ELDER LAW UPDATE

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SECURE ACT

- "Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019"
- Bi-partisan Sponsorship and Support in the House – 417 to 3
- Effective Date: IRA owners that die in 2020 and later
- Government plans where owners die in 2022 and later
- Special Delay for contracts under collective bargaining agreements
- Companion Bill Pending in Senate – "RESA"

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SECURE ACT – STRETCH OUT CHANGES

- "Stretch Out" distributions after death of Owner to beneficiaries significantly altered in favor of 10 year Payout (Senate Bill is 5 years with an exemption of $400,000 per Beneficiary)
- 10 Year Payout starts to run in the year following the IRA or Plan Owner's Death (Pre or Post RBD)
- No RMDs, but instead just has to be withdrawn by the 10th year
- This applies to IRAs and other qualified plans and Roths

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SECURE ACT

- Exempt Beneficiaries:

1) Spouses
2) Disabled Individuals
3) "Certain Chronically Ill Individuals" – IRC 7702B
4) Beneficiaries whose age is within 10 years of the Deceased
5) Minors (10 year payout starts to run in the year when the Beneficiary reaches age of majority)
6) Recipients of certain annuitized payments that commenced before the enactment of the Secure Act

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SECURE ACT

- "Spouse"
- Still allowing for full rollover
- Concern that if surviving spouse lives for a long time, upon death, the 10 year payout will result in more tax being paid
- Consider having some of the Decedent spouse's IRA not rollover and disclaim
- Rate shopping

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SECURE ACT

- Disabled Individual
- Does not have to be a descendant of the IRA Owner
- Not fully defined – probably the SSA rules – may have to be that person has to receive SSD or SSI
- RMDs will still apply
- Accumulation Trusts will still work (but not clear you will have to use them)
- How will this impact 98 MA/024 for a beneficiary if not held in trust? Along with Federal Bankruptcy cases that say an Inherited IRA is not an exempt asset?

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SECURE ACT

- "Certain Chronically Ill Individuals" – appears to be those with Cognitive Impairment or who need substantial assistance with ADLs
- Beneficiaries whose Age is within 10 years of the Decedents (if Owner dies after the RBD, payout is longer of the Owner's or B's LE; if Owner dies before RBD, payout is based on B's LE)
- Minors (has to be a child of the Decedent only)
- Age of Majority to start 10 year run. The age in the Bill is 21.

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SECURE ACT – NEW PLANNING?

- What does this do for planning?
- If you have a non-disabled person who is not a minor, RMDs do not matter, and can do a spendthrift trust, but will have to consider how the trust will be taxed on income (Accumulate v. Pay Out)
- Conduit Trusts – should be revisited. The consequences could be unintended
- Accumulation trusts will still work for disabled and minor beneficiaries
- Discretionary Spray Trusts for the rest – Nondisabled and Adult Children and Grandchildren. IRA distributions are subject to the Kiddie Tax but can spread the distributions among more beneficiaries. Life expectancies of remainder beneficiaries should become irrelevant

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SECURE ACT – NEW PLANNING?

- Make payable to CRT if client is charitably inclined – no income tax going in – IRC Section 664
- When comes out to life beneficiary there is income tax due
- Rate Management
- Use Life Insurance to make up the difference for loss in taxes or allow for the surviving spouse to do a Roth Conversion

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SECURE ACT – OTHER CHANGES

- Owners do not have to start taking distributions until the year he or she turns 72 (as opposed to 70 and ½) (from the 1960s)
- Traditional IRA contributions can be made at any age now
- Care Payments for Medicaid waiver programs – compensation can now be used to fund a retirement account
- 529 Distribution options are expanded (apprenticeships; homeschooling and loan repayments) – Pelosi pulled this and caused holdup with Senate version
- Most small businesses will now be able to offer a plan (get higher tax credit)
- Part time workers should now be eligible to participate with an employer plan
- Makes it more difficult to take loans against Plan money

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RECENT CASES

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HOME CARE HOURS

- Andryeyeva v. New York Health Care, Inc. 2019 N.Y. LEXIS 617 (Court of Appeals)
- Issue whether employer must pay its home care aide employees for each hour of a 24 hour shift
- The DOL's interpretation of its Wage Order to require payment for 13 hours of a 24 hour shift is reasonable if the employee is allowed a sleep break for at least 8 hours and actually receives 5 hours of uninterrupted sleep and 3 hours of meal break time [those are regularly scheduled "periods of assignment free time."; just there for an emergency]
- Because DOL's interpretation of its Wage Order was not irrational or unreasonable, it is upheld and the AD's finding that DOL's interpretation of its own Wage Order was not reasonable is reversed (longstanding regs get greater deference)
- Remitted back to the lower courts to see if other class certification is warranted
- If there is not 5 uninterrupted hours of sleep, the 8-hour exclusion does not apply and must be paid for 8 hours

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HOME CARE HOURS (CONTINUED)

- Same for the 3-hour meal time
- Defendants in this case were HHC companies only
- ADs ruled for Plaintiffs – because aides required to be present and perform services if "called upon"
- Court commented that Plaintiffs' complaint about no sleep and meal times may have merit; employers do not tract hours worked
- Change should come from DOL and Legislature
- AD said class certification was OK under its erroneous interpretation of wage laws and Plaintiffs have to go back to lower court to recertify "class"

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TINSMON CASE -SNT HOME PURCHASE

- Appellate Division, 3rd Department – 2019 NY Slip Op 01471
- Affirmance of Order of the Albany County Surrogate Court for Petition under SCPA 2107 for "advice and direction in extraordinary circumstances" to allow Trustees of Self Settled Trust to use trust funds to purchase the residence for Trust beneficiary to be held in her name, not the Trust with funds from SNT
- B TBI and parents are her Guardians and Trustees
- Residence was co-owned by B and mother
- Medicaid said has to be held by Trust for reimbursement
- SSI POMS 01120.201(F)(1) allow for this as the house is a "durable item"
- Trustees are not obligated to conserve the Trust assets for the benefit of Medicaid for the payback, but to use them for her benefit
- Within the Trustee's discretion to make expenditures for disabled person's benefit after considering impact on the beneficiary's access to government benefits - none

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ESTATE OF ELI T., 2018 NYLJ LEXIS 4125 (DECEMBER 2018) 17-A DENIED

- Kings County Surrogate denied 17-A guardianship where respondent with IQ of 64 did not need guardian and that with support of loving family, he could make decisions on his own.
- "The appropriate legal standard is not whether the petitioners can make better decisions than respondent; rather, it is whether or not respondent has the capacity to make decisions." Advance directives could be executed for any authority his parents sought – more targeted than guardianship that takes away all rights of developmentally disabled person (not tailored approach like Article 81 guardianships).
- Good case for discussion on definition of a "developmentally disabled person" under 17-A.
- Because 17-A is not "tailored" like Art. 81, it is the most restrictive type of guardianship
- Record was devoid of Eli's inability to make decisions with the support of his family and his deficiencies were mild
- Court did not want to impose the guardianship unless necessary

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MATTER OF ANNA F., 2018 NY SLIP OP 05590 (AUGUST 2018) ARTICLE 17-A GRANTED

- Second Department reversed Brooklyn Surrogate Court's dismissal of a 17-A guardianship application for Petitioner's 51-year old sister, who had a severe intellectual disability for most of, if not all of her life, directing that the case be brought as an Article 81 guardianship. Second Department held that the Petitioner's sister was indeed intellectually disabled within the meaning of SCPA 17-A and deemed that the Petitioner was best suited to care for her sister, appointing her as guardian.
- That an Art. 81 was unnecessary

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MATTER OF DELANEY, NY SLIP OP 02090 (MARCH 2019) POA CREATES SNT

- Agent under basic durable POA signed by Principal with paranoid schizophrenia commenced proceeding in Rockland Surrogate's Court to create an SNT for individual who was receiving government benefits, including SSDI, to receive the principal's inheritance from his parents that had not yet been paid. SNT was for principal's supplemental care, maintenance, support, and education. Application was denied.
- That agent did not have authority and POA not properly done
- 2nd Department reversed Rockland Surrogate's decision that the agent under durable POA did not have authority to commence proceeding to create SNT on principal's behalf. POA granted authority for, among other things, "claims and litigation", "estate transactions, and "all other matters", citing GOL 5-1502H; Matter of Perosi v. LiGreci 98 AD3d 230.
- Case where Court allowed POA agent to amend Trust – unless act is to (1) execute Will; (2) Affidavit of Personal Knowledge; or (3) marriage or divorce (98 A.D.3d 237-239).

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BRONSTEIN V. CLEMENTS, 2019 NY SLIP OP 01470 (FEBRUARY 2019) STATE LAWS CONFLICT IN GUARDIANSHIP

- Defendant had IP sign 2 POAs PA Forms in New York using PA form: one gave unrestricted authority to Plaintiff, and second gave restricted authority to Defendant to engage in real estate transactions and to create a trust for the IP. Plaintiff filed for guardianship in PA and was granted same and filed the Guardianship Order in NY pursuant to 83.39. Plaintiff commenced this proceeding to revoke the limited POA given to Defendant. Lower Court revoked limited POA and 2nd Dep't affirmed
- Under PA law, the guardian could revoke POAs, but not the same under MHL 81.22(b)(2). Court held that POA fell under purview of GOL. (Although limited, not just for business or commercial purposes)
- Under a choice of law analysis: "the applicable law should be that of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."
- Resident of PA
- PA Form was used – governed by PA Statute
- Agent had to act with highest principles of fidelity

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MATTER OF KRONIK, 2019 NY SLIP OP 30178(U) TRUST REVOKED BY GUARDIANSHIP COURT

- Decedent signed Irrevocable Trust and pour over Will in March 2000. Decedent found to be incapacitated in August 2000. Guardians applied for revocation of trust and after a jury trial it was determined that Decedent lacked capacity to sign Trust and that there was undue influence.
- Family wanted a 1976 Will probated
- NY Co. Surrogate Court held that the two instruments were part of same transaction secured by the same potential B. The Will was incidental to the Trust and any claim of its validity was barred.
- MHL 81.29 bars guardianship court from voiding a will; but that decision can indirectly occur with facts as they existed in this case.

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MATTER OF PROSPECT PARK UNION ASSOC. V. DEJESUS, 2018 NY SLIP OP 09016 FHA AND GUARDIANSHIP

- Landlord/tenant case (Bronx): GAL stipulated to have apartment cleaned by certain date as alternative to eviction of tenants in HUD section 8 housing. Tenant failed to comply with multiple stipulations. Court allowed for eviction but also notified APS. APS got involved and temporary guardian was appointed for both tenants and cured the problem.
- Motion to vacate the eviction was denied because cure was not timely and Appellate Term First Department affirmed.
- Appellate Division modified the decision saying that the landlord must make reasonable accommodations under the Fair Housing Act for mentally disabled people and that the case should be remanded to decide whether the existence of a guardianship is sufficient for tenant to fulfill lease obligations and avoid eviction (and should not just be evicted because cooperation was not timely)
- Appointment of Article 81 guardian sufficiently establishes that these tenants are "handicapped" within the meaning of the FHA.

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MATTER OF TIMPANO (MCGURK), 2018 NY SLIP OP 28298 COMPETING NH AND DSS JUDGMENTS SURROGATE'S COURT,ONEIDA COUNTY

- NH obtained judgment over NH resident while living but did not yet begin collection on judgment before resident died. County was appointed Administrator of the estate and filed accounting and proposed to pay balance of estate to DSS (amount in estate was less than both NH and DSS's, separately).
- The Court held that the judgment that the NH had was not secured by real property and the NH had not already begun perfecting the lien against the decedent and the lien was not secured. The Court distinguished this case from a case where a DSS was not able to cut in front of NH, but in that case the NH had perfected the judgment by filing a lien against *real property*. The case at hand did not involve real property; thus, the judgment was not perfected and DSS was still a preferred creditor for balance of estate.
- Pierce Case (106 A.D.2d 892 (2d Dept 1985)) – NH got judgment docketed – in part v. RP. Distinguish this case – no RP, not a Secured Creditor.
- Court also focused on the fact that Medicaid started to pay before judgment by NH entered.

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MATTER OF BREIER V. NY DSS, 2019 NY SLIP OP 00433 SECOND DEPARTMENT (SUFFOLK) NH ACTS PRECLUDE APPEAL OF DENIAL

- Decedent's attorney-in-fact authorized Medicaid coordinator at NH to represent decedent during Medicaid eligibility process. Medicaid coordinator applied for benefits and was denied by County DSS due to failure to submit proper documentation. Coordinator reapplied and denied again. Then coordinator requested a fair hearing but was denied because the request had not been made in a timely manner.
- Petitioner argued that SOL on deadline to apply for fair hearing should have been tolled because the attorney-in-fact was not noticed just the NH Rep. Court denied and said that the coordinator was the proper person to notice as they were authorized and recognized representative.
- Be careful – do not cede too much authority to NH Rep.

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MATTER OF SHAMBO 2019 NY SLIP OP 01280 (FEBRUARY 2019): ADMINISTRATOR SURCHARGED – THIRD DEP'T

- Admin – Father died in 2007, daughter became fiduciary of estate and was to sell residence and fund SNT for mother who was on MA
- Did not. Mother died in 2009. Has order in 2013 to sell house for a certain price range – failed to do so – until 2015, at a lower price than Court ordered
- Third Department upheld surcharge against unfit Administrator
- Court held that Admin. failed to act diligently and prudently in the management of the estate's sole asset, which she could have sold at a reasonable price within a reasonable amount of time
- Medicaid was respondent in this case seeking to be paid their claim against estate for care provided to decedent

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MATTER OF ALEXANDER B.P., 2018 NY SLIP OP 07644 SECOND DEPARTMENT (NASSAU)

- NH brought Art. 81, was successful, but Court ordered that NH pay G $500/month and pay modest CE Award Fee
- Where Court found that a guardianship was not brought in bad faith by nursing home, it was an improvident exercise of discretion for the Court to require petitioner to pay the fee of the court appointed guardian.
- Petitioner has to pay CE and CAA only when:
  1) Denied or Dismissed
  2) AIG dies before determination is made
- NH as Petitioner had to pay CE Fee because it stipulated to do so.

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MATTER OR R.T. : JOINT ACCOUNTS BETWEEN SPOUSES; GUARDIANSHIP

- Broome County, May 15, 2019
- H&W – 2x married and divorced; both had kids from 1st marriage
- W commenced guardianship; kids from IP's 1st marriage cross-petitioned
- W amended Petition to use AIP's income for her support
- Consented to kids being guardians
- Guardians then sought judgment v. W – theft of AIP's income
- Prior to illness, income collectively used: "Enjoy Life" and used generously for both spouses

  H – 4,000 annuity
  H – 1,200 SS
  H – 270 RMD
  5,500 monthly income

  W- $1,700 in monthly income

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MATTER OR R.T. : JOINT ACCOUNTS BETWEEN SPOUSES; GUARDIANSHIP (CONTINUED)

- W became joint owner of bank account when H dementia started
- From June 2017 – Feb 2018, W took income and used it to pay couple's expenses and other expenses

Kids wanted judgment from W's use of his income, and to use 81.29(d), but Court said that does not apply

- Joint Account – use of these funds is OK only if wife can show by C&C evidence that other spouse consented or for their joint benefit
- Kleinberg v. Heller, 38 N.Y.2d 836 (1946) – good analysis
- JA consideration:
  1) Nature of joint relationship
  2) Presence or absence of free commingling of funds
  3) Testamentary distributions for "excess withdrawer"
  4) Prior generosity to "excess withdrawer"
  5) Age and physical condition of other JT
  6) Other JT's knowledge of withdrawals

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MATTER OR R.T. : JOINT ACCOUNTS BETWEEN SPOUSES; GUARDIANSHIP (CONTINUED)

- In addition, does spouse have duty to use marital funds solely for the IP prior to Art. 81 commencement?
- Court says yes, because he lacked capacity to consent
- W's following payments from joint account subject of judgment against her:
  - Made payment for her own real estate
  - Gifts to/on behalf of W's son from earlier marriage
  - Gift car to herself
  - Legal fees she paid to commence Art. 81, when she really only wanted support for self
  - Reimbursement from LTC policy was $10K that she took for self
  - But payments on a loan to improve marital residence bathroom for H is OK
- Spouse of IP cannot spend income being paid to a joint account in a manner inconsistent with prior spending pattern unless she has 1) the consent of the other joint holder spouse, and 2) doing so is a breach of her duty to conserve such marital funds once the other spouse/joint holder suffers diminished capacity.

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MATTER OF A.B.D. : DD PERSON CAN PAY INCOME TO AN ABLE ACCOUNT

- Nassau County Surrogate Court June 13, 2019. 2019 N.Y. Misc. LEXIS 3237
- Guardians for DD Person (who is on SSI and Medicaid) applied to have income from internship paid to an ABLE account
- Because this account will not affect SSI or Medicaid if account is not more than $100,000 and the maximum annual contribution is not exceeded (plus lesser of (1) gross income or (2) amount equal to poverty level for one person) the transfer to the ABLE account was allowed by the Court

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BEDNAREK V. INGERSOLL, 2019 NY SLIP OP 50142(U): PARTIES SUBJECT TO GUARDIANSHIP

- Chemung County, February 4, 2019
- Bednarek, one daughter, sought accounting from POA as agent under POA for mother, from daughter "I"
- Bednarek also commenced Art. 81
- Separate but related cases
- G Court Order required that daughter "I" reimburse money to mother (used mother's funds to pay lawyer for joint account), daughter "I" sought to vacate order;
  - Only a "person on notice" and not a party

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BEDNAREK V. INGERSOLL, 2019 NY SLIP OP 5012(U): PARTIES SUBJECT TO GUARDIANSHIP (CONTINUED)

- There was no cross-petition filed by daughter "I", but:
  1) Her lawyer filed a Notice of Appearance
  2) Lawyer appeared and participated many times in Art. 81 proceeding
  3) Submitted motions in Art. 81
  4) Subject to Court's jurisdiction
  5) But validity of payment of fees to be determined in separate POA proceeding
- Daughter I. was a person entitled to notice under an Article 81 proceeding under MHL 81.07

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FAIR HEARING 7923571Y: PROMISSORY NOTE UPHELD DESPITE NONCOMPLIANT PAYMENTS

- Genesee County 4/29/19
- Promissory Note that was otherwise DRA compliant
- DSS argued that Note was a countable resource because some of the payments were not made exactly as the Note has set forth
- In August 2017, Applicant gifted $120,000 and purchased a Promissory Note for $81,000.
- Applicant entered the NH in September 2017 and applied for Medicaid in December 2017.
- Application denied. Medicaid said Note was voided because the payment terms were not complied with.
- $81,000 Note Purchased was a gift and also caused a resource problem because it made Applicant not otherwise eligible for Medicaid until it was paid back so penalty on $120,000 gift did not start until all $81,000 returned.

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FAIR HEARING 7923571Y: PROMISSORY NOTE UPHELD DESPITE NONCOMPLIANT PAYMENTS (CONTINUED)

- Note terms complied with 06 OMM/ADM-6 and MARG.
- Note payments all made in 10-month period, but differed slightly for a few of the 10 months.
- Applicant cited Fair Hearing #6248084Y (7/2/13) for support, looked only to the terms of the Note.
- DSS argued that it was a sham Note under FH 7588152H, but that was a case with a DRA Compliant Note where the required payments were never made.
- Intent of the parties to the loan and circumstances surrounding the loan were considered more important than strict adherence
- DSS's claim that Promissory Note was a sham was rejected

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FH # 7393751Z: MLTC DECISION TO DENY 24 HOUR LIVE IN REVERSED

- NYC 5/23/19
- Applicant received 49 hours per week of home care under MLTC plan.
- A Uniform Assessment Report done in January 2019 with a UAS Aide Table Plan, which determined that Applicant needed the same 49 hours/week.
- Request for increase was twice denied by MLTC and FH requested.
- Increase in service sought and denied.
- But MLTC's own UAS put the plan on notice of Appellant's "Mayer III" status.
- Also, it notes Applicant has "declined" and now requires "extensive" assistance with ADLs.
- GIS 97 MA 033 applies and this should require 24 hour care in the absence of formal or informal supports (but this is normally from family and G is 97 MA 033 says this is voluntary).
- FH successful and 24 hour live in care required.

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BED HOLD UPDATE

- DOH letter dated 7/3/19 confirms bed hold policy set forth in 505.9 of 18 NYCRR and Section 86.24 of 10 NYCRR, that for patients over 21 who are not on hospice or therapeutic leave, there will be no Medicaid reimbursement for bed holds.
- This was part of the 2017-18 NYS budget.
- Used to be able to have Medicaid pay 50% of rate for bed in a facility that was 95% occupied up to a maximum of 14 days per year.
- But have to offer that individual the first available bed.
- Family can still pay to hold the bed.
- "Therapeutic" leave is for non-medical purposes such as to visit family or friends (MA will pay 95% of bed rate up to 10 days per year).

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POMS CHANGE GN 03920 TN 26 6/25/19

- Legal fees charged for "services in connection with a claim".
- Example 3 in the Transmittal is for a Third Party Trust:
- *Clara Waters, a grandmother, establishes a trust for Rainbow, her granddaughter through Mr. Johnson, an attorney. Generally, we would not need to authorize Mr. Johnson's fee, so long as the trust was not established for the purpose of affecting his clients' eligibility for benefits.*
- *Explanation: An attorney may establish a trust for a minor child for many reasons. If a trust is prepared in order to affect someone's eligibility for benefits, we must authorize the representative's fee for preparation of the trust.*

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POMS CHANGE CONTINUED

- Not clear what "in connection with a claim" means, but it appears to include a third party trust done, in part, to protect the beneficiary SSI eligibility.
- The Transmittal is not 100% clear.
- POMS are not law but may be entitled to preferential treatment.

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