excluded from coverage if the service is not in the course of the employing spouse's trade or business, or if it is domestic service provided in the private home of the employing spouse. The same POMS also excludes coverage for those same services provided by a child age 18-21 if not in the course of the

¹ I will refrain from attaching the various POMS to this paper since they are available at ssa.gov.

parent's trade or business, or if it involves domestic service in the parent's home, and for services provided by a parent for a child, with one extremely narrow exception. See RS 01901.250C(1)(b). Stepchildren are included in the category of family relationships.

Section B of RS 01902.250 states that service for a corporation is not considered to be family employment, so long as the employment is bona fide, though service for a family partnership would be excluded if the employee had the forbidden family relationship with each of the partners. RS 01901.250E.²

There is no prohibition against family employment if it is in the course of the payor's trade or business, so a regular family business can employ family members without any problems. However, SSA may inquire, and disallow, that employment if it looks fraudulent. The example they give is a woman with a 4th grade education allegedly working as a bookkeeper in her son's law office. RS02101.125.

These regulations were enacted specifically to prevent families from colluding to establish SS coverage for a family member who might otherwise have to be cared for in old age by his or her children.³

Note that the POMS only excludes work paid for by the employing spouse. Thus, if someone else (i.e., an agency) pays the domestic worker, the worker would earn SS credits from the employment. What would happen if, say, one sibling, Big Brother, pays another sibling, Little Sister, to provide domestic services for their parents in the parents' house? Little Sister is not being paid by the person in whose house she is performing the domestic services, so she ought to be able to earn SS credits with this arrangement. The two red flags, though are that (1) she is probably an independent contractor rather than an employee (see discussion below), and (2) there could be a question of fraud if Big Brother is just funneling Mom and Dad's money to Little Sister through him.

² The corporate exception language, unlike that of the partnership exception, appears only in the section of the POMS which deals with a child working for a parent, but the statute on which the POMS is based, namely 20 CFR 404.1015(b) makes it clear that the corporate exception applies whether the case involves a child working for a parent or *vice versa*.

³ See *Cornelius v. Sullivan*, 936 F.2d 1143, 1148 (11th Cir. 1991), originally published as 923 F.2d 1486, 1490 (11th Cir. 1991) for a discussion of the constitutionality of the family employment exclusion and its basis as a concern about fraud.

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