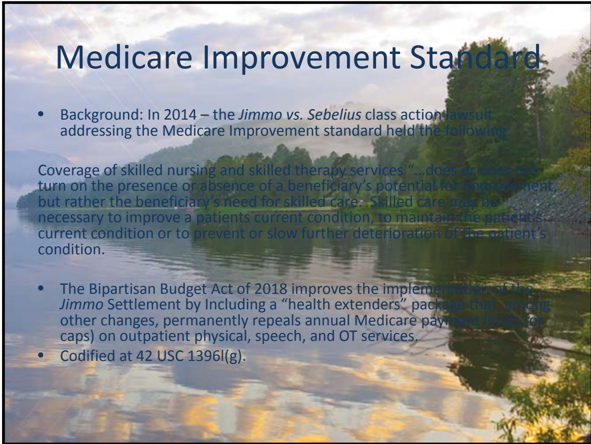
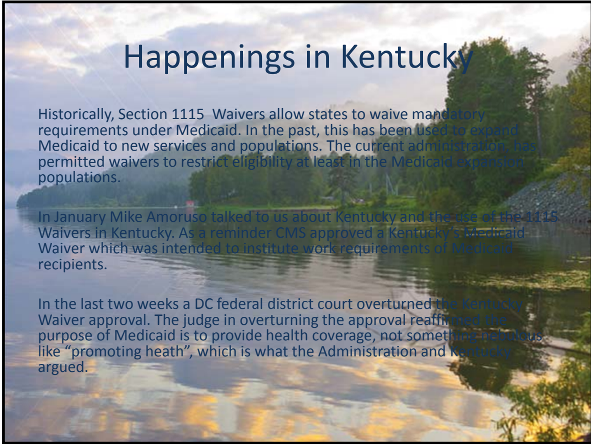
Summer Update
Tara Anne Pleat
July 12, 2018
ELSN - NYSBA

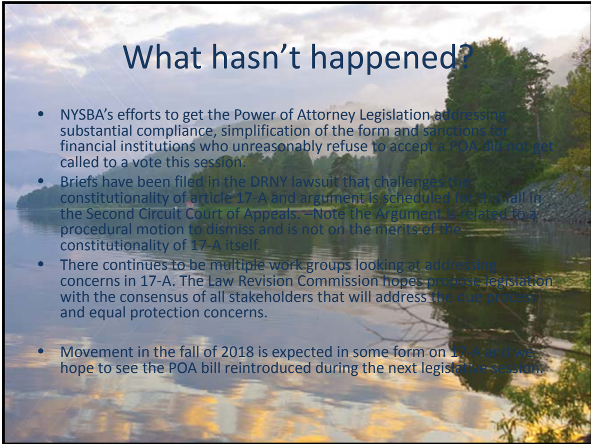
Most Important Updates!
The Philadelphia Eagles Won the Super Bowl! As a Giants Fan this was totally devasting.
The Golden State Warriors won the NBA finals which resulted in LeBron going to the Lakers.
The Washington Capitals won the Stanley Cup finals!
Most Notably and most recently, it’s not coming home. England suffered a devastating loss in the semi-finals in the World Cup yesterday.

TWO NATIONAL ITEMS OF NOTE

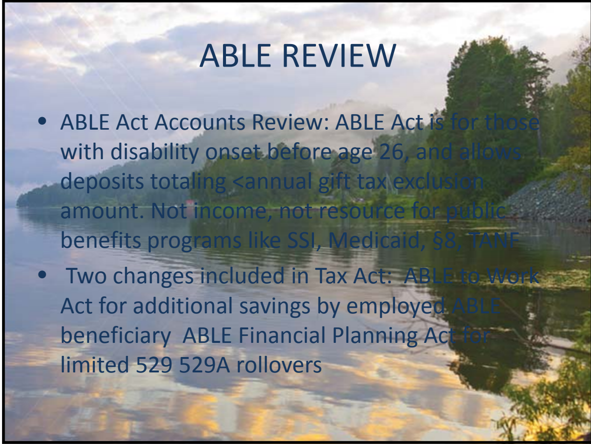

Medicare Improvement Standard
• Background: In 2014 – the *Jimmo vs. Sebelius* class action lawsuit addressing the Medicare Improvement standard held the following:
Coverage of skilled nursing and skilled therapy services "…does or does not turn on the presence or absence of a beneficiary's potential for improvement, but rather the beneficiary's need for skilled care. Skilled care may be necessary to improve a patients current condition, to maintain the patient's current condition or to prevent or slow further deterioration of the patient's condition.
• The Bipartisan Budget Act of 2018 improves the implementation of the *Jimmo* Settlement by Including a "health extenders" package that, among other changes, permanently repeals annual Medicare payment limits (or caps) on outpatient physical, speech, and OT services.
• Codified at 42 USC 1396l(g).


Happenings in Kentucky
Historically, Section 1115 Waivers allow states to waive mandatory requirements under Medicaid. In the past, this has been used to expand Medicaid to new services and populations. The current administration, has permitted waivers to restrict eligibility at least in the Medicaid expansion populations.
In January Mike Amoruso talked to us about Kentucky and the use of the 1115 Waivers in Kentucky. As a reminder CMS approved a Kentucky's Medicaid Waiver which was intended to institute work requirements of Medicaid recipients.
In the last two weeks a DC federal district court overturned the Kentucky Waiver approval. The judge in overturning the approval reaffirmed the purpose of Medicaid is to provide health coverage, not something nebulous like "promoting heath", which is what the Administration and Kentucky argued.

ANTICIPATED CARRYOVER FROM 2018 TO 2019


What hasn't happened?
NYSBA's efforts to get the Power of Attorney Legislation addressing substantial compliance, simplification of the form and sanctions for financial institutions who unreasonably refuse to accept a POA did not get called to a vote this session.
Briefs have been filed in the DRNY lawsuit that challenges the constitutionality of article 17-A and argument is scheduled for this fall in the Second Circuit Court of Appeals. –Note the Argument is related to a procedural motion to dismiss and is not on the merits of the constitutionality of 17-A itself.
There continues to be multiple work groups looking at addressing concerns in 17-A. The Law Revision Commission hopes propose legislation with the consensus of all stakeholders that will address the due process and equal protection concerns.
Movement in the fall of 2018 is expected in some form on 17-A and we hope to see the POA bill reintroduced during the next legislative session.

FEDERAL LAW CHANGES & CHANGES TO COME


ABLE REVIEW
ABLE Act Accounts Review: ABLE Act is for those with disability onset before age 26, and allows deposits totaling <annual gift tax exclusion amount. Not income, not resource for public benefits programs like SSI, Medicaid, §8, TANF
Two changes included in Tax Act: ABLE to Work Act for additional savings by employed ABLE beneficiary ABLE Financial Planning Act for limited 529 529A rollovers

ABLE TO WORK ACT

- Employed ABLE beneficiary may contribute additional amount up to Federal Poverty Level for one person (about $12K), expanding the $15,000 maximum.
- To be eligible Beneficiary must not have contributed to employer sponsored defined contribution plan, §403(b), or §457(b) account
- Beneficiary can, however, claim the retirement savings contributions credit ("savers credit") for up to $2K of their contribution (§25B(d)(1)(D)) – even for contributions <$15K threshold

ABLE Financial Planning Act

- Allows beneficiary of 529 education account to roll over up to the $15K annual 529A limit each year into an ABLE / 529A account
- No penalty, no tax for roll-over
- How to use this option?
  - Roll over all existing 529s as quickly as $15K limit allows? Maybe. Uses up $15K limit
    - 529 penalties are less restrictive than 529A pay-back
    - Use selectively to convert education $$ to rent payment, e.g.
    - Consider new contributions to 529 plan, with follow-on roll over

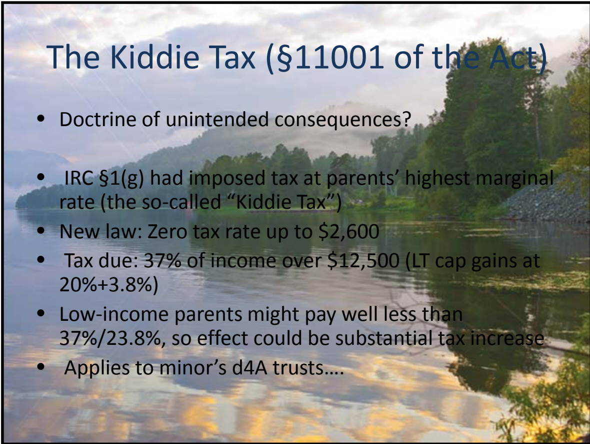
ABLE Age Adjustment Act

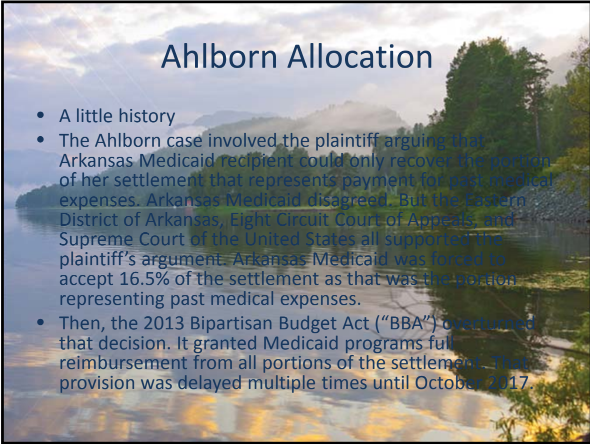
(not part of the tax act)

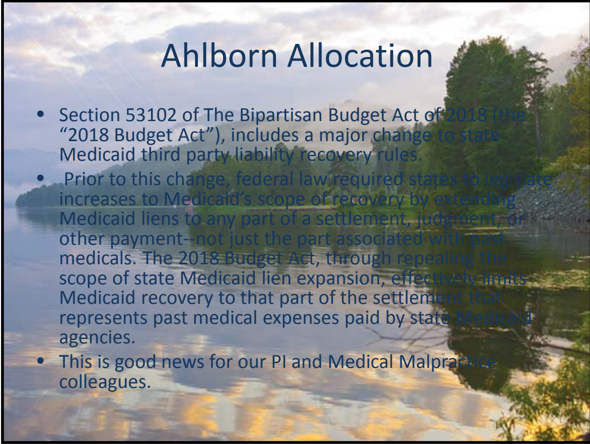
Active Federal Legislation that has not been passed but to be on the lookout for:

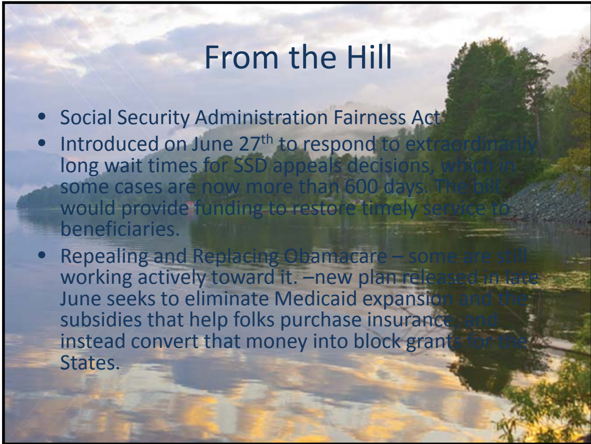
S.817/HR 1874

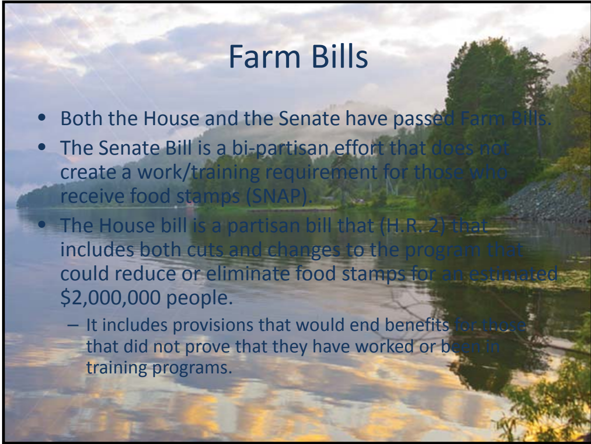
Bill would amend Section 529A(e) of the Internal Revenue Code to increase the eligibility threshold for ABLE accounts for onset of disability from prior to age 26 to prior to age 46.


The Kiddie Tax (§11001 of the Act)
• Doctrine of unintended consequences?
• IRC §1(g) had imposed tax at parents' highest marginal rate (the so-called "Kiddie Tax")
• New law: Zero tax rate up to $2,600
• Tax due: 37% of income over $12,500 (LT cap gains at 20%+3.8%)
• Low-income parents might pay well less than 37%/23.8%, so effect could be substantial tax increase
• Applies to minor's d4A trusts….


Ahlborn Allocation
• A little history
• The Ahlborn case involved the plaintiff arguing that Arkansas Medicaid recipient could only recover the portion of her settlement that represents payment for past medical expenses. Arkansas Medicaid disagreed. But the Eastern District of Arkansas, Eight Circuit Court of Appeals, and Supreme Court of the United States all supported the plaintiff's argument. Arkansas Medicaid was forced to accept 16.5% of the settlement as that was the portion representing past medical expenses.
• Then, the 2013 Bipartisan Budget Act ("BBA") overturned that decision. It granted Medicaid programs full reimbursement from all portions of the settlement. That provision was delayed multiple times until October 2017.


Ahlborn Allocation
• Section 53102 of The Bipartisan Budget Act of 2018 (the "2018 Budget Act"), includes a major change to state Medicaid third party liability recovery rules.
• Prior to this change, federal law required states to legislate increases to Medicaid's scope of recovery by extending Medicaid liens to any part of a settlement, judgment, or other payment--not just the part associated with past medicals. The 2018 Budget Act, through repealing the scope of state Medicaid lien expansion, effectively limits Medicaid recovery to that part of the settlement that represents past medical expenses paid by state Medicaid agencies.
• This is good news for our PI and Medical Malpractice colleagues.


From the Hill
Social Security Administration Fairness Act
Introduced on June 27th to respond to extraordinarily long wait times for SSD appeals decisions, which in some cases are now more than 600 days. The bill would provide funding to restore timely service to beneficiaries.
Repealing and Replacing Obamacare – some are still working actively toward it. –new plan released in late June seeks to eliminate Medicaid expansion and the subsidies that help folks purchase insurance, and instead convert that money into block grants for the States.


Farm Bills
Both the House and the Senate have passed Farm Bills.
The Senate Bill is a bi-partisan effort that does not create a work/training requirement for those who receive food stamps (SNAP).
The House bill is a partisan bill that (H.R. 2) that includes both cuts and changes to the program that could reduce or eliminate food stamps for an estimated $2,000,000 people.
– It includes provisions that would end benefits for those that did not prove that they have worked or been in training programs.

SOME OF WHAT'S NEW
IN NEW YORK

Enrollee Lock in for MLTC Plans

- Public Health Law Section 4403-f(7)(b)(7)*added by* 2018 N.Y. Laws Ch. 57
- MLTC enrollees may change plans without cause within 90 days of either notification of enrollment or the effective date of enrollment into a plan. After the 90 day period DOH can prohibit a recipient from changing plans more frequently than once every 12 months, except for good cause.
- Val's session on Saturday will address this, the new exhaustion requirements, etc. and all other things MLTC in the current environment.

Pooled Trust Notification Bill

- Social Services Law § 366, subd. 5(f) and (g), as amended by L. 2017, ch.475, effective June 16, 2018.
- Requires plain language notification to Medicaid applicants and recipients of the availability of pooled trusts as a means of maintaining Medicaid eligibility while retaining access to the surplus monthly income. The notice must also include information regarding how to enroll in a supplemental needs trust, as well as information on how to request that the Department of Social Services re-budget medical assistance based upon participation in a pooled trust.

Pooled Trust Notification Bill

- A reminder and a little history:

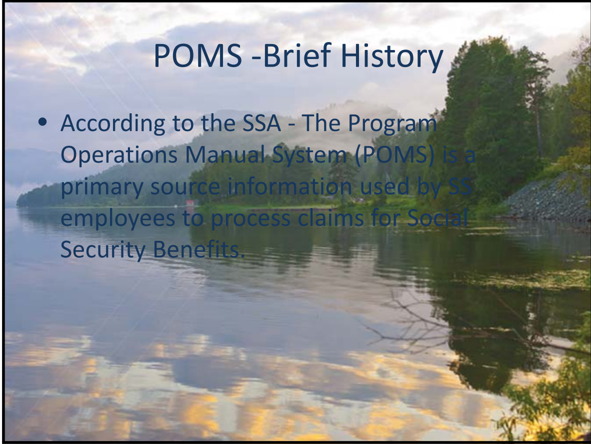
For Community Medicaid Recipients with too much income they have the choice to:

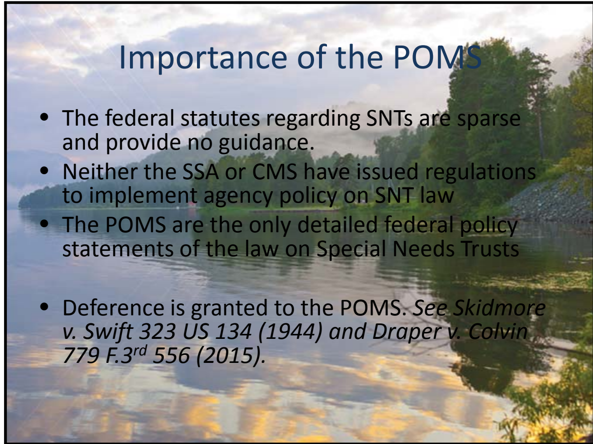
(1) Pay the surplus into the County
(2) Pay medical expenses with the surplus
(3) Pay into a First Party SNT (private if under 65/pooled for any age but everyone over 65).

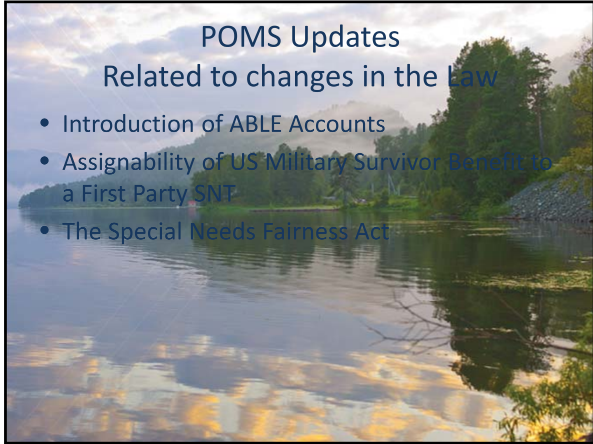
Prior to the enactment of this legislation, LDSS would issue notice assessing a spend down and only advise of options 1 and 2 and not the much more favorable option 3.

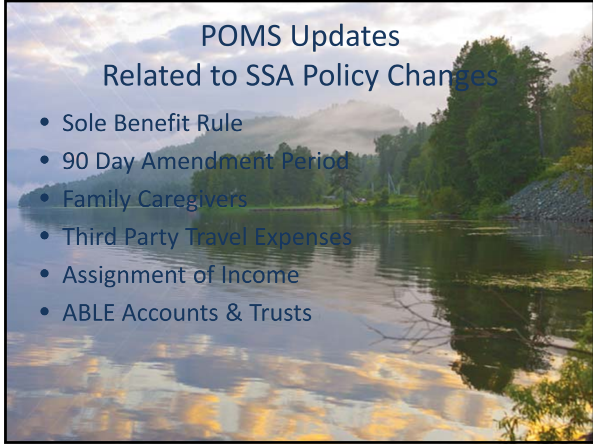
Nursing Home Carve Out
• Public Health Law Section 4403-f(7)(b)(v)(13)added by 2018 N.Y. Laws Ch. 57
• People "Permanently Placed" in a Nursing Home for three or more months will no longer be able to enroll in MLTC plans, and those who are already in MLTC plans when they enter a nursing home will be disenrolled after 3 months of permanent placement. This is a reversal of the MLTC program expansion that began in 2015. Since then, all nursing home members have been required to enroll in or remain in managed care and MLTC plans.
• The Fear: When MLTC plans are no longer responsible for the cost of nursing home care, the plans will have an incentive to place members with high needs in nursing homes, rather than approve more hours of home care needed for the member to remain in the community.

UPDATES TO THE POMS


POMS -Brief History
• According to the SSA - The Program Operations Manual System (POMS) is a primary source information used by SS employees to process claims for Social Security Benefits.


Importance of the POMS
The federal statutes regarding SNTs are sparse and provide no guidance.
Neither the SSA or CMS have issued regulations to implement agency policy on SNT law
The POMS are the only detailed federal policy statements of the law on Special Needs Trusts
Deference is granted to the POMS. See Skidmore v. Swift 323 US 134 (1944) and Draper v. Colvin 779 F.3rd 556 (2015).


POMS Updates
Related to changes in the Law
Introduction of ABLE Accounts
Assignability of US Military Survivor Benefit to a First Party SNT
The Special Needs Fairness Act


POMS Updates
Related to SSA Policy Changes
Sole Benefit Rule
90 Day Amendment Period
Family Caregivers
Third Party Travel Expenses
Assignment of Income
ABLE Accounts & Trusts

POMS Updates Trust Review Process

- Instructions and reminders to Field Office/Review Office staff in evaluating trusts:
- Reiterating administrative finality rules
- Confirming that no originals are necessary
- Notices indicating Trusts are not acceptable must identify what part of the trust is a problem and what POMS section applies
- Reiterating instructions not to impose overpayment during 90 day amendment period
- Making POMS easier to search, such as by making lists (such as the glossary) alphabetical, and
- commentary on application of rules.

POMS – Trust Review Process SI 01 01120.200L

Three Steps

(1) The Claims Specialist (CS) does the first review, starting with is the trust a resource: which is determined under SI 01120.200D -with the question: Does the trust beneficiary have the legal authority to revoke or terminate the trust, and then use the funds to meet his or her own food or shelter needs, or can the beneficiary direct the use of trust principal for her support and maintenance under the terms of the trust. SI 01120.200D1a; SI 01120.200D2.

(2) The trust is then sent to the Regional Trust Review Team for review and communication back to the Claim Specialist.

(3) If a request for reconsideration is submitted, then the case goes to the Regional Trust Lead. (RTL)

RTLs are responsible for all pooled trust reviews and maintenance of the pooled trust precedents;

IGRA trusts; reevaluations and appeals. SI 01120.200L3.

SI 01120.202 Manual Notice Language

Guidelines on issuing manual notices for individuals determined ineligible because of excess resources that include a countable trust.

When applicable, SSA will use a manual notice for trusts as required per SI 01120.204. For such notices, SSA will specify the reason the trust is countable and the notice must cite:

(1) The applicable section of the trust (or any joinder agreement);
(2) The POMS citation that contains the policy requirements on that subject
(3) Where the POMS can be found online

SI 01120.201F SOLE BENEFIT

- This section was largely rewritten and urges the claims specialists to exercise common sense when interpreting text and reviewing trust assets.
- Specifically: “The key to evaluating this provision is that, when the trust makes a payment to a third party for goods and services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to the prevent any collateral benefit to anyone else, e.g. if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there: if the Trust buys a tv that no one else can watch it”.

SOLE BENEFIT

- Addresses the titling of assets purchased by the Trust, requiring that the Beneficiary or Trustee be on title, HOWEVER, it allows for alternatives, such as when a state may not allow a minor or someone without a valid drivers’ license to be the titled owner of a car.
- Further recognizes that some state Medicaid programs will allow someone else to be on a car title, so long as the Trust has a lien on the vehicle to protect the Trust’s interest.

SI 01120.200B 19 SOLE BENEFIT

- Provides language to definition of Trust beneficiary to explain that the Beneficiary has certain rights (enforce mandatory provisions, demand an accounting, and bring an action to remove a Trustee). It further confirms that the Trustee has certain duties to a Beneficiary.
- The purpose of this language is to clarify to the Field Staff that someone can be paid by a Trustee or have their expenses paid by the Trustee, is not a Trust Beneficiary.

SI 01120.200K
90 Day Amendment Period

- Allows a 90 day amendment period for trusts previously reviewed and found not to be resource, but due to a change in policy, a policy clarification, or the reopening of a prior erroneous determination, are now found to be a resource (because something in the Trust conflicts with current requirements.. think funeral provision).

SI 01120.200K
90 Day Amendment Period

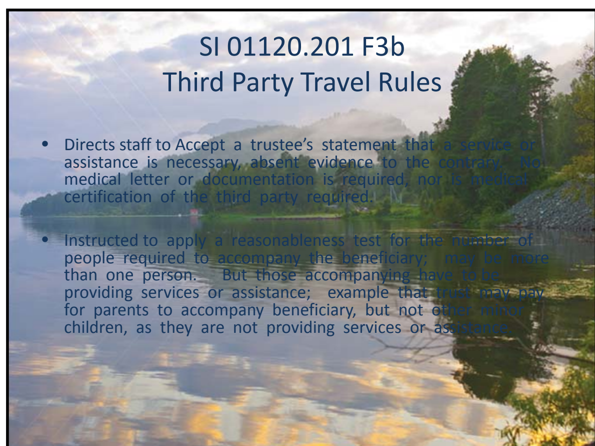
- During the 90 day amendment period, the trust should not be counted as a resource and no overpayment should be assessed. SI 01120.200K2
- For good cause (i.e. a court order being required to modify the Trust) an extension of the 90 day period can be obtained.

SI 01120.201F
Family Caregivers

- This section makes clear that a third party service provider may be a family member, a non-family member or a professional entity; the same rules apply for all.
- It also states that "companion care" can be a valid expense, and although family members may often provide this without compensation, a trustee may validly pay for this. A trustee may also pay for incidental expenses for the companion, such as admission to events that the beneficiary can only attend with assistance.

SI 01120.201F
Family Caregivers
• Claim Specialist Staff are instructed NOT to request income tax information or other evidence of business relationship, unless it relates to the income of a family member who is being paid could affect the SSI eligibility of the Trust Beneficiary.
• Claim Specialist Staff should not routinely question the reasonableness of the service provider's compensation; however if there is reason to question this, take into consideration the time and effort involved as well as the prevailing rate of compensation where the care is being provided.

SI 01120.201 F3b
Third Party Travel Rules
• Payment of third party travel expenses to accompany the trust beneficiary and provide services or assistance that is necessary due to the beneficiary's medical condition, disability or age do not violate the sole-benefit rule.
• Explains that travel expenses means transportation, food and lodging; (however, under the companion care allowance, a trustee could also pay for the such things as entrance fees for activities for the beneficiary.) What's not included here is spending money, souvenirs, new clothes for a trip for companions.


SI 01120.201 F3b
Third Party Travel Rules
• Directs staff to Accept a trustee's statement that a service or assistance is necessary, absent evidence to the contrary. No medical letter or documentation is required, nor is medical certification of the third party required.
• Instructed to apply a reasonableness test for the number of people required to accompany the beneficiary; may be more than one person. But those accompanying have to be providing services or assistance; example that trust may pay for parents to accompany beneficiary, but not other minor children, as they are not providing services or assistance.

SI 01120.201F3c
Travel for Third Parties to visit a Trust Beneficiary

- Payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long term care facility (e.g. group homes and assisted living facilities) or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement. The travel must be for the purpose of ensuring the safety and/or medical well-being of the individual.
- In addition, in the case of a non-institutionalized beneficiary, a trust may pay reasonable travel expenses of a trustee to visit the beneficiary, in the exercise of the Trustees fiduciary duty and responsibility for the well-being of the beneficiary.

Assignment of Income to a Trust

- SI 01120.200G 1d – Clarifies that the assignment of payments to a Trust under a Court order is Irrevocable and thus not income to the Beneficiary.
- SI 01120.201 Jd – Confirms that child support and alimony paid to a Trust or Trustee due to a court order are considered Irrevocably assigned and are not income to the Beneficiary.

Assignment of Income to a Trust

- Addresses the Military Survivor Benefit Plan Payments and confirms they are to be considered Irrevocably assigned to a Trust so long as the Assignment is made in accordance with the applicable policies of the Department of Defense. - SI 120.200G1d & j1d

SI 01120.203 B & C Court Orders

- SI 01120.203B8 clarifies that a court order to establish a first party trust is not considered an action by the beneficiary. (SNTFA made this moot).
- Confirms that if a trust has already been established and funded, a court order can not make retroactive changes curing a defective Trust. (i.e. no nunc pro tunc corrections)
- Also addresses that an individual can establish their own Trust effective 12/13/16 due to SNTFA.
- Finally addresses that an agent under a POA for the individual can establish a Trust if the POA allows for it. (Make sure there are Trust establishment provisions in the gifts rider on your POAs!)

SI 01120.201 I1e True Link Cards

- This section addresses administrator managed prepaid cards like True Link.
- The issue is who owns the prepaid card account. If the Trustee is the owner of the account, the care is not the beneficiary's resource, and the effect of disbursements from the card depends on how funds are spent: if for food or shelter, the individual will be charged for ISM. If for cash, treated as unearned income.

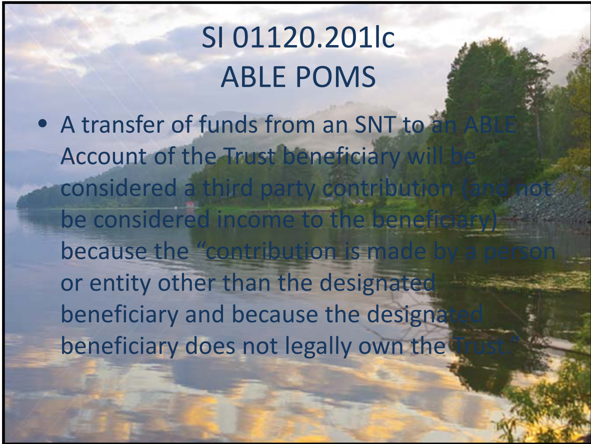
SI 01120.201lc ABLE POMS

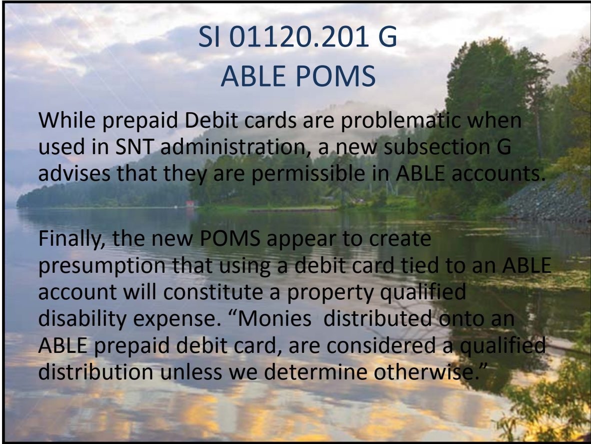
Income received by the designated beneficiary and then deposited into his or her ABLE account is income to the designated beneficiary.

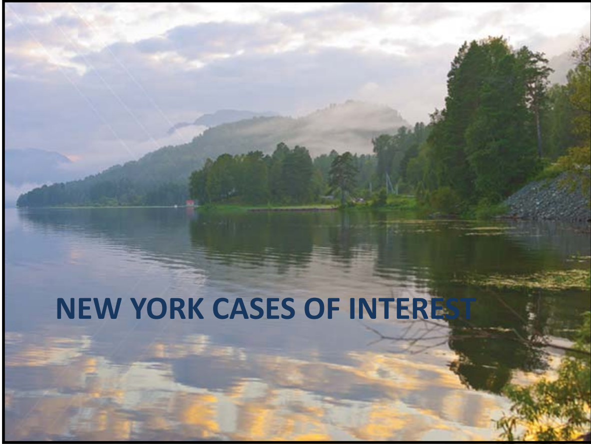
Relative to First Party contributions, an individual cannot use direct deposit to avoid income counting.

Note: While child support or alimony can be irrevocably assigned to an SNT, they can not be irrevocably assigned to an ABLE account.

You can't use an ABLE account to meet an income spend down.


SI 01120.201lc
ABLE POMS
• A transfer of funds from an SNT to an ABLE Account of the Trust beneficiary will be considered a third party contribution (and not be considered income to the beneficiary) because the "contribution is made by a person or entity other than the designated beneficiary and because the designated beneficiary does not legally own the Trust."


SI 01120.201 G
ABLE POMS
While prepaid Debit cards are problematic when used in SNT administration, a new subsection G advises that they are permissible in ABLE accounts.
Finally, the new POMS appear to create presumption that using a debit card tied to an ABLE account will constitute a property qualified disability expense. "Monies distributed onto an ABLE prepaid debit card, are considered a qualified distribution unless we determine otherwise."


NEW YORK CASES OF INTEREST

Bonin v. Wells et. Al
2017 NY Slip Op 32097

- Attorney Malpractice Case – Involved a legal malpractice claim over an allegedly improperly drafted Medicaid Trust.
- Confirmed that an action to recover for attorney malpractice is governed by a three year statute of limitations and it accrues when the malpractice is committed, not when the client discovers it.
- It further held that the continuous representation doctrine was not applicable because once the Trust was funded, the attorney client relationship cannot be revived after the limitations period expries.
- Note: Define your scope in your engagement letters and send file completion letters when your engagement has ended.

Jiminez v. Concepts of Independence
2018 NY Slip Op 30257U

- The NY County Supreme Court found that in the CDPAP program a joint employer relationship is possible and therefore the Fiscal Intermediary may be liable for wage and hour claims including a 24 wage claim for live in workers.
- This is one of many Home Care Wage cases that is in the system.

Matter of Waterfront Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health, 2018 N.Y. App. Div. LEXIS 4858

In this case the Medicaid agency denied eligibly because of a failure to provide financial information about a non-applying community spouse. The Fourth Department reversed and granted the petition of the applicant because the plain language of the Medicaid regs state that Medicaid will not be denied because an applicant does not have and cannot obtain information about a community spouse who does not reside with the applicant.

The Agency argued on appeal that its decision should be affirmed because of a failure to show undue hardship. The Fourth Department held that this argument was not preserved for appeal.

Decision was June 29, 2018

FH #: 7660482M
Monroe County

- Case regarding excess resources. The issue at the hearing revolved around when client resources were depleted and how the county interpreted their December 1 "snapshot" of her resources. The county representative insisted that any money showing in an account as of 12:01 a.m. on the first of the month is found to be available to the beneficiary no matter what may have been done previously to deplete that resource.
- "Without disputing the snapshot date policy, the Appellant persuasively argued that the check drawn on November 29, 2017, and hand-delivered to the Center for Disability Rights on November 30, 2017 for deposit into a pooled supplemental needs trust, should not have been counted in determining available resource as of December 1, 2017" ...despite the fact that the check didn't "clear" until December 5, 2017! "Since the check was not only written, but also out of the Appellant's control on November 30th, this amount should have been deducted from the resource calculation for December."

Matter of Wellner v Jablonka, 2018 N.Y. App. Div. LEXIS 2656 (3rd Dept)

- This is a Medicaid eligibility case which found that a mortgage was not actuarially sound, where its repayment term significantly exceeded the life expectancy of the lender.
- An amended mortgage reducing the term did not cure the issue.
- Court found that there was substantial evidence to support DOH's conclusion that the A/R did not rebut the presumption that transfers were made, at least in part, for the purpose of qualifying for Medicaid. --Petitioner suffered from a disease that was progressive in nature and was in poor health at the time of the transfer.

FH #: 7618249Z
Erie County

- A/R took funds from an IRA Rollover and purchased and annuity and did not name state as remainder beneficiary.
- Hearing holds that Entz decision does not apply and that an annuity in an IRA is considered an annuity and is subject to the Annuity provisions under the DRA

Matter of Key Bank
67 NYS 3d 407 (Saratoga Surr)

- Decision sprung out of request to reform a Trust to remove a funeral provision that was in place well before the POMS changed. As a result, County DSS appeared and requested multiple additional modifications to the Trust.

- Holding confirms that the role of the LDSS is to review the Trust AS ESTABLISHED and assess whether or not the Trust has an adverse impact on the Beneficiary's eligibility for the Medicaid program. It does not give the LDSS a seat at the drafting table.

Thank you!

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