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SPECIAL NEEDS TRUSTS

February 18-19, 2021

Webcast

Pooled Trusts: Your Answer to Transfers and Over 65 Strategies

Haley Greer

Author Contact Information:
Haley Greer
The Arc of Texas
Austin, Texas
hgreer@thearcoftexas.org

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There are many times that a trust may no longer be appropriately managed by its current Trustee. Resignations of trustees and appointment of a new trustee occur with some regularity. Reasons a Trustee may need to resign include that a Trustee may no longer be willing or able to serve in that capacity, because of personality issues of the parties involved or because it is no longer economically feasible for the current Trustee to serve. This paper will explain transfers from a D(4)(a) Trust to a D(4)(c)[1]. This paper will not address Third party trust transfers directly, however the information provided herein are similar.

Texas Legislature was apprised of and recognized the need to be able to transfer self-settled trust created under Section 1301[2] of the Texas Estates Code to a pooled trust. Then in 2019, additional court created trusts established under Texas Property Code Section 142 were also provided the ability to transfer to a pooled trust[3]. Prior to these statutes there were cumbersome ways to transfer a D(4)(a) Trust to a D(4)(c). These statutes have provided much needed avenues to make a transfer happen easily.

The legislature has outlined in code the ability for a court to order the transfer of the funds from the existing D(4)(a) special needs trust to a D(4)(c) pooled trust. Under the code the pooled trust sub-account is established by court order and the property is then transferred to the pooled trust. The transfer is considered a continuation of a management trust and not an establishment of a new trust, even though the Trust does not continue in the same form.

An important piece to note in both statutes is "*The court may not allow termination of the management trust from which property is transferred under this section until all of the property in the management trust has been transferred to the pooled trust subaccount. (emphasis added)"*[4] A sample order is included in Appendix A of this paper.

The Dallas Region of SSA has approved previously transferred accounts to a pooled trust without issue. Recently SSA updated their Program Operating Manual Systems regarding decanting and transfers between trusts. The update did two things: added a definition and examples for decanting and updated language for early termination provisions. The definition of decanting was added but no other reference to decanting was mentioned outside of the definition.

> POMS SI 01120.199D.7 states: Decanting- Trust decanting generally refers to the distribution or transfer of trust property from one trust to one or more other trusts, usually with more favorable terms. Decanting may involve the early termination of the first trust, or the effect of decanting may be materially the same as the effect of an early termination. In such a situation, we generally evaluate the decanting provision under the instructions on early termination in this section. However, decanting can be complex and can vary depending on applicable State law. It may be appropriate for the RO to seek input from the office of the RCC.

POMS SI 01120.199E.2 states: Exception for transfers to a secondary trust upon early

[1] 42 U.S. Code § 1396p D(4)(a) and (c)
[2] Texas Estates Code Section 1301.202
[3] Texas Property Code Section 142.010
[4] Texas Estates Code Section 1301.202(c) and Texas Property Code Section 142.010(e)

termination. An early termination provision in a section 1917(d)(4)(A) special needs trust or section 1917(d)(4)(C) pooled trust does not need to meet the above criteria if the provision allows solely for a transfer of the beneficiary's assets to a secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust of which the same individual is the beneficiary.

The early termination provision must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust or to pay for the administrative expenses listed in SI 01120.199E.3 in this section and in SI 01120.201F.4.

There is still discussion regarding these changes and how they impact transfers via early termination, however Texas law and the Dallas SSA region have accepted transfers without penalty for some time.

Understanding Pooled Trust Before Transferring

To understand if a pooled trust transfer is right for your or your client's situation, you first must understand how pooled trust sub-accounts are established and how they operate. They are not always the best solution and sometimes not a solution at all.

Most pooled trusts, and specifically The Arc of Texas Master Pooled Trust (The Arc MPT), have master trust documents that are used for all beneficiaries. Pooled Trusts' Trustees are not a successor Trustees and cannot accept your trust as written, it must be one of the Master Trust documents provided by the pooled trust. These documents are only changed or amended for the entire pool of beneficiaries that fall under that Trust. The Trust documents have language for amendments, but the Court does not have the authority to make amendments to the document as it is a master document. The court does not appoint or change trustee. The Trust provisions govern the trustee, not the Court. These documents remain as written unless the Manager and Trustee make amendments to the master document, which in turn impacts all individuals in sub-accounts under that master trust document. Individuals join the pooled trust through an application document that The Arc MPT calls a joinder agreement. These joinder agreements are also static documents and cannot be individually amended or changed by the Grantor or court, only the Manager and Trustee. Review the Trust agreement carefully to determine if this is the appropriate route for your client.

Pooled trusts often combine all the assets into a single pool for investment purposes. You must consider what assets are being held in trust and if the pooled trust can take such assets. Some pooled trusts take real property or other assets, however The Arc MPT is only able to accept cash assets. The Arc MPT also cannot accept assets in kind, such as stocks or other investment vehicles, due to the pooled nature of the assets.

Recognizing the limitations of using a pooled trust are imperative when determining if it is the right choice. If there are specific individual needs that the beneficiary has that do not fit the pooled trust model, then another option should be reviewed. Trying to fit a square peg in a round hole is never good.

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First appeared as part of the conference materials for the
17th Annual Changes and Trends Affecting Special Needs Trusts session
"Pooled Trusts: Your Answer to Transfers and Over 65 Strategies "