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## **2021 Fundamentals of Special Needs Trusts Administration Webinar**

**Friday, April 30, 2021**



**Stetson University College of Law  
Gulfport, Florida**



## **2021 Fundamentals of Special Needs Trusts Webinar**

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## **The Fundamentals of Special Needs Trust Administration Webinar**

**~Friday, April 30, 2021~**

*A half-day webinar that addresses challenging administrative issues faced by trustees, attorneys, financial planners and others involved in Special Needs Trust Administration.*

**12:30-12:40 pm EDT**

**Welcome and Announcements**

**Professor Roberta Flowers**

**12:40-1:30 pm EDT**

**Digital Assets**

**Emma Barry**

*Please tune in for an overview of best practices (and pitfalls to avoid!) concerning planning for digital assets when beneficiaries have Special Needs. This session will address, among other issues, fiduciary access to, and management of, such assets.*

**1:30-2:20 pm EDT**

**Hold 'em, Fold 'em, Walk Away, or Run? Considerations for Trustee Resignation**

**Will Lucius and Yolanda Mazyck**

*As the words of Kenny Rogers's "The Gambler" suggest, this session will explore the many fiduciary considerations that accompany the decision of whether to resign as trustee of a pooled or special needs trust. This conversation will include whether resignation is in the beneficiary's best interest, appropriate under the circumstances, the governing instrument's terms, and the need or requirement for judicial intervention. We will also discuss the resignation process, including interim distributions, investment management, beneficiary communication; benefits eligibility constraints; notice; release, indemnification, selection or nomination of a successor trustee, and transfer of assets.*

**2:20-2:30 pm EDT**

**Sponsor Break - ElderCounsel**

**2:30-3:20 pm EDT**

**Understanding Best Disbursement Practices and Pooled Trust Remainder Policies**

**Joanne Marcus and Karen Konvicka**

*This session will provide comprehensive information about the disbursement process, the scope and constraints of the duty of the Trust Administrator, and an overview of First-Party and Third-Party remainder policies.*

**3:20-4:10 pm EDT**

**Lessons Learned From the Pandemic**

**Megan Brand and Shirley Whitenack**

*From the varying perspectives of an attorney, trust administrator and employer we will discuss how the pandemic has impacted the people we serve, their public benefits and new initiatives introduced by the new administration. We'll also review the implications of remote work both in the present and long-term, vaccinations and other current hot topics related to COVID-19.*

**4:10-5:00 pm EDT**

**The Three Ds of Ethical Administration of a Special Needs Trust**

**Roberta Flowers**

*Administering a trust involves the balancing of a variety of factors and concerns both practical and ethical. Participants of this presentation will be introduced to the Best Practices Guide created by the Life Passages Projects. The presentation will consider the need to ethically look at administration of a trust from a beneficiary-centered perspective.*

# 2021 Fundamentals of Special Needs Trusts Administration Webinar

## Speakers



**Emma H. Barry**  
Attorney  
The Bowden Law Firm, LLC

Emma H. Barry has worked with Kristen M. Lewis in her Special Needs Estate Planning practice since graduating from Georgia State University College of Law in 2016. Emma focuses her practice on Special Needs Trust matters and other aspects of comprehensive Special Needs Estate Planning. She has extensive experience representing clients in Guardianship and Conservatorship proceedings in Probate Courts throughout Georgia. She handles all non-contested adult Guardianship and Conservatorship matters at The Bowden Law Firm.

Emma is from Atlanta and attended Woodward Academy before earning her undergraduate degree in Political Science from Davidson College. She is admitted to practice law in the State of Georgia.

Emma is a member of the Fiduciary and Elder Law Sections of the State Bar of Georgia. She is an active member of the Academy of Special Needs Planners, the National Academy of Elder Law Attorneys, and the American Bar Association. Emma is also a graduate of the Philanthropic Advisors Leadership Institute.

Emma serves as a Children's Legacy Advisor for Children's Healthcare of Atlanta. She also serves on the Board of SNs360, a non-profit organization dedicated to increasing access to residential options, employment opportunities, and faith communities for persons with disabilities. In addition, Emma is involved in The Georgia Heirs Property Law Center's Form Project, which seeks to create a set of estate planning forms to help remediate heirs property in the broader community.

Emma and her husband live in Dunwoody with their two children.



**Megan Brand**  
Executive Director  
Colorado Fund for People with Disabilities (CFPD)

Megan Brand is the Executive Director of CFPD-Colorado Fund for People with Disabilities. Megan began her service at CFPD in 2003 and has been the Executive Director since 2010. Megan has a bachelor's degree in social work from the College of St. Benedict over 20 years of experience in working with people with disabilities, their families, service providers, attorneys, trustees, financial planners, guardians and other professionals. She leads a staff of 25 in administering the largest and longest-standing locally managed pooled trust in Colorado, as well as providing myriad of other services that offer protection, personalized attention, access to our network of organizations and services, and financial and benefit's guidance. In addition to leading the staff, Megan currently serves on the board for the National Planned Lifetime Assistance Network and is a frequent presenter in the community, both locally and nationally, on Special Needs Trusts and related topics.



**Roberta K. Flowers**

Professor of Law and Director,  
Center for Excellence in Elder Law  
Stetson University College of Law

Roberta K. Flowers is a professor of law at Stetson University College of Law. Within the Elder Law LL.M. program, Professor Flowers teaches Ethics in an Elder Law Practice. She also teaches Evidence, Criminal Procedure, and Professional Responsibility. While at Stetson, Professor Flowers has successfully coached trial teams, arbitration teams and moot court teams to national championships. She has served as the director of the Center for Excellence in Advocacy and as the William Reece Smith Jr. Distinguished Professor in Professionalism. During her time at Stetson, Professor Flowers has received the university-level Excellence in Teaching Award, Most Inspirational Teacher Award from the Student Bar Association, and an award from the Student Bar Association for supporting student life. She also has received the university-level Homer and Dolly Hand Award for Excellence in Scholarship, the Dean's Award for Extraordinary Service, and been awarded the Distinguished Service Award four times. In 2005, the Florida Supreme Court awarded Professor Flowers the Faculty Professionalism Award.

Professor Flowers has lectured worldwide on the topic of ethics. She won a Telly Award for Excellence in Educational Films for having produced a series of educational videos on the ethical issues faced by prosecuting attorneys. Along with Professor Rebecca Morgan, she created a video series used to train and educate attorneys nationwide on the ethical dilemmas faced by elder law attorneys. The Florida Supreme Court awarded Professor Morgan and Professor Flowers the Florida Supreme Court Professionalism Award for their video productions. Additionally, with Professor Morgan, Professor Flowers designed the nation's first "elder friendly courtroom," which serves as model for courtrooms of the future.



**Karen Dunivan Konvicka**

Director of Client Services and General Counsel  
Commonwealth Community Trust

Karen Dunivan Konvicka serves as Director of Client Services and General Counsel for Commonwealth Community Trust (CCT). When in private practice, Ms. Konvicka specialized in public benefits law and estate and trust planning and administration for individuals with special needs. Ms. Konvicka maintains her memberships in the Virginia State Bar, National Academy of Elder Law Attorneys (NAELA), and Virginia Academy of Elder Law Attorneys (VAELA) and enjoys continuing to educate attorneys and families about special needs planning from the pooled trust perspective.



**William D. Lucius**

Director, Special Needs Trusts  
Raymond James Trust

Will Lucius joined Raymond James Trust, N.A. in 2015 and currently serves as Director of Special Needs Trusts. He comes to Raymond James Trust having practiced law in Michigan and Wisconsin. Will focused his practice on elder law, estate and trust administration, long-term care planning, public benefits and health insurance programs/eligibility, Veterans benefits, as well as representing children and adults with special needs and disabilities.

Will is a graduate of Elmira College (2005) with a BA degree in Political Science and a BA degree in Philosophy/Religious Studies. Upon graduation Will attended Stetson University College of Law (2008) in Gulfport, Florida receiving a Concentration Certificate in Elder Law and was the 2008 recipient of the Matthew Bender Elder Law Award. He is licensed to practice law in Florida, Michigan, and Wisconsin, and was an accredited attorney with the Department of Veterans Affairs. Will is active in the field of elder law and disability rights serving as an e-bulletin co-editor of the National Academy of Elder Law Attorneys, a subject-matter speaker at state and national conferences, and an Adjunct Professor at Stetson College of Law. Will is also active in his community having served as a Rotary club president, is a Paul Harris Fellow, and an appointed member of the Hillsborough County Council on Aging.



**Joanne Marcus**  
President and CEO  
Commonwealth Community Trust

Joanne Marcus has a master's degree in social work and serves as the President and CEO of Commonwealth Community Trust (CCT). Ms. Marcus brings to CCT over 37 years of experience in nonprofit administration and served as the Executive Director of CCT for 21 years before being named President and CEO. Under the leadership of Ms. Marcus, CCT has grown to serve over 1,900 trust beneficiaries throughout the United States. Ms. Marcus is frequently asked to speak to professional groups and community organizations nationwide.



**Yolanda Mazyck**  
Executive Director  
Shared Horizons

Yolanda Mazyck, a native Pennsylvanian, and graduate of the University of Pittsburgh, relocated to the Washington, D.C. metropolitan area to manage Shared Horizons' Pooled Special Needs Trust in January 2005.

Yolanda has over 30 years of nonprofit experience, primarily in the fields of substance abuse, criminal justice, and disabilities. She worked as a certified addictions counselor and intervention specialist for nine years before accepting the position as Director of the Neighborhood-based Family Intervention Center (NBFIC) in Sharon, Pennsylvania. During her 12 years as Director, she developed new initiatives for delinquent youth, their families, and other "at-promise" populations, preserving and supporting families in crisis.

Yolanda is honored to work with a dedicated staff and committed Board of Directors that embrace Shared Horizons' person-centered trust management model and looks forward to expanding services to meet the needs of an increasingly diverse population of people with disabilities and their families.



**Shirley B. Whitenack**

Partner

Schneck, Price, Smith & King, LLP

Shirley B. Whitenack co-chairs Schenck Price's Elder and Special Needs Law Practice Group and the Estates and Trusts Litigation Practice Group. She devotes a substantial portion of her practice to elder and special needs law, estate planning and administration, and trust and estate litigation. She is also on the State of New Jersey roster of approved mediators.

Shirley is a Past President of the National Academy of Elder Law Attorneys (NAELA), a NAELA Fellow, and a member of NAELA's Council of Advanced Practitioners (CAP), an invitation-only group of elder and special needs planning practitioners, and has served as an adjunct professor of law in the J.D. and LL.M. in Elder Law Programs at Stetson University College of Law. Shirley is a member of the Special Needs Alliance (SNA), an invitation-only nationwide alliance of special needs planning attorneys.

She is AV rated by Martindale-Hubbell and has been recognized in *New Jersey Monthly* magazine as one of New Jersey's top 100 Super Lawyers, one of New Jersey's top 50 women Super Lawyers and as a top Elder Law "Super Lawyer." She also has been selected by her peers for inclusion in The Best Lawyers in America (C) for Trusts and Estates.



STETSONLAW

# 2021 Fundamentals of Special Needs Trusts Administration

## Webinar

Friday, April 30, 2021  
12:40 P.M. – 1:30 P.M.

### Digital Assets

Presenter:

Emma H. Barry, Esq.

- Materials

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**DIGITAL ASSETS IN THE CONTEXT OF  
SPECIAL NEEDS PLANNING**

**Emma H. Barry, Esq.**  
**The Bowden Law Firm, LLC**  
**Atlanta, Georgia**  
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## **Emma H. Barry**

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Emma and her husband live in Dunwoody with their two children.

## **DIGITAL ASSETS IN THE CONTEXT OF SPECIAL NEEDS PLANNING**

**Emma H. Barry, Esq.**  
**The Bowden Law Firm, LLC**  
**Atlanta, Georgia**  
**[emmabarry@bowdenlaw.com](mailto:emmabarry@bowdenlaw.com)**

As the readers of this outline will undoubtedly already know, we are in an increasingly digital world. The amount of information that can be stored in handheld devices, such as smartphones, is staggering, and professional advisors are often playing “catch up” in terms of best practices when dealing with digital assets (and such is the case whether or not beneficiaries have special needs). This outline includes an overview of best practices (and pitfalls to avoid!) concerning planning for digital assets, including considerations when beneficiaries do have special needs. This outline addresses, among other issues, fiduciary access to, and management of, such assets.

### **INTRODUCTION**

It is important for Special Needs Trust (“SNT”) Trustees and other allied professionals to recognize the significant likelihood that SNT beneficiaries have digital assets, and, thus, require proper planning for such assets and the appropriate administration of such assets. If these digital assets are of significant monetary value, then they need to be held within SNTs in order to maintain the beneficiary’s critical eligibility for means-tested benefits, such as SSI and Medicaid. Because SNT beneficiaries challenged by disabling conditions may be more likely to be assisted by agents acting under a power of attorney or by court-appointed legal guardians and/or conservators, it is particularly important for SNT Trustees to ensure they have a correct understanding of the wishes of beneficiaries concerning access to digital assets by such fiduciaries.

## I. DIGITAL ASSETS

Most estate planning attorneys are familiar with the two broad categories of personal property: tangible and intangible. In recent years, a new sub-category of personal property has arisen: digital assets.

### A. Definition of Digital Asset

While there is not a single generally-accepted definition of “digital asset,” the Revised Uniform Fiduciary Access to Digital Assets Act (the “RUFADAA”) defines “digital asset” as “an electronic records in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.” For purposes of said definition, “electronic” means “relating to technology having electrical, digital, magnetic, wireless, optical, electro-magnetic, or similar capabilities,” and “record” means “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” RUFADAA § 2. Moreover, ownership of a digital asset is separate from ownership of the physical device upon which the digital asset is stored.

### B. Types of Digital Assets, Where They Are Found, and How to Access Them

There are several subcategories of digital assets, including personal digital assets (*e.g.*, e-mails, text messages, photographs, music files (*e.g.*, mp3 files), videos, documents (*e.g.*, Word documents and PDF files), spreadsheets, tax records and returns, and e-books); social media accounts (*e.g.*, Facebook, LinkedIn, Twitter, and Instagram accounts); financial accounts (online bank accounts, PayPal accounts, Bitcoin and other cryptocurrency accounts, investment and

brokerage accounts, IRS e-filing); business accounts (e.g., customer information databases, client records, and patient records); websites (e.g., domain names and blogs); loyalty program benefits (e.g., frequent flyer points and credit card reward points); online gaming “money,” and avatars (i.e., small icons that represent people or their businesses on social media). Beyer, Gerry W. and Nipp, Kerri G., *Cyber Estate Planning and Administration* (August 29, 2020), at 1-2. Available at SSRN: <https://ssrn.com/abstract=2166422> or <http://dx.doi.org/10.2139/ssrn.2166422>.

Digital assets may have significant monetary value, whether as a single digital asset or as part of a combination of assets.

Digital assets are often found on computers, smartphones, tablets, cameras, memory cards, USB drives, CDs, DVDs, and in cloud storage systems.

There may be several layers of security around digital assets, e.g., a password or passcode to start an electronic device, a password to access an operating system, a password to open a document, and/or a password to access a website where material is stored.

## **II. IMPORTANCE OF PLANNING FOR DIGITAL ASSETS**

The benefits of planning for digital assets are numerous, but below are some major reasons to ensure proper planning for such assets.

### **A. To Create a Plan in Case of Incapacity**

If a person is challenged by a lifetime incapacity, he or she will have ongoing expenses, and a general power of attorney without specific language concerning digital assets may be insufficient to grant access to digital assets. Even in the case of a court-appointed legal guardian, some online service providers will require a specific court order before releasing information necessary to gain access to an account, as the protected person in question is likely to retain a right to privacy when it comes to personal communications. *Id.* at 15.

If the digital assets at stake are of significant value or central importance, and there is not a solid plan in place for a fiduciary to handle such assets, the consequences can be severe. For example, if the person who becomes incapacitated was the sole operator of an online business and was the only person with access to information to customer orders, corporate bank accounts, or employee payroll accounts, the business could suffer great financial loss in a short amount of time if someone else cannot get access to maintain the business's operations. *Id.* at 3.

Domain names for websites can have significant value, and if registrations of domains are not maintained appropriately, then others may start to use such valuable domain names upon discovering that a registration has lapsed. *Id.* at 4.

If digital assets that are encrypted remain so, then they may lose their value. It may be necessary for SNT Trustees to engage IT or other technology experts to assist with any needed "de-cryption" of such assets. *Id.*

**B. To Protect Against Identity Theft**

If there is not a well-coordinated and up-to-date plan for digital assets, then login credentials or other information that gives access to such assets could fall into the hands of persons who would use such information to engage in identity theft. As the schemes of such theft are progressively more sophisticated, proactive planning can prevent great emotional distress and financial loss down the road. Unfortunately, it is estimated that about 2.5 million deceased Americans have their identity stolen each year. Beyer and Nipp at 3.

**C. To Avoid The Loss of Personal Memories**

Individuals are increasingly storing and cataloguing information about their lives onto digital media. If the appropriate persons are never designated to handle digital assets, many precious items, which may bear great sentimental value, if not monetary value, may become lost.

**D. To Maintain Confidential Information**

If the SNT beneficiary happens to maintain a database with sensitive information (e.g., some kind of client or customer information inventory), then not having a proper plan for such digital assets leads to vulnerability to a security breach and the loss of confidentiality (which could also, in turn, lead to the identity theft of such clients or customers).

**E. To Facilitate Smooth(er) Estate Administration**

Having a well-organized plan for digital assets can prevent headaches when a SNT beneficiary dies. Digital files that are stored on tangible devices, such as a flash drive or CD, could be specifically bequeathed in a Will (but such provisions in a Will would require frequent updating and perhaps decrease the security of such assets if they are not encrypted or otherwise protected). Another option is to have a separate memorandum or “Letter of Wishes” addressed to fiduciaries which gives instructions as to such assets.

**III. CHALLENGES WHEN PLANNING FOR DIGITAL ASSETS**

The challenges to creating and effectuating a proper plan for digital assets are significant, but proactive steps can be taken toward making the plan as viable as possible.

**A. Lack of Clarity Regarding Fiduciaries’ Rights to Access Digital Assets**

The rights of executors, administrators, agents, guardians, and trustees concerning access to digital assets are often ambiguous. This lack of clarity can result in families resorting to litigation in order to obtain the necessary legal authority to access the relevant assets and accounts.



Even if a court is willing to rule on such a dispute, an online service provider may have a Terms of Service Agreement (“TOSA”) which also impacts the requested access.

**B. Terms of Service Agreements**

When a person creates a new online account, he or she must often first agree to a TOSA. Although few people may actually read such “boilerplate” agreements (before rushing to click “I agree” so they can access the service they are attempting to use), their enforceability is typically upheld by courts. Beyer and Nipp at 5. When it comes to how fiduciaries access digital assets that are subject to such agreements, some online service providers may require (in the case of the death of the owner/user) the receipt of a death certificate or other legal document by the provider signifying that an owner of an account has died in order to start an application for an authorized representative to obtain access to the contents of an account, while other providers may simply have a policy of deleting certain information upon the death of an account owner. Such agreements can also impact the access that fiduciaries have in the case of a lifetime incapacity of an owner/user.

A TOSA can often prohibit a user from granting others access to an account. Therefore, a user who reveals a username and password to a non-user in order to grant access to the non-user may be in violation of federal law prohibiting access without lawful consent (as is discussed in greater detail, below).

**C. Ownership Issues**

Another type of challenge occurs when an SNT beneficiary does not, in fact, own a digital asset, but rather has a license to use such an asset while he or she is alive (*e.g.*, music, movies, and e-books which are not transferrable upon the death of the beneficiary to another

person). An SNT beneficiary may be considerably disappointed to discover that such personally-valued collections of digital records may not be transferrable to loved ones.

**D. Constraints to Planning Due to Federal Law**

Several Federal laws attempt to govern the unauthorized access to digital assets and to address the privacy of online communication.

**1. The Stored Communications Act**

The Stored Communications Act (the “SCA”) was enacted in 1986 as part of the Electronic Communications Privacy Act. Under the SCA, criminal penalties will be imposed on anyone who “intentionally accesses without authorization a facility through which an electronic communication service is provided” or “intentionally exceeds an authorization to access that facility” and “thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system.”

Additionally, the SCA prohibits an electronic communication service provider or a remote computing service provider from knowingly revealing the contents of a communication that is stored by, carried, or maintained on, that service, unless such disclosure is made “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.” However, just because such lawful consent is given does not mean that a service provider is *required* to disclose such information. See In re Facebook, Inc., 923 F. Supp 2d 1204 (N.D. Cal. 2012). In 2017, the Supreme Court of Massachusetts ordered that a personal representative may grant “lawful consent” as defined in the SCA on behalf of a decedent; however, again, it is not mandatory for a service provider to disclose the requested information in such circumstances. See Ajemian v. Yahoo!, Inc., 84 N.E.3d 766.

## **2. Computer Fraud and Abuse Act**

The Computer Fraud and Abuse Act (the “CFAA”) was also enacted in 1986, and states that anyone who “intentionally accesses a computer without authorization or exceeds authorized access” has committed a crime. A minor violation of the CFAA is a misdemeanor, but a greater violation can rise to the level of a felony if committed for profit or if committed in furtherance of another crime or tort.

## **3. Interaction with Terms of Service Agreements**

Challenges may surface if a TOSA prohibits a user from granting access to an account to third parties. If a user does share his or her login credentials, then such a disclosure of information could be construed as a violation of the SCA and the CFAA as being without “lawful consent.” Beyer and Nipp at 7. Therefore, it is helpful to put express language in the estate planning instruments granting access to fiduciaries to digital assets that states that such authorization is to be construed as the user’s/owner’s lawful consent under any and all applicable Federal or state data privacy laws or criminal laws, including the Electronic Communications Privacy Act of 1986, as amended, and the Computer Fraud and Abuse Act of 1986, as amended. While neither the SCA or the CFAA was designed to address fiduciary access to digital assets, their interface with TOSAs have led to confusion regarding such access, and states have been grappling with how to help resolve such uncertainty.

## **4. State Law Considerations**

Some states provide by statute that such a grant of access is not, and shall not be deemed to be, a breach of any terms of the relevant TOSA. However, this “solution” may, in turn, create yet more issues (*e.g.*, Do these statutes interfere with contract rights? Will contrary

provisions in the TOSA be deemed unenforceable as violating public policy? What is the impact of choice-of-law provisions in TOSAs, which indicate that the agreements are governed by the laws of some other state or country? Are such statutes, which, arguably, attempt to bypass Federal law, unconstitutional?). Gerry Beyer, “Web Meets the Will: Estate Planning for Digital Assets,” *Estate Planning*, Volume 42, Number 3, March 2015, at 32.

Most states have enacted their own version of the RUFADAA. The RUFADAA centers upon whether the deceased user or user challenged by a lifetime incapacity expressly consented to the disclosure of the content of the digital assets, either through an “online tool” (such as that through Google or Facebook) or through the express grant of authority in the user’s estate planning documents (thus, the RUFADAA respects the concept of “lawful consent” under the SCA). Beyer and Nipp at 11-12. The RUFADAA addresses access to digital assets for four different types of fiduciaries: 1) a personal representative of a decedent’s estate, 2) an agent appointed under a power of attorney, 3) a conservator or guardian, and 4) a trustee of a trust.

However, the RUFADAA does not apply to the digital assets of an employer used by an employee in the ordinary course of the employer’s business. Guidance through an online tool is given first priority under the RUFADAA, and second priority is given to the user’s instructions via his or her estate planning documents or other written record. If the user has not provided instructions through an online tool or a written record, then the service provider’s TOSA will govern the rights of the user’s fiduciaries to access the user’s digital assets. If the relevant TOSA does not provide guidance on said fiduciaries’ rights, then the default RUFADAA rules apply.

The author’s home state, Georgia, adopted its version of the RUFADAA in 2018. *See* O.C.G.A. §§ 53-13-1 through 53-13-40. The RUFADAA, as adopted by Georgia,

states that access to digital assets may be granted with an online tool or in a Will, trust, power of attorney, or other record (there are specific requirements for obtaining access depending on several factors, including the specificity of the user's express consent and the level of access already possessed by the fiduciary). For example, for trusts, a custodian of digital content must disclose the content of an electronic communication as well as the catalogue of electronic communications (*i.e.*, the name of the sender, the e-mail address of the sender, and the date and time of the message, but not the text of the message itself) if the trustee is an original user of the account in question. A court-appointed conservator, on the other hand, must ask the relevant Probate Court for permission to access the digital assets of a ward.

#### **IV. DRAFTING BEST PRACTICES**

Clear and effective planning concerning the wishes of an individual as to his or her digital assets is paramount, especially in light of the lack of certainty regarding fiduciary access to digital assets under the current legal landscape.

##### **A. Do Not Overlook Digital Assets**

Attorneys should plan for digital assets as a matter of course, as digital assets can have great personal and/or monetary value, and as such assets will likely only become increasingly ubiquitous. Thus, attorneys should inquire as to digital assets in an estate planning inventory or questionnaire. It will be necessary to decide whether such a document will also contain login (or other access) credentials. If this document does contain such sensitive information, particular cautions will need to be taken in terms of storing such a document (*e.g.*, in order to help prevent financial abuse or other kind of identity theft). An option could be to "password-protect" or otherwise encrypt such a document.

**B. Give Careful Consideration to the Titling of Digital Assets**

Trusts are often more desirable to hold title to digital assets instead of Wills, due to the fact that Wills become matters of public record. Moreover, placing digital assets into a trust might result in a greater length of time that a license applies, as it may not be keyed to a human lifespan. Beyer and Nipp at 20. Actual passwords, usernames, and other login credentials should not be included in the dispositive instrument itself, but rather in a separate writing or “Letter of Instructions” that is referenced by the dispositive instrument. However, a Will can be helpful in order to bequeath specific digital assets that are stored on tangible devices. Moreover, if ownership of the digital asset is governed by a TOSA, then the asset would pass outside of the probate process. Regardless of which instrument holds title to digital assets, it is important that the instrument clearly define what a digital asset is and not rely on a general description of personal property.

Routinely including such provisions gives fiduciaries “at least arguable” access to, and authority over, digital assets (however it is important to recognize and warn clients that these instructions may not be binding on service providers) (*see* Amos Goodall and Robert Fleming, “Digital Assets,” <https://www.specialneedsalliance.org/wp-content/uploads/2015/11/Goodall-Fleming-Digital-Assets.pdf>). This approach not only helps to give access that might not otherwise be available to the fiduciary, but also allows for a defense if there should be a challenge to the fiduciary’s authority. *Id.*

However, even if there are such express provisions, for example, in power of attorney giving an agent access to a beneficiary’s digital assets, it can remain unclear as to whether an agent can use such authority in a legal manner, depending on the particular terms of a relevant TOSA, as discussed herein. *Id.*

## V. COUNSELING BEST PRACTICES

Advice given to a SNT beneficiary and his or her support network is at least as important as the provisions of the relevant trust agreements when implementing a comprehensive plan concerning digital assets.

### A. **Provide Immediate Access to Digital Assets (When Appropriate)**

The provision of immediate access to digital assets may be appropriate in some cases (*i.e.*, allowing multiple individuals to have access). This may be the case in terms of having an SNT be an original user of an account, for the reasons discussed herein, or if the individual otherwise already requires assistance managing such assets.

### B. **Have Appropriate Login Credentials Protocols**

Passwords to online accounts should not just be held in memory. Additionally, passwords and usernames should ideally not be reused for multiple accounts. It is recommended that an SNT beneficiary (or his or her support system) maintain information about accessing accounts for the SNT beneficiary's agents, nominated personal representative, and trustee to review, and to update such information at least on an annual basis.

A few issues to be decided include whether or not to include login credentials in such a list, where such a list will be stored, protocols for updating the list, and who should have access to the list. One option is for the SNT beneficiary (or his or her support system) to participate in a password management system to help navigate some of the challenges of obtaining access to accounts. Some such programs operate on what is known as a "Dead Man's Switch" model – a participant will receive e-mails asking if he or she is still competent or alive – if there is a prolonged delay in a response, designated recipients will be given needed login credentials.

Some entrepreneurs have even created what are known as “online afterlife management companies” which offer a plethora of services to assist clients in storing information about digital assets as well as in coordinating the sending of notes or e-mails about such assets on behalf of a decedent, post-mortem. Of course, the same concerns surrounding having one document where all access credentials, such as passwords, PINs, and usernames are kept, arise if one is storing all such information with such a company (for example, if a security breach occurs). Therefore, it may be prudent to have such information separated into different documents or imported into different online storage locations and to give the login information to different trusted individuals, who may then need to act in concert (which may also serve as a “check” on each such person) to access such information.

In any case, no matter how such information is organized, any inventory or list concerning the assets should be updated regularly and saved via multiple avenues (*e.g.*, on a flash drive and in the cloud).

**C. Make Sure to Have Several Tangible Modes of “Back-Up”**

It is critical to copy digital files onto tangible items (*e.g.*, CDs, DVDs, portable hard drives, and flash drives), and to store such items in a safe place, so as to increase the likelihood of successfully preserving digital assets and carrying out a plan concerning said assets. Of course, only trusted individuals should have knowledge about where such items are stored, and perhaps the passwords to access such devices can be given to different individuals (who perhaps do not know where the items are stored) in order to add an additional layer of security.

**CONCLUSION**

We are living in an ever more online and digital age. All persons, and perhaps particularly SNT trustees (and other allied professionals), guardians, conservators, and others in the support



network of a loved one with a disability, need to understand the importance of planning for such assets and the consequences of failing to do so. Estate planning attorneys and other advisors need to be and remain informed about the changes in this developing area of the law. Effective planning for digital assets can be thought of as an intricate dance between maintaining security concerning such assets and providing sufficient access to such assets to trusted fiduciaries, and this “dance” will have different “steps” depending on the particular circumstances and preferences of the individual for whom such planning is performed.



STETSON LAW

# **2021 Fundamentals of Special Needs Trusts Administration Webinar**

**Friday, April 30, 2021**

**1:30 P.M. – 2:20 P.M.**

**Hold 'em, Fold 'em, Walk Away, or Run?  
Considerations for Trustee Resignation**

Presenter:

Yolanda Mazyck and William D. Lucius, Esq.

- Materials
- PowerPoint

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## *Hold 'em, fold 'em, walk away or run?*

### **Considerations of the Resigning Trustee**

Yolanda Mazyck and William D. Lucius, Esq.

Prepared for  
*Fundamentals of Special Needs Trust Administration Webinar*  
Stetson University College of Law

Yolanda Mazyck, a native Pennsylvanian, and graduate of the University of Pittsburg, relocated to the Washington, D.C. metropolitan area to manage Shared Horizon's Pooled Special Needs Trust in January 2005. Yolanda has over thirty years of nonprofit experience, primarily in the fields of substance abuse, criminal justice, and disabilities. She worked as a certified addictions counselor and intervention specialist for nine years before accepting the position as Director of the Neighborhood-based Family Intervention Center (NBFIC) in Sharon, Pennsylvania. During her tenure as Director, Yolanda developed new initiatives for delinquent youth, their families, and other "at-promise" populations, preserving and supporting families in crisis. Yolanda is honored to work with a dedicated staff and committed Board of Directors that embrace Shared Horizons' person-centered trust management model and looks forward to expanding services to meet the needs of an increasingly diverse population of people with disabilities and their families.

William D. Lucius, Esq., a member of the Florida, Michigan, and Wisconsin bar associations, is the Director of Special Needs Trusts at Raymond James Trust, N.A., in St. Petersburg, Florida, where his department oversees the administration of numerous special needs and settlement preservation trusts across the nation. Prior to joining Raymond James Trust, N.A., Will practiced extensively in the areas of estate planning, elder law, and disability rights throughout northern Michigan and Wisconsin. He is an adjunct professor at Stetson University College of Law, serves on the Hillsborough County (Florida) Council on Aging, and speaks frequently on special needs planning in state and national forums.

*Know when to hold them...*

I. A Trustee's Decision to Resign

Released in 1978, a young Kenny Rogers sang of a down-on-his-luck gambler who, “on a train bound for nowhere” and in exchange for one last shot of whiskey, offered the following advice, “...you’ve got to know when to hold ‘em, know when to fold ‘em, know when to walk away, know when to run.”<sup>1</sup> Although this prophetic refrain was offered fifteen years prior to the passage of the Omnibus Budget and Reconciliation Act of 1993, which included the now seminal statute for special needs planning, the Gambler could have been providing this advice to the trustee of a special needs trust (“SNT”) or pooled special needs trust (“PSNT”) who may be considering resignation (hereinafter referred to as the “resigning trustee”).<sup>2</sup>

Special needs trusts are designed, in part, to improve and enrich a beneficiary’s life while maintaining the beneficiary’s eligibility for a plethora of state and federal benefits programs.<sup>3</sup> Because the beneficiary of a special needs trust will likely have a disabling condition or special needs that often precludes gainful employment thereby causing a significant reliance on the trust to offset the loss of income and insurance that could otherwise be provided through such employment, when coupled with the maze of federal and state statutes, rules, and regulations underpinning public benefits eligibility, it becomes immediately clear that a trustee of an SNT or PSNT may have an arduous task ahead. Trustees of trusts, regardless of design or purpose, have at all times the mandatory duties of loyalty,<sup>4</sup> impartiality,<sup>5</sup> and prudent administration.<sup>6</sup> Therefore, when the administration of a special needs trust arrives at a point where the trustee can no longer perform his, her, or its obligations under the governing instrument in a fashion that

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<sup>1</sup> Kenny Rogers, *The Gambler* (United Artists Group Nov. 15, 1978).

<sup>2</sup> Special Needs Trusts are commonly referred to as either being first or third-party trusts depending on the source of funds used to establish the trust. A first-party SNT, funded with the assets of a beneficiary with a disability or special needs, is created pursuant to 42 U.S.C. § 1396p(d)(4)(a), whereas a third-party SNT is the advent of state law. In addition, a pooled special needs trust, created pursuant to 42 U.S.C. § 1396p(d)(4)(c), is either a first or third-party SNT established and administered by a non-profit association where separate subaccounts are maintained for each beneficiary of the PSNT, but for purposes of investment management the trust pools the individual accounts for collective investment. Intentionally omitted are qualified income trusts established pursuant to 42 U.S.C. § 1396p(d)(4)(b). The presenters assume the readers have a working knowledge of the various types, definitions, purposes, and applications of both first and third-party SNTs and PSNTs. Distinctions between PSNTs and SNTs on trustee resignation considerations will be made where applicable. Otherwise, “special needs trust” as used in this article will collectively refer to both SNTs and PSNTs.

<sup>3</sup> Special Needs Alliance, *Administering a Special Needs Trust: A Handbook for Trustees* (2020 Edition) found at <https://www.specialneedsalliance.org/wp-content/uploads/2018/01/2018-Trustee-Handbook.pdf> (accessed March 2021).

<sup>4</sup> Unif. Trust Code § 802.

<sup>5</sup> Unif. Trust Code § 803.

<sup>6</sup> Unif. Trust Code § 804.

is in the best interest of the beneficiary,<sup>7</sup> the trustee should think back to the Gambler's advice and consider whether it is time to fold her hand and walk (or run) away.

Reasons that cause a trustee to consider resignation are many, such reasons often depend on the unique circumstances of the beneficiary and trustee, the relationship between the two, as well as the type of trust involved. Much of what follows is applicable to the trustee of any trust type considering resignation for any purpose. For SNTs specifically, however, the reasons for trustee resignation may also be influenced by whether the trustee is a layperson or professional trustee holding itself out as having special skills in this space. With individual SNT trustees, resignation is commonly premised on a realization of the difficulty that comes with special needs trust administration, both the time commitment involved and the substantive knowledge required for effective SNT administration. In addition, where the individual trustee has a familial relationship with the beneficiary resignation may be sought to preserve harmony and prevent further discord. As to professional trustees, especially those with a special skill in SNT administration, resignation may be sought when the value of the trust declines past the minimum account size for the fiduciary's enterprise, where the trust is comprised of a significant concentration in the investment portfolio, for reputational considerations (i.e., criminal activity) caused by the beneficiary or other involved parties, to best resolve ongoing conflicts between the parties, capacity constraints caused by the heightened needs or unreasonable expectations of a particular beneficiary to the detriment of adequately servicing other unrelated clients, and to prevent or rectify a breach of trust.

PSNT resignation considerations will differ insofar as the characteristics of a PSNT contrast with an SNT by statutory design (i.e., non-profit trustee, small account size, pooled investment management, Master Trust documents and joinder agreements, etc.). What follows is not a discussion on trustee resignation from the PSNT Master Trust Agreement, rather the PSNT trustee's decision to terminate the relationship of an individual pool participant.

In addition to the above considerations, non-profit PSNT administrators must also consider, though seldom addressed, the organization's bottom line and reputation. How will termination of a particular subaccount impact the organization's budget and how will the original referral source view the resigning PSNT's inability to manage such accounts. PSNTs, especially a stand-alone non-profit organization, have herculean management responsibilities related to the non-profit, as well as the subaccounts within the pool. PSNTs essentially manage two

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<sup>7</sup> Unif. Trust Code § 404 requires a "trust and its terms must be for the benefit of its beneficiaries." *See also* Soc. Sec. Program Operations Manual System (POMS) SI 01120.201F for SSA's policy on SNTs established for the "sole" or "primary" benefit of the beneficiary.

organizations (or more if the non-profit manages multiple pool and individual trusts). This, coupled with the size of the initial deposits, make the decision to resign from a relationship even more difficult.

Historically, the option to include the PSNTs in the OBRA '93 organizing statute for special needs trusts was to ensure folks of modest means were able to enjoy the same protections afforded to those with greater means. It took several years for PSNTs to become widely accepted since the feasibility studies were not promising. Securing start-up funds to establish the non-profit entity and draft the Master Trust Agreement with or without an incubator or sponsoring organization was a limiting factor. Initially, growth was slow, and management was extremely involved. PSNT administrators were, and still are, expected to do much with limited resources. While PSNTs will have a termination clause in the Master Trust Agreement and related documents, most PSNTs simply cannot afford to resign on every occasion — administrators often “bite the bullet” and wait for either the account to deplete, the beneficiary to relocate geographically, or expire. Worth noting is that the Social Security Administration (“SSA”) required all PSNTs to amend trust documents to include PSNT-to-PSNT transfers, with ABLE accounts as the only exception. Although termination provisions in the PSNT Master Trust Document are common and there exist a myriad of reasons or situations to support resignation from a subaccount, PSNT administrators seldom initiate the resignation process.

Resignation at its core, regardless of the underlying reason, is often sought when either the trustee has determined the trust may be more effectively administered by a new fiduciary or upon request by the beneficiary or other party in lieu of a formal removal action.<sup>8</sup> When the resigning trustee has determined that resignation is appropriate under the circumstances and will further the best interest of the beneficiary, it is incumbent that the resigning trustee effectuate resignation timely and in accordance with the many statutory mandates imposed upon the trustee during the resignation process. What follows is a brief survey of select considerations for the resigning trustee, including the several available methods to effectuate trustee resignation as well as the processes employed during the trust administration and asset transfer process.

While a trustee’s decision to resign and whether the resignation was properly effectuated may implicate the rights and interests of other parties, this article is through the lens of a resigning trustee and not the beneficiary or settlor. Otherwise, the applicable Kenny Rogers’ lyrics would be “you picked a fine time to leave me Lucille, with four hungry children and a crop

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<sup>8</sup> John Moran, *Hello Goodbye: Resignation, Removal, and Succession of Personal Representatives and Trustees* (38<sup>th</sup> Annual Attorney/Trust Officer Liaison Conf. Aug. 23, 2019)(copy on file with the Florida Bar Real Property, Probate & Trust Law Section).

in the field” from the 1977 classic *Lucille*. Additionally, note that this survey only confronts resignation, and does not address the separate issues of declination of trusteeship, the removal of a trustee, trust modification, or trust termination.

*Know when to fold them...*

## II. Methods to Effectuate Trustee Resignation

In the oft quoted words of Justice Benjamin Cardozo the pillar of a fiduciary relationship comprises “not honesty alone, but the punctilio of an honor the most sensitive.”<sup>9</sup> Accordingly, it should come as no surprise to the resigning trustee that for many years permissible resignation of a duly appointed fiduciary was arduous. In fact, historically a trustee could not resign as a matter of right.<sup>10</sup> In the years leading up to the drafting of Justice Cardozo’s prose on the sacrosanctity of the fiduciary relationship, unilateral trustee resignation was only permissible if granted in the governing instrument.<sup>11</sup> Absent such express language, trustee resignation was permitted only with the consent of all trust beneficiaries or with court approval.<sup>12</sup> Severing and subsequently transferring a fiduciary relationship through much of the early 20<sup>th</sup> century was met with immense scrutiny.

Although the Restatement (Second) of Trusts § 106 and Restatement (Third) of Trusts § 36 attempted to soften the bright line common law rule pertaining to trustee resignation by affording resignation to a trustee with the consent of the beneficiaries, it was the enactment of the Uniform Trust Code (the “Code”)<sup>13</sup> in 2000 and subsequent 2010 amendment that now largely shapes the law on modern trustee resignation.<sup>14</sup> As the prefatory comments suggests the Code, as the first national codification of trust law and now enacted in some form by the majority of states, attempted to modernize trust law through innovative provisions that provide “easily

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<sup>9</sup> *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

<sup>10</sup> *Trusts and Trustees – Resignation of a Trustee (Note)*, 28 N.Y.U. L. Rev. 1298 (1953).

<sup>11</sup> *Stearns v. Fraleigh*, 39 Fla. 603, 610 (June 1897) (“...the general rule, that a trustee can not, after having accepted a trust, resign or renounce it at his pleasure...but it is equally true that where the instrument creating the trust empowers the trustee to resign after acceptance, a resignation in the manner pointed out by such instrument will be valid.”)

<sup>12</sup> *South British Ins. Co. v. Younger*, 58 F. 2d 1049, 1050 (S.D. Ohio 1932) and *Douglas Properties v. Stix*, 118 Fla. 354, 367 (Fla. 1935).

<sup>13</sup> Natl. Conf. of Commrs. on Unif. St. Laws, *Uniform Trust Code*, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=3d7d5428-dfc6-ac33-0a32-d5b65463c6e3&forceDialog=0> (accessed March 2021).

<sup>14</sup> Unif. Trust Code § 705 cmts.

accessible guidance on trust law questions.”<sup>15</sup> One such innovative solution is found in Section 705 entitled “Resignation of Trustee.”

As set forth in Section 705, a trustee may now resign as of right notwithstanding contrary terms of the governing document or securing the consent of the beneficiaries. Section 705 provides the resigning trustee the option to resign by employing the following available methods: 1) pursuant to the terms of the governing instrument to the extent such terms are not inconsistent with the mandatory provisions of the Code;<sup>16</sup> 2) upon at least 30 days’ notice to all qualified beneficiaries, the settlor (if living), and all cotrustees;<sup>17</sup> or 3) with court approval.<sup>18</sup>

Consequently, with the current iteration of Section 705 the Code rejected the common law approach, softened the requirements of the Restatement (Second) and Restatement (Third) as to class of persons entitled to give consent for the trustee’s anticipated resignation, as well as “approximate[d] standard drafting practice” by providing the trustee the option to provide notice to the relevant parties of a trust rather than leveraging the more traditional method of resignation by court order.<sup>19</sup> The subsections that follow provide a brief synopsis of each of the resignation methods commonly employed; however, said subsections are not exhaustive of all issues that a resigning trustee may confront with any of the three particular resignation methods especially as it relates to special needs trusts.

It should be noted that while the Code grants the resigning trustee the choice among several methods to effectuate permissible resignation, the facts giving rise to the trustee’s resignation may make a particular method more appropriate (or the only option) among the choices available. For instance, a court order approving trustee resignation may be necessary to the extent a beneficiary(ies) objects to the resigning trustee’s final accounting or other actions, if the trust is subject to ongoing court supervision, or where the terms of the governing instrument are silent as to successor trustee nomination. In any event, as discussed in Section I there are many reasons that may cause a trustee to consider resignation, but once the trustee has determined resignation to be appropriate under the circumstances the resigning trustee should ensure that prior to releasing the trust corpus to another party the resigning trustee has secured an effective, valid resignation under applicable state law.

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<sup>15</sup> Unif. Trust Code prefatory cmts.

<sup>16</sup> See Unif. Trust Code § 105 (“the terms of a trust prevail over any provision of this Code...”).

<sup>17</sup> Unif. Trust Code § 705(a)(1).

<sup>18</sup> Unif. Trust Code §. 705(a)(2).

<sup>19</sup> Unif. Trust Code § 705 cmts.



## A. Terms of governing instrument

The Code suggests that the default rules apply only to the extent the terms of the trust fail to address a particular issue or are in contravention of the mandatory rules.<sup>20</sup> As such, when considering resignation by an acting trustee the trustee must begin her resignation analysis with an examination of the governing instrument. To the extent the governing instrument clearly delineates a resignation and successor trustee appointment process that is amenable to all parties involved then such provisions should be given effect so as to comport with the settlor's intent or standing court orders, if any.<sup>21</sup> Where a governing instrument is silent on resignation, or the terms are such that strict compliance would defeat or impair the purpose of the trust whether due to costs, delay, or impossibility, then the resigning trustee should look to one of the other available methods for effectuating her resignation.

Of more import to the resigning trustee, where the governing instrument exceeds the minimum requirements of resignation imposed by applicable state law the resigning trustee may wish to consider seeking court approval in the alternative. Interestingly, the corresponding sections of Article 7 of the Code ("Office of Trustee") in which the resignation provisions are found are not considered "mandatory" provisions under the Code;<sup>22</sup> therefore, such provisions are only triggered where the trust is silent. However, certain states have deviated from this position. For instance, the Florida Trust Code states that the terms of the trust prevail over provisions of the applicable statutes with certain exceptions, with one such exception being the right of a trustee to resign trusteeship under Fla. Stat. § 736.0705.<sup>23</sup> Because § 736.0705 tracks the model language used in the Code for permissible resignation in this example, a resigning trustee may have a valid argument when disregarding the dispositive provisions of the governing instrument on trustee resignation in lieu of court approval where the governing instrument imposes more stringent, burdensome requirements than the minimum requirements of the mandatory provisions in § 736.0705. The inverse of this argument, unfortunately, also holds true — if the governing instrument is more expansive than the minimum statutory requirements on

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<sup>20</sup> See Unif. Trust Code prefatory cmts. and Unif. Trust Code § 705 ("Default and Mandatory Rules")

<sup>21</sup> As has long been the case in American jurisprudence, a court will give preference to the grantor's intentions as stated in the trust. See *Claflin v. Claflin*, 149 Mass. 19 (Mass. 1889) ("...testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out...").

<sup>22</sup> Unif. Trust Code prefatory cmts. See also Unif. Trust Code § 105 which list fourteen mandatory provisions not subject to override by the terms of the trust.

<sup>23</sup> Fla. Stat. Ann. § 736.0105(o) (West) (current through 2020 Legis. Sess.).

trustee resignation a court may give effect to the settlor's intent nonetheless so long as the relevant provisions do not conflict with the minimum statutory safeguards.<sup>24</sup>

## B. Notice to parties

As a departure from the Restatement (Second) of Trusts and Restatement (Third) of Trusts requiring consent of the affected beneficiaries, the resigning trustee now has a right under the Code to effectuate resignation by proper *notice* to all “qualified beneficiaries,” the settlor (if living), and all cotrustees, without judicial intervention.<sup>25</sup> When resigning by notice, the resigning trustee should be aware of all parties entitled to notice in order to fully comply with and receive a valid resignation under the Code. This includes the legal representatives of any qualified beneficiaries under a disability (minor or incapacitated), as well as unborn and unascertained beneficiaries.<sup>26</sup> Failure to provide notice to all appropriate parties or their legal representative(s) could negate resignation by notice.

The Code defines a “qualified beneficiary” as a beneficiary who on the date the beneficiary's qualification is determined is (a) “a distributee or permissible distributee of trust income or principal;”<sup>27</sup> (b) “would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (a) terminated on that date without causing the trust to terminate;”<sup>28</sup> or (c) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.”<sup>29</sup> Inasmuch as state law varies on defining qualified beneficiaries, a resigning trustee should be familiar with the applicable jurisdiction's definition of those entitled to notice.<sup>30</sup> Moreover, if the settlor is living and should there be any other named cotrustees then serving, the resigning trustee must provide notice to those individuals or entities in addition to all qualified beneficiaries.<sup>31</sup> With the expansion of fiduciary roles and bifurcated trust arrangements in special needs planning becoming more

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<sup>24</sup> *Supra* n. 8.

<sup>25</sup> Unif. Trust Code § 705(a)(1).

<sup>26</sup> Unif. Trust Code § 301.

<sup>27</sup> Unif. Trust Code § 103(13)(a).

<sup>28</sup> Unif. Trust Code § 103(13)(b).

<sup>29</sup> Unif. Trust Code § 103(13)(c).

<sup>30</sup> For example, Florida follows the Uniform Trust Code (Fla. Stat. Ann. § 736.0103(16) (West)); whereas the Texas Prop. Code does not appear to have a corresponding definition of “qualified beneficiary” and instead defines a “beneficiary” as a “person for whose benefit property is held in trust, regardless of the nature of the interest.” Tex. Prop. Code § 111.004 (West) (current with legis. Passed in 2019 Reg. Sess.).

<sup>31</sup> Unif. Trust Code § 705(a)(1).

prevalent to include trust directors, trust protectors, trust advisory committees, and others, the class of persons entitled to notice of resignation will likely expand over time.<sup>32</sup>

In addition, the SNT and PSNT resigning trustee should be cognizant of required notice, if any, that must be provided to the applicable state and/or federal agency(ies) from which the beneficiary receives certain public benefits or services or where such services or benefits would be subject to lien reimbursement. Much as the recipient or applicant or the recipient or applicants' representative for Supplemental Security Income ("SSI") has an ongoing obligation to timely report changes to the SSA,<sup>33</sup> so too may a resigning trustee have similar notice requirements upon resignation to those agencies that may require reports from a special needs trust as a condition of determining the beneficiary's continued eligibility for a particular benefits program. States like Arizona, for example, impose upon the resigning trustee an affirmative reporting obligation to the Arizona Health Care Cost Containment System for substantive changes to an SNT, including a change in trusteeship, in order for the SNT to continue to receive "special treatment" status that allows the SNT to be considered an exempt asset for Medicaid eligibility purposes.<sup>34</sup> The governing instrument, a standing court order, state or federal statute, or applicable state or federal regulation may also compel the trustee to provide regular accountings to the appropriate state or federal agency, which in turn may require subsequent notice to the same agency upon any substantial changes to the governing instrument such as transfer of trusteeship that the resigning trustee should be aware of when effectuating resignation.

While it should be underscored that the Code only requires notice by the resigning trustee to the above-referenced parties and does not require mutual consent to effectuate the resignation, a resigning trustee may wish to consider seeking court approval should the resigning trustee anticipate that a qualified beneficiary(ies), cotrustee, or settlor will object, especially as it relates to approval of the resigning trustee's final accounting or other actions during trust administration.

Proper notice should comport with applicable statutory requirements imposed on the resigning trustee as to form and delivery. If the resigning trustee utilizes a template form resignation, the template should comply with the statutory requirements, if any, for valid execution and delivery (i.e., signed with same formalities as governing instrument, notarized,

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<sup>32</sup> William D. Lucius and Shirley Berger Whitenack, *Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties, and Liabilities in Special Needs Planning*, 15 NAELA J. 2 (Fall 2019).

<sup>33</sup> 20 CFR § 416.708 and POMS SI 02301.005(B)(1)-(5).

<sup>34</sup> Ariz. Rev. Stat. § 36-2934.01 (West) (current through L. 2021, ch. 152).

witnessed, first class mail, electronic delivery, duly recorded, etc.). Again, while proper notice varies among the states' rules of civil procedure and any applicable local court rules, the Code suggests that notice may be accomplished in a manner that is "reasonably suitable under the circumstances and likely to result in receipt of the notice or document."<sup>35</sup> Permissible methods of notice include first-class mail, personal service, delivery to the person's last known residence or place of business, or a properly directed electronic message (e-mail).<sup>36</sup>

Prior to moving further in the trust transfer process outlined in Section III, the resigning trustee should have on file verification that all parties were timely notified within the requisite statutory period for providing notice of resignation. As an aside, while beyond the scope of the scheduled webinar with the rise in the use of nonjudicial settlement agreements ("NJSAs") the resigning trustee should consider whether an NJSAs may be leveraged to facilitate the resignation, appointment of successor trustee, approval of final accounting, and transfer of assets to ensure that all facets of the resignation process are appropriately and efficiently addressed, documented, and acknowledged by the parties involved.<sup>37</sup>

### C. Approval of the Court

As has been the case since the time Justice Cardozo took the bench,<sup>38</sup> a resigning trustee may seek court approval of its resignation.<sup>39</sup> Among other reasons, this may be required to the extent the court retained continuing jurisdiction over the trust or where the terms of the governing instrument mandates the resigning trustee seek court approval as a prerequisite for resignation. Where not required, resignation by approval of the court may be preferred nonetheless where the facts do not lend resignation by notice and the process established under the terms of the governing instrument prove untenable. Often first-party special needs trusts established by court order with continuing court supervision will expressly state in the resignation language that resignation may only be effectuated by court order. In these situations, the resignation process should be clear to the resigning trustee.

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<sup>35</sup> Unif. Trust Code § 109(a).

<sup>36</sup> Unif. Trust Code § 109(a).

<sup>37</sup> For example, in Florida matters that may be resolved by a NJSAs include, but are not limited to, approval of a trustee's report or accounting, resignation and appointment of a trustee, and liability of a trustee for an action relating to the trust (Fla. Stat. Ann. § 736.0111(4) (West) (current through 2020 Legis. Sess.)).

<sup>38</sup> Justice Benjamin Cardozo was appointed to the Supreme Court by President Herbert Hoover in 1932 to succeed Justice Oliver Wendell Holmes, Jr. The cases referenced in notes eleven and twelve were issued prior to, or during this tenure.

<sup>39</sup> Unif. Trust Code § 705(a)(2).

There are other instances, however, that require additional thought and planning before seeking resignation by court approval. By way of example, imagine a corporate fiduciary serving as trustee of a special needs trust with depleting assets due to the significant, ongoing costs related to the beneficiary's care and support above what Supplemental Security Income and Medicaid provide. The value of the trust is comprised of \$50,000 in marketable securities, bonds, and cash, as well as real property serving as the beneficiary's primary residence which last appraised at \$185,000. Given the high distribution rate, declining value in marketable securities, and significant concentration in an illiquid special asset within the investment portfolio, the corporate trustee wishes to resign in favor of an individual professional trustee in order to preserve the trust corpus for as long as possible by foregoing continued fees and other expenses of administration often associated with a corporate fiduciary. The governing instrument permits the trustee to resign at will by proper notice to the qualified beneficiary(ies), yet the document also requires at all times a corporate trustee with assets under management of no less than \$100,000,000. With the likelihood that another comparable corporate trustee would decline trusteeship for a modest account with a concentration and that termination under the state's uneconomical trust statute is not viable due to the beneficiary's receipt of means-tested benefits,<sup>40</sup> the corporate trustee under such circumstances would likely need to seek prior court approval in order to effectuate its resignation.

While the court procedures to secure a trustee's resignation are beyond the scope of this survey, the resigning trustee in the above example would be best advised to retain counsel who practices regularly in this space to file the appropriate petition, complaint, or application for resignation in the court of competent jurisdiction to hear the matter. The application/petition/complaint would likely request 1) approval for resignation; 2) modification of the trust to permit an individual trustee (if appropriate);<sup>41</sup> 3) appointment of the successor individual trustee; and, if necessary or required, approval of the resigning trustee's final accounting. Similar to resignation by notice, it is paramount that all qualified beneficiaries and other interested parties, including any applicable state or federal agencies providing certain benefits to the beneficiary previously discussed, are served with notice of the action so that they

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<sup>40</sup> While Unif. Trust Code § 414(a) envisions the modification or termination of an uneconomic trust having a total value less than \$50,000, such termination could jeopardize the beneficiary's receipt of certain means-tested public benefits programs as well as trigger the mandatory Medicaid payback provisions found in the early termination provisions of the governing instrument and applicable state law or regulation.

<sup>41</sup> See Unif. Trust Code §§ 410-417.

are bound to the court's final judgment; especially as it relates to triggering the limitations period for breach of trust claims discussed below.

When seeking court approval, the resigning trustee should be fully aware that the court may issue any relevant orders or impose conditions necessary for the protection of the trust property.<sup>42</sup> Such conditions and orders may transcend the original purpose for filing the resignation petition. Furthermore, interested parties to the proceeding who have not been an integral part of the trust administration process prior to filing may now have access to information not previously front-of-mind or otherwise readily available. Recall that in resignation by notice the class of persons entitled to notice are only the qualified beneficiary(ies), settlor (if living), and co-trustees; whereas, with resignation by court order the class of persons considered interested parties under applicable state statute and rules of civil procedure may, at times, be broader in scope than a qualified beneficiary. Because this may be the first opportunity for the court and all interested parties to review trust activity, the resigning trustee should work in close coordination with counsel to ensure that the accounts are current and that any matters that may give pause for concern have been appropriately addressed prior to initiating the judicial proceeding.

#### D. Select resignation considerations for the PSNT Administrator

Resignation considerations for the PSNT are limited in scope. The unspoken belief, at least in the early years of PSNT administration, was that PSNTs were best suited to manage very small accounts; and because PSNTs are structured as 501(c)(3) entities PSNTs were better suited to manage problematic, high-touch accounts. While those unspoken beliefs still hold true, PSNTs are now often viewed as a better fit because of the human and social service component offered with most PSNTs. PSNT administrators have the knowledge of systems and the people those systems support – a one stop shop. The social service foundation of most PSNTs is the building block that leads to resignation as a last resort, if at all. No matter how nominal the subaccount, difficult or high touch a beneficiary may be, PSNT administrators naturally seek solutions to manage the beneficiary, their expectations, and behavior. However, should a PSNT decide that resignation is in the best interest of all parties, the process identified above is similar with the exception of minimal court involvement. In addition, the resignation process may differ according to the Master Trust Agreement of a 1<sup>st</sup> Party/Self-Funded and 3<sup>rd</sup> Party trust. Neither Master Trust document will provide significant guidance on resignations, as there are few

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<sup>42</sup> Unif. Trust Code § 705(c).

options to consider once it has been determined that the beneficiary's public benefits may be placed in jeopardy. PSNT administrators take very seriously the oath to do no harm, along with guidance from the SSA that 1<sup>st</sup> Party PSNTs can only initiate pool-to-pool transfers when terminating an account.

E. Ancillary considerations to effectuate trustee resignation

1. Final report (or accounting)

A trustee must keep all qualified beneficiaries reasonably informed of the administration of the trust and any material facts necessary for the qualified beneficiaries to protect their interests.<sup>43</sup> To that end, the Code directs that upon vacancy in trusteeship due to resignation or removal where a cotrustee does not remain in office a final report must be sent to the qualified beneficiaries by the former trustee.<sup>44</sup> As the comments to Section 813 of the Code posit, this is a longstanding fundamental duty of the trustee. Most states, such as Wisconsin, expressly require that a resigning trustee provide an accounting detailing the trust property, liabilities, receipts, disbursements, and source and amount of trustee compensation within a requisite time period unless waived by the beneficiaries.<sup>45</sup> The resigning trustee should be familiar with the particular jurisdiction's reporting requirements at resignation in addition to any requirements imposed by the governing instrument. While the Code purposely uses the term "report" rather than "accounting" so as to "negate any inference that the report must be prepared in any particular format or with a high degree of formality,"<sup>46</sup> it is likely the case that the applicable state statutes or governing instrument will require a full accounting and will set forth the detailed requirements to complete the same.<sup>47</sup>

A full and final accounting by a resigning trustee should be provided concurrently in the resignation process, regardless of whether resignation is by court order, notice, or within the governing instrument, in order to initiate the limitations period for adverse proceedings against the resigning trustee by a beneficiary for breach of trust. Under the Code, a beneficiary may not initiate a proceeding against a trustee for breach more than one year after the date the beneficiary (or her representative) received a report that "adequately disclosed" the existence of a potential

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<sup>43</sup> Unif. Trust Code § 813(a).

<sup>44</sup> Unif. Trust Code § 813(c).

<sup>45</sup> Wis. Stat. Ann. § 701.0813(3)-(4) (West) (current through Acts 2021-2022, ch. 23).

<sup>46</sup> Unif. Trust Code § 813 cmts.

<sup>47</sup> For example, the Florida trust accounting statute lists six items that should be included in a trustee's account (Fla. Stat. Ann. § 736.08135 (West) (current through 2020 Legis. Sess.)).

claim.<sup>48</sup> The report adequately discloses a potential claim for breach if the report provides sufficient detail so that the aggrieved beneficiary knows or should have known of the potential claim.<sup>49</sup> Otherwise, a judicial proceeding for breach may be commenced up to five years after the resigning trustee's resignation.<sup>50</sup> Of course, claims for breach of trust by a resigning trustee may also be foreclosed by consent, release, or ratification in certain instances.<sup>51</sup> Lastly, some jurisdictions allow for a truncated limitations period in circumstances where the trustee provides notice of the limitations period along with a "trust disclosure document" (i.e. an account or report) to the qualified beneficiary(ies).<sup>52</sup>

To the extent a beneficiary informed of a trustee's impending resignation does not waive her objections to the resigning trustee's accounting or her right to seek a judicial accounting, and execute a release from liability in favor of the resigning trustee for all matters disclosed in any previously provided periodic statement of accounts, in consideration of the resigning trustee expeditiously and cost-effectively transferring the trust corpus to the successor trustee without seeking judicial intervention in the resigning trustee's discharge, the resigning trustee should seek a court order approving the resignation and final account before proceeding further in the resignation process.

## 2. Appointment of successor trustee

A vacancy in trusteeship occurs if a trustee resigns,<sup>53</sup> and absent one or more cotrustees remaining in office, a vacancy in trusteeship must be filled.<sup>54</sup> With proper drafting, the dispositive provisions of the governing instrument related to resignation and appointment of successor trustees will nominate a successor trustee or will provide a process for such nomination.<sup>55</sup> To the extent that the document provides for a ready and willing successor trustee who has accepted trusteeship, then the resigning trustee may move forward with the trust asset and administration transfer process.

There are occasions where the governing instrument will be silent on nominating a successor trustee or where the nominated successor trustee is unavailable, deceased, or otherwise

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<sup>48</sup> Unif. Trust Code § 1005(a).

<sup>49</sup> Unif. Trust Code § 1005(b).

<sup>50</sup> Unif. Trust Code § 1005(c)(1).

<sup>51</sup> Unif. Trust Code § 1005 cmts.

<sup>52</sup> Fla. Stat. Ann. § 736.1008 (West) (current through 2020 Legis. Sess.).

<sup>53</sup> Unif. Trust Code §. 704(a)(3).

<sup>54</sup> Unif. Trust Code § 704(a)(b).

<sup>55</sup> See Unif. Trust Code § 704 cmts which state "...good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors, and specifying the procedure for filling vacancies."



declines to serve. This is often the case with testamentary third-party special needs trusts arising from antiquated estate plans that had not been reviewed and updated to the extent possible with those nominated no longer available to serve, as well as those circumstances where the nominated successor trustee of a SNT was not fully apprised of the commitment necessary to serve in this capacity and declines to serve upon notice of the prior trustee's resignation. Conversely, a resigning trustee of a first-party special needs trust may be confronted with resignation and appointment language that simply provides a successor trustee shall be appointed by a court of competent jurisdiction. Regardless, a resigning trustee who has effectuated a proper resignation must still ensure the vacancy is filled to be fully discharged.<sup>56</sup>

The Code directs that the vacancy in a trusteeship required to be filled may be done so in the following priority: 1) by a person designated in the governing instrument; 2) by unanimous agreement of the qualified beneficiaries; or 3) by a person appointed by the court.<sup>57</sup> Note that a court always reserves the ability to appoint an additional trustee or special fiduciary when necessary whether or not a vacancy is required to be filled.<sup>58</sup> Assuming a successor trustee has been properly appointed it is critical that the resigning trustee ensure that the successor trustee has formally accepted the role.<sup>59</sup> The successor trustee may accept this role by either substantially complying with the method of acceptance established under the governing instrument;<sup>60</sup> or alternatively, where the document is silent, by accepting delivery of the trust corpus, exercising the powers or performing the duties of trustee, or other actions indicating acceptance.<sup>61</sup> Best practice would be for the resigning trustee to obtain a formal written acceptance from the nominated successor trustee.

At this initial stage in the resignation process, the resigning trustee should have 1) effectuated a proper resignation as permitted under the terms of the governing instrument, by notice to the appropriate parties, or by judicial proceeding; 2) provided notice, if required, to any applicable state and/or federal agency for which the beneficiary receives certain public benefits; 3) secured court approval of its final accounting and discharge or obtained an appropriate release, waiver, and hold harmless agreement; and, 4) verified that a nominated successor trustee

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<sup>56</sup> Compare Unif. Trust Code § 705(c) (“any liability of a resigning trustee or of any sureties on the trustee’s bond for acts or omissions of the trustee is not discharged or affected by the trustee’s resignation.”) with Unif. Trust Code § 704.

<sup>57</sup> Unif. Trust Code § 704(c)(1)-(3).

<sup>58</sup> Unif. Trust Code § Sec 704(c).

<sup>59</sup> Unif. Trust Code § 701(b) (“...A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.”).

<sup>60</sup> Unif. Trust Code § 701(a)(1).

<sup>61</sup> Unif. Trust Code § 701(a)(2).

has been properly appointed and has formally accepted the new fiduciary role. Once these important but preliminary matters have been achieved the resigning trustee must “proceed expeditiously to deliver the trust property within the trustee’s possession” to the successor trustee.<sup>62</sup> Now, the resigning trustee begins to walk the labyrinth of the trust asset and administration transfer process.

*Know when to walk away, know when to run.*

### III. Trust Asset and Administration Transfer Process Considerations

The resigning trustee should fully understand that effectuating a proper resignation does not end the resignation process, or cut-off the resigning trustee’s exposure to liability. To the extent there is not a cotrustee in office and until all trust property is delivered to the successor trustee a resigning trustee retains the duties of a trustee along with the powers necessary to protect the trust.<sup>63</sup> So long as a trustee retains the duties of a trustee so too does she retain the attendant liabilities.<sup>64</sup> In difficult resignations a court may appoint a special fiduciary to oversee the transfer process, especially if necessary to remedy a breach of trust.<sup>65</sup> Similarly, a successor trustee must take reasonable steps to compel a former trustee to deliver trust property.<sup>66</sup>

Recall, a resigning trustee has an obligation to proceed as expeditiously as possible to transfer the trust property in her possession to the person or entity entitled to receive it.<sup>67</sup> Although the resigning trustee must move expeditiously, the resigning trustee retains the overarching duty of prudent administration which includes exercising reasonable care, skill, and caution.<sup>68</sup> By way of example, the resigning corporate trustee of a first-party special needs trusts for the benefit of a ventilator-dependent beneficiary who requires 24-hour skilled care; with a market value of \$5,000,000 comprised of marketable securities, residential real estate, and a structured annuity; and, which makes daily distributions for the beneficiary’s primary benefit, must be incredibly vigilant during the trust asset and administration transfer process so as to not impede the beneficiary’s ongoing well-being, jeopardize the health of the investment portfolio, or incur unnecessary tax consequences.

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<sup>62</sup> Unif. Trust Code § 707(b).

<sup>63</sup> Unif. Trust Code § 707(a).

<sup>64</sup> Unif. Trust Code § 707 cmts (“...the former trustee remains liable for actions taken during the trustee’s term of office until liability is otherwise barred.”).

<sup>65</sup> Unif. Trust Code § 707 cmts.

<sup>66</sup> Unif. Trust Code § 812.

<sup>67</sup> *Supra* n. 67.

<sup>68</sup> Unif. Trust Code § 804.

Nationally chartered corporate fiduciaries or state banking institutions serving in a fiduciary role are regulated by the Office of the Comptroller of the Currency or state regulatory authority, respectively; agencies which often mandate that the fiduciary document and maintain formal policies and procedures pertaining to the trust transfer process and other administrative matters. For those fiduciaries not bound by regulatory and compliance oversight, best practice would dictate that the fiduciary has a documented policy in place that the fiduciary and all staff follow for each transferring trust or account. This process should have dual control so that no less than two associates within the fiduciary's organization have reviewed and approved the various steps of the transfer process. What follows is a brief example of such suggested processes for the transfer of a SNT or PSNT.

A. Workflow processes for the transfer of SNT assets and administration to successor trustee

On each occasion a trustee resigns the resigning trustee should initiate the resignation process by thoroughly reviewing the dispositive provisions within the governing instrument addressing trustee resignation and appointment of successor trustee. The applicable verbiage should be documented on an account closing form that outlines the various resignation steps and is signed by a minimum of two trust administrators at the completion of the form and prior to the transfer of assets. From there, the resigning trustee should consider the following steps:

- 1) Employ the appropriate method to effectuate the resignation as discussed in Section II;
- 2) Obtain formal, documented acceptance of the nominated successor trustee;
- 3) Notify any applicable state and/or federal agency providing benefits to the beneficiary, if required or appropriate to do so under the circumstances;<sup>69</sup>
- 4) Notify all vendors and service providers engaged by the resigning trustee of the pending transfer (i.e., TEAM Risk Management Strategies, Inc., National Care Advisors, caregivers, agency representatives or points-of-contact, utility providers and others affiliated with trust-owned real property, etc.);

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<sup>69</sup> Note that resignation is not similar to trust termination where a state or federal agency may then have a vested interest, especially as it relates to unreimbursed medical assistance benefits provided to the beneficiary. Accordingly, notice to the Social Security Administration, state Medicaid agency, housing authority, or other departments/agencies in which the beneficiary derives benefits may not be necessary at resignation, but the resigning trustee should confirm with counsel at the initial stages of the resignation process.

- 5) Halt active trading within the investment portfolio and establish the investment objective as “closing” where the investment portfolio is then carefully monitored;
- 6) Obtain and confirm the successor trustee’s primary point of contact (if not an individual trustee), mailing and legal address, e-mail, and phone and facsimile numbers;
- 7) Maintain a list of the trust assets, market value, and cost-basis information as of the date of resignation;
- 8) Review current available cash to determine appropriate reserves for final expenses due prior to transfer;
- 9) Notify the tax preparer and ensure any pending state or federal fiduciary tax returns are complete and current, as well as confirm any final tax preparation fees or outstanding tax liabilities have been debited;
- 10) Review any real estate or other illiquid assets for pending fees, outstanding taxes, or expenses; prepare a distributive deed conveying title to the property to the successor trustee; and notify the property insurer, utility company(ies), and appropriate municipality or taxing authority of the change in fiduciaries;
- 11) Verify there are no outstanding checks and cancel any regularly recurring remittances after confirming with the successor trustee that payments regularly made for the benefit of the beneficiary will resume immediately upon transfer to reduce the risk of cancelled services critical to the beneficiary’s well-being;
- 12) Prepare correspondence to the successor trustee that a) includes a Release, Waiver, and Refunding Agreement, if appropriate;<sup>70</sup> b) requests transfer instructions providing for a cash or in-kind transfer of marketable securities, and if in-kind, requests the successor trustee provide transfer instructions with a medallion signature guarantee; and, c) contains a Plan of Distribution for the successor trustee and beneficiary(ies) signature which should be signed by a minimum of two trust associates;<sup>71</sup>
- 13) Prepare correspondence to the beneficiary(ies) providing an update on the status of the transfer, to include the final report (or accounting) and Plan of Distribution.

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<sup>70</sup> Noticeably absent from this survey is a conversation on releases, waivers, indemnification, and exculpation issues between the resigning trustee and the successor trustee and/or beneficiary, which is beyond the scope of this article.

<sup>71</sup> For example, in Florida a trustee preparing a final accounting must include a “plan of distribution” for any “undistributed assets shown on the final accounting.” (Fla. Stat. Ann. § 736.08135(2)(f) (West) (current through 2020 Legis. Sess.).

Recall, a determination should be made whether the final account will be approved by the court. If judicial intervention will not be required the correspondence should include a request that the beneficiary(ies) execute a Release, Waiver, and Hold Harmless Agreement accepting the resigning trustee's periodic statements and discharge (refunding language should be employed in the Release to the extent the beneficiary(ies) will be receiving assets as part of the transfer process);

- 14) Once the items listed in paragraphs (12) and (13) above have been returned, correspondence to the successor trustee should be prepared evidencing any and all trust documents being provided to the successor trustee and whether the documents are photocopies or originals. A receipt should be provided wherein the successor trustee acknowledges the delivery of the specific documents and records that were forwarded. Such documents and records include, but are not limited to, the governing instrument and all amendments; applicable court orders; prior resignation and appointment documents; prior three years' fiduciary tax returns (Form 1041) and, if applicable, the federal Estate (and Generation-Skipping) Tax Return (Form 706) and federal Gift Tax Return (Form 709); confirmation of the federal tax identification number for the trust; and, a cost-basis transfer report if the assets will be transferred in-kind. This letter should be sent certified with a request for a return receipt;
- 15) Verify that all final fees and expenses have been debited in accordance with the jurisdiction's Principal and Income Act, if applicable, to include final trustee compensation, legal fees, court costs (if any), tax preparation fees, real estate expenses, valuations, express/certified mailings, etc.;
- 16) Upon receipt of all Releases (if applicable) from the beneficiary(ies) and successor trustee, and return receipt of the previously provided trust documents and records letter, the account administrator (with dual control) should again thoroughly review the governing instrument and the workflow processes completed to date, and then release the check or transfer the securities in accordance with the transfer instructions previously provided by the successor trustee (the reader should note that, at times, a partial transfer of assets to the successor trustee may be warranted if the resignation process will be protracted);

17) Upon the transfer of the trust assets, records, and other administrative matters, the resigning trustee should confirm receipt by the successor trustee and then monitor the account for a minimum of ninety (90) days for any residual income or refunds due to the successor trustee, and if none, then provide a final zero-balance statement to the beneficiary(ies) and successor trustee evidencing the completion of the asset transfer process.

B. Workflow processes for the transfer of PSNT assets and administration to successor trustee


Workflow processes for the transfer of PSNT assets and administration to a successor trustee is similar to that of the SNT trustee identified Part III (A) above. However, because the PSNT Master Trust name is distinct from the individual beneficiary's name, the following additional steps are worth consideration:

- 1) Notification to amend the applicable estate planning documents for third-party SNTs;
- 2) Notification to change the beneficiary designations on policies, annuities, accounts, and structured settlements, which may require court involvement; and
- 3) Valuation of the sub-account prior to transfer.

#### IV. Conclusion

Serving in a fiduciary capacity with the accompanying profound responsibility for prudent asset management and ensuring the best interest of a third party, in particular a third party who is disabled or has significant special needs and may be entirely dependent upon those managed assets or the coordination of their care and support, comes with much risk to the fiduciary. But so too is there much joy. Notwithstanding those risks many trustees serving in the SNT and PSNT space make an informed decision to accept the fiduciary appointment in service to meeting the needs of those individuals for whom the fiduciary has dedicated their professional or personal pursuits to uplifting. Therefore, the decision to terminate that arrangement requires thought and reflection. When the trustee of a SNT or PSNT has made the determination that resignation is appropriate under the circumstances, then to avoid being on the Gambler's train-bound-for-nowhere the resigning trustee must expeditiously effectuate a proper resignation, provide any necessary notice, ensure a successor fiduciary is available and duly appointed, account to the beneficiary(ies) and interested parties, and timely transfer the assets and administration at the appropriate time. By facilitating a resignation experience that comports to

the ongoing fiduciary obligations imposed upon a resigning trustee while continuing to meet the immediate needs of the beneficiary during the transition, the resigning trustee will rest assured that their final acts as fiduciary are consistent with the language employed in many special needs trusts that the trust enrich the beneficiary's life and make it more enjoyable.

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## *Hold ‘em, fold ‘em, walk away or run?* Considerations of the resigning trustee.

Yolanda Mazyck & Will Lucius, Esq.  
Friday, April 30, 2021

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## *Know when to hold ‘em....* why resign?

<p><b>SNT</b></p> <ul style="list-style-type: none"> <li>➤ Individual vs. Professional</li> <li>➤ Time commitment</li> <li>➤ Preserve relationships</li> <li>➤ Small account size</li> <li>➤ Reputational/Conflicts/Capacity</li> <li>➤ Breach</li> </ul>	<p><b>PSNT</b></p> <ul style="list-style-type: none"> <li>➤ Note distinctions between structure of PSNT vs. SNT</li> <li>➤ Financial impact</li> <li>➤ Perspective of referral source</li> <li>➤ Is resignation counter to objectives of non-profit (or trust)?</li> </ul>
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## *Know when to fold ‘em....* resignation methods.

<p><u>Is it permissible?</u></p> <ul style="list-style-type: none"> <li>➤ Historical approach</li> <li>➤ UTC           <ol style="list-style-type: none"> <li>1. Governing Instrument</li> <li>2. Notice</li> <li>3. Court</li> </ol> </li> </ul>	<p><u>Ancillary Issues</u></p> <ul style="list-style-type: none"> <li>➤ PSNT distinctions (Master Trust &amp; joinder agreements)</li> <li>➤ Final Report</li> <li>➤ Successor Trustee appointment</li> </ul>
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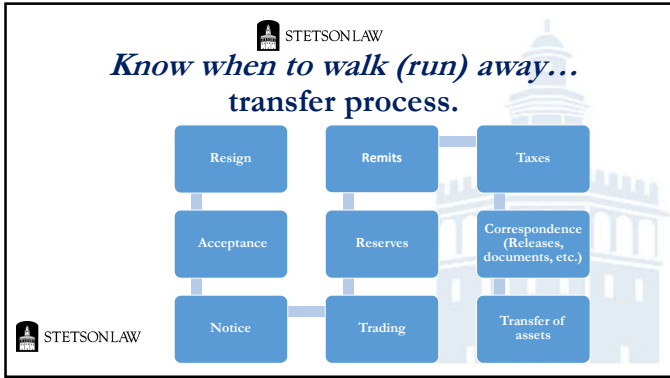
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*Questions???*

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**JAMES H. HUBBARD**

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STETSON LAW

# **2021 Fundamentals of Special Needs Trusts Administration Webinar**

**Friday, April 30, 2021  
2:30 P.M. – 3:20 P.M.**

## **Understanding Best Disbursement Practices and Pooled Trust Remainder Policies**

Presenter:

Joanne Marcus and Karen Dunivan Konvicka

- Materials
- PowerPoint

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## **Special Needs Trusts – Disbursement Best Practices**

*Karen Dunivan Konvicka, J.D.*

*Director of Client Services and General Counsel for*

*Commonwealth Community Trust*

### **Public Benefits – Provided to the Disabled and Impoverished:**

**Disability.** The public benefits that are most often associated with special needs trusts are all predicated on disability as defined in 42 U.S.C. § 1382c(a)(3). *See also 20 C.F.R. § 416.* Disability is defined in Subparagraph (A) as “...unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” And for minors in subparagraph (C) as “...medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”

\*Also, Aged (65 and over) and Blind are eligible. Different income and resource regulations apply for those 65 and over (i.e. a transfer of assets penalty in some states and inability to create a stand-alone special needs trust (pooled trusts are allowed)).

\*\*Alcoholism and drug addiction as a contributing factor have additional regulations.

**Impoverished.** A disabled individual is determined to be impoverished based primarily on two factors: the individual’s income and resources.

**Income:** For those disabled individuals receiving less than the Federal Benefit Rate which is currently \$794 for an individual and \$1,191 for married couples, the federal government provides Supplemental Security Income (SSI). *See 20 C.F.R. § 416, Subparts D, K.* Some states supplement this income as well.

In addition, disabled individuals who are impoverished are entitled to receive medical assistance through the Medicaid program which is a federal program administered by the states. Some states base income eligibility on FBR, in some states the SSI recipient is categorically eligible for Medicaid (“1634 States” based on Section 1634 of the Social Security Act) and some

states base Medicaid income eligibility on Federal Poverty Level or some percentage thereof. Long term care and waived services are usually higher and are also state specific regulations.

**Resources:** To be eligible, the disabled individual must not have countable resources in excess of \$2,000 and a married couple must not have resources in excess of \$3,000. Not all assets are countable resources (i.e. one vehicle, real estate that is personal residence of disabled individual, most personal property, etc.) *See 20 C.F.R. § 416, Subpart L., POMS SI 01110.210 B.*

### **Special Needs Trusts – Not Countable Resources:**

**First-Party or Self-Settled Special Needs or Supplemental Needs Trusts – Creatures of Statute 42 U.S.C. § 1396p(d)(4)(A) and (C).** Two types of trusts created with the assets of the disabled individual are not countable resources:

***“(d)(4)(A) trusts”*** which are defined as “A trust containing the assets of an individual under age 65 who is disabled (as defined in §1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court **if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.**” *See 42 U.S.C. § 1396p(d)(4)(A); and,*

***“(d)(4)(C) trusts”*** which are defined as trusts “established and managed by a non-profit association”; in which a “separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts”; “accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in §1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court”; and, “*to the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.*” *See 42 U.S.C. § 1396p(d)(4)(C).*

### **Third-Party Special Needs or Supplemental Needs Trusts – Issues of Drafting.**

Trusts that 1) are created with the assets of a third party (anyone other than the beneficiary), 2)

do not grant the beneficiary the authority to revoke or terminate, and 3) do not grant the beneficiary the authority to direct distributions for the beneficiary's support and maintenance are not countable resources. *See POMS SI 01120.200 D.2.* Third party trusts can be created by will (testamentary trusts) or through lifetime transfers (i.e. outright gifts or revocable living trusts/inter vivos trusts).

### **Distributions from Special Needs Trusts – Is it Income?**

**Cash Paid Directly to Beneficiary.** Any distribution of cash to the beneficiary is unearned income and will reduce SSI payments dollar for dollar. If over the Federal Benefit Rate, then the monthly benefit could be lost entirely. *Example:* Individual receives a check from the trust for her to spend on a medical expense not covered by Medicaid. Even though this distribution is for a service, is not food, shelter, or an item that would be a countable resource the following month, it is considered income because the check was payable directly to the beneficiary. *See POMS SI 01120.200 E.1.a., SI 01120.201 I.1.a.* Disbursements for gift card or gift certificates are income as well. *See POMS SI 01120.201 I.f.*

**In-kind Support and Maintenance (ISM).** Any distribution from a trust that results in the beneficiary receiving food or shelter is considered income in the month in which the benefit is received. *See POMS SI 01120.200 E.1.b., SI 00835.310.* Third party vendor payments (TPVP) are considered ISM if they result in the beneficiary receiving food or shelter. In other words, paying a landlord, an electricity bill or a restaurant directly from the trust is still ISM. *See POMS 00835.360.* More importantly and less intuitively, paying a credit card balance that resulted from purchasing food or paying a shelter expense is a TPVP and will result in ISM in the month in which the credit card payment is made. *See POMS SI 00835.360D.1., SI 01120.201 I.1.b. and d.* One exception to the food and shelter rule is food and shelter expenses made when the beneficiary is traveling.

**Food and Shelter Expenses are limited to:** Food, Mortgage (including property insurance required by the mortgage holder), Real property taxes (less any tax rebate/credit), Rent, Heating fuel, Gas, Electricity, Water, Sewer, and Garbage removal. *See POMS SI 00835.465D.1.*

**Presumed Maximum Value (PMV).** In the case that a trust distributes funds to a beneficiary that are considered ISM, the PMV of the distribution is one-third of the FBR then in effect. The monthly benefit is then reduced by one-third of the FBR plus \$20. *See POMS SI 00835.300 C.* There are times, of course, when distributions must be made for food and shelter expenses due to the circumstances in which the beneficiary is living. Consider the beneficiary who has lost a roommate or who has gotten behind in real estate taxes and faces foreclosure. There are also times when a calculated decision is made to pay these expenses. Consider the beneficiary who has a large trust and chooses to lose the PMV each month (several hundred dollars) in exchange for a much larger rent payment (perhaps several thousand dollars). In both instances, it is best to have the beneficiary sign a letter acknowledging that his or her benefits may be reduced due to the distribution and that the beneficiary requests the distribution anyway. These distributions should be self-reported by the beneficiary to the SSA. Trust administrators may consider reporting on the beneficiary's behalf so it is in a timely and accurate manner.

*\*\*Distributions for food and shelter expenses for beneficiaries not receiving public benefits are not subject to ISM scrutiny. All beneficiaries must be disabled, but not all trusts require that the beneficiaries receive public benefits.*

**Using ABLE to avoid ISM.** Achieving a Better Life Experience Act (ABLE) allows some flexibility for some beneficiaries with regard to In-kind Support and Maintenance (along with a myriad of other advantages outside the scope of this article). ABLE is created pursuant to 26 U.S.C. § 529A and allows a person who was disabled prior to the age of 26 to have an account with tax free growth opportunities much like the "529 College Savings Plans." Annual contributions that are not counted as income for public benefits purposes can be made by the individual or third party up to the gift tax exclusion in effect at that time (currently \$15,000). The first \$100,000 is not a countable resource for SSI eligibility purposes. *See POMS SI 01130.740 C.3. and 4.* Distributions from a trust to an ABLE account are not income to the beneficiary. *See POMS SI 01130.740 C.1.b. and POMS SI 1120.201 I.1.h.* At the death of the beneficiary of the ABLE account, the program will first repay Medicaid for medical assistance given to the beneficiary during the beneficiary's lifetime. *See 26 USC 529A(f) and POMS SI 01130.740 A.2.*

How does that help with ISM? Distributions from an ABLE account for Qualified Disability Expenses (QDEs) are not taxable income and are not countable income for public

benefits eligibility. *See 26 U.S.C. § 529A(c), POMS SI 01130.740 C.4.* QDEs include food and housing expenses which are specifically defined the same as shelter expenses. *See POMS SI 01130.740 B.8. and 9.* Accordingly, distributions may be made to an ABLE account for food and shelter expenses (annually up to the gift tax exclusion) and then distributions may be made from the ABLE account to the beneficiary without counting as ISM. The distributions made from the ABLE account to the beneficiary for QDEs must be spent in the month in which they are made, as any distribution remaining in the next calendar month will be a countable resource. *See POMS SI 01130.740 D.2.*

**Administrator-managed Prepaid Visa Cards.** While gift cards, gift certificates and payments to debit cards are income to the beneficiary, there is a distinct type of card that a trust can fund and a beneficiary can use for their convenience: Administrator-managed prepaid cards. To qualify for exemption from being included as a countable resource, these cards must be owned and managed by the trustee and allow the trust administrator to block certain merchants, block access to cash or block entire categories of spending. Although distributions to fund these cards are not countable income, the use of the card for food or shelter expenses will be considered ISM as if it were paid directly to the TPV, and any use of the card to obtain cash will be considered unearned income. *See POMS SI 01120.201 I.e.* Therefore, the trust administrator should monitor the spending closely, require receipts for purchases and block certain types of vendors that may be problematic for the SSI or Medicaid recipient. The use of the card may need to be suspended if purchases may cause a beneficiary to have unearned income or ISM.

**Sole Benefit Rule.** First party special needs trusts must, by federal statute and the POMS, be used for the sole benefit of the beneficiary. *See 42 U.S.C. § 1396p(d)(4), POMS SI 01120.203(D).* In addition, most third party pooled trusts are governed by master trust agreements that restrict all distributions to the sole benefit of the beneficiary. For the third party trusts which do not impose a sole benefit requirement, this section does not apply to disbursement decisions. *See POMS SI 01120.201 A.2.*

*\*\*This discussion primarily addresses whether the disbursements are income or ISM for purposes of public benefits, but the trust administrator must still exercise discretion when reviewing a payment request to determine if the request is a prudent use of the trust. In other words, just because it is allowed by the POMS, does not mean it should be approved. (See Discretionary Distributions below).*

**Travel expenses:** Travel expenses for the beneficiary are allowable disbursements. And, in fact, food and shelter while traveling are not ISM. What about other types of travel expenses?

**Third party travel expenses to accompany beneficiary:** Travel expenses for third parties to accompany the beneficiary, even family members, are now expressly allowed. The companion must be necessary to support the beneficiary's travel. In the case of a minor who cannot travel alone, a companion is considered necessary. Only as many traveling companions as are required for the safety of the beneficiary are deemed necessary. For example, if a parent accompanies a minor beneficiary, that parent's expenses can be properly paid. If the whole family accompanies the minor beneficiary, the other family members' expenses cannot. *See POMS SI 01120.201 F.3.b.* If a beneficiary is severely disabled and needs more than one companion to accompany him or her, while the POMS do not require this, a medical opinion that the other companions are necessary would be best practice.

**Third party travel expenses to visit a beneficiary:** In addition to allowing third party travel expenses to accompany the beneficiary, travel expenses to visit the beneficiary to ensure the safety and well-being of the beneficiary also do not violate the sole benefit rule. *See POMS SI 01120.201 F.3.c.*

**Purchasing goods or services for the beneficiary that also benefit others:** In April of 2018, the POMS were revised to specifically address the problem of how to interpret "sole benefit." Distributions can be made to third parties to purchase goods or services that benefit the beneficiary even if others also benefit. Some examples of distributions that are for the sole benefit of the beneficiary but collaterally benefit others are: buying a television or Xbox and paying for subscription services to use them even though other people may watch tv or play Xbox; buying a house or furniture for the beneficiary when others live in or use the house or furniture; paying for house cleaning services when others live in the same residence. *See POMS SI 01120.201 F.3.a.*

However, goods that require registration or titling must be registered or titled in the beneficiary's name. For example, a vehicle must be titled in the beneficiary's name unless state law does not allow as is sometimes the case when the beneficiary is a minor or does not have a driver's license. If the vehicle is titled in the name of a third party, the trust administrator be required by state Medicaid rules to hold a lien on the vehicle. *See POMS SI 01120.201 F.3.a.*



**Service providers:** Whether for medical services, companion care, cleaning services or any other service for the sole benefit of the beneficiary, distributions to third parties for services are allowed. The service provider can be a family member. *See POMS SI 01120.201 F.3.a.* Prior to making distributions for service providers, special consideration should be given to the amount, the payee and the employment relationship.

\*Form 1099: All payments to individuals or unincorporated business for services and rental payments that aggregate \$600 in a calendar year must be reported to the IRS on Form 1099MISC. The trust administrator should obtain a signed W-9 from the payee prior to making distributions that total \$600 in any calendar year to confirm the payee's taxpayer identification number. *See Treas. Reg. § 1.6041-1.* Failure to file Form 1099MISC can result in penalties for each informational return that is not filed.

\*\*Employment relationship: The distinction between independent contractor (requiring a 1099) and an employee (requiring withholdings, insurance and taxes, etc.) is a fine line. In *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 232 Cal. Rptr. 3d 1, 416 P.3d 1 (2018), the California Supreme Court laid out a three-part test to determine this question. While it is only precedent in California, it lays out clear guidelines that would serve trust administrators well to review. The three prong test asks is the worker “free from the control and direction” of the business, “perform[ing] work that is outside the usual course of the hiring entity’s business” and “customarily engaged in an independently established trade, occupation, or business?” *Id.*

In most cases with trust beneficiaries, the real issue is who is the “business?” Is it the beneficiary or the trust? Most caregivers are under the control and direction of the beneficiary and performing work the beneficiary regularly needs and are only providing that work for the beneficiary. There is significant liability for failure to classify an employee and thus make the proper withholdings and payments. The safer course of action is certainly to use an employment service which will not only reduce this liability but will also provide safety for the beneficiary. Employment services typically run background checks on employees, provide advice about minimum wage and overtime, and provide workers' compensation and liability coverage.

**Payments and Reimbursements to Third Parties.** Distributions to third parties, or reimbursements to third parties, that result in the beneficiary's receipt of goods (other than cash),

are not income to the beneficiary *unless* the goods would be countable resources in the month after receipt. *See POMS SI 01120.200 E.1., SI 00815.550 A.* If the item would be a countable resource if retained into the month after receipt, the disbursement is in-kind income, and the item will potentially cause the beneficiary to be over the resource limit in the following month. For instance, if a distribution is made to purchase a beneficiary a second vehicle (only one vehicle is exempt – *POMS SI 01130.200*), that disbursement would be in-kind income in the month the purchase was made, and the second vehicle would be a resource in the following month. *See POMS SI 01120.200 E.1.a.* Conversely, if a distribution is made to a third party to purchase, or to reimburse for the purchase, of a computer for the beneficiary, that distribution is not income because the computer will not be a countable resource in the following month. *See POMS SI 01110.210 B. for a full list of resource exclusions. See Large Purchases below for a more detailed discussion of income and home purchases or renovations.*

**What is Not Income?** Whether paid to reimburse a third party or by TPVP, these disbursements are generally not income to the beneficiary: Educational expenses, therapy, transportation, entertainment, phone bills, cable bills household goods and personal effects, recreation, travel, medical services, caregiver services, glasses, dental work, camps, clothes, payments for exempt resources and so forth. *See POMS SI 01120.200 E.1.c.*

### **Difficult Discretionary Decisions:**

If the POMS do not consider the disbursement income or ISM and the goods will not become a resource (*See Large Purchases below*), does that mean it should be approved? Not necessarily. A trust administrator owes a fiduciary duty to the beneficiary to prudently exercise its discretion when making disbursements. The beneficiary must be protected, and the disbursement must be a good use of the assets after weighing the value of the trust and the expected longevity and goals of the trust.

**Beneficiary's Disability.** The disability of the beneficiary should be a primary focus of the determination process. Distributions for beneficiaries who have mental illness, who are developmentally or intellectually delayed or exhibit other factors that may mean the beneficiary cannot speak for him or herself must receive additional attention. Sometimes the beneficiary is dependent on the advocate and fears retaliation for not requesting disbursements. The

exploitation of trust beneficiaries is not uncommon. The trust administrator should have a working relationship with a fiduciary for the beneficiary, a trusted advocate for the beneficiary or a case manager, whether on staff or hired independently to help assess the beneficiary's needs and circumstances. Payment requests should be signed and submitted through a mechanism that ensures authenticity. Receipts or documentation should be submitted and carefully reviewed for accuracy and authenticity. Names and addresses on bills and invoices should match the beneficiary or the third party being reimbursed. The reimbursement should match a bank statement or canceled check if there is any concern. Calling the third party vendor to verify its existence is not outside the scope of good practices.

**Minors.** The parental obligation of support is well settled law. Parents have a duty to support to their children and that minor children should not be asked to pay for the family's shelter, food, transportation, clothing or furniture; however, these types of requests present themselves regularly. Two main factors the trust administrator should consider are 1) whether the family is in unusual dire straits (i.e. COVID presented many problems with unemployment and parents who could not work because disabled children were not in school); and 2) whether the expense is actually support or whether it is disability related. For instance, a wheelchair accessible vehicle may be approved over a request to buy a family car. And, renovations to a home to make a bathroom accessible may be approved before a request for a new HVAC unit for the house.

But the trust administrator should not lose sight of the fact that the minor beneficiary should not be asked to live in poverty because of the circumstances of a under privileged family struggling to make ends meet. Goods and services can be enjoyed for others without violating the sole benefit rule so it would not be categorically negligent to buy furniture for the house, for instance. *See Sole Benefit Rule above.* These are difficult discretionary decisions.

**Large purchases.** Not only must the trust administrator consider the income rules, but it must also consider the resources exclusions to the \$2,000 resource limit. Purchases for non-exempt items will be income in the month of purchase and will be a countable resource in the following calendar month potentially disqualifying the beneficiary from benefits eligibility. *See POMS SI 01120.200 E.1.a.*

Two of the more common exempt resources that require considerable discretion are houses and automobiles.

**Vehicles:** One vehicle used for transportation is excluded from resource calculations regardless of value. It must be used by the beneficiary for transportation. A vehicle, registered or unregistered, can be an automobile, motorcycle, boat, snowmobile, animal-drawn vehicle or even animals. *See POMS SI 01130.200 B.1.* It must also be for the beneficiary's sole benefit, requiring titling in the beneficiary's name, if possible. *See POMS SI 01120.201F.3.a.* Some state Medicaid agencies require pre-approval for the purchase of vehicles and require a lien on the title of the vehicle if the trust does not take title to the car. The trust administrator must consider and use discretion when determining how much collateral benefit other family members may have from the vehicle and whether parents should be providing transportation to the beneficiary. Vehicles that are specially equipped to accommodate the beneficiary's disability are more likely an easier decision regardless of other family members' use and parental obligations.

Practical considerations are determining fair market value, requiring liability and collision insurance, requiring inspections and warranties, and whether to require a lien to prevent a sale or title loan by the beneficiary. Moreover, if the beneficiary cannot drive, is an ATV or golf cart or scooter an acceptable purchase? Purely recreational vehicles are not excluded, but may be the beneficiary's sole source of transportation. *See POMS SI 01130.200 C.3.*

**Real Estate:** An even larger purchase for most beneficiary's would be a home in which he or she would live. The shelter itself, the land on which the shelter is located, and any related buildings on the land are excluded resources. *See POMS SI 01130.100A.1.* However, unlike a vehicle purchase, in the month in which the house is purchased whether owned by the beneficiary or the trust, the distribution is considered ISM and will reduce the beneficiary's income by the PMV. If the home is purchased by mortgage, every month in which a mortgage payment is made, the distribution is considered ISM and will reduce the beneficiary's income by PMV. *See POMS SI 01120.200 F.*

Some very important considerations for such a large purchase are whether the beneficiary can live independently and is set up to successfully own and maintain a home. Some beneficiaries may be exploited by others once living alone; some may not be able to financially or logistically maintain the home; and others may simply not be able to maintain a safe environment by themselves. A case manager may be used to conduct an independent living skills assessment or to assess the family's living situation. Sometimes a social worker will draft discharge plan upon discharge from a residential or hospital setting that the trust administrator

can use in assessing the beneficiary's ability to live alone and maintain a residence. If the trust has sufficient assets to maintain the house during the beneficiary's lifetime, it may be prudent to hire case management services to help manage the logistics and finances of home ownership. The assets must last the lifetime of the beneficiary to pay homeowner's insurance and real estate taxes if tax abatement is not available.

Practically speaking, if the concept of a purchase is approved, prior to approval, the trust administrator should receive an appraisal, an inspection, and a title report; and then, obtain homeowner's insurance (liability and replacement), title insurance and carefully review the settlement statement for appropriate charges.

***Renovations to Real Property:*** When renovations, repairs or maintenance are done to real estate owned by the beneficiary (or the trust) those renovation are not ISM to the beneficiary. *See POMS SI 01120.200 F.3. c.* A more interesting discretionary decision is whether to approve renovations, repairs or maintenance to real estate not owned by the beneficiary but being used by the beneficiary as his or her residence. The trust administrator must consider the parental obligation of support, the sole benefit rule (and the collateral benefit exception), and the needs of the beneficiary, especially for renovations to accommodate the beneficiary's disability. Renovations are not one of the clearly delineated Shelter Expenses in POMS SI 00835.465D.1., so it reasons that the distribution for renovations would not be ISM, but is it exempt from income as a payment to a third party that results in goods or services to the beneficiary?

### **Practical Considerations:**

**Review process.** If possible, a multi-layered approval process is ideal to avoid simple and easy human error. Each approver should be asking:

- 1 – What benefits does the beneficiary receive?
- 2 – Will the disbursement affect eligibility for any benefits?
- 3 – What is the beneficiary's disability?
- 4 – If impaired cognitive or mental abilities, who speaks for the beneficiary?
- 5 – Is the beneficiary a minor?

6 – If so, who speaks for the beneficiary and does the disbursement supplant the parental obligation of support?

7 – What is the value of trust? And, what is the rate of spending? How old is the beneficiary and/or what is the goal for how long the trust will last?

8 – Do the provided invoices, estimates and receipts substantiate the request and meet internal guidelines for authenticity?

9 – If the disbursement is a large purchase or one requiring extra scrutiny, should it be brought to a committee for additional review?

10 – If the request is for a disbursement related to a living expense or home, does the beneficiary own the home? Is the request disability related? Who else lives in the home?

**Committee decisions.** Having a standing committee to review certain disbursements can serve to not only provide large, controversial or unusual request an extra layer of scrutiny, but can also serve to relieve the responsibility of one person making these decisions. It provides an opportunity to obtain other points of view on discretionary decisions. The committee may be comprised of employees, management or board members for pooled trusts.

**Denials.** Denied requests should be communicated in writing with a clear explanation for the reason. If there is an opportunity to change the denial (i.e. additional information necessary) that should be noted in the communication.

**Appeals process.** An appeals process should be clearly stated in writing either on materials provided to the beneficiary upon joining or at any time a denial is made. The appeals process should allow the beneficiary the opportunity to provide a written explanation with any additional documentation to justify the request.

## **Termination of Trusts – When, What and How:**

**Early Termination – Allowable Disbursements.** First party trusts may contain provisions allowing for the termination of the trust prior to the death of the beneficiary; however, there are restrictions regarding the ultimate distributions to or for the benefit of the beneficiary, who has the authority to make the decision to make an early termination and, in addition, there

are only three distributions that can be made prior to final distribution to the beneficiary. They are: 1 - taxes due from the trust to the State(s) or Federal government due to the termination of the trust; 2 - reasonable fees and administrative expenses associated with the termination of the trust; and, 3 - repayment to the State(s) up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s) (to the extent not retained by the nonprofit organization for pooled trusts). *See POMS SI 01120.199.*

**Transfers to a Secondary Trust meeting the requirements of 42 USC 1396p(d)(4).**

Transmittal 64, issued October of 2020, clarified in POMS SI 0120.199 that transfers to (d)(4)(A) and (C) trusts are allowable without further termination provisions. Previously, there existed a “pooled trust to pooled trust” exemption from the early termination requirements, but the POMS were silent as to other transfers such as from a (d)(4)(A) trust to a (d)(4)(C) trust.

**Remainder Distributions for First-Party Trusts.** The primary consideration for distributions after the death of the beneficiary is the State Medicaid reimbursement provision. The details of this requirement are found in POMS 01120.203B.10. for individual special needs trusts and D.8. for pooled trusts. The state (or states) that provided medical assistance to the beneficiary at any time during the beneficiary’s lifetime (not just during the existence of the trust), must be repaid up to the amount remaining in the trust after the allowable expenses are paid. Those allowable expenses are taxes due from the trust to the State(s) or Federal government due to the termination of the trust and reasonable fees and administrative expenses associated with the termination of the trust. *See POMS SI 0112.203.D.1.* If more than one state has provided medical assistance and funds are not sufficient to repay all of the states, the states must be reimbursed on a pro-rata basis.

After the Medicaid repayment and to the extent there are funds remaining, (d)(4)(A) trusts will make distribution to specific named residual beneficiaries. If Medicaid repayment is made and to the extent there are funds remaining, (d)(4)(C) trusts will make distribution to specific named residual beneficiaries.

**The Pooled Trust Twist.** In contrast to (d)(4)(A) trusts which **must** repay Medicaid, the nonprofit organization which administers the (d)(4)(C) trust may retain some of or all of the remainder funds to further its charitable mission. The authority is found in the federal statute 42 USC 1396p(d)(4)(C) which states “*to the extent that amounts remaining in the beneficiary’s account upon the death of the beneficiary are not retained by the trust...*”

There is a disparate array of options implemented by pooled trusts in this regard. Many attorneys mistakenly believe that all pooled trusts retain the entire remainder. Some do, but in reality there are many different remainder policies that should be considered when investigating pooled trusts. Some pooled trusts allow the grantor to allocate a percentage to the pooled trust when creating a subaccount. Some retain certain percentages based on the number of years the account is in existence. Some pooled trusts only retain the remainder if the remainder amount is less than the Medicaid repayment, so the successor beneficiaries would always receive funds if there would be funds left after the Medicaid repayment.

In addition to the variety of remainder policies, many states have promulgated rules that either restrict the percentage or prohibit the retention of the remainder entirely. When requesting the repayment amount from the state Medicaid agency, the policy regarding pooled trust retention should be requested as well.

**Remainder Distributions for Third-Party Trusts.** Because there is no Medicaid repayment for third party trusts of any kind the remainder beneficiaries and pooled trust remainder policies are dictated by the terms of the trust document. Testamentary and inter vivos trust agreements name successor beneficiaries who will receive the final disbursements at the death of the disabled individual, after paying costs associated with the winding up of the administration of the trust. There is no limitation on what expenses can be paid other than those imposed by state law or the terms of the trust document.

Third party pooled trusts, and even testamentary or inter vivos trusts being administered by a nonprofit organization, may allow the nonprofit to retain part or all of the remainder for the charitable mission of the organization. Much like the first party agreements, there is a wide variety of remainder policies to investigate. Some pooled trusts retain 100% of the remainder for the nonprofit organization's charitable purposes. Some pooled trusts allow the Grantor to determine an amount to be distributed to the named successor beneficiaries and an amount to be distributed to the nonprofit organization. Some pooled trusts distribute the entire remainder to the named successor beneficiaries.



**Pooled Special Needs Trusts –  
Disbursement Best Practices**

*Presented by:*  
*Joanne Marcus, MSW and Karen Dunivan Konvicka, J.D.*  
*of Commonwealth Community Trust (CCT)*

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**Joanne Marcus, MSW**

Joanne Marcus has a master's degree in social work and serves as the President and CEO of Commonwealth Community Trust (CCT). Ms. Marcus brings to CCT 37 years of experience in nonprofit administration and served as the Executive Director of CCT for 21 years before being named President and CEO. Under the leadership of Ms. Marcus, CCT has grown to serve 2,000 trust beneficiaries throughout the United States. Ms. Marcus is frequently asked to speak to professional groups and community organizations nationwide.

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**Karen Dunivan Konvicka, J.D.**

Karen Dunivan Konvicka serves as Director of Client Services and General Counsel for Commonwealth Community Trust (CCT). When in private practice, Ms. Konvicka specialized in public benefits law and estate and trust planning and administration for individuals with special needs. Ms. Konvicka maintains her memberships in the Virginia State Bar, National Academy of Elder Law Attorneys (NAELA), and the Virginia Academy of Elder Law Attorneys (VAELA) and enjoys continuing to educate attorneys and families about special needs planning from the pooled trust perspective.

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**Public Benefits – Provided to the Disabled and Impoverished**

**Disability:** Public benefits most often associated with SNTs are all predicted on disability as defined in 42 USC §1382c(a)(3).  
*See also CFR Part 416.*

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**Public Benefits Primer**  
*Disability as defined by the Social Security Administration (SSA)*

Adult	Minor (under 18)
<ul style="list-style-type: none"> <li>To be disabled within the meaning of the Social Security Act, the individual must have a severe, medically determinable physical or mental impairment which as or is expected to last for one year or to result in death.</li> <li>The impairment must make the individual unable to engage in "substantial gainful activity."</li> </ul>	<ul style="list-style-type: none"> <li>The child must have a physical or mental condition(s) that very seriously limits his or her activities.</li> <li>The condition(s) must have lasted, or be expected to last, at least one year or result in death.</li> </ul>

Source: Social Security Handbook ([disability.gov](http://disability.gov))

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**Supplemental Security Income (SSI)**  
*What happens if one is disabled and impoverished?*

- Monthly monetary allowance that is intended to pay for food and shelter
- Means-tested benefit for the disabled who are impoverished
- See 20 C.F.R. Part 416 Subpart D and K



**Adults are eligible if they are:**

- Disabled
- Have no more than \$2,000 in countable resources

**AND**

- Below the Federal Benefit Rate – currently \$794

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## Social Security Disability Insurance (SSDI)

A monthly benefit from SSA

Based on a worker's social security withholdings while working just as social security benefit at retirement is based on withholdings

Adults are eligible for SSDI if they are disabled before retirement age and accumulated enough quarters of withholdings based on age

Government's version of disability insurance

Worker gets out based on what is paid in

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## Medicaid

- Federal health insurance program for the aged, blind and disabled
- Administered by the States – some states have different eligibility requirements
- Administered through the local Department of Social Services
- For simplicity's sake – eligibility for Medicaid is the same as SSI
  - Cap on resources and income

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## Medicare



Federal health insurance program for:

- People who are 65 or older

**AND**

- The disabled who are receiving SSDI and have received SSDI for 24 months

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Pooled Special Needs Trusts (PSNTs) –  
Not Countable Resources



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**What is a PSNT?**

- Trust arrangement for disabled individuals – often receiving public benefits
- Created by one Master Trust Agreement
- Clients “join” by signing the Joinder Agreement
- Lower fees and lower minimum funding requirements that most financial institutions and professional Trustee options

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**SNTs: Individual vs Pooled**

Individual	Pooled
<ul style="list-style-type: none"> <li>• Typically administered by a family member or institutional trustee</li> <li>• Although most do, beneficiaries are not required to have a specific disability</li> <li>• Trustee must file taxes and other regulatory filings</li> <li>• Trustee may not have knowledge of the rules governing Supplemental Security Income (SSI) and/or Medicaid</li> <li>• First party is sometimes called d(4)A</li> </ul>	<ul style="list-style-type: none"> <li>• Administered by a non-profit organization</li> <li>• All beneficiaries have a disability</li> <li>• Assets are “Pooled” to provide lower administrative fees, opportunity for higher returns on investments and a smaller minimum account requirement</li> <li>• Trust tax returns and filings completed by nonprofit</li> <li>• Staff has expertise in public benefits rules</li> <li>• First party is sometimes called d(4)C</li> </ul>

Each has advantages that require careful considerations to determine which option best meets your client’s needs.



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### Two Types of PSNTs:

Third-Party	First-Party
Grantor can be any third-party individual such as a parent, family member or friend.	Federal Statute requires that the Grantor be the individual, the individual's guardian, parent, grandparent, or Court. The authority granted by a Power of Attorney is accepted.
Typically funded by Estate Plans, Life Insurance Policies, Investments, Retirement Accounts or other assets.	Funds belong to the Beneficiary, usually from a personal injury or workers' compensation award, direct inheritance, the beneficiary's own funds or Social Security back payment.
Revocable or Irrevocable	Irrevocable
NOT subject to Medicaid payback	Subject to Medicaid payback
No Age Limitation	A transfer of assets penalty may apply if the Beneficiary is 65 years old or older (varies by state). Contact CCT for more information.


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### Source of Law: *Third-Party PSNT* POMS SI01120.200D.2

The trust must be:

- For the Beneficiary's sole benefit
- Irrevocable after funding
- Funded by third-party assets



The Trustee must have sole and absolute discretion.


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### Source of Law: First-Party PSNT

- Omnibus Reconciliation Act of 1993
- Created by Federal Law 42 U.S.C. §1396p(d)(4)(A) – (C)
  - (d)(4)(A): individual special needs trusts
  - (d)(4)(C): pooled special needs trusts
- Code of Federal Regulations: 20 C.F.R. §416
- SSA-POMS-Program Operations Manual System
  - SI 01120.203D.
- State Laws and Regulations for Medicaid recipients
  - Medicaid Manuals


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*Distributions from SNTs –  
Is it Income?*

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**ABLE Accounts**

- Modeled after 529 College Savings Plan
- Not a countable resource, with some limitations

Some PSNTs refer clients with small accounts to ABLE, but this can also be used for the following...

***Trust to ABLE Transfers***  
**Avoidance of In-kind Support and Maintenance Reduction**

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**Reduction of Benefits**



In-kind support and maintenance or payment for shelter expenses by any third-party causes a reduction in SSI benefit

**Payment from a PSNT is considered a third-party and causes this reduction.**

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### ABLE Account- *Qualified Disability Expenses*

Payments from an ABLE account for shelter expenses are classified as QDEs and do not cause a reduction in benefits.



**Benefit Reduction**

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### Solution



Remember: payments from the ABLE account must be spent within the calendar month or the funds become a countable resource.

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### Examples of How Funds Can Be Spent

- ✓ Medication and Devices
- ✓ Medical Services
- ✓ Assistive Technology
- ✓ Education
- ✓ Vehicle
- ✓ Housing
- ✓ Home Modifications
- ✓ Home Repairs and Upkeep
- ✓ Case Manager
- ✓ Caregiver Services
- ✓ Clothing
- ✓ Household Bills
- ✓ Care Providers
- ✓ Vacations
- ✓ Family Travel
- ✓ Mileage
- ✓ Pre-Need Burial and Funeral Expenses



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**Funds Can Be Disbursed to the Following:**



Vendor or service provider



Retail Merchant



An advocate who has purchased goods and services on behalf of the Beneficiary



A credit card company for goods and services purchased on behalf of the Beneficiary



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**Pre-Paid Credit Card**


Some organizations offer a pre-paid credit card option.



- Linked directly to the trust account
- Helpful option for the beneficiary to purchase necessities
- Gives the beneficiary a sense of independence



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**Guidelines for Disbursements**

When considering whether to approve a disbursement request, the following best practices can be used as a guide for decision-making:

For a beneficiary receiving SSI and/or Medicaid, will the request jeopardize benefits?	Is the request for the sole benefit of the beneficiary?	Are there adequate funds in the trust to cover the request?
Is the request prudent?	For a Third-Party Trust, is the request consistent with the intent of the Grantor(s)?	Is the request consistent with the Budget and Objectives?



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### Disbursement Request Process

**Advocate(s) Requests a Disbursement**  
\*Backup documents such as receipts should be required.

**Requests are Reviewed**

**Approved Disbursement Requests**

**Questions or Concerns**  
\*Every effort should be made to contact the Advocate(s) quickly.

**Denied Requests**  
\*Should be communicated to the Advocate(s) verbally and/or in writing.

\*Some organizations have a website that allows the advocate to submit requests securely through a portal.

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### The Decision-Making Process

**Advocate(s) submits a disbursement request with supporting documentation.**

**The request is reviewed.**

**An in-house Disbursement Committee is recommended to review requests of a complex nature.**

**A Board of Directors Disbursement Committee can be consulted as needed.**

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### Appeals Process

- A written grievance policy should be in place to ensure that clients have an easy and accessible way to provide feedback.
- It is recommended that written complaints be filed within 30 days of the denied request.
- Written description of the complaint and subsequent related events should be maintained in the beneficiary's case record.

\*It is important to welcome all client comments, complaints, and suggestions that will improve the client experience.

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Termination of Trusts –  
When, What and How?

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**Early Termination – Allowable Disbursements**

Three Distributions that can be made prior to final distribution:

1. Taxes
2. Reasonable Fees and Administrative Expenses
3. Repayment to the States (*SI 01120.199*)

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**Transfers to a Secondary Trust:**  
*Meeting the requirements of 42 USC 1396p(d)(4)*

Transmittal 64, issued October of 2020, clarified in POMS SI 0120.199 that transfers to (d)(4)(A) and (C) trusts are allowable without further termination provisions.

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### Third-Party PSNT Remainder Policies

In some cases, the Trust Administrator will keep the entire remainder while others keep a percentage, and a few keep none, distributing all the remainder to the successor beneficiaries.

**\*Pre-need burial and funeral expenses should be paid for during the Beneficiary's lifetime.**



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### First-Party PSNT Remainder Policies: Medicaid Recipient Beneficiaries



- Federal statute allows the non-profit trust administrator to retain the remaining funds.
- Each state interprets this differently and promulgates rules dictating what percentage if any, the PSNT can retain.
- Within the regulations of the individual states, many PSNTs retain the entire balance.
- Others keep the remainder only if the Medicaid repayment is greater than the remaining balance which allows successor beneficiaries to receive the remainder after the Medicaid repayment is satisfied.
- Some allow families to choose at the time of joining.

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### First-Party PSNT Remainder Policies: Non-Medicaid Recipient Beneficiaries

- Some nonprofit organizations retain the balance or a percentage.
- Some PSNTs, distribute the remainder to the designated Successor Beneficiary on the Joinder Agreement.



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### Death of the Beneficiary: *First-Party PSNT*

The following chart illustrates distribution upon the death of the Beneficiary:

Non-Medicaid Recipient	Medicaid Recipient
<ul style="list-style-type: none"> <li>Remaining funds are distributed to the successor or contingent Beneficiaries or retained by nonprofit Trust Administrator.</li> </ul>	<ul style="list-style-type: none"> <li>Medicaid is repaid for its services to Beneficiary</li> <li>Remaining funds are distributed to successor or contingent Beneficiaries</li> <li>Or, nonprofit Trust Administrator retains remainder.</li> </ul>

Details of the State Medicaid Reimbursement Provision can be found in POMS 01120.2038.10.

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### Death of the Beneficiary: *Third-Party PSNT*



Funds remaining in the Beneficiary's trust account at the Beneficiary's death are distributed to the successor or contingent Beneficiary(ies) named on the Joinder Agreement after administrative fees are paid. Some PSNTs retain all or a portion of the remainder for charitable purposes.

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### Fact Pattern #1

- Christopher is a 30-year-old trust beneficiary, disabled from a car accident in his late 20s
- Christopher's mom is his advocate
- Mom calls because Christopher has been repeatedly asking for spending money (gas, cigarettes, etc.)



**What are the payment options?**

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### Fact Pattern #2

- Bob and Amy establish Wills providing testamentary SNTs for their disabled daughter, Erin
- They also created a Third-Party inter vivos SNT
- Their daughter, Colleen, is trustee of the testamentary trust and successor trustee of the Third-Party inter vivos trust
- Bob and Amy die and daughter, Colleen, is now married with a busy job and three young children
- Colleen has decided not to serve as Trustee for her sister

*What language would need to be in the documents for Colleen to easily transfer the administration of both trusts to a PSNT?*



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### Fact Pattern #3

- Matthew is 12 years old. His disability is a result of a birth trauma for which he received a \$2 million dollar recovery
- Since birth, his parents divorced; mom remarried and had two more children; dad remarried a woman who has three minor children
- Mom calls about a trip to Disneyland for Matthew to celebrate his 13<sup>th</sup> birthday
- They are all planning on going to celebrate him becoming a teenager since everyone gets along so well

*What will and can the Trust pay for and for whom?*



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### Fact Pattern #4

- Olivia is a 14-year-old quadriplegic
- She received a \$7 million dollar recovery from a car accident where her mother died as a passenger
- Olivia lives with her dad, her younger sister, her older brother and her uncle (her dad's brother)
- Dad owns the home and submits all the household bills to the Trust for payment, including the mortgage payments and real estate property taxes

*What can and will be paid out of the trust? Does the answer change if Olivia is 22 years old?*



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# **2021 Fundamentals of Special Needs Trusts Administration Webinar**

**Friday, April 30, 2021  
3:20 P.M. – 4:10 P.M.**

**Lessons Learned From the Pandemic**

Presenter:

Megan Brand and Shirley Whitenack

- Materials
- PowerPoint

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# **Lessons Learned from the Pandemic**

**Megan Brand  
Shirley Whitenack, Esq.  
Stetson University Spring Webinar, 2021**



## **Introduction**

March 2021 marked the anniversary of the United States “shutting down” in response to COVID-19 world-wide pandemic. On the day we packed up our offices for what we thought would be a week or two of remote work, we could have never imagined that it would have been an ordeal lasting more than year. We were quickly thrust into wearing masks, mastering zoom and other video platforms, some of us juggling homeschooling our children and needing to know what a six foot “social distance” looked like. Of course, we also could not have imagined the death toll caused by the virus, the mental toll it took on us and the people we serve and the political divide our country would face.

While some may be exhausted at the sheer mention of COVID-19, there are so many topics that we must continue to learn about and contemplate- from the impact on the people we serve, their public benefits, their physical and mental health, service delivery, initiatives from the new administration and vaccinations from the varying perspectives of an attorney and trust administrator. From the employer perspective we’ll also review vaccinations, changed processes to work more efficiently and morale in the remote or hybrid work environment.

## **People we Serve and the Impact of COVID-19**

Few would argue that people with disabilities and older adults have been two of the populations who have been most impacted by COVID-19 by the risks to their health and well-being and the restrictions on their daily lives. These individuals and other vulnerable populations have been encouraged to stay home and away from others to the extent possible in order to avoid contracting the virus, which can be more severe and more likely to result in death for them. Unfortunately, despite these restrictions, people who are older and have other health

complications have had the highest rates of mortality. This has led to fear, isolation and loss of hope for many.

One of the silver linings for Medicaid recipients is the “locked-in” period that was first developed with the Families First Coronavirus Response Act (FFCRA). The FFCRA states that all states claiming the temporary Federal Medical Assistance Percentage (FMAP) increase under the FFCRA must maintain beneficiary enrollment (continuation of Medicaid Benefits) through the end of the month in which the Public Health Emergency for COVID-19 ends. The Public Health Emergency concerning the COVID-19 was declared on January 31, 2020 and most recently extended on January 7, 2021. A recent Colorado Medicaid newsletter stated that they expect the PHE to continue through 2021.

This continual Medicaid coverage is a definite benefit to Medicaid recipients so that they do not have additional stressors during the public health emergency. However, it is yet to be seen how Medicaid Agencies will consider problems after the time of the locked in benefits. (Ex: someone is over resourced for 6 months due to not spending.) Further, applications for new benefits have been delayed in some states due to Medicaid staff working remotely, difficulties in performing in-person assessments, etc.

In addition to the benefits of the FFCRA, the American Rescue Plan Act (ARPA) of 2021 has additional benefits for Medicaid recipients. It includes the following, but not exhaustive benefits:

- Substantial new incentives to the 12 states that have not yet expanded their Medicaid Program under the Affordable Care Act.
- Funding for rural healthcare programs impacted by COVID-19.
- Resource allocation for Community Health Centers to specifically address the COVID-19 Vaccinations.
- Mandates COVID-19 Vaccination coverage without Medicaid cost-sharing.
- Increases FMAP for Home and Community Based Services (HCBS), including Program of All Inclusive Care for the Elderly (PACE) by 10% beginning April 1,

2021 and ending March 31,2022. States receiving the FMAP increase must enhance, expand or strengthen their HCBS programs during this time.

- Funding for Mobile Crisis Intervention services and a variety of other state and local programs for mental health and substance abused disorders.

Throughout the pandemic there have been three economic stimulus packages that have resulted to direct payments to individuals. Social Security Beneficiaries have also been recipients of these Economic Impact Payments (EIP). Most importantly, Social Security and Medicaid have not counted the EIPs as Income and recipients have given 12 months for each of the three payments to be spent before they are counted towards the resource limit. Of course, for people who are frugal spenders, this has created a new challenge to spend down these funds. Some individuals have elected to make additional contributions to their first party pooled or individual trusts to stay under the limits and avoid having to monitor these funds and dates.

These Economic Impact payments have created even more challenges for organizations or individuals who are serving as Representative Payee (oftentimes entities serving as trustee for people with disabilities also serve as Organizational Representative Payees). One organizational Rep Payee reported receiving the EIPs in the form of a debit card for both the second and third stimulus package for over 250 individuals. This presented multiple problems since these cards could not be managed and had to be converted to cash. Additionally, some Medicaid Agencies are requiring that the EIPs be kept in a separate sub-account for tracking purposes. Finally, even though the Social Security Administration states that the funds are not the responsibility of the Representative Payee, the Rep Payee is still a fiduciary and feels obligated to manage these funds in a prudent way or track down payments for people who do not receive them when they do not have the ability to contact the Internal Revenue Service on their own.

COVID-19 has also had a great impact on our service delivery as trustee, attorney, etc. For much of the past year, individuals were under the guidelines of the Centers for Disease Control and local Departments of Public Health and Environment. These entities placed many restrictions on gatherings or meetings with people outside of their residences. Further, nursing homes, assisted living facilities and other congregate residential settings developed strict guidelines for who was allowed in the building and what visits were allowed. Even within these facilities, residents were confined to their bedrooms with all of their care and meals coming to them. One Nursing Home Ombudsman<sup>1</sup> reported that what many individuals have experienced is similar to Stockholm Syndrome and they are finding it difficult to encourage people to leave their rooms now that some restrictions are beginning to loosen. The Ombudsman also reported that the affects of the COVID-19 pandemic on mental health of residents is still fully unknown but is of great concern to family members and especially to the National Consumer Voice for Quality Long-Term Care (Consumer Voice). Consumer Voice, which is the leading national voice representing consumers in issues related to long-term care, published the results of a survey of family members<sup>2</sup> and reported these key findings of the devastating affects of the COVID-19 Lockdown:

- 85% noted a decline in physical abilities.
- 87% indicated their loved one's physical appearance had declined.
- 91% of reported that their loved one's demeanor (mental status) had declined.
- 40% indicated their loved ones were missing personal belongings.
- 69% indicated the facility did not appear to have sufficient staff to care for residents.
- 10% observed facility staff not wearing or properly using personal protective equipment (PPE).

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<sup>1</sup> In an interview with one of the authors.

<sup>2</sup>[https://theconsumervoice.org/uploads/files/issues/Devastating\\_Effect\\_of\\_Lockdowns\\_on\\_Residents\\_of\\_LTC\\_Facilities.pdf](https://theconsumervoice.org/uploads/files/issues/Devastating_Effect_of_Lockdowns_on_Residents_of_LTC_Facilities.pdf)

In addition to the barriers of being able to physically see people, many people with disabilities and older people have more barriers to accessing technology as a substitute. This may be due to their cognitive or physical abilities or due to their access to such technology.

Finally, the ways in which we do business for our beneficiaries, especially as it relates to signing documents, has also felt the affects of the COVID-19 pandemic. More and more legal documents are being signed electronically through docusign or adobe pro or other such tools. Further, many states are considering or passing legislation for remote notarization when it is not possible for the notary to be physically present with the signer. Similarly, trustees are faced with decisions to make in re: the electronic signing of trust documents and bank accounts. Most often, the entity controlling the document (financial institution, Social Security, Medicaid, etc.) will be the one to make the final decision in re: if an electronic signature will suffice or if a “wet” signature is required.

### **The Interplay between Federal Laws and COVID-19 Vaccinations**

The United States Equal Employment Opportunity Commission (“EEOC”) is the federal agency that enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act (which, in addition to including the requirement for reasonable accommodation and non-discrimination based on disability, also includes rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act and the Genetic Information Nondiscrimination Act.

Title I of the ADA applies to private employers with 15 or more employees, state and local government employers, employment agencies and labor unions. The EEOC laws apply during the pandemic but they do not hinder employers from following guidelines made by the Centers for Disease Control and Prevention (“CDC”) or state or local public health authorities about steps employers should

take during the pandemic. The EEOC website answers many questions employers have regarding what they can and cannot do during the pandemic.

According to the EEOC, employers covered by the ADA may ask employees if they are experiencing symptoms of the COVID-19 but they must maintain all information about the employee's illness as a confidential medical record. Although taking an employee's temperature is a medical examination, employers are permitted to measure it during the pandemic. Employers are permitted to require employees who have COVID-19 symptoms to stay home and can also refuse entry to employees who refuse to answer questions or have their temperature taken. On the other hand, an employer cannot ask the employee whether family members have COVID-19 or symptoms associated with the virus because the Genetic Information Nondiscrimination Act forbids employers from asking employees medical questions about family members.

Employers may administer accurate and reliable COVID-19 tests to employees whose presence in the workplace may pose a direct threat to the health of others. They cannot, however, administer antibody tests because the CDC's guidelines state that such tests should not be used to decide whether an employee should return to the workplace.

### **CAN EMPLOYERS REQUIRE MANDATORY VACCINATIONS?**

Some employers are compelling their employees to be fully vaccinated. Atria Senior Living and Sunrise Senior Living, two of the country's largest assisted living chains, are requiring their workers to be fully vaccinated as a condition of employment. Similarly, New Jersey-based Juniper Communities, a smaller senior living chain, which operates 22 communities in three states and has approximately 1,500 employees, also is mandating vaccines for its employees.

The three vaccines currently approved in the United States are being administered under emergency-use authorization ("EUA"). The EUA states that individuals have the right to accept or refuse the vaccine. While the Food and Drug Administration ("FDA") does not require COVID-19 vaccinations,

the EEOC guidelines indicate that state, local governments or employers may mandate vaccinations under state or other applicable laws. While the employer may ask employees under such laws to provide proof of vaccination, the employer cannot require the employee to provide any medical information as part of the proof.

The ADA permits an employer to implement qualification standards that include “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” Employees are entitled to a medical exemption if they have a medical condition that puts them at risk for an adverse reaction. If a vaccine requirement screens out an individual with a disability, the employer must show that the unvaccinated individual will pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. 1630.2(r). Employers must conduct an “individualized assessment” based on four factors in determining whether there is a direct threat: “(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.” *Id.* If the employer determines that there is a direct threat, it must try to provide a reasonable accommodation.

In addition to a medical exemption, employees may also assert a religious exemption pursuant to Title VII of the Civil Rights Act. If an employee cannot get vaccinated because of a medical or religious exemption and the employer cannot offer a reasonable accommodation, the employer can exclude the employee from the workplace but may not be able to automatically terminate the employee who may be protected under other federal and state laws.

There are at least two federal lawsuits that seek to overturn mandatory vaccine policies: California Educators for Medical Freedom et al v. The Los Angeles Unified School District et al, Case Number: 2:21-cv-02388, and Legaretta v. Fernando Macias et al, Case No. 21-cv-179 MV/GBW. On March 4, 2021, an order was entered in the latter case denying a request for a temporary restraining

order because the plaintiff, an employee at the Dona Ana County Detention Center, had not been terminated and therefore, failed to establish a showing of immediate and irreparable harm. Both cases are in the early stages of litigation.

It is likely that many other organizations in the senior living and group home space will strongly encourage but will not mandate vaccines as a condition of employment. Some employers are offering financial incentives such as gift cards or paid time off.

### **WFH is a Thing**

As a result of the pandemic, many employers and employees who typically worked in offices pre-pandemic have been working from home (WFH) with mixed results. Many people with children attending school remotely and those living in small apartments or houses have found working from home to be quite challenging. Others have embraced the ability to work from home and would like to continue the practice to some extent even when the pandemic is over. Some employers believe that the practice of having at least some employees working from home in the future will allow the employers to reduce their current office space and save some costs. Working from home, however, has required employers to impose new protocols to meet the challenges of having employees work at home.

The pandemic has resulted in a surge in the use of videoconferencing. Workers have had to learn how to use platforms such as Zoom, Microsoft Teams, Bluejeans, Webex, GoToMeeting.com, Facetime and Google Hangouts and share documents through these platforms. Employers should make sure that their employees know how they are expected to dress, how and when to mute themselves and the proper background for videoconferencing.

Employers need to consider technologies and protocols for secure internet access for those working remotely. A virtual private network (VPN) uses encryption to provide a protected connection to another network over the internet. Employers should consider whether employees should be permitted to use their personal devices for work and whether they should be allowed to use public wifi.



Working from home presents challenges for privacy, security and confidentiality of client information because there are less safeguards in remote work environments. Remote workers should be able to have private conversations and should protect confidential information and documents.

On March 10, 2021, The American Bar Association (ABA) Standing Committee on Ethics and Professional responsibility released Formal Opinion 498 that provides new guidance for attorneys working remotely.<sup>3</sup> The opinion states that lawyers practicing virtually must “consider ethical duties regarding competence, diligence and communication, especially when using technology.” Attorneys must make “reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information.” The opinion highlights the “duty of supervision” and cautions attorneys who supervise others to “make reasonable efforts to ensure” that those they supervise comply with the rules of professional conduct. Formal Opinion 498 also offers best practices in the area of hardware and software systems, accessing clients’ files and information, virtual meeting and videoconferencing platforms, and document and data exchange platforms.

Remote work can lead employees to feel isolated and disconnected. In order to maintain productivity, employers need to think of ways to maintain or boost morale. One of the best ways to do this is to communicate with employees on a regular basis. Videoconferencing is often superior to telephone calls because participants can see facial expressions and body language. Social activities can also boost morale. Virtual happy hours, trivia and photo contests are just a few ways to engage staff and stay connected.

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<sup>3</sup> The opinion is attached hereto and can be accessed at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-498.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf).

As more workers become vaccinated, employers will need to consider safety measures when bringing employees back to the office. Social distancing considerations may require reconfigurations of office space. Employers should understand the federal, state and local guidelines in place for employees returning to the office. Under federal law, employers must provide a safe workplace. Employers should consider protocols for facial coverings, temperature checks and virus testing which comply with applicable laws.

Employers must also consider how to accommodate staff who are not able or who are not willing to come back to the office while the pandemic is ongoing and the laws that are applicable to such workers. WFH may be an attractive option. If that is not feasible, it may be appropriate to grant the employee a leave of absence as an accommodation. The employer may be able to terminate an employee who does not want to return to the office simply because he or she is afraid of the virus but that should be considered only as a last resort.

## **Conclusion**

The worldwide pandemic of 2020 and 2021 will forever be etched in our memories due to the loss of human life and the impact on the loved ones they left behind. Secondly, it has had a huge impact on all of us—one of the only shared experiences we have faced not only as a nation, but as a world. It will forever have a lasting effect on how we conduct business and live our lives from this point forward.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 498**

**March 10, 2021**

## **Virtual Practice**

*The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.<sup>1</sup> When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.*

### **I. Introduction**

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.<sup>2</sup>

### **II. Virtual Practice: Commonly Implicated Model Rules**

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.<sup>3</sup> A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

<sup>3</sup> See generally MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,<sup>4</sup> virtual practice commonly implicates the key ethics rules discussed below.

A. *Commonly Implicated Model Rules of Professional Conduct*

1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (*Emphasis added*). Comment [1] to Rule 1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . ."<sup>5</sup> Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.<sup>6</sup>

2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."<sup>7</sup> The following non-

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<sup>4</sup> For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

<sup>6</sup> Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."<sup>8</sup> As ABA Formal Op. 477R notes, lawyers must employ a "fact-based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation.<sup>9</sup> At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."<sup>10</sup> However, depending on the circumstances, lawyers may need to take special precautions.<sup>11</sup> Factors to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."<sup>12</sup> As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

### 3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.<sup>13</sup> Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."<sup>14</sup> Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

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<sup>8</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].

<sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

<sup>10</sup> *Id.*

<sup>11</sup> The opinion cautions, however, that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

<sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

<sup>13</sup> MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).

<sup>14</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.*"<sup>15</sup> The duty to supervise nonlawyers extends to those both within and outside of the law firm.<sup>16</sup>

### B. *Particular Virtual Practice Technologies and Considerations*

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

#### 1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.<sup>17</sup> To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

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<sup>15</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

<sup>16</sup> As noted in Comment [3] to Model Rule 5.3:

When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

<sup>17</sup> For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

## 2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such “files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.”<sup>18</sup> Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.<sup>19</sup>

## 3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer’s ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.<sup>20</sup> Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,<sup>21</sup> to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

## 4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers’ virtual document and data exchange platforms should ensure that

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<sup>18</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 482 (2018).

<sup>19</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 483 (2018) (“Even lawyers who, (i) under Model Rule 1.6(c), make ‘reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,’ (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients ‘reasonably informed’ and with an explanation ‘to the extent necessary to permit the client to make informed decisions regarding the representation.’”).

<sup>20</sup> See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-422 (2001).

<sup>21</sup> Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to “Host Only;”
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).<sup>22</sup>

#### 5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

#### 6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.<sup>23</sup> Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

##### a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.<sup>24</sup> This duty requires regular interaction and communication with, for example,

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<sup>22</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

<sup>23</sup> As ABA Formal Op. 477R noted:

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

<sup>24</sup> The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.



associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.<sup>25</sup>

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.<sup>26</sup>

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

#### b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,<sup>27</sup> and should ensure that all client-related information is secure, indexed, and readily retrievable.

### 7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.<sup>28</sup> The

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- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

<sup>25</sup> See ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

<sup>26</sup> For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

<sup>27</sup> See, e.g., Mo. Bar Informal Advisory Op. 20070008 & 20050068.

<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.15; See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

### **III. Conclusion**

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

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#### **AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

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accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.”).

# LESSONS LEARNED FROM THE PANDEMIC

One year later...

Megan Brand  
Shirley Whitenack, Esq.  
Stetson University Spring Webinar, 2021

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## The Year in Review

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### People we serve

- Medicaid is locked in per the FFCRA
- Benefit Applications

### -Public Benefits

- Medicaid Benefits enhanced through ARPA
- Economic Impact Payments

FFCRA=Families First Coronavirus Response Act, 2020  
ARPA= American Rescue Plan Act

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*People we serve*

*-How we deliver our services*



- Limitations on seeing people
- Impact to physical and mental health
- Technology barriers to people with disabilities
- Remote Notarization and other issues related to document signing, etc.
- Requests and distributions

Conversion to Electronic Processes. Photo Credit: Megan Brand

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*The interplay between Federal Laws and COVID-19 Vaccinations*

- Federal Laws:
  - Equal Employment Opportunity Commission (EEOC)
  - Americans with Disabilities Act (ADA)
- Can Employers Require Mandatory Vaccinations?
  - Residential Facilities
  - Employees
    - Medical exemption under ADA
    - Religious exemption under Title VII of the Civil Rights Act
- Two Federal Lawsuits

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*WFH is a thing*

- Pros and Cons of Work from Home
- Video Conferencing, VPNs and other considerations
- Privacy, security, confidentiality
  - American Bar Association Formal Opinion 498
- Isolation, disconnection and ways to Boost Morale
- Considerations for “bringing people back” or not.

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# CONCLUSION

**Schenck Price**  
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STETSON LAW

# **2021 Fundamentals of Special Needs Trusts Administration Webinar**

**Friday, April 30, 2021  
4:10 P.M. – 5:00 P.M.**

## **The Three Ds of Ethical Administration of a Special Needs Trust**

**Presenter:  
Roberta K. Flowers**

- **Materials**
- **PowerPoint**

**STETSON  
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Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

## LIFE PASSAGES<sup>1</sup> PSNT BEST PRACTICES GUIDELINES

*“It is one of the most beautiful compensations of life that no man can sincerely try to help another without helping himself.” Ralph Waldo Emerson*

### Introduction

The area of Pooled Special Needs Trusts (PSNT) has seen tremendous growth over the last two decades. With that growth comes great challenges including: the challenge of keeping the beneficiary central to all services provided, the challenge to face and incorporate new technologies, and the need to balance growing the entity with assuring that the humanity of the clients is never lost. The purpose of this guide is to provide PSNT Executive Directors, Administrators and Boards of Directors with suggestions on how to operate their PSNT in a way that balances all of the competing factors.<sup>2</sup>

We recognize that PSNTs come in all different shapes and sizes,<sup>3</sup> and we were trying to write guidelines that would cover the landscape, realizing that in doing so, not all of these guidelines would apply to every PSNT. A PSNT wishing to follow any of these best practices guidelines may need to pick those that would apply and modify them to fit their own special circumstances. These best practices can be adopted in their entirety, in part or modified to suit the specific needs of the PSNT.<sup>4</sup>

This guide is not intended to create a duty of care or standard that would be used in litigation against a PSNT but rather a guide that will be reviewed, edited, and expanded. Thus, this is why the document uses guide or guidelines rather than standard.

The mission, purpose and intent of PSNTs, is to serve beneficiaries and families, and continue to earn the support and trust of the government and the public. As the National Pooled Trusts Standards Committee (NPTSC) Guidelines offer, the “[m]ission [of a PSNT is] [t]o provide pooled trust services with integrity. The pooled trust program’s mission and primary purpose should be adherence to its fiduciary duties and the sole benefit status of each trust beneficiary’s account.”<sup>5</sup>

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<sup>1</sup> The authors of these guidelines are Stephen Dale, John Dickerson, Professor Roberta K. Flowers and Professor Rebecca Morgan (referred to as the Team). The Team uses life passages to mean the various stages of life through which an individual passes and how individuals with special needs and PSNT administrators need to plan for these stages for the individuals. These guidelines were created as part of a project funded by the May and Stanley Smith Charitable Trust.

<sup>2</sup> These materials are designed to guide the day to day operations of a PSNT and are not intended to aid in the establishment of a PSNT.

<sup>3</sup> “While effective pooled trusts share a broad range of best practices, variation still exists, indicating that a successful trust can take numerous shapes and forms.” See, *Pooled Special Needs Trust Best Practices*, by True Link Financial, available at <https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/Pooled-Special-Needs-Trust-Best-Practices.pdf> at 16. True Link notes variations amongst PSNTs on various items, including whether to provide “case management in-house, providing extensive hands-on support to the families they serve,” *True Link* at 17, and fees, with some using flat fees, others asset-based fees, still others based on time/resources used. *True Link* at 18.

<sup>4</sup> Many of these practices can apply to stand alone accounts for those PSNTs that also administer stand-alone trusts.

<sup>5</sup> National Pooled Trust Standards Committee, *Guidelines for Pooled Trust Organizations*, Guideline 1, Mission (06/21/2019), referred in this document as NPTSC, and available at [http://nationalplanalliance.org/wp-content/uploads/2019/08/GuidelinesForPooledTrustOrganizations\\_v2\\_2019\\_06\\_21-rev.pdf](http://nationalplanalliance.org/wp-content/uploads/2019/08/GuidelinesForPooledTrustOrganizations_v2_2019_06_21-rev.pdf). © NPTSC. “These [NPTSC ] Guidelines were developed as part of an informal working group, the “National Pooled Trust Standards Committee”, comprised of members listed below, all stakeholders in non-profit organizations providing pooled trust

services for beneficiaries with disabilities. Each author holds an undivided ownership interest in and to the final product in perpetuity until such right is extinguished by assignment back to the National Pooled Trust Standards



This mission requires a commitment to the highest standards of ethical conduct. Defining standards for ethical practice requires a thorough dissection of all the difficult and varied circumstances faced by trust personnel. This guide may seem at times lengthy; but hopefully, it addresses the most difficult situations faced by PSNT and provide steps that will help PSNTs prevent those situations. The length and complexity of the best practices is directly related to the complexity of taking the responsibility to recognize and facilitate a lifetime commitment to the beneficiaries. Some of the examples are based upon actual policies in use by a certain PSNT and provided to us with permission to reprint. In those instances, acknowledgement is provided. If the reader wishes to incorporate those examples into their publications, the reader should contact the PSNT for reprint permission.

These best practices are the compilation of a review of policy and procedure manuals that currently are used by some PSNTs, conversations with a number of PSNT administrators, and editing by a group of experts in the field of PSNT. There are several sources that we used in this Best Practices Guide. We have relied on True Link Financial, *Pooled Special Needs Trust Best Practices* (2016) (referenced as True Link);<sup>6</sup> National Pooled Trust Standards Committee, *Guidelines for Pooled Trust Organizations* (06/21/2019) (NPTSC) and Plan of New Jersey's *Service Coordinator Handbook* (referenced as Plan of New Jersey).<sup>7</sup> We also spoke with a number of leaders of PSNTs both as a group and individually, and with the members of the project's think tank.

The authors wish to thank the members of the project's think tank for their invaluable input.<sup>8</sup> The authors particularly wish to thank the May and Stanley Smith Charitable Trust and the Poses Family Foundation for their financial support, which made this project possible.

### *The Life Passages Plan Team*

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Committee. It is the intent of the Committee that these Guidelines will be used in future academic, professional and industry publications, so as to advance and aid in standardizing the practices of pooled trust administration and management. To the extent these Guidelines are adopted or incorporated into subsequent publicly accessible third-party publications, proper attribution must be made to the National Pooled Trust Standards Committee and its authors.”

<sup>6</sup>True Link, in its *Introduction*, explained the genesis of its PSNT Best Practices guide:

Through True Link's ongoing work with pooled special need trusts, we have found that the most successful trusts distinguish themselves in one or more of the following ways: how they communicate with beneficiaries, use technology, develop administrative processes, manage financial assets, and build their teams. These trusts develop advantages—often thorough a time- intensive and iterative process —and overcome the odds to thrive in a resource-constrained environment.

How do we know when something is a “best practice”? Trust leaders tell us. When it comes to technology, for example, people's own descriptions range from “Digitizing our documents has completely transformed our practice,” to “We succeed despite our technology—it's terrible.” Our hope is that by collecting and publishing best practice, effective trusts will learn from the innovations of others and continue to break ground in the field, and newer trusts will be more likely to succeed.

True Link Financial, *Pooled Special Needs Trust Best Practices*, available at <https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/Pooled-Special-Needs-Trust-Best-Practices.pdf>), at 1-2.

<sup>7</sup>Plan of New Jersey's *Service Coordinator Handbook* is an internal document.

<sup>8</sup>Those involved and providing information are full time pooled trust administrators from various parts of the country.

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## ***I. Financial Management of the Trust***

Trustees are fiduciaries and have duties to the beneficiaries. Each state has its own Trust Code that sets out the duties of the trustees. Many of the state trust codes are based on the Uniform Trust Code. Article 8 of the UTC provides the duties and powers of trustees. These include:

Duty to administer the trust	Recordkeeping and identification of trust property
Duty of loyalty	Enforcement and defense of claims
Impartiality	Collecting trust property
Prudent administration	Duty to inform and report
Costs of administration	Discretionary powers, tax savings
Trustee's skills	General powers of trustee
Delegation by trustee	Specific powers of trustee
Control and protection of trust property	Distribution upon termination

It is important to remember that a Pooled Special Needs Trust is still a trust and the PSNT trustee is still a trustee. As a result, those administering PSNTs must comply with the applicable rules of their state's trust codes. What follows is our take on some of the duties of the trustee that have unique applicability to a PSNT. As always, the PSNT should consult their state's trust code.

### **1. Distributions<sup>9</sup>**

- a. The PSNT should have a regular schedule for routine and recurring distributions.
  - i. The beneficiary and any authorized representative should be provided with the distribution schedule when the account is created and whenever there is a change to the schedule.
  - ii. Vendors with whom the PSNT makes recurring distributions for beneficiaries should also be apprised of the distribution schedule.
  - iii. The executive director (or other member of the leadership team) should be authorized to make limited exceptions to the distribution schedule.
  - iv. Every distribution should have at least one supervisory approval beyond the initial staff approval. There should be a third level for amounts above an amount set by policy.

**Example:** *NPTSC Guidelines, Guideline 6(c) provides that “[t]he beneficiary or that person’s representative as applicable should be informed of the pooled trust program’s typical time frame for processing distributions.”*

- b. The PSNT should identify who can routinely approve distributions, any limit on the amount of distribution and who can approve a distribution over the approved amount.

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<sup>9</sup> As the UTC § 801 notes, the trustee has a duty to administer the trust. In the case of PSNTs, the duty would include making distributions.

**Suggestion** ☹ : A PSNT should consider approving a certain limit for discretionary distributions that an account manager is authorized to expend per beneficiary for the calendar year without further approval. The account manager must keep a record to track these distributions vis a vis the limit. If there is a request that would exceed the approved amount, the manager would seek approval of the supervisor. The PSNT should have a form for the account manager to use to document the distribution and the supervisor should do regular reviews of these discretionary distributions to make sure the process is correctly followed.

- c. The PSNT should have an internal review process for every (non-discretionary see-above) distribution that requires at least a two-step process.
  - i. First the account manager should determine the appropriateness of the expenditure.
  - ii. Second, the account manager should get approval from the Trust Director.
  - iii. Finally, the associate executive director (if any) or the Executive director approves the check request, examining the request for any anomalies.
- d. The PSNT should have a documented appeal process if a distribution request is denied. The appeal process should have reasonable time frames and allow for oversight of the process and a fair review. Any time a request is denied, the beneficiary and legal representative should be notified in writing of the appeals process.

**Suggestion** ☹ : The following (1-5) are a documented denial process from a successful PSNT with 30 years of experience. We would suggest that you develop the appropriate written denial process that fits your organizational structure and provide that to beneficiaries. Here is the example:

1. If the beneficiary requests a review of the denial of the request, then the account manager forwards the request and the denial to the Executive Director.
2. If the Executive Director agrees with the denial, then the beneficiary is notified.
3. If the beneficiary requests further review, then the request and denial are submitted to the Trust Advisory Committee for Review. Note: We suggest a committee like this be made up of volunteer lawyers well informed about what is and is not admissible.
4. If the Trust Advisory Committee supports the denial, the beneficiary is notified.
5. If the beneficiary requests further review, then the request and the denial are submitted to the PSNT's board of directors for review. The board recommends either approval or denial. The board's decision is final.

**Suggestion** ☹ : **The Trust Advisory Committee could be made up of volunteer attorneys who understand what is and is not appropriate.**

- e. Each distribution decision should be made and communicated to beneficiary within a reasonable time.
- f. Before a distribution is approved, the PSNT should confirm that the necessary documentation has been received.
  - i. For example, the PSNT should obtain a copy of the court order that established or otherwise approved the creation of a (d)(4)(C) trust.
- g. The PSNT should keep a real time accounting of the beneficiary's budget so the PSNT can determine the impact of the distribution on the beneficiary's budget.

- h. The PSNT should provide regular accountings for the beneficiary at least quarterly.
- i. The PSNT should require original receipts before making a disbursement except in emergency situations, with a requirement that receipts be submitted within a specific time.
  - i. The PSNT should develop a written procedure that beneficiaries and third parties can use to submit receipts, and what forms of transmission of receipts are accepted (Example: mail, fax, etc.).
  - ii. The PSNT should examine every receipt prior to making a disbursement to ensure the receipt contains the necessary information.
  - iii. The PSNT should move toward a system of scanning every paper receipt and file it in the electronic folder for the individual beneficiary along with any electronic receipt.
- j. The PSNT should have a process in place to verify the legitimacy of reimbursements, requiring original receipts to avoid forged receipts.
- k. PSNTs should take precautions to prevent beneficiaries or family members from improperly using bank routing numbers.
- l. The PSNT may wish to use a debit card system for beneficiaries or a credit card system (The PSNT may wish to use a debit or credit card system for beneficiaries as allowed by, See POMS SI 01120.201I.1.e).
- m. The PSNT should establish a standardized and formalized process for discretionary disbursements and follow the process. The PSNT should always handle reimbursement requests and disbursements in the same way and always require the documentation prior to the disbursement.
- n. The PSNT should establish a policy on the timeliness of handling distribution requests and publish that for all beneficiaries.

**Commentary:** for routine, recurring distributions, such as paying the beneficiary's rent, the drafters believe that two working days is sufficient time to process the request. More time may be needed for unique requests.

- i. If the PSNT cannot grant the request the beneficiary should timely be informed of the decision in writing, along with the reason for the denial.
- ii. The PSNT should have a clear policy of internal review of disbursement requests including the person completing the initial request and document review, a secondary review and a final review.
- iii. The PSNT should establish a random process to check their distribution protocol and let all participants know that any disbursement may be subject to review at any time as part of this process.
- iv. The PSNT should have an appeal process in writing to give a beneficiary a chance to have a request that has been denied by the PSNT reviewed upon appeal.

**Commentary:** Perhaps no other place than here is process so important. There is a balance to be struck between attention to detail and prompt processing of distributions. Since mistakes can occur, the process needs to be clearly understood by all staff. True Link offers this best practice: “Strike a balance between diligence and efficiency in reviewing disbursement requests.”<sup>10</sup> How does a PSNT accomplish this? Designate a small number of certain staff to undertake the reviews and invest in technology that allows for online review and approval, such as a web-based system.<sup>11</sup>

## 2. Investments

- a. The PSNT should have a written investment policy that complies with their state’s version of the Prudent Investor Act and should follow that policy.<sup>12</sup> The policy should be given to the beneficiary when the account is created and be available thereafter on request.

**Example:** *NPTSC Guidelines, Guideline 8(a) provides that “[p]ooled trust programs should develop written investment policy statements that are available for review by the beneficiary or that person’s representative as applicable and consider prudent investments and risk tolerance.”*

- b. When creating the investment policy, the PSNT should be cognizant of the potential for tension between what may be good for the overall PSNT or for one beneficiary may not be good for all beneficiaries.
- c. The goal of the investment policy should be reflected in a board resolution setting the policy for the investment decisions. One very successful PSNT states their goal is to operate the trust as they would for a client that is already retired and needs the income – rather than a 30-year-old starting a retirement fund they will not need for 35 years.
- d. A copy of the investment policy should be provided as part of the materials for prospective beneficiaries or authorized representatives.

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<sup>10</sup> True Link at 9.

<sup>11</sup> True Link at 9. True Link in its commentary offers that “pooled trusts with streamlined multi-person approval systems stay focused on the task at hand: documenting discretion and ensuring appropriate disbursements are made.” *Id.*

<sup>12</sup> For example, NPTSC Guidelines, Guideline 8(b) provides that “[I]nvestment managers should comply with the organization’s investment policy statements. See also Article 9 of the Uniform Trust Code.

**Example:** *NPTSC Guidelines, Guideline 8(a) provides for making the investment policy statement available to beneficiaries and Guideline 8(d) provides that “[p]ooled trust programs should, upon request, make written investment policy statements available to each beneficiary or that person’s representative, if applicable.” Additionally, 8(e) calls for “provid[ing] information to teach a beneficiary or that person’s representative as applicable regarding who manages investments” on request.*

- e. The Investment policy should be reviewed at least annually.<sup>13</sup>
- f. The PSNT should rely on a team of investment advisors in developing and updating the policy, as well as formulating an appropriate asset allocation and the selection of individual marketable securities within the portfolio. The PSNT should also reduce an asset or sector concentrations that are identified during the review, as well as ensure appropriate cash/liquidity is available for distributions.
- g. The Board of Directors of the PSNT should complete an annual conflict of interest statement and it should be kept on file.

**Commentary:** In order for the investment advisors to give the PSNT informed advice, the PSNT will need to provide them with appropriate context regarding beneficiaries (such as life expectancy, likely distribution rate, nature and extent of disabilities and attendant costs, etc.). This in turn will better position the advisors to assess risk, develop a diversification strategy and create investment options.<sup>14</sup>

- h. The PSNT should require fee transparency from investment advisors.<sup>15</sup>

### **3. Insurance**

- a. The PSNT should have adequate and appropriate insurance.
  - i. The various types of insurances to consider include: premises (whether owned, or rented), key person (director), directors and officers, errors and omissions, workers’ compensation, health insurance for employees, cyber security insurance, employee theft, liability, business interruption, disaster insurance (floods, fires, mudslides, tornados, sink holes, etc.), appropriate riders if employees use their cars, an umbrella policy and insurance against employee theft.

**Example:** *NPTSC Guidelines, Guideline 4(h) directs that the PSNT have “directors and officers and professional liability insurance.”*

- b. The PSNT should insure the beneficiary’s property, including as appropriate renter’s insurance, homeowner’s insurance (which would include flood, wind and wildfire riders, if necessary), casualty insurance, automobile insurance and personal property insurance. The PSNT should confirm that any valuable personal property

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<sup>13</sup> The NPTSC Guidelines, Guideline 8(c) provides that “[p]ooled trust programs should conduct regular investment performance reviews of the performance of the investment manager and should provide a written report of the findings of such reviews to the organization’s Board of Directors.”

<sup>14</sup> *True Link* at 12.

<sup>15</sup> *See True Link* at 12, discussing the need for the PSNT to “[b]e aware (and beware) of expenses ratios and internal fees.” (inquiring about “the fully loaded cost”).

is scheduled separately if required by the policy. The premiums would typically be paid from the beneficiary's funds held by the PSNT. In the event the beneficiary has insufficient funds, the PSNT may pay the insurance premiums from the retained funds (if the joinder agreement so provides).<sup>16</sup>

**Suggestion** ☹: Suggest the beneficiary video the property to establish the pre-loss condition of the property. The PSNT may need to provide the beneficiary with the video equipment.

#### 4. Audits

- a. Each year the PSNT should arrange for outside audits: (1) internal financial operations; (2) trust procedures, internal controls and activity, (3) Information Technology (IT) security and (4) the investment management of the fund.
- b. The PSNT should post its state-filed financial documents on its website and comply with standard nonprofit practices.

**Suggestion** ☹: A PSNT might consider having a periodic programmatic audit with one firm and an annual financial audit by another firm. This allows the PSNT to identify and respond earlier to trends and problems.

**Example:** *NPTSC Guidelines, Guideline 4(g) provides that “[o]rganizations should have regular audits of the organization, including internal financial operations, trust activity and Information Technology (IT) security.”*

**Example:** *Each state has requirements for reporting. In some states, the PSNT may have to file a report with the state’s Secretary of State.*

**Suggestion** ☹: Copies of the audit reports should be provided to beneficiaries or authorized third parties. The PSNT should also consider whether to post the reports, or summaries of them, on their website—either the public side or available through client portals.

**Suggestion** ☹: Any audit findings/exceptions should be timely remediated. The audits should be presented to and confirmed by the PSNT board.

#### 5. Record Keeping<sup>17</sup>

- a. The PSNT should get originals or copies of original beneficiary documents that the beneficiary has received from government agencies such as SSA, Medicare, or Medicaid, as well as court orders, wills, trusts, settlement agreements, insurance policies, etc.
- b. If administering an MSA for a beneficiary, the PSNT should keep track of any MSAs for beneficiaries, including a policy for sufficient set asides to satisfy the MSA.

<sup>16</sup>The UTC requires the trustee to control and protect the trust property. See UTC § 809.

<sup>17</sup>See, e.g., UTC § 810 (Recordkeeping and Identification of Trust Property).



- c. The PSNT should regularly report to Medicaid, Social Security and any other required state agencies disbursements and comply with all reporting requirements of the state.

**Suggestion** ¶: The PSNT should use tickler/calendar reminders for mandatory, annual reporting requirements.

**Suggestion** ¶: The PSNT should get a copy of any correspondence to CMS regarding the MSA amount and calendar any relevant dates regarding payments to CMS when a PSNT is administering an MSA

- d. The PSNT should operate with transparency in the creation and operation of the PSNT, including record keeping.
- e. The PSNT should have a document retention policy that covers how original documents will be handled, stored and destroyed. Original documents kept in the PSNT office should be securely maintained in a way that protects the documents from theft, damage, or destruction.

**Example:** *NPTSC Guidelines, Guideline 6 TRUST CREATION TRANSPARENCY, especially 6(a) “[t]he pooled trust program should disclose the operational features of its Trusts to each prospective beneficiary or that person’s representative as applicable to set expectations of how the Trust may assist the beneficiary...”*<sup>18</sup>

*Also, Guideline 2(m) directs that “[t]he organization’s program trust operations ...be reasonably transparent for a beneficiary or that beneficiary’s representative as applicable for that beneficiary’s account.”*

- f. PSNT employees should document each transaction with supporting documentation and each beneficiary contact.
  - i. Every call should be logged and noted to the appropriate beneficiary account.
  - ii. An action report (to-do list) should be created as a result of a beneficiary’s request.
  - iii. The PSNT should make a decision on a routine recurring distribution request within a reasonable time and note the decision in the beneficiary’s file. Every contact with the beneficiary, whether initiated by the PSNT or the beneficiary should be noted in the beneficiary’s file.

**Suggestion** ¶: What is a reasonable time is fact specific. A routine recurring distribution could be determined appropriate or rejected within two working days and a check received within 5-7 days, whereas a request that needs to be taken to the PSNT committee would take more longer but still should be reasonable.

<sup>18</sup> Guideline 6(b) covers information about any balance in a beneficiary’s account on the beneficiary’s death, 6(c) deals with the time to process a distribution and 6(d) recommends that a proposed beneficiary be encouraged to seek the advice of an attorney.

- iv. Decisions and other dispositions should be noted in the file, along with the date and method of communication to the beneficiary of the decision or disposition.

**Example:** *NPTSC Guidelines, Guideline 4(l) requires that each PSNT prepare “a brief trust summary of each trust under management which could include names and contact information for grantors, trustees, beneficiaries and remainder beneficiaries, unusual provisions, financial restrictions and examples of permissible purchases.”*

## **6. Communications**

- a. The PSNT should have a policy that covers both the methods of communication with the beneficiary and the time frame within which a communication will be returned.<sup>19</sup> This information should be conveyed orally and in writing to the beneficiary and any authorized third parties.
- b. The PSNT should consider security of email and when conveying personal or financial information, consider encrypted or other secure communications.
- c. Every contact from a beneficiary, whether in person, phone, email, or other, should be logged into the file for the beneficiary that includes the date, time, method of communication and summary of it.<sup>20</sup>
- d. Every PSNT employee who has contact with anyone outside the organization should be trained on effective communication skills, including both verbal and non-verbal communications.

**Commentary:** Building relationships is critical for a PSNT organization and to that end, communication is just as important as the services provided. As True Link explains in best practice standard 1 Beneficiary Communication, “understand, communicate, review and reach out,” the “[h]igh-performing pooled trusts” approach their difficult balancing act of “protecting [the beneficiary’s] government benefits eligibility” while still purchasing items for the beneficiary “that enhanced [the beneficiary’s] quality of life” by a three-pronged approach of “understand[ing] the beneficiary’s situation, communicat[ing] critical information—especially restrictions— early on in the relationship, and maintain[ing] ongoing, regular contact.”<sup>21</sup>

True Link notes that communicating with prospective beneficiaries about the trust and its operation allows the PSNT a chance to “learn about the beneficiary’s situation, goals, and needs, and to lay the foundation for a transparent, productive relationship. Rather than just answering questions as they come in, trusts can proactively provide information about things that might need a little explaining, like the onboarding process, fee schedule, and disbursement guidelines.”<sup>22</sup>

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<sup>19</sup> A trustee has a duty to inform and report. See UTC § 813.

<sup>20</sup> The NPTSC Guidelines, Guideline 4(c) is somewhat applicable to this point. It provides that the “organization should have systems for tracking information and processes for accurate and timely availability of the needed information.”

<sup>21</sup> *True Link* at 2.

<sup>22</sup> *Id.* at 3.

**Suggestion** ¶: Use prospective beneficiary conversations not only to be hired, but use these talks to manage expectations, educate beneficiaries about limits on the use of the money and develop rapport with the beneficiary.<sup>23</sup>

**Suggestion** ¶: Consider this example from Plan of NJ, known as the “Contact Note Format”:

**A. Contact Note Format**

The acronym “S.O.A.P.” can serve as a mnemonic device to help you remember what to address in your contact notes. **You should not write the letters S - O - A - P**, but you can use this guide to make sure you include all of the components in body of your note.

**S** = Service provided – What was the purpose of the contact?

**O** = Observations – Describe objectively what you see and hear.

**A** = Assessment – How is the person doing with what you came to check out?

**P** = Plan – What is your follow up and next step together.

**B. Sample Contact Note**

(S) This writer visited BJ at her home on August 1, 2008 to get acquainted and to assess her general health and well-being. The visit included a discussion with Iwach Overu, BJ’s residential sponsor, conversation with BJ, and transporting BJ to Fridays for lunch and back.

(O) BJ’s residential sponsor, Iwach Overu, reported that her health problems include diabetes, Parkinson’s, Alzheimer’s, high blood pressure, scoliosis, and psychiatric conditions. Ms. Overu showed this writer how B’s medication is tracked and discussed a wheelchair that was recently purchased through Medicare for her. Ms. Overu requested a therapeutic chair with lumbar support to ease BJ’s discomfort from scoliosis and indicated that BJ needed clothing that could be purchased through Sears. Ms. Overu also reported that BJ had not attended her day program since November after she broke her ankle and spent time in rehabilitation.

(A) BJ ordered food consistent with her required diet. She was able to answer questions and express her interest in following the Yankees and the Giants. BJ expressed contentment with her living situation and her daily routine. However, BJ did state that she missed her day program and particularly the Bingo. BJ did not comment on the need for a therapeutic chair.

(P) This writer will


1. Research the need for and acquisition of a therapeutic chair and clothing through the trust fund and initiate action accordingly.
2. Get a release for the doctor and follow up on the day program issue.
3. Make an appointment to visit BJ the beginning of September.<sup>24</sup>

- e. The PSNT should train employees on responding to beneficiaries who frequently call. The PSNT should also train employees on tips for de-escalating an interaction with an aggressive or upset beneficiary (especially when a distribution request is denied).
- f. When communicating with third parties, whether family of beneficiaries, service providers, or others, the PSNT must first have the consent of the beneficiary or

<sup>23</sup> *Id.*

<sup>24</sup> *Plan of New Jersey* at 15-16.

- authorized representative and every communication should be documented and then filed within the file of the beneficiary with whom the contact is concerned.
- g. The PSNT should have an efficient process for handling all incoming phone calls and emails. The PSNT should decide whether there will be one person who answers the phone and directs calls, or whether direct lines for each employee will be used.
  - h. The PSNT should have a reliable process for handling emergency and after-hours calls.
  - i. The PSNT should have a clear policy for communicating with the originators of unfunded third-party trusts that have been established. This is an important relationship to foster and build and should not be lost in daily communication with beneficiaries. It is suggested that at least annually, the PSNT update the information with the originators of the third-party trust.

**Suggestion** : Communication with beneficiaries is an ongoing process and the quality of communication goes a long way toward the effectiveness of the relationship. Frequent, transparent, and clear communication with beneficiaries is crucial. The PSNT should routinely ask beneficiaries about any changes in the beneficiary’s circumstances. For those beneficiaries who regularly reach out, the PSNT should always ask the beneficiary “what’s new with you?” For those beneficiaries who do not regularly communicate with the PSNT, the PSNT should schedule routine check-ins with those beneficiaries just to get a status update.<sup>25</sup>

- j. Communication is a two-way street. The beneficiary should be given an opportunity to provide feedback to the PSNT in whatever manner the beneficiary feels most comfortable. One example might be a beneficiary satisfaction survey or questionnaire. Another is to just ask the beneficiary.

## 7. Fees

- a. The PSNT should create a published fee schedule that is adopted or approved annually by the PSNT board. The Board should confirm that the fee schedule is reasonable under the applicable state law.<sup>26</sup>
- b. Any fee structure changes should be determined at least six months in advance and be published to all beneficiaries affected and to any potential enrollees considering enrollment.

**Example:** *NPTSC Guidelines, Guideline 9(a) provides that “[f]ees charged by the pooled trust program should be reasonable” while 9(b) provides for “[t]he executive director in consultation with staff should develop a fee schedule that is reviewed and approved by the board of directors on a regular basis to see whether the fees are reasonable and are sufficient to meet basic organizational expenses...”*

<sup>25</sup> See, e.g. *True Link* at 4-5 which suggests “[s]etting a needs-based engagement calendar for each beneficiary with reminders scheduled immediately following the onboarding call, can be an effective strategy. Calendar items can include regular check-ins with beneficiaries themselves, as well as advocates and service providers.”

<sup>26</sup> See, e.g., UTC § 708 (compensation of trustee).

- c. The PSNT should be transparent about its fee structure and be sure to provide it to potential clients at the first meeting.

**Example:** *NPTSC Guidelines, Guideline 9(c) directs that the organization give the proposed beneficiary or the beneficiary’s authorized “representatives or grantors as applicable” a copy of the fee schedule for that beneficiary “and ... indicate that fees are subject to change upon advance notice.”*

- d. The PSNT should create a policy on exceptions to the fee structure.
  - i. For example, if a beneficiary runs out of money, will the PSNT continue to cover the beneficiary’s (basic) expenses out of retained funds?
  - ii. The policy should explain how an exception is requested, the supporting information needed and who makes the decision about the exceptions.
- e. The PSNT in its organizational structure should clearly identify who has decision-making authority to waive or reduce any fees.
- f. The PSNT should make sure the allocation of fees between principal and income for trust accounting complies with state law.
- g. The PSNT should determine whether the fee structure is all encompassing or a la carte.

## **8. Tax Exempt Status**

Each PSNT or their umbrella organization should obtain tax exempt status as a 501(c)(3) charity from the IRS.<sup>27</sup> All federal and state filings for a not-for-profit organization should be carried out in a timely manner. The PSNT should annually confirm that its tax-exempt status is in good standing and that all required reporting requirements have been met.

**Example:** *The NPTSC Guidelines, Guideline 2(b) directs the PSNT to “provide charitable services and seek donations and grants as needed in keeping with their charitable non-profit status.” Further, Guideline 4(o) directs that “[b]oard members and officers should serve without compensation (other than expense reimbursement) except to the extent they are employees of the pooled trust organization.”*

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<sup>27</sup> NPTSC Guideline, Guideline 2(a) directs that the PSNT “be qualified as a charitable entity by the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code.”

## **9. Transfers from one PSNT to another**

- a. A PSNT should determine whether it will accept a transfer of a beneficiary's account from another PSNT or a standalone SNT that authorizes decanting to a PSNT.
  - i. If the PSNT does accept the transfer, the PSNT should create a list of items/information it will need from the transferring PSNT before accepting the transfer. This information could include a list of any outstanding expenditures, an accounting, any tax returns filed for the last 3 years, any applicable court orders or pending petitions, and a copy of the transferring PSNT's assessment/budget/plan.
  - ii. The receiving PSNT should not assume liability for any wrongdoing by the transferring PSNT by accepting the transfer.
  - iii. Except in limited circumstances, the request for the transfer should come from the beneficiary or the beneficiary's authorized representative.
- b. A PSNT whose beneficiary has requested the transfer of the beneficiary's account to another PSNT should
  - i. Accept the decision to move the trust but also seek to learn more from the decision. Inquire as to the reasons for the transfer and attempt to resolve any issues presented by the beneficiary as the basis for the transfer.
  - ii. Advise the beneficiary and authorized family members of the potential impact of an out-of-state transfer. For example, if the transfer is to a PSNT located in another state, the beneficiary may or may not be eligible for public benefits under that state's rules and it is possible that the state's Medicaid agency may not approve the PSNT even though the current state's Medicaid agency in fact approved it.
  - iii. If the beneficiary insists on the transfer after the disclosure, the PSNT should have the beneficiary sign an acknowledgment of the potential negative consequences of the transfer and give informed consent for the PSNT to proceed with the transfer.
  - iv. Only after the beneficiary has been advised of the potential consequences of the transfer should the PSNT cooperate fully with the beneficiary and the receiving PSNT to timely accomplish the transfer.
  - v. The beneficiary's request for transfer should be made in writing and kept as part of the PSNT's file.
- c. In the event another PSNT is deemed unable to continue its role and the PSNT is asked to assume support to an entire PSNT, the receiving PSNT shall require a court order that clearly states there is no liability for any actions prior to the court order, and no responsibility to pay any outstanding bills that are not acknowledged by the court order. Such an order will include an immediate audit of all incoming accounts paid for by the PSNT being terminated.
  - i. The PSNT should provide the beneficiary with a written explanation regarding the effect, if any, of the transfer and require the beneficiary to provide a written acknowledgment of receipt of the explanation.
  - ii. The transferring PSNT should provide the beneficiary or authorized representative with copies of any documentation provided to the receiving

- PSNT and receive a written acknowledgment of receipt of the documents from the beneficiary or authorized representative.
- iii. If a court order is required to approve the transfer, the PSNT should file a petition with the court having jurisdiction over the beneficiary's PSNT for court approval of the transfer.

**Example:** *NPTSC Guidelines, Guideline 4(k) provides that: [l]ateral transfers to and from another similar pooled trust should not be unreasonably denied to promote choice and options for beneficiaries, as appropriate."*

## 10. Financial Provisions for PSNTs

- a. A PSNT should have unrestricted reserves of one-year operating expenses in case no new beneficiaries enroll for a year.
- b. In creating a new PSNT, the founders should have accumulated enough initial capital for 2-3 years of operational costs before starting the PSNT via cash, grants and donors.
- c. The PSNT should have additional provisions in place to ensure long-term financial sustainability.

## 11. Retained Funds

- a. The PSNT should have a policy on remainder funds, complying with the applicable laws.
  - i. The policy should describe the circumstances when funds remain, the uses of the remainder funds (whether for operations or for other beneficiaries), any time limit on terminating the joinder agreement, etc.<sup>28</sup>
  - ii. The policy should be included in the joinder agreement, written in plain language, be noted prominently and require initials of the beneficiary or authorized third party.
  - iii. If a PSNT has too large an amount of remainder funds, the PSNT should review its budgeting process.

**Suggestion** ⓘ : Every year the PSNT should review the accounts of any beneficiaries who died that year with remaining funds, to see if the beneficiary's death was earlier than anticipated or due to an accident, or whether the PSNT should have done something differently regarding the oversight of that beneficiary's account, especially when the beneficiary has not been accessing money from the PSNT.

**Commentary:** The PSNT administrators and Board should understand that remainder funds are not the same as reserves for operating expenses.

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<sup>28</sup> In discussing remainder interests, True Link notes variations amongst PSNTs on this issue. "Some pooled trusts have strict policies that prevent the retention of any remainder interest. Others retain remainder interest and use it to run charitable programs, support operations or subsidize fees for lower-income beneficiaries." *True Link* at 17.

**Example:** *NPTSC Guidelines, Guideline 10(a) provides that “[f]unds retained by the organization upon the death of a pooled trust beneficiary should be used to benefit people with disabilities and to further the mission of the organization.”*

## **12. Confidentiality**

- a. Having a policy on confidentiality alone isn’t enough. As part of mandatory training for all employees, the PSNT should train employees on confidential information and confidentiality.
  - i. Information that is confidential just does not include the client’s financials, but includes any information at all about the client, including that the client is a client of the PSNT.
- b. Clients should consent to the release of information prior to its release. The release of information should only be for appropriate business purposes.
- c. If it is necessary to provide any client information to any agencies, the client’s consent should be obtained at the beginning of the representation, as part of the joinder agreement.
- d. In cases where a client’s health information is obtained (including in situations where the client is evaluated for disability), the PSNT must ensure that each employee with access to such information is trained on the applicable laws and regulations and the employee signs a statement of completing the training and abiding by the requirements of the laws and regulations.
- e. An intentional breach of client confidentiality should be treated as a firing offense.

## **13. Contracting with 3rd Parties and the Use of Agents:<sup>29</sup>**

- a. If a PSNT contracts with a third party, the PSNT should do the following before hiring the third party:
  - i. If the third party is an individual rather than a company, the PSNT should conduct a background check, obtain references and check the references. If the third party is a company, the PSNT should ensure that the company is regularly performing background checks of its employees.
  - ii. The PSNT should obtain and check references.
  - iii. The PSNT should get three bids—choose the most appropriate, not necessarily the lowest bid
  - iv. The PSNT should conduct interviews—over the phone is acceptable.
  - v. The PSNT should make sure that the 3rd party selected is licensed, bonded and insured. The PSNT should make a copy of the license number and certificate of insurance and keep in the file.
- b. The PSNT should not pay the 3rd party the entire amount up front, but instead may contract to make installment payments on achievement of certain benchmarks.
  - i. The PSNT should not make any payment to the third party at the beginning of the contract, but if the 3rd party insists on some payment up front, then the PSNT should only agree to a small amount, with discretion to the executive director to negotiate a higher amount, but no more than 50% of the contract price.


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<sup>29</sup> See, e.g., UTC § 807, Delegation by Trustee.



- ii. The PSNT should confirm the job is completed before making the final payment. This may include having another inspect the premises or confirm the job completion.
  - 1. The PSNT should be sure to obtain and file any release of liens filed by the 3rd party at the inception of the contract.
  - 2. If the job isn't completed to the satisfaction of the PSNT, the PSNT should withhold final payment until the contract is fulfilled.
- iii. When hiring a third party, the PSNT should enter into a written contract with the third party that clearly sets out the scope of work, the start and completion dates, the payment schedule, non-discrimination clause, as well as any boilerplate clauses required by law or on advice of counsel. The beneficiary or authorized third party should be given a copy of the executed contract.
- c. The PSNT should deal at arm's length with third parties. For example, the PSNT should not hire families or friends or an unlicensed handyman to make repairs to the beneficiary's home.

**Commentary:** Although a friend of the family may offer to do the work a lot cheaper than a professional, the potential for things going wrong could outweigh any savings.

**Suggestion**  : In the event that a professional is not available to do the work, or it is in any other way not feasible to hire a professional, then when dealing with a family member or friend, the PSNT should follow similar procedures to hiring a professional, include language in the contract limiting liability and withholding payment until the job is completed to the PSNT's satisfaction. In all events a written contract must be obtained, rather than making an agreement on a handshake.

## ***II. Trust Management Best Practices***

### **14. Policies and Procedures**

- a. Each PSNT should, with the input and contribution of the board, develop a comprehensive set of policies. The finalized policies should be adopted by the PSNT board of directors.<sup>30</sup> This set of policies should be provided to staff in a compilation that is regularly updated and able to be referred to in print or electronically.

**Commentary:** Since no two PSNTs are alike, some policies may be more appropriate for some PSNTs than others. The PSNT should be sure to develop all the policies needed for the PSNT to fulfill its goals.

- b. Every PSNT should have policies required by local, state and federal laws, such as wage and hour laws, workers compensation, and the Americans with Disabilities Act, to name a few.

<sup>30</sup> For example, NPTSC Guidelines, Guideline 4(a) provides that “[o]rganizational policies should be approved by the board of directors.”

- c. Every PSNT should have a policy on who has access to a beneficiary’s personal identifying and financial information. Access should be limited to only those who need the information in order to do their jobs and the officers of the PSNT (if necessary).
- d. Every PSNT should have a policy on social media that covers, among other things, prohibitions on using the PSNT technology for an employee’s **personal** use, and employee posting to the employee’s **personal** social media from the office, even during personal time, and the prohibition against personal posting the employee’s personal social media site any information about beneficiaries, co-workers and others with whom the PSNT staff interact in any way. The policy should also prohibit employees using the PSNT’s logo or any other trademark in personal postings.
- e. The PSNT should have an internal conflict of interest policy approved by the PSNT board that applies to employees, administrators, officers and board members.
- f. In the event the PSNT is part of a larger not-for-profit organization; there must be clear firewalls between the PSNT, their donors, beneficiaries and key people and the not-for-profit. For example, the umbrella not-for-profit should not have access to the donors to the third-party trusts for the purposes of fund-raising.

**Example:** *NPTSC Guidelines, Guideline 4(n) provides that “[t]he Pooled Trust Program ... have a conflict of interest policy. The pooled trust organization should require all board members and officers to disclose any real or potential conflict of interest at the time it arises and, in any event, should annually request disclosure of such real or potential conflicts. Where an individual has a conflict of interest, the board should take appropriate steps to protect the pooled trust organization from injury or undue influence arising from the conflict.”*

- g. The PSNT should have an external conflict of interest policy approved by the PSNT board that applies to employees working or volunteering part-time for other agencies, for anyone employed by or in governance of the PSNT serving on boards of organizations or doing business with entities when doing so creates an actual conflict or the appearance of a conflict of interest. The policy should require the disclosure of such outside business activity at the inception of the activity and with annual updates as long as the activity continues.

**Example:** *NPTSC Guidelines, Guideline 4(o) prohibits officers or members of the board from being paid or receiving any kind of compensation “from any entity doing business with the pooled trust organization.”*

- h. Each PSNT employee, administrator, officer and members of the board must sign an acknowledgment regarding the conflict of interest policy.
- i. Each PSNT should have a policy that prohibits an employee, administrator, officer or board member from having any involvement with a beneficiary outside of work-related duties.<sup>31</sup>

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<sup>31</sup> See, e.g., NPTSC Guidelines, Guideline 7(a): “[t]he pooled trust program should maintain a professional relationship with the beneficiary....”

- j. Each PSNT should have a policy for employees on when to call law enforcement or 911 when a beneficiary or interested third party is acting out of control, rather than trying to handle the matter. The failure to comply with the policy should be considered a disciplinary infraction because doing so puts individuals at risk of harm.
- k. Each PSNT should have a policy that requires reporting of suspected abuse, neglect and exploitation when a beneficiary reports to them that they have been abused by any provider, caregiver, community member or family member and provide documentation that policy is followed in each case. The policy should have specific steps based upon the situation, *i.e.*, an allegation of rape has very specific steps that should be taken.
- l. Each PSNT should also have a policy that requires reporting of suspected self-harm by the beneficiary. PSNT staff should be trained on steps to take in such situations.
- m. Each PSNT should have a policy on steps to be taken if staff believe a guardian or key person involved with a beneficiary is acting in a way that is harmful or dangerous to the beneficiary, including steps in extreme cases to seek legal recourse to seek removal of that person's legal status.
- n. Each PSNT should have a policy to address when it might be necessary for the PSNT to petition for the appointment of a guardian, conservator or guardian ad litem, or for instructions from the court.
- o. Each PSNT should have a policy and process on notifying the appropriate individuals and authorities when beneficiaries describe behavior that is indicative of bullying, taunting, etc. The policy should cover whom to report and the responsibility of staff to respond.
- p. Each PSNT should have a policy on remainder funds and on reserves that is approved by the board and reflected in the joinder agreement.<sup>32</sup> The policy should be disclosed to and acknowledged in writing by the prospective beneficiary at the creation of the account.
- q. Each PSNT should have a strong and clear policy on confidentiality. The policy should address (1) with whom can the PSNT share information, whether family members of beneficiaries, vendors or others, (2) the type and amount of information to be shared, and (3) the circumstances under which the sharing of information would be appropriate.
- r. PSNTs should always follow their own policies and procedures and include a statement in the employee handbook on the ramifications for failing to do so. If an employee doesn't know the policy, the employee should know to ask the supervisor, rather than making up an answer on the fly.
  - i. If a beneficiary can give informed consent, the PSNT should obtain such consent from the beneficiary regarding the sharing of information. The consent should be in writing and clearly note that the beneficiary can revoke this consent at any time. The beneficiary should be given a copy of the consent.
    - 1. The scope of consent should be clearly laid out in the document.

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<sup>32</sup> See, e.g. NPTSC Guidelines, Guideline 4(f) which directs that “[o]rganizations and their boards of directors should actively and regularly evaluate their operating reserves.”

- ii. If a 3rd party has legal authority to provide consent for the beneficiary, if the beneficiary is still capable of giving consent, the PSNT should look to the beneficiary for consent.
- iii. If a 3rd party has legal authority to provide consent, the PSNT should require the 3rd party to provide a copy of the document (if any) authorizing the 3rd party to provide consent. The document should be kept in the beneficiary's file.

**Example:** *The NPTSC Guidelines, Guideline 4(b) provides that “[t]he organization should have policies and procedures for the confidentiality of information and the privacy of beneficiaries.*

- s. The PSNT should recognize that its employees are fiduciaries and have a policy that outlines the performance of fiduciary duties.
  - i. As a routine matter, on hiring of an employee, each PSNT should provide the employees with information about being a fiduciary and how to discharge their duties as fiduciaries.
- t. If employees of the PSNT use their personal cars for company business, the PSNT should have a policy on mileage reimbursement, insurance, liability and appropriate uses of personal cars.
  - i. The employee must provide the PSNT with written proof of ownership or documentation they are allowed to use the vehicle as well as written proof of insurance; and road worthiness and safety of the vehicle before the employee can use the employee's personal vehicle for PSNT business.
  - ii. If an employee transports a beneficiary in the employee's car, the transportation should only be for authorized activities. The PSNT should obtain a rider on insurance to cover any harm that might occur to a beneficiary when riding in an employee's personal vehicle. The employee should not assist or lift the beneficiary to/from/in/out of the vehicle. Transporting a beneficiary for non- authorized activities is a firing offense.
  - iii. Reimbursement for mileage should be no more than the federal allowable rate.
- u. PSNTs should use secure time keeping-billing methods and keep accurate, detailed records.
  - i. To determine the appropriateness of an expenditure, the PSNT should make sure that the expenditures contain enough detail that the beneficiary or authorized 3rd party will have sufficient information about the expenditure.
  - ii. Entries should be made contemporaneously with an expenditure or no later than the next business day.
  - iii. Supporting documentation should be obtained for each expenditure.
  - iv. If the time/billing records are kept electronically, the PSNT should be sure to have adequate firewalls and cybersecurity systems in place.
  - v. Those individuals who have authorized access to a beneficiary's funds should be bonded.
  - vi. The PSNT should have an internal audit system to ensure appropriateness of time, billing and approval of expenditures.<sup>33</sup>

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<sup>33</sup> See, e.g., NPTSC Guidelines, Guideline 4(g) noting the need for “regular audits of the organization, including

- vii. The PSNT should have an external review of financial policies at least once every three years as part of an independent audit of the PSNT.
- v. A PSNT should have a policy on who is to respond when the beneficiary has an emergency.
  - i. The beneficiary and authorized third parties should be given a copy of the policy and the names and emergency contact information for the PSNT.
  - ii. Those employees on call after hours should understand the necessity of being reachable at any time in the event of an emergency.
  - iii. If an on-call employee fails to make him/herself available during an emergency, absent good cause, the employee should be terminated.
  - iv. The PSNT should consider the provision of a safe place for employees during a disaster that has backup generators and supplies so the employees can continue to be reached by beneficiaries (*See*, § 21 on Disaster planning).

**Commentary:** There are two scenarios that should be addressed in an emergency preparedness policy. The first is when a disaster strikes that effects the PSNT’s ability to conduct business. The PSNT needs to be sure that it can continue operations after the emergency has abated. The second is when a vendor requires an up-front payment from the PSNT before providing services to a beneficiary during or right after an emergency. For example, in the case of evacuation, the PSNT may need to pay for lodging for the beneficiary and the vendor may require an upfront payment or guarantee from the PSNT.

## 15. Strategic Partnerships

- a. The PSNT should identify organizations and agencies that would be beneficial to the PSNT with which to have a working relationship.
  - i. These could include an elder law section of a local or state bar association, local government agencies (such as permitting), state agencies (such as Medicaid), federal agencies such as SSA or HHS or charitable organizations.
- b. The PSNT should identify employees who might be available to serve on boards of such agencies or organizations and encourage them to seek such leadership positions.
- c. The PSNT should include a marketing line item in its operating budget that includes sponsorships for charitable fundraising activities.

**Caution: In creating strategic partnerships, the PSNT should be cognizant of actual or potential conflicts of interest, or even the appearance of a conflict of interest.**

## 16. Media


- a. A PSNT should have a policy on dealing with the media. As part of the policy, an individual should be identified who will handle all media inquiries. Others should be trained to refer all media inquiries to the individual and not try to respond to the media. The policy should ensure that employees understand confidentiality of beneficiary information.

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internal financial operations....”

## 17. Technology

- a. Every PSNT should make sure it has secure firewalls, antivirus and other cybersecurity systems in place.
- b. Every PSNT should be sure to train employees on the appropriate use of technology and the risks of inappropriate use of it. The PSNT employee manual should address security concerns while working remotely.

**Suggestion**  : The manual should address the risks of accessing unsecured or public Wi-Fi, using a laptop in public, business continuity and technology accessibility for business continuation in the event of a natural disaster or emergency.

- c. The PSNT should have a tracking system that requires each employee to log-on in order to track the transactions for individual beneficiaries.
- d. The PSNT should use accounting software that allows the PSNT to track transactions for individual beneficiaries.
- e. The PSNT should have adequate cybersecurity insurance.

**Commentary:** Technology has become ubiquitous and its use widespread. However, the PSNT needs to examine technology as it supports the mission of the PSNT. Technology is a tool, but not a replacement for humans. When determining methods of communication, a PSNT may choose to use email as a primary method of communication. There are many conveniences and advantages to email, but it may not always be the best method for communication.

Further, the PSNT should remember that not all beneficiaries have access to, or the ability to use, technology for communication. To that end, the PSNT should recognize that multiple methods of communication are important, and in some instances a phone call, a fax, or even snail mail may be the better way to proceed for a particular beneficiary.<sup>34</sup>

Even though the PSNT may need to use alternative methods of communication with certain beneficiaries, the PSNT should still recognize the value of technology as a tool for more effective operations and efficiencies. To that end, the PSNT should strive to become paper-less (that is, less paper, not paper-free) so the PSNT will need a high-volume scanner and other technology that allows for efficiencies. For example, True Link observed that

Paperless pooled trusts employ a range of tools to digitize documents. Instead of collecting signatures via paper and pen, they use services like HelloSign, eSignLive, or DocuSign, which offer electronic signature technology as well as comprehensive audit trails. These systems can be used to expedite communication with beneficiary advocates and external partners, and facilitate internal authorization when multiple approvals are required.<sup>35</sup>

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<sup>34</sup> See *True Link* at 8, noting that “offer[ing] ... beneficiaries multiple ways to submit requests [can lead to] greater compliance, fewer hours spent fielding calls, and addressing concerns, and quicker disbursement turnaround times.” The takeaway, according to True Link: “it’s easier to teach ... staff to do the same task multiple ways through good technology than it is to persuade all beneficiaries to do the same task the same way.” *Id.*

<sup>35</sup> *True Link* at 6.

True Link analyzed the advantages of a PSNT going digital noting the potential for growth, efficiencies, cost and time savings and better inter-agency communications. The report also noted that 3rd parties found advantages to digital documents when requesting them from the PSNT.<sup>36</sup>

**Suggestion** ☹ : Use technology to make the PSNT operations more efficient and better able to serve beneficiaries. Technology can lead to better record-keeping, an electronic paper trail for reporting and timelier responses to beneficiary requests. Recognize that there will be up-front costs and a learning curve, but the end result will lead to efficiencies and improved effectiveness.

## 18. Real Estate

The PSNT should have a policy on whether to use the beneficiary's funds to buy the beneficiary a house or whether to accept title to real estate on behalf of a beneficiary. In determining whether to do so, the PSNT should keep in mind the unique issues that real estate ownership presents, the additional costs associated with real estate ownership, the Sole Benefit Rule and the POMS regarding real estate ownership.

**Commentary:** The POMS notes that the sole benefit rule comes into play regarding home ownership. See POMS SI 01120.201.F.2. If others live in the house with the beneficiary, the sole benefit rule is implicated, and these other occupants will need to pay rent to the trust.

**Commentary:** Other issues implicated by ownership of real estate include maintenance, taxes, depreciation (or appreciation), insurance, liability issues and more. The PSNT should consider a budget for ownership before deciding whether to purchase or take title to real estate.

## III. Personnel and Physical Plant

### 19. Hiring and Firing: Potential Employees, Employees and Vendors

- a. Potential Employees
  - i. As a matter of routine, a PSNT should complete a criminal background check, fingerprinting, a reference check, a drug test and a credit check for each prospective employee.<sup>37</sup> Each prospective employee should provide a valid and current photo ID. If the employee is going to ever be transporting a beneficiary a current driver's license and insurance card must be provided. It is the responsibility of the employee to notify the PSNT of any loss of driving privileges or insurance coverage.
- b. Vendors
  - i. A PSNT should check references for any vendor and confirm that the vendor is licensed and insured. A reference check should also be conducted before hiring a vendor.
  - ii. Before doing business with any vendors that will have access to physical space of the PSNT, the PSNT should determine whether any employees of vendors have been screened, bonded, etc. by the vendor and if not, then the PSNT should consider conducting a criminal background check,

<sup>36</sup> True Link at 7.

<sup>37</sup> See, e.g., Plan of New Jersey at 4.

fingerprinting, a reference check, a drug test and a credit check for each such vendor or have a policy that each PSNT employee must secure files and log off computers so anyone not employed by the PSNT who has access to the space will not have access to confidential information.

**Commentary:** The PSNT may hire a cleaning service, and if that is the case, before engaging the service ask about the employee screening used by the cleaning service. If instead of a service, the PSNT hires individuals to clean the office space, then the PSNT needs to do its own check of the individual before hiring the individual. Further if any PSNT employees might be working late when the individual is on the premises, screening the individual before hiring will help ensure the safety of the PSNT employees.

- c. Employees
  - i. Each new employee should have a stated probationary period and this should be clearly noted in a letter of employment.
  - ii. Each employee should be provided with an employee manual that includes information about policies and procedures (including technology policies), penalties for violation of policies and procedures, and actions that could lead to immediate termination.
    - 1. Employees should sign an acknowledgment of the policy manual.
    - 2. Employees should confirm in writing that they have read the manual.
    - 3. Employees should be required to undergo an initial and then periodic training on the PSNT policies and procedures.<sup>38</sup>
  - iii. The PSNT should offer practices and incentives to employees to encourage retention. It is critical to maintain continuity of staff both for beneficiaries to have confidence and knowledge of the staff they work with and for program integrity.
    - 1. The PSNT should develop a regular “stay interview” with staff focusing on their contribution to the organization, their personal goals for development and the mission of the organization. For new employees this should be done within the first 30 days, repeated at six months and then become an annual event separate from any annual evaluations.
    - 2. Every employee of the PSNT should have an annual evaluation with review of mutually set goal, requests for training and direct feedback on performance from their supervisor.
    - 3. The PSNT should have an annual training program for staff that is focused on the needs of individuals – employment goals for example – so, they become more knowledgeable about the ways they can support beneficiaries.
    - 4. The PSNT in conjunction with their staff should develop a series of incentives that recognizes continuity and longevity. The incentives

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<sup>38</sup> NPTSC Guidelines, Guideline 3(a) provides that “[o]rganizations ... hire competent staff and provide staff with ongoing training.”



can be tailored to the individual PSNT and can take a variety of forms other than monetary incentives.

**Example:** *A PSNT may allow a casual dress day or bring in puppies from a local rescue for an afternoon break.*

- iv. The PSNT should ask staff to define professionalism and customer service and create its definition of professionalism with the staff input.
  - 1. The PSNT board should adopt a professionalism and customer service policy that applies from the top down.
  - 2. Staff should be asked for examples of professional conduct and unprofessional conduct, with those examples incorporated into the policies and procedures manual.

## 20. Training

- a. The PSNT should have a required training program for all new employees and then regular continuing required training for all employees.
  - i. Required topics should include the mission of the PSNT, the role of the PSNT, supporting a quality of life of beneficiaries, history of the PSNT, Governance of the PSNT, their role and responsibilities, HIPAA, confidentiality and informed consent, implicit biases, employee attitudes, POMS, sole benefit, policies and procedures, and record keeping
  - ii. Topics for continued training could include building natural supports, building relationship and effective methods of communication, handling beneficiaries who are angry or demanding, assessment tools, various disabilities, government programs and benefits, dealing with an angry beneficiary or family member, dealing with local agencies, cyber security, what happens when a beneficiary runs out of money, etc.<sup>39</sup>
  - iii. Additional training should be related to program areas like vocational opportunities, health and wellness, and developing community interactions as outlined in the BEST Tool.
  - iv. The PSNT should regularly share success stories with staff of critical steps taken by the PSNT that effectively changed the lives of the beneficiary for the better.
  - v. Employees should be given an opportunity to evaluate a training session, suggest topics for future trainings and to serve as trainers or facilitators.
  - vi. The PSNT should keep a record of each staff member's participation in training and this should be part of their annual evaluation.

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<sup>39</sup> See, e.g., NPTSC Guidelines, Guideline 3(b) which directs that employees “possess or know where to obtain knowledge of trust laws specific to the applicable state, Medicaid laws and regulations specific to the applicable state; Social Security laws and regulations; HUD Section 8 laws and regulations; laws pertaining to other major programs; and law changes. 3(c) directs that employees have “or know where to obtain knowledge of the population served and receive ongoing training regarding the population served and changes in disability services.”

- b. Every PSNT should conduct annual employee reviews, using a written tool that employees can either use to self-evaluate or read prior to evaluation.<sup>40</sup> The review process should also give employees a chance to confidentially evaluate supervisors.
- c. Every PSNT should develop a plan for employee retention and incentives for engagement.
- d. Every PSNT should have an exit interview process to learn from any staff leaving what caused them to leave and what if anything can be learned to improve the work environment for all.

**Commentary:** Well-trained and dedicated staff are the most valuable asset a PSNT has. The PSNT should be sure that staff education is a priority and staff retention an ongoing goal.<sup>41</sup>

**Suggestion** ⓘ : A PSNT should consider the creation of a “retention strategy”<sup>42</sup> and benchmarks for employees who strive for greater responsibility within the organization. Promotion from within can have great advantages, but the PSNT also needs to recognize that they need to provide appropriate training, professional opportunities and support for employees, so the employees are not promoted only to fail.

- e. The PSNT should also offer training to family caregivers, professional caregivers and beneficiaries, including topics such as financial literacy (especially for beneficiaries), record keeping, receipts, sole benefit rule, etc.
- f. As a value added, a PSNT might consider offering additional training for family caregivers and professional caregivers should also focus on their personal well-being in the role they have undertaken.

## 21. Distribution of Duties

- a. Each staff member should have discrete responsibilities and a job description.
- b. Staff should be cross-trained so that operations continue even if an employee is on vacation, ill, etc.
- c. A member of the leadership team should monitor the workload of each staff member and redistribute the cases as needed.
  - i. Case load numbers are not always a good indicator of workload, in that some beneficiaries need more time and attention while others need little.

**Suggestion** ⓘ : Regular reports and group meetings can help with workload flow.

## 22. Physical Plant

- a. The PSNT should decide whether to have a location to meet with beneficiaries that is part of the PSNT physical plant or a separate facility.

<sup>40</sup> The NPTSC Guidelines, Guideline 3(d) calls for regular employee evaluations.

<sup>41</sup> See, e.g., *True Link* at 15, discussing that top performing PSNTs “invest in staff development and retention because they know that institutional knowledge is invaluable.” *Id.* at 15.

<sup>42</sup> *True Link* at 16.

- b. All physical parts of the PSNT should be fully accessible, ADA-compliant and meet state/local building codes.
- c. The PSNT should have adequate security for people (employees, vendors, beneficiaries and business invitees) and for information. Thus, the PSNT should consider the use of keycard or biometric entries, emergency call buttons, cameras and lighted parking.
  - i. If cameras are used on the premises, appropriate notices should be posted regarding the use of cameras.
  - ii. The PSNT should consider the issues presented by the storage of video, including security and length of storage and who can access the stored video.

#### ***IV. Emergency Planning***

##### **23. Disaster Planning**

- a. A PSNT must have a disaster plan and policy for both the organization and for the beneficiaries.
  - i. A PSNT must have a disaster plan for the organization that recognizes the need to secure the equipment, data, and original documents; protect employees and beneficiaries; and allows for ongoing operations.
- b. Although the physical space may not be available for some time, the PSNT must be able to continue business or resume business as soon as possible.
- c. Beneficiaries dependent on the PSNT for paying bills and arranging services will need to have that support continued even though the physical location of the PSNT is inaccessible.
- d. The disaster plan must contemplate that when a natural disaster strikes, all entities and individuals will be scrambling for services, infrastructure repairs, and basics, such as food, clothing and shelter.
  - i. The plan needs to arrange for adequate provisions prior to the natural disaster and for at least three weeks post-disaster.
  - ii. The PSNT should assume that electricity, cell service, water, gasoline, and food supplies will be interrupted and have a plan in place to respond to beneficiaries' needs during these outages.
- e. A PSNT must have adequate insurance that includes property and casualty, business interruption, and liability insurance.
- f. A PSNT should ask each facility where one of the PSNT beneficiaries resides for a copy of the facility's disaster plan and review it for adequacy.
- g. The PSNT should have an alternative means of communication available until local governments and cell providers are able to restore standard communications.

##### **24. Emergency Procedures**

**Suggestion** ☹: The PSNT should distinguish between emergencies and disaster preparedness and train employees on each.

- a. The PSNT should train employees on how to respond if a beneficiary has a medical emergency in the presence of the employee.
- b. The PSNT should have backup files offsite-whether in a physical location or cloud storage.
- c. The PSNT should have a business interruption plan to allow the PSNT to resume operations as soon as possible.
- d. The PSNT, in developing its emergency response plan, needs to balance employee safety and security with the needs of and supports for beneficiaries.
- e. The PSNT should provide every beneficiary, authorized caregiver and authorized family member with an emergency phone number and ensure that a PSNT employee is available at any time to answer that number.

## ***V. Beneficiary Related Best Practices***

### **25. Beneficiary-Centered Processes**

The Beneficiary Experience: How does the operation of the PSNT look from the viewpoint of the beneficiary, the family, and others who care about them?

### **26. Considering the entire person**

- a. **The goal of the PSNT should be to consider the entire person and their quality of life.** The PSNT should be an effective organization providing support to the beneficiary with timeliness, accountability and transparency. In addition, the PSNT should be an effective partner with the beneficiary in building a better life looking to critical areas that often have been overlooked in the past. The PSNT should have a process to regularly engage all beneficiaries in developing their plan for a quality life in critical areas.

### **27. Employment<sup>43</sup> Opportunities for Beneficiaries**

One of the areas that has most often been overlooked by the PSNT in the past has been employment opportunities for beneficiaries. As a result, our best practices guide recommends a renewed approach for all beneficiaries to explore employment opportunities.

- a. As part of the assessment of the beneficiary, the PSNT should inquire of the beneficiary the beneficiary's interest in employment opportunities, whether for pay or as a volunteer. These interests should reflect the beneficiary's interests and desires for work, not just available jobs.
- b. PSNT staff should be trained on the various vocational opportunities for beneficiaries.
  - i. For those beneficiaries who need support, the PSNT should include in the beneficiary's budget a job coach or job companion in the budget if there is no federal, state or local government funding for such positions.

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<sup>43</sup>We use the word employment to indicate paid or volunteer employment, and in this document consider it synonymous with vocational opportunities.

- ii. The budget may also need to include transportation, clothing and other expenses associated with vocational opportunities.
- c. Staff of the PSNT should familiarize themselves with vocational training, college programs, and employment resources in their community, their state and nationwide, such as the Association of People Supporting Employment First (APSE); state specific vocational rehabilitation services funded under the Rehabilitation Services Administration (<https://www.careeronestop.org/ResourcesFor/WorkersWithDisabilities/vocational-rehabilitation.aspx>), The Arc, U.S. Department of Labor Office of Disability Employment Policy and the World Institute on Disability.

**28. From the beginning to the end, the PSNT should have processes in place that ensure that the focus is on the beneficiary in all facets of the administration of the beneficiary’s account in the PSNT.**


- a. The PSNT should learn as much as possible about the beneficiary, not just the benefits for which the beneficiary is or may become eligible and the beneficiary’s needs, but what gives the beneficiary joy and provides the beneficiary with a quality of life.<sup>44</sup>
- b. A PSNT should use a routine process for learning about the beneficiary that allows the PSNT administrator to know the beneficiary as a person, rather than as a case.
- c. As much as possible, the PSNT should emphasize the beneficiary’s autonomy and quality of life rather than focus on the task at hand.
- d. The PSNT should strive to empower each beneficiary when making decisions about expenditures and other matters and make decisions in a way that allows a beneficiary autonomy.<sup>45</sup> Whenever possible, the PSNT should use tools that allow the beneficiary’s participation in decision-making, such as supported decision-making. Key to this process is spending time insuring to the extent possible beneficiaries understand the resources available to them and the limits of those resources.
- e. A beneficiary’s request should not be denied just because the PSNT fears the possibility of liability.
- f. When creating a budget for the beneficiary, the PSNT should consider those expenditures and matters that provide a beneficiary with joy and, whenever financially feasible, include those in the budgeting process, even though the PSNT administrator may consider the items to be frivolous or unnecessary. However, the PSNT administrator should take the beneficiary’s long-term needs and safety against such expenditures. It is essential for the PSNT to distinguish between the importance to the individual beneficiary rather than the PSNT or other’s opinions.

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<sup>44</sup> True Link Best Practices suggests that PSNT staff “take detailed notes on the beneficiary’s needs, living situation, capacity, spending habits, anticipated future purchases, and government benefits....” and use the information to determine “a monthly spending plan to help the beneficiary, as well as the trust, budget appropriately.” True Link notes that all information gathered should be “entered electronically into an internal client database.” In fact, True Link notes the most efficient trusts “enter data in real time” during the meetings with the beneficiaries. *True Link* at 3.

<sup>45</sup> See, e.g., NPTSC Guidelines, Guideline 7(a): “[t]he pooled trust program should maintain a professional relationship with the beneficiary and that person’s representative as applicable, consider the needs of the beneficiary and respond to requests for trust distributions.”

- g. The PSNT should obtain the informed consent of the beneficiary (if the beneficiary is capable of giving informed consent and if not, the representative of the beneficiary), including a HIPAA consent. Consent should be obtained before any information about the beneficiary is shared with a third party.
- h. PSNT staff should never assume that the inability to verbally communicate precludes any other form of communication. In the case of persons who are nonverbal, the PSNT staff must develop alternative means to engage the beneficiary. The PSNT staff should have auxiliary aids and other effective (and ADA compliant) communication devices available to assist in communicating with the beneficiary. The PSNT should also arrange for interpreter services for those whose primary language is not English.
- i. The PSNT should always remember that the individual beneficiary is just that---an individual and ensure that staff are trained to understand this and have operating procedures that are designed to treat the beneficiary as an individual.
- j. The mission of the PSNT should incorporate a focus on the quality of life of the individual beneficiary rather than just on the provision of services.
- k. When meeting with a prospective client/beneficiary, the PSNT should explain how decisions are made, the information needed under BEST to provide an accurate profile of the beneficiary, explain operating procedures and ascertain beneficiary expectations.<sup>46</sup> As well, the PSNT should explain the investment management part of the PSNT, such as how the funds are invested within the PSNT, who manages the investments, personal tax reporting requirements/tax liability considerations, etc.

**Suggestion**  In meeting with the prospective client/beneficiary, the PSNT representative should be careful to not mislead the prospective beneficiary or over-promise programs and services. The prospective beneficiary should have specified a cooling off period between the time of signing the joinder agreement and the time the check is deposited.

- l. The PSNT should have a specific timeframe for processing requests that is shared with all beneficiaries. For example, a request is processed and a check prepared or a beneficiary is notified that a request is denied within two full working days.
- m. The PSNT should have an electronic means for beneficiaries to access their accounts, check balances and see amounts available to them for disbursements.
- n. The PSNT staff or representatives should visit every beneficiary in person or virtually through telecommunication at least semi-annually and provide a record of a contact. Any change of status should initiate a personal visit.

**Commentary:** When visiting a beneficiary, the PSNT representative should prepare in advance for the visit and use a checklist (contained in BEST) to ensure the maximum and best information is gathered during the visit. The checklist would include observations regarding surroundings, the

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<sup>46</sup> For example, NPTSC Guidelines, Guideline 6(b) requires that the PSNT give “a prospective beneficiary or that person’s representative as applicable ... the details of how remaining funds are distributed on upon the beneficiary’s death, including the possibility of payback of funds to Medicaid agencies and retention of remaining funds by the organization pursuant to” federal law.

beneficiary's appearance, health care and treatment, etc. If appropriate, the PSNT representative visit should include observation during mealtime.<sup>47</sup>

In person visits are critical but the frequency may depend on the needs of an individual beneficiary, the amount in the beneficiary's trust and the costs incurred in visiting the beneficiary (especially those where lengthy travel is required). For some beneficiaries, semiannual visits may be enough. For others, more often visits may be needed due to critical changes occurring with the beneficiary, although the frequency may change depending on the beneficiary's situation. It is our opinion that an annual in-person visit is insufficient.

**Commentary:** In some instances, especially in rural areas where the PSNT staff may be several hours away from the beneficiary, the PSNT might consider the use of technology for real time visits as a substitute for some in-person visits.

**Example:** *NPTSC Guideline 6 covers Trust Creation Transparency. In particular Guideline 6(a) states that “[t]he pooled trust program should disclose the operational features of its Trusts to each prospective beneficiary or that person’s representative as applicable to set expectations of how the Trust may assist the beneficiary. The program should provide information related to trust irrevocability, sole benefit restrictions, in-kind support and maintenance restrictions, Trustee discretion, and restrictions on direct payments to beneficiaries.”*

*Further, Guideline 6(d) recommends that “[t]he pooled trust program ... encourage a prospective beneficiary or that person’s representative as applicable to meet with independent counsel to discuss trust features and specific circumstances of Trust creation.*

*Finally, Guideline 5 Practices, especially 5(b) cautions the PSNT that it “not make a warranty of eligibility for public benefits.”*

**Suggestion** ¶: Consider carefully the documents used by the PSNT as well as the content of the PSNT website. Those each communicate a specific impression of the PSNT with prospective beneficiaries and involved third parties. The documents and the website should be written in clear, understandable and informative language.<sup>48</sup>

- o. Each PSNT should operate in such a way as to keep humanity in their services.

**Suggestion** ¶: A PSNT may send individualized birthday, anniversary and appropriate holiday greetings to beneficiaries. A PSNT may choose to hold a party for beneficiaries or in some way acknowledge and celebrate individual beneficiaries. If the activity is benefitting all beneficiaries, the PSNT should not charge the cost of the activity against the beneficiary's account.

<sup>47</sup> See, *Plan of New Jersey* at 7-9.

<sup>48</sup> True Link offers examples of “high-performing trusts” describing “the quality and clarity of [those] materials. Trusts that create user-friendly forms, easy checklists, visual resources, and documents geared toward the population served... reported higher success rates with the onboarding process. Some trusts take this even further, sending duplicate materials to advocates, loved ones, and service providers so everyone is on the same page. Still others create customized packets for beneficiaries depending on the type of benefits received.” *True Link* at 4.

A PSNT should develop tools to engage and support beneficiaries in understanding the funds available, share documents and their goals and life plans. This tool should be accessible to Trust staff working with beneficiaries when making decisions about expenditures. The BEST tool is one a PSNT might consider. The BEST Tool will provide the PSNT an interactive and real time tool to use with their beneficiaries for their benefit not as another assessment and will provide the PSNT with a planning tool that also support financial literacy skills of the beneficiary.

## 29. Beneficiary Budgets

- a. The PSNT should create a budget for each beneficiary.<sup>49</sup> The goal of the budget is to build a quality life for the individual to the extent possible and to expend all funds prior to death of the beneficiary.
- b. Before creating a budget for the PSNT beneficiary, the PSNT should complete an assessment (BEST) to determine the beneficiary's goals, expectations, dreams and factors that provide the beneficiary with a quality of life.
- c. The budget that the PSNT creates should be based on the amount of money the beneficiary deposits with the PSNT but taking into account the beneficiary's life plans. The PSNT should recognize that the money is to be spent on the beneficiary's behalf, and not saved for future generations. The PSNT reserves the right to go beyond the annual budget for special circumstances and this should be communicated in writing to the beneficiary. The budget should also take into consideration any outside income/assets or any government or private benefits received by the beneficiary.
- d. The budget should also take into account the beneficiary's life expectancy as determined by the life expectancy tables which includes flexibility for people with multiple disabilities, the beneficiary's health and disability. This table should be reviewed periodically and adjusted as needed. A key determinant of effectiveness should be a review of the number of beneficiaries who die before their trust is expended.
- e. Once the budget is created, the PSNT should review and explain the budget with the beneficiary, if the beneficiary is capable of comprehending, as well as anyone else the beneficiary chooses to be part of the discussion. When considering whether a beneficiary is comprehending the discussion, the PSNT should recognize that a beneficiary with diminished capacity may still comprehend the information depending on the form in which the information is presented, as well as the time of day and location of the conversation. If the beneficiary is unable to comprehend the conversation, then the PSNT should have the conversation about the budget with the individual(s) legally authorized to speak on the beneficiary's behalf.
- f. Once the budget is final, the beneficiary or authorized third party should sign an acknowledgement of the budget and be given a copy.

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<sup>49</sup> *But see* NPTSC Guidelines, Guideline 7(b) which provides that

The pooled trust program should have full discretion to decide if a beneficiary should have a written spending plan for each beneficiary that is provided to each beneficiary and that person's representative as applicable. This may include review of prior year spending, anticipated life of the trusts, and considerations of principal and interest spending.



- g. The budget is a living document and should be periodically updated, especially in the event of a significant occurrence.

**Example:** *NPTSC Guidelines, Guideline 4(d) recommends the provision of “individual trust accountings.... on a regular schedule.”*

PSNT staff should remember that a budget balances the beneficiary’s needs against the amount of money in the account. However, the PSNT should never let the potential for remainder funds guide any decision to approve or deny a request. PSNT staff should support the goals of the person, follow the law on allowable expenses, and consider each situation individually. Their personal values about an expenditure as being too lavish or too cheap, should not impact their decision to allow or deny any request.

**Example:** *NPTSC Guidelines, Guideline 7(c) directs that a “pooled trust program ... not take retention by the organization into consideration when making distributions.”*

- h. In situations where it appears likely that the beneficiary will exhaust the funds in the PSNT, the PSNT should prepare a phase-out or “weaning” budget.

### **30. PSNT Providing Additional Services to Beneficiaries**

- a. A PSNT may decide to offer services beyond that of administration of the pooled trust. Any fees for wrap-around services and extraordinary fees should be clearly listed on the published fee schedule.

**Commentary:** Some PSNTs that offer additional services may serve as a representative payee for a person receiving Social Security benefits, as a fiduciary for someone receiving Veterans benefits, or care management services.

<sup>56</sup> See, e.g. *True Link* at 4-5 which suggests “[s]etting a needs-based engagement calendar for each beneficiary with reminders scheduled immediately following the onboarding call, can be an effective strategy. Calendar items can include regular check-ins with beneficiaries themselves, as well as advocates and service providers.”

- b. A PSNT needs to recognize the potential for conflicts of interest when deciding whether to hire a third-party to provide case manager/care manager or to provide those services in house.

**Commentary:** Assume a beneficiary needs a care manager to arrange for services for the beneficiary. If the PSNT offers expanded services, the PSNT may choose to use an in-house care manager to arrange for these services. But what if a third-party care manager can provide those same services cheaper than what the PSNT would bill the beneficiary? The PSNT may be tempted to keep the transaction in-house, since it would benefit the PSNT's bottom line, but it would cost the beneficiary more.

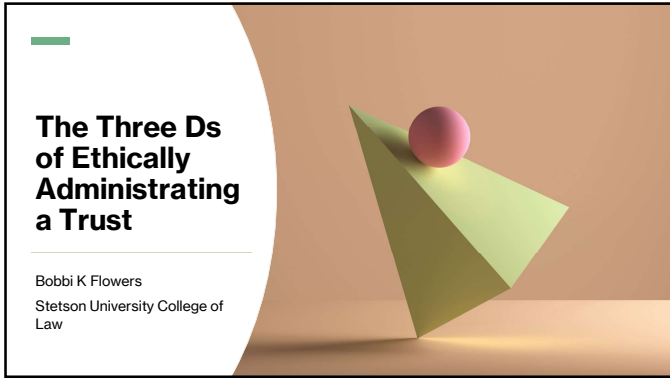
There may be valid reasons for the PSNT to keep the transaction in-house. For example, the PSNT may be able to arrange the services for the beneficiary faster than the third-party service provider. If there is a reason to justify the higher expenditures for services provided by the PSNT, the PSNT should be sure to document the beneficiary's file to reflect this. In order to avoid the perception of self-dealing, written authorization to provide in-house care management services should be provided prior to delivery of the service. The authorization can be a Life Plan document, a Joinder Agreement or other writing evidencing the request. The PSNT should have and follow a policy that public support services will be utilized prior to private trust assets being used. A competent beneficiary or authorized representative may make a written request that trust assets be used in lieu of public support services.

### **Summary**

These guidelines are designed to be comprehensive, but we recognize that not all of these guidelines will fit every PSNT. We hope that these guidelines will be used by PSNTs in the U.S. to the extent appropriate and feasible. These guidelines may be reproduced with attribution to the Life Passages Planning Project and the May & Stanley Smith Charitable Trust. In reproducing these guidelines, we ask that edits or changes be reviewed by the Life Passages Planning Project to avoid attributing a contrary position to the Project.

Sept. 30, 2019

First Revision January 25, 2020



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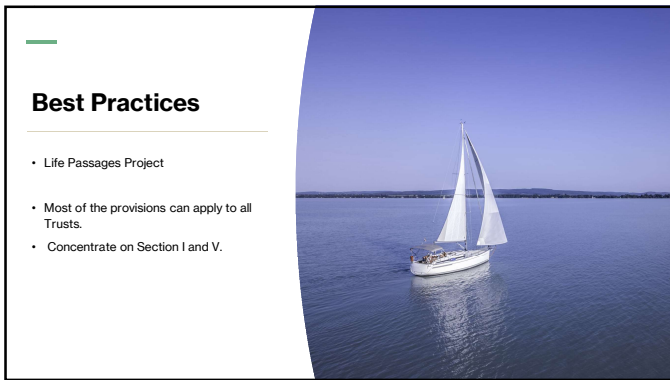
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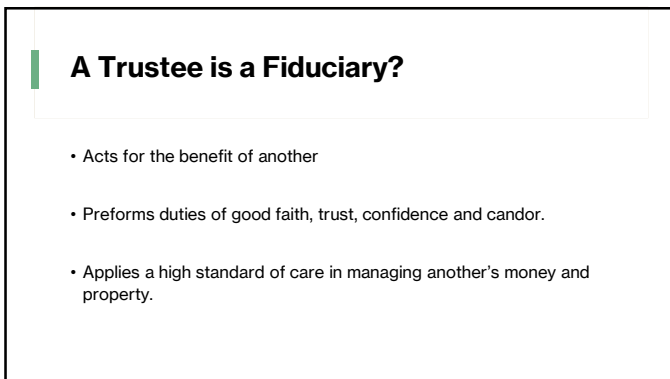
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### 5 biggest Mistakes Fiduciaries can Make



- Self Dealing/Stealing
- Failure to consult with experts when necessary
- Failure to consult with beneficiary
- Not keeping informed about the "consumer"
- Poor Record-keeping

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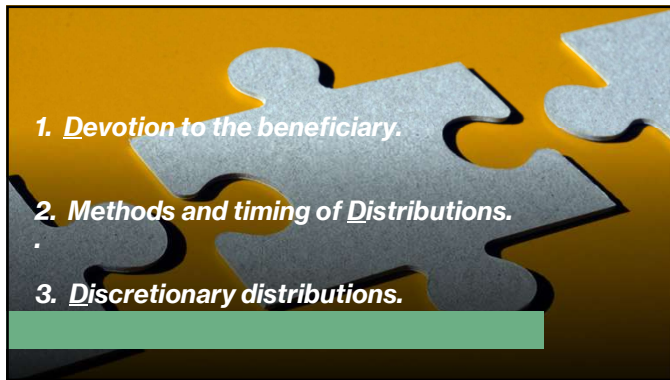
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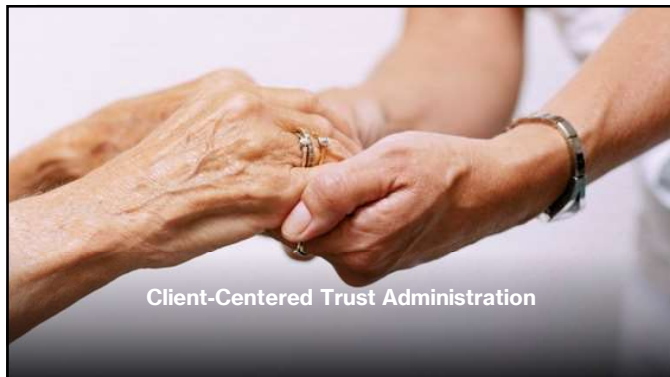
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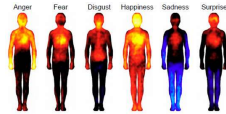
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## Client-Centered Administration

- The goal of the fiduciary should be to consider the entire person and their quality of life.
- In addition, the fiduciary should be an effective partner with the beneficiary in building a better life looking to critical areas that often have been overlooked in the past.
- The fiduciary should have a process to regularly engage all beneficiaries in developing their plan for a quality life in critical areas.




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## Communication, Communication, Communication.

- Beneficiary Educated
- Beneficiary Empowered
- Beneficiary Informed

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8

## Best Practices

- Employment – Voluntary or Paid (within government guidelines)
  - Inquire of the beneficiary
  - Budget for
    - Vocational opportunities – Training?
    - Transportation
- Autonomy and Supported Decision-making
- Quality of Life, not just services.
- Budgets for the Beneficiary
- Avoid Conflicts of Interests with in trust services

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**Timing and Methods of Distributions**

- Transparency
- Routine Distribution Schedule
- Who can approve the discretionary distributions?
- Intentional denial process
- Communicate denials in a reasonable time
- Timeline



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**Discretionary Distributions**

- Denials based on Trustee/Trust Companies needs
- Denials based on trustee's value or morals
- Denials based on funds/quality of life

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THANK YOU

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