STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

2023 Fundamentals of Special Needs Trusts Administration Webinar

Friday, April 21, 2023

STETSON LAW

Stetson University College of Law
Gulfport, Florida

2023 Fundamentals of Special Needs Trusts Webinar

Stetson University College of Law
Center for Excellence in Elder Law
1401 61st Street South
Gulfport, FL 33707
(727) 562-7393
Email: sntconf@law.stetson.edu

STETSON UNIVERSITY

Center for Excellence in Elder Law

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

The Fundamentals of Special Needs Trust Administration
Webinar

~Friday, April 21, 2023~

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

12:40-1:20 pm EDT
The Basics of Special Needs Trusts
Mary Alice Jackson
In today's world, there are many options from which to choose when protecting public benefits eligibility. In this session we'll explore the fundamental who, when, why, and what of special needs trusts when planning in 2023.

1:20-2:10 pm EDT
Ethics in Special Needs Trust Planning
Stu Zimring
The intended Beneficiary, the family, the proposed Trustee, the PI Lawyer are all sitting in your conference room. Who's the Client? Quickly becomes "Who's On First?" as we examine the ethical issues involved in drafting and administering SNTs.

2:10-2:50 pm EDT
Guardian and Trustee: A Marriage Made in …
Slade Dukes and Kerry Tedford-Coles
The relationship between guardian and trustee can sometimes be complicated. The balance of case management and fiduciary duty can be a challenge despite both parties wanting the best outcome for the beneficiary. The speakers will discuss guardian and trustee duties, use case studies to analyze successes and disappointments along with tips on how to ensure this is a marriage made in heaven.

2:50-3:00 pm EDT
Sponsor Break - *ElderCounsel*

3:00-3:40 pm EDT
Welcome! Now What?: Beneficiary Intake and Onboarding
Megan Brand and Yolanda Mazyck
Deciding to relinquish control of one's assets to a trustee is difficult. Many may question that decision when attempting to access the funds held in trust, which can overwhelm the beneficiary and their support network. Establishing a cohesive intake and onboarding process can reduce the dreaded "buyer's remorse" many beneficiaries may experience between the time the ink dries, and requests are submitted. This presentation will provide options for inclusion when developing or revising a comprehensive intake and onboarding process for special needs trust practitioners.

3:40-4:20 pm EDT
The Trust Protector
Shirley Whitenack
Trust protectors are often appointed to oversee the management of a special needs trust by the trustee. This session will discuss the advantages and disadvantages of designating a trust protector, including the powers of a trust protector, compensation for the trust protector and the trust protector's liability.

4:20-5:00 pm EDT
Q&A Session
All Webinar Speakers
Join the webinar speakers for an interactive Q&A session.

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

The Fundamentals of Special Needs Trust Administration Webinar

Friday, April 21, 2023

~Speakers~

Megan Brand

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 and 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 as Vice President of the National Planned Lifetime Assistance Network, the Vice President of the Alliance of Pooled Trusts and is a frequent presenter in the community, both locally and nationally, on Special Needs Trusts and related topics.

Slade Dukes

Slade (he/him/his) is a Florida native, having lived and worked across the state. He has practiced law for over 16 years, serving in both the public and private sectors. Slade lives in St. Petersburg, FL, working out of offices in both St. Petersburg and Sarasota. He is a proud member of and advocate for the LGBTQ+ community.

Slade is continually building upon and further developing his diverse and extensive legal and managerial professional knowledge and experience, and currently focuses on the practice areas of Guardianship, Probate and Trust Administration, Estate Planning, and General Practice.

Roberta Flowers

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.

Mary Alice Jackson

Mary Alice is of counsel to the firm of Boyer & Boyer in Sarasota, Florida, a firm she helped found in 1995. She began practicing in elder law in 1992 and has been Florida Bar Board certified in Elder Law since 1998. Mary Alice is licensed to practice in in both Texas and Florida. She has an AV Preeminent rating from Martindale Hubbell and has been named a Super Lawyer in both Texas and Florida. She is a frequent speaker on elder law and special needs planning topics.

Mary Alice is a Fellow of the National Academy of Elder Law Attorneys, and has been a member of NAELA since 1993. She is a member of the Florida and Texas Chapters of NAELA. Mary Alice is a member of the Special Needs Alliance and serves on its Board of Directors. She is a past President of Legal Aid of Manasota, the Florida Bar Elder Law Section (1999) and the Sarasota County Bar Association (2005). She also served as board President for Tidewell Hospice of Southwest Florida, Senior Friendship Centers, and the Area Agency on Aging for Southwest Florida chapter. She spent six years on the board of trustees of The Pines in Sarasota.

Mary Alice co-authored the initial editions of Planning for the Elderly in Florida, a Lexis Nexis publication. She currently teaches long term care planning in the Stetson Elder Law LL.M. program and serves on the Elder Law Advisory Board at Stetson. Mary Alice is a Florida native, having been born and raised in Winter Park. She holds a B.S. in government and a master’s degree in Public Administration from Florida State University. She received her J.D. in 1991 from her father’s alma mater, Stetson University College of Law. Her standard poodles, Henry and Shadow, and her husband, Bob, are never ending sources of amusement and help her keep life in perspective.

Yolanda Mazyck

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.

Kerry Tedford-Coles

Kerry Tedford-Coles is the Executive Director of Planned Lifetime Assistance Network of Connecticut, Inc. (PLAN of CT). Kerry has spent her career serving those with disabilities through both Special Education and the non-profit sector. She has been with PLAN of CT since 2004 and has been instrumental in its exponential growth. In June of 2016 she added the role of Executive Director of the

National PLAN Alliance. She is a frequent local and national presenter regarding Special Needs Trusts for community organizations, legal and financial professionals and disability providers. She is also a member of the Pooled Trust National Standards Committee, Center for Future Planning Advisory Council, Board member and Co-Chair of the Outreach & Education Committee of the Association of Pooled Trusts (APT) and served on the ABLE Act Advisory Committee through the Department of Treasury for the State of Connecticut. Kerry lives in Eastern Connecticut with her husband and 2 children, one of which is on the Autism Spectrum.

Shirley Whitenack

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.

Shirley publishes and lectures extensively on topics related to guardianship, elder and special needs law, estate and trust litigation and probate mediation. She is quoted in publications such as The Wall Street Journal, Market Watch, Kiplinger's Personal Financial Magazine, Money and Consumer Reports.

Stuart Zimring

Stuart D. Zimring was born in Los Angeles, California, December 12, 1946. He was admitted to the Bar in 1972, and is admitted to practice in California and U.S. District Court, Central and Northern Districts of California and the U.S. Supreme Court. He received his B.A. degree in 1968 from UCLA and his J.D. degree in 1971 from the UCLA School of Law and is “AV” rated in Martindale-Hubbell. He is a member of the Los Angeles Superior Court Probate Volunteer Panel. Mr. Zimring is a Fellow of and Past President of the National Academy of Elder Law Attorneys (NAELA), and a Charter Member of NAELA’s Council of Advanced Practitioners (CAP). He is a Fellow of the American College of Trusts and Estate Counsel (ACTEC), is certified as a Specialist in Estate Planning, Probate and Trust Law by the Board of Legal Specialization of the State Bar of California and is one of the 7 California members of the Special Needs Alliance.

Mr. Zimring serves on the Boards of Directors of a number of non-profit organizations, including Justice In Aging (formerly the the National Senior Citizens Law Center and is past-president of ONEgeneration in the San Fernando Valley, on whose Board he continues to serve. He is also a member of the Estate Counselors Forum, San Fernando Valley Estate Counselors Forum, San Fernando Valley and Los Angeles County Bar Associations (of which he is a past Chair of its Trust & Estates Executive Committee), State Bar of California and Southern California Council of Elder Law Attorneys.
He is an Adjunct Professor at Stetson University College of Law and California State University Northridge on issues in Elder Law and Special Needs Trusts. He is a frequent speaker and writer on Elder Law, Special Needs Trusts and related issues throughout the country. He is co-author of “Tax, Estate and Financial Planning for the Elderly – California Guide” and “Fundamentals of Special Needs Trusts,” both published by Matthew Bender/Lexis-Nexis, as well as a member of Matthew Bender’s Elder Law Editorial Committee.

STETSON LAW

2023 Fundamentals of Special Needs Trusts Administration Webinar

Friday, April 21, 2023
12:40 P.M. – 1:20 P.M.

The Basics of Special Needs Trusts

Presenter:
Mary Alice Jackson

- Materials
- PowerPoint

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

2023 FUNDAMENTALS OF SPECIAL NEEDS TRUST ADMINISTRATION WEBINAR

Stetson University College of Law
April 21, 2023

BASICS OF SPECIAL NEEDS TRUSTS

(Really, is there such a thing?)

Mary Alice Jackson, Esq.
Boyer & Boyer, P.A.
Sarasota, Florida
majackson@boyerboyer.com

With sincere thanks to Sydney Seabaugh, Esq., for her tenacious cite checking and editing prowess.

I. Introduction.

Special needs are defined by Merriam-Webster[1] as any of various difficulties (e.g. physical, emotional, behavioral, or learning disability or impairment) that causes an individual to require additional or specialized services or accommodation (such as in education or recreation).

The additional or specialized services or accommodations are too expensive for most individuals and their families to access, and they then turn to government funded public benefits to fill the gap. Public benefits are not only for the indigent, however. Families with significant resources are drawn to applying for public benefits because the only programs which are available for their loved one with special needs are provided by publicly funded programs. When a child is injured at birth or at a very young age, seemingly endless money may not be sufficient to pay for what the child needs throughout his or her lifetime. Families without significant resources need to save each available extra dollar for needs that may not arise until 30-40 years in the future.

Why a trust? Why not one of the myriad ways in which money controlled by a fiduciary could be tracked and meet the distribution requirements of SSI, Medicaid and other means-tested programs? With few educated resources within the Social Security Administration (SSA) to process special needs cases, it seems practical to use a single vehicle. Additionally, trusts are familiar vehicles for most lawyers. We are comfortable with understanding the terms of most trusts, of protecting the beneficiary as directed in the trusts and with overseeing fiduciaries to ensure that duties are not breached. We debate but understand "who is our client" because we know that in the end, protecting a special needs beneficiary is the ultimate duty, even if our client is the Trustee.

It is possible to claim that a legal instrument, device or arrangement, although not a trust, is similar to a trust in that it involved a Grantor, in the SSA definition of the word. The Grantor provides the assets to fund the legal instrument, device or arrangement; transfers the property to an individual or entity with fiduciary obligations; and makes the transfer with the intention that the individual or entity hole, manage, or administer the property for the benefit of the grantor or others.[2] Examples of legal instruments or devices similar to a trust can include but not be limited

[1] ©Merriam, Webster 2023.
[2] POMS SI 01120.201(B)(4)

to escrow accounts, investment accounts, conservatorship accounts, pension funds, annuities, and certain UTMA accounts.[3]

Special Needs Trusts can be organized in your head, on paper, in your computer, or wherever you wish in the following ways: (1) any special needs trust (single document or pooled trust) which requires repayment to Medicaid upon trust termination must specifically follow the individual steps laid out in the POMS when drafting the language ensuring that the government gets its money back. Of particular interest is drafting to ensure that any state which pays benefits through the Medicaid program for the beneficiary is to be paid back prior to post-payback distributions, even if that payback ends up being pro rata; (2) All special needs trusts – first and third party – need to follow the requirements of protecting public benefits by being sole benefit trusts, providing for absolute Trustee discretion, having spendthrift language and any other trust language and protections which are fundamental to your own drafting style or program and to your state laws.

The resource limit for eligibility of a public benefits program is commonly $2,000. By funding a special needs trust with those resources whose value is in excess of $2,000, the beneficiary has chosen to protect resources against losing eligibility. Protection of resources doesn't come without costs, however. A capacitated beneficiary understands that he or she is permanently (except in the case of early termination) giving up the right to manage and access his or her funds. He or she has agreed to let a Trustee, the chosen fiduciary, determine whether, and if, any monies will be distributed. There is no ability for the beneficiary to compel the Trustee to do anything. No control, ever.

Public benefits are "means-tested"; that is, applicants can only be accepted if their income and resources are within certain limits. Title XVI of the Social Security Act specifies who is eligible to receive Supplemental Security Income (SSI) benefits, the amount of cash payments, and the conditions under which payments can be made. A person who applies for SSI and meets the conditions in the law is eligible for benefits.[4] …[I]f medical assistance is included for any group of individuals…the single standard to be employed in determining income and resource eligibility for all such groups, and the methodology to be employed in determining such eligibility,

[3] Id.
[4] POMS SI 00501.001A

shall be no more restrictive than the methodology which would be employed under the SSI program in the case of groups consisting of aged, blind, or disabled individuals in a State in which such program is in effect, and which shall be no more restrictive than the methodology which would be employed under the appropriate State plan…".[5] These provisions tell us two things: (1) Medicaid eligibility is determined under the same regulations as SSI; and (2) the state can choose to be more lenient in its eligibility requirements, but cannot be more restrictive. As an example, a state may choose to allow a Medicaid applicant to have two vehicles when the federal law permits only one; however, the state cannot restrict the applicant to having no vehicles at all, even if the applicant cannot drive.

SSA refers to special needs trusts as the "Medicaid trust exceptions". This is not the same as a Medicaid qualifying trust, a qualified income trust or preservation settlement trust, to name a few. "We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because section 1917(d)(4)(A) and (C) of the Social Security Act (Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) sets forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid title of the Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI program (such as undue hardship) and because the term has become a term of common usage."[6]

Can a trust be a special needs trust even if the words "special needs" are nowhere to be found in the document? Yes. But the use of certain phrases which are found in the POMS[7] manual used by SSA caseworkers is wise. Language to consider including is the phrase "supplements and supplants", or just "supplants". Many state manuals and the POMS refer to the fact that the intent of a special needs trust (or a rose by any other name) is to supplement and supplant benefits which are otherwise unavailable due to cost or unavailability of private programs.

It's simple to get lost in the vernacular of the special needs trust language when writing our documents. We know that there are at least five commonly used names for first party trusts. For ease of interpretation, let the caseworker know who is establishing the trust, who is benefitting

[5] 42 U.S.C. § 1396a(10)(C)(i)
[6] POMS SI 01120.203A
[7] Program Operations Manual System; https://secure.ssa.gov/poms.nsf/home!readform *(go to "SI", in particular but not limited to Income and Resources)*

from it, whether anyone else will benefit (if so, when – making it clear when a contingent beneficiary becomes involved), and who will serve as Trustee. Perhaps you can avoid a time-consuming regional review if the language used in your trust matches that used in the caseworker's manual – in this case, the Program Operations Manual System, or POMS, or for emphasis in a possible appeal, the federal law and the Code of Federal Regulations.[8] *Always use this language:*

"the State(s) will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State(s) Medicaid plan(s)."[9]

II. ELEMENTS TO CONSIDER

Who is the creator of a special needs trust? A Grantor, Settlor or Donor? An Establisher? While trust attorneys have typically used the word "Grantor" to describe the individual or individuals who create and sign a trust document, this is not correct terminology in special needs trust drafting. The term "Grantor" has a very specific meaning in the POMS – the Grantor is the person who supplies (owns) the money which funds the trust. If the Grantor is the individual with a disability, then the trust is a first party (self-settled, d(4)(A), payback, etc.) trust and the maker of the Trust has made a written contract with the federal government to re-pay any Medicaid benefits which have been paid to the Grantor during his or her lifetime. This is the quid pro quo which was created when the trust exception statutes were written in 1993.[10] Is there an argument that an incapacitated beneficiary who later regains capacity did not voluntarily choose the payback trust and had she been competent, she would not have done so? How much due diligence should third parties and attorneys do before determining that a special needs trust is the right planning choice? If the Grantors consist solely of third parties, then the Trust is a third-party trust with no pay-back obligation. An alteration of a first party trust to a third-party trust can be a great service to the client(s) in many circumstances if the facts allow.

One example is to examine the ownership of funds which are inherited by a beneficiary with a disability who is already receiving SSI and Medicaid benefits but does not have a special

[8] 42 U.S.C. § 1396p; 20 C.F.R. Section 416
[9] POMS SI 01120.203B(1)
[10] Omnibus Budget Reconciliation Act of 1993*; see also Weisner, Ira S. 19 Nova L. Rev. 679 (1994-1995) OBRA 93 and Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*

needs trust. If the funds are devised outright, or pass through intestacy, to the beneficiary, then the beneficiary may be the owner of the funds and a first-party special needs trust will need to be established if public benefits are to be preserved. (There are some instances in which inheritances can be modified, or monies decanted, in order to create a third-party trust rather than a first-party trust and avoid the Medicaid payback). If the inheritance is written in a manner that states the funds are to be distributed to the Trustee of Patches' Irrevocable Trust, then the money never passes through Patches' hands and a third-party trust may be used. State statutes regarding trust modification typically refer to determining whether the circumstances in creating the trust were such that the maker of the Trust would not have anticipated the need for a special needs trust, and that his or her wish would have been to have the money protected for the beneficiary's life, rather than to run out or be squandered. Many of these Wills were written 15 or more years ago when the laws regarding special needs trusts was in their infancy and the importance was not widely appreciated by estate planning experts. What about the Will, which was written 3 years ago, with language that indicates that there was an awareness of a beneficiary with special needs, but no effort was made to protect the funds within the Will? The beneficiary received an outright inheritance, and a first-party trust was created. It would be more difficult to argue to the court that the Testator wasn't aware of the circumstances and would have acted differently had he known.

Who can create a first-party special needs trust? The individual with a disability (or his or her agent under a Durable Power of Attorney), the disabled individual's parent(s), the disabled individual's grandparent(s), the disabled individual's legal guardian(s), or a court.[11]

III. WHAT MEDICAID MIGHT BE THINKING.

A first-party trust is established through the actions of a specific person, whether it is the individual with the disability, or an agent acting on his or her behalf. The current preference of SSA is that we use the words "established through the actions of"[12] to indicate the identity of the party who will be making the actual funding transaction. The person signing the trust might be this Establisher, or you may choose to identify him or her as the Creator, Settlor, Donor, etc. The key is not to make the caseworker guess what's happening.

[11] POMS SI 01120.203(B)(7)
[12] POMS SI 00120.203(C)(2) *see note.*

The issue of proper trust funding arose some years ago when persons with access but no legal authority to use the beneficiary's funds were transferring monies into first party trusts. Without the legal authority to access the funds (perhaps a small settlement or a large structure, coordinated by a parent? A bank account owned by the disabled individual but accessible to the spouse whose name is not on the account?), SSA took the position that the trust was not correctly funded, and the trust was rejected.

Assuming that you have proper funding, SSA is looking for four provisions which would indicate that the trust is subject to being considered within the special needs trust exception. These provisions are: (1) the purpose for which the trust was established; (2) whether the Trustees have or exercise any discretion over the trust; (3) whether there are any restrictions on when or whether distributions can be made from the trust; and (4) any restrictions on the use of distributions from the trust. These four factors are *not* those which determine whether the trust meets the Medicaid exception rules, but they must be contained in the trust document so that the caseworker can conduct an evaluation.

Court-ordered trusts. In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order for the exception in section 1917(d)(4)(A) of the Act to apply. The special needs trust exception can be met when a court approves a petition and establishes a trust by court order, as long as the creation of the trust has not been completed before the order is issued by the court. Court approval of an already created special needs trust is not sufficient for the trust to qualify for the exception. The court must specifically either establish the trust or order the establishment of the trust. An individual is permitted to petition a court for the present establishment of a trust or may use an agent to do so. The court order establishes the trust, not the individual's petition. Petitioning a court to establish a trust is not establishment by an individual.[13]An individual may petition the court with a draft document of a trust as long as it is **unsigned** and not legally binding.[14] (*emphasis added)*

A first-party special needs trust is for the sole benefit of the Beneficiary; gives the Trustee absolute discretion over distributions or the lack thereof; contains a spendthrift clause to prevent the Beneficiary from selling a current or future interest; and includes a Medicaid pay-back clause

[13] POMS SI 01120.203(B)(8)
[14] Id.

verbatim in the words of the POMS. Merely labeling the trust as a Medicaid payback trust, an OBRA 1993 payback trust, a trust established in accordance with 42 U.S.C. § 1396p…is not sufficient to meet the requirements for this exception. The trust must contain specific payback language whose effect is consistent with the requirements.[15] Note that payback only includes benefits paid during the Beneficiary's lifetime from Medicaid, not SSI, Medicare or any other program.

A third-party special needs trust includes the first three items but is *not* subject to a pay-back provision. Because the third-party trust is created with assets belonging to someone other than the beneficiary, the identity and methods of the funders are not relevant, as long as there has been no convoluted straw-person trick to fund the trust with the Beneficiary's money while making it look as though the money belonged to a third party. The contingent beneficiaries of a third-party SNT are chosen by the Settlors; early termination provisions can be used for the sake of administration but are not required by law because no payback is required.

The words "resources" and "assets" are used interchangeably in most special needs trusts articles, trusts or other references, however the distinction between the two is made under the POMS.[16] Resources are cash or any other real or personal property an individual (1) owns; (2) has the right, authority or power to convert to cash; and (3) is not legally restricted from using for his/her support and maintenance. Conversely, an asset is defined as property an individual has an ownership interest in, but the individual is not legally able to transfer that interest to anyone else.[17] Some states exempt real property from being categorized as a countable asset when it is jointly owned, not permitting partition.

Because Medicaid laws parrot SSI requirements, counseling regarding special needs trusts begins with assuring that the client is aged, disabled or blind and is under the age of 65 (some states use the age of 60 for nursing home eligibility purposes). An individual attains the age of 65 on the anniversary date of his or her birth.[18] The Trust corpus remains a non-countable asset after age 65, but no new additions to the corpus can be made. Such additions would not be subject to

[15] POMS SI 01120.203(B)(10) *see note.*
[16] POMS SI 01110.100
[17] POMS SI 01110.100(B)(3)
[18] POMS SI 01120.203(B)(2)

the special needs trust exemption and would be considered as countable resources. This rule does not apply to interest, dividends or other earnings of the Trust.[19]

Sometimes the Beneficiary will have the right to receive payments from an annuity, court support proceeding, or Military Survivor Benefits. If those payments have been irrevocably assigned to the Trust, and the assignment was made prior to the age of 65, the payments are treated as though the Trust received the payments before the Beneficiary attained age 65. (Considered as neither countable income nor resources).[20]

The answer to the question of whether the intended Beneficiary must be disabled prior to the establishment and funding of the special needs trust is no.[21] "To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act **as of the date on which the trust's resource status could affect the individual's SSI eligibility**." The disability must exist at the time that the SSA or Medicaid office is evaluating the trust to determine whether it should be excluded. Leaving out any reference to the Beneficiary's disability is fine; every practitioner has his or her own preference.

We can't begin to see all of the possibilities for a beneficiary with a disability as he or she ages. It may be that a new treatment is found, or an illness goes into remission, and the use of a first party special needs trust is no longer necessary. An early termination provision or clause would allow a trust to terminate before the death of the beneficiary. Commonly, such provisions or clauses provide for termination of the trust when, for example, the beneficiary is no longer disabled or otherwise becomes ineligible for Supplemental Security Income (SSI) and Medicaid, or when the trust fund no longer contains enough assets to justify its continued administration.[22]

For successful early termination, three elements must be met:

Upon early termination the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and

[19] POMS SI 01120.203(B)(3)
[20] Id.
[21] POMS SI 01120.203(B)(4)
[22] POMS SI 01120.199

Other than payment for allowable administrative expenses found in this section, no entity other than the trust beneficiary may benefit from the early termination (i.e., after reimbursement to the State(s), **all** remaining funds are disbursed to the trust beneficiary); and the early termination clause gives the power to terminate to someone other than the trust beneficiary. Spell each element out in your trust document in order to meet SSA requirements.

Pooled Trusts are also first-party trusts, and they have all of the administrative provisions of a single Special Needs Trust Agreement. However, there is only one "Master" trust agreement, and to take part as a Beneficiary, a Joinder Agreement must be completed by the applicant or his or her representative party. Hundreds of individuals can have "sub-accounts" with a pooled trust; the assets of all are pooled to get the best return on the money invested. The pooled trust administrators make distributions and keep abreast of current SSI and Medicaid regulations.

There are five requirements for a pooled trust to be considered exempt for purposes of SSA approval: (1) The pooled trust is established and managed by a nonprofit association; (2) separate accounts are maintained for each beneficiary, but assets are pooled for investing and management purposes; (3) accounts are established solely for the benefit of the disabled individuals; (4) the account in the trust is established through the actions of the individual, a parent, a grandparent, a legal guardian, or a court; and (5) the trust provides that, to the extent that any amounts remaining in the beneficiary's account, upon the death of the beneficiary, are not retained by the trust, the trust will pay to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).[23]

As with first-party trusts, SSA is particular about court-ordered trusts. "In the case of a trust account established through the actions of a court, the creation of the trust account must be required by a court order for the exception in section 1917(d)(4)(C) of the Act to apply. That is, the pooled trust exception can be met when courts approve petitions and establish trust accounts by court order, so long as the execution of the trust account joinder agreement and funding of the trust have not been completed before the order is issued by the court. Court approval of an already executed pooled trust account joinder agreement is not sufficient for the trust account to qualify

[23] POMS SI 01120.203D(1)

for the exception. The court must specifically either establish the trust account or order the establishment of the trust account."[24]

One matter of contention which is getting more attention from SSA offices is whether the joinder into a pooled trust and establishment of a sub-account for an individual over the age of 65 is subject to a transfer penalty. There are a couple of potential explanations: first, unlike the d(4)(A) language, the d(4)(C) language doesn't require that a beneficiary be under age 65 to participate. But does this mean that at age 65, the criteria for getting benefits (age, disability or blindness) change from disability to age? If so, how would that trigger a change in the transfer penalty exception? The answer which seems most logical to me is that the transfer of a first-party trust into a pooled trust means the state loses its guaranteed right to recovery upon the death of the beneficiary. Pooled trusts are permitted to retain the funds in the deceased sub-account holder's for charitable purposes[25], defeating the right which the state would assert if the first-party trust was still in place. Transfers from first party to first party trusts, as was briefly discussed in modification and decanting, don't have any impact on the payback clause and therefore are less likely to be challenged.

Is the ABLE Act a special needs trust? No, ABLE - Achieving a Better Life Experience Act of 2014 or the ABLE Act of 2014 - allows people with disabilities and their families to establish a special tax-advantaged *savings account* for disability-related expenses. Earnings on ABLE accounts are not taxed, and account funds are generally not considered as a resource for the Supplemental Security Income (SSI) program, Medicaid, and other federal means-tested benefits. The opportunity to have a savings account which is not a countable asset for public benefit purposes is the most important similarity to special needs trusts. An individual is eligible to establish an ABLE account if (1) he or she became disabled *before age 26*; and (2) receives Social Security Disability Insurance (SSDI) or SSI, or alternatively, files a disability certification under the IRS rules. Upon the death of the beneficiary, any remaining funds in the account are subject to pay back to the State for medical assistance paid on behalf of the beneficiary under the State

[24] POMS SI 01120.203D(7)
[25] POMS SI 01120.203D.1

plan.[26] Like special needs trusts, the individual with the disability can open an ABLE account for himself or herself.

Alternatively, a person with signature authority can establish and administer an ABLE account for a designated beneficiary who is a minor child or is otherwise incapable of managing the account. Signature authority is not the equivalent of ownership. The person with signature authority must be the designated beneficiary's agent acting under power of attorney, or if none, a parent or legal guardian of the designated beneficiary. The designated beneficiary is[27] the owner of the ABLE account, regardless of whether someone else has signature authority over it. The beneficiary is limited to one ABLE account, which can be funded with either first- or third-party funds. A drawback of this merging of funders is that ABLE accounts are subject to Medicaid payback. If an ABLE account might be an option for an individual with a disability, careful consideration should be given to how much money should be accumulated in the account, risking the Medicaid payback. This is particularly trust when third party funders are being considered. So, when might an ABLE account be considered as an alternative or a complement to a special needs trust? Wages, unearned income such as gifts, small settlements or inheritances which total less than $15,000 (or whatever the annual tax exclusion amount might be in a particular year), can be placed into the account without the need for the expense and sometimes complicated administration of a SNT. The ABLE account also gives capacitated beneficiaries the right to manage their own money through the use of an administratively managed prepaid debit card, referenced above. Distributions from a prepaid debit card made for "qualified disability expenses"[28] (QDEs) are not considered to be income to the beneficiary[29].

One more note on ABLE accounts. Since ABLE became law in 2016, special needs planners and disability organizations have been searching for the optimal situations in which ABLE accounts can be used. One instance has been to use the money in an ABLE account to pay rent. When the beneficiary is paying rent from his or her funds (remember that the ABLE beneficiary is the account owner), he or she is no longer subject to the one-third reduction rule or PMV. The amount of his or her SSI benefit will increase to the maximum SSI to which he or she

[26] 26 U.S.C. §529A; POMS SI 01130.740.
[27] POMS SI 00130.740(B)(6)
[28] POMS SI 01130.740(B)(8)
[29] POMS SI 00130.740(G)(2)

would be entitled without the application of those rules. Housing is a qualified disability expense.[30]

IV. WHAT ELSE SHOULD YOU KNOW.

There are certain terms which are helpful for special needs attorneys to know. Some assist your clients directly; others add to your own ability to under the system. Some are practice add-ons, others are substantive.

Aged - 65 years of age or older.[31] Check to see whether your state has chosen to apply a younger age. A state may not apply an older age because states cannot be more restrictive than federal law.

Alien - An individual lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions in 8 U.S.C. § 1182(d)(5)).[32] Many states have significant populations of qualified and non-qualified aliens. Immigration law has never been seen to be a component of a special needs practice, but can you create a special needs trust for someone who doesn't meet this definition. For individuals with disabilities, alien-status will have been determined by SSA. If you are working to get benefits for a seriously compromised individual who needs SSI and/or Medicaid, consider retaining immigration counsel.

Blind - For SSI and Medicaid, an individual is considered blind if he or she has central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered as having a central visual acuity of 20/200 or less. An individual is also considered to be blind if he or she is blind as defined under the State Plan.[33] Unless individuals have disabilities in addition to blindness, it's not common to

[30] POMS SI 01130.740(B)(8)
[31] 42 U.S.C. §1382c(a)(1)(A).
[32] 42 U.S.C. §1382c(a)(1)(B)(i).
[33] 42 U.S.C. §1382c(a)(2); 42 U.S.C. § 1396d(a)(iv), (vii).

have blind individuals seek public benefits until they are older and no longer have the ability to life safely.

Categorically Eligible - Within federal guidelines, States have broad discretion in determining which groups their Medicaid programs will cover and the financial criteria for eligibility. Being categorically eligible means that they are in a category which may make them eligible to get Medicaid. States must provide coverage to mandatory categorically eligible individuals (e.g. recipients of SSI and families with dependent children receiving cash assistance, as well as other mandatory low-income groups such as pregnant women, infants, and children with incomes less than the specified percent of the FPL) and certain low-income Medicare beneficiaries. States can elect whether or not to provide coverage to optional categorically eligible individuals, such as individuals who would be eligible for SSI but do not meet the income criteria for the program.[34]

CHIP - The Children's Health Insurance Program (CHIP) is an insurance program jointly funded by the state and federal government and administered by the states. The program provides health coverage to low-income children and, in some states, to pregnant women in families who earn too much income to qualify for Medicaid but cannot afford to purchase private health insurance coverage. Eligibility for CHIP varies by state.[35] Assistance to CHIP clients is a sub-specialty of special needs planning.

Commutation Riders - A drafting provision in a self-settled special needs trust arising out of a personal injury settlement. The structured settlement annuity payments may become immediately liquid in whole or in part upon the occurrence of a certain event. For special needs planner, commutation clauses in the settlement documents may provide for immediately liquidity to pay Medicaid and/or the IRS upon the death of the beneficiary. Failing to have a commutation clause can create unnecessary complexities (as I learned first-hand, ouch). The parties must be aware of potential adverse tax consequences and review 26 U.S.C. §130 of the Internal Revenue Code.[36] Good personal injury attorneys understand this issue, but many don't understand, giving

[34] 42 C.F.R. § 435.4.
[35] 42 U.S.C. Subchapter XXI.
[36] Begley, T. and Canellos, A. *Special Needs Trust Handbook,* Aspen Publishers.

you the opportunity to step in to provide immediate Medicaid payback, and potential distribution of remainder amounts to the contingent beneficiaries.

Compassionate Allowances - The List of Compassionate Allowances (CAL) identifies diseases and other medical conditions that, by definition, meet the Social Security Administration's standards for disability benefits. The CAL helps caseworkers at the Social Security Administration quickly reach a disability determination for individuals with very serious disabilities.[37] If you learn that a very sick client is waiting for a disability determination, check the list of compassionate allowances.

Constructive Receipt - The Social Security Administration counts earned and unearned income in the months of actual or "constructive" receipt. Constructive receipt means that the income has been credited to the individual's account or has been set aside for his or her use, whether or not the individual has actually received the money.[38] Constructive receipt can become an issue in probate, trust inheritances and litigation settlement, to name a few instances.

"(d)(4)(c)" Special Needs Trusts - A pooled SNT established under 42 U.S.C. § 1396p(d)(4)(C) is managed and created by a non-profit organization, which maintains separate accounts for its beneficiaries. An account in a pooled SNT is established solely for the benefit of the individual with a disability and can be established by the beneficiary or the beneficiary's parent, grand-parent, or legal guardian. Upon the beneficiary's death, of the remaining account, an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan will be paid to the State. An account in a (d)(4)(c) SNT is treated as an exempt asset for Medicaid eligibility purposes.[39]

Deeming - The process of attributing another person's income and resources to be available to an individual applying for or receiving government benefits. For example, for children under the age of 18 the income of a parent or the spouse of a parent, who lives in the same household as

[37] "Compassionate Allowances." *The Social Security Administration*. https://www.ssa.gov/compassionateallowances/index.htm.
[38]"Supplemental Security Income, Sec. 2133.2- What Does Constructive Receipt Mean." *The Social Security Handbook*. https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2133.html.
[39] 42 U.S.C. § 1396p(d)(4)(C).

the child, is generally deemed to be available to the child for purposes of SSI eligibility.[40] When the child is medically fragile, deeming may be waived so that Medicaid services can be provided.

Definition of Disability - A person is considered disabled by the Social Security Administration if he or she is unable to engage in any substantial gainful activity (SGA) 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. A person is considered to be engaging in substantial gainful activity (SGA) if he or she earns more than $2,210 (2019) (if the person is blind, the amount of SGA is $2040 [2019]). Children under the age of 18 will be considered disabled if they have a medically determinable physical or mental impairment that results in *marked and severe* functional limitations, 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.[41]

Deficit Reduction Act of 2005 (DRA) - The (DRA) is a compilation of federal laws which made major changes in how Medicaid eligibility is calculated. Several provisions were aimed at reducing Medicaid costs and at providing states with flexibility to reform their state Medicaid programs to save costs. The legislation, among other things, extended the Medicaid "lookback" period for transfer of assets from three to five years, changed the formula by which transfer penalties were calculated, which seriously affected the ability of elder law attorneys to protect Community Spouses. Other features permitted states to provide home and community based services as an optional benefit, established a maximum net equity value on the family home, and mandated that annuities be treated as a transfer of asset for less than fair market value unless the annuity met the requirements under 42 U.S.C. 1396p(c)(1)(F).[42]

Federal Benefit Rate (FBR) - The Federal Benefit Rate (FBR) is the maximum federal monthly SSI benefit and the SSI income limit. In 2023, the FBR is $914 per month.[43] In 1999, the FBR was $369.

[40] POMS SI 01320.001.
[41] 42 U.S.C. § 1382c(a)(3)(C)(i).
[42] Zimring, Morgan, Frigon, & Reaves. "Medicaid." *Fundamentals of Special Needs Trusts* § 10.04 (2017).
[43] POMS SI 02001.020.

Federal Poverty Level (FPL) - The Federal Poverty Level (FPL) is an income level used to determine eligibility for certain programs and benefits. The FPL is determined annually by HHS and defines the amount of annual income which constitutes "poverty" in the United States. For 2023, the FPL (excluding Alaska and Hawaii) for individuals is $14,580 and $30,000 for a family of 4.[44]

Grantor Trust for tax purposes - First-party special needs trusts generally always receive the tax classification of a "grantor trust." This tax classification means that all of the items of income, deduction and credit generated by the trust should be reflected on the personal income tax return of the individual with the disability, who is the trust beneficiary. In first-party special needs trusts, the grantor is actually the beneficiary because the law requires the trust be funded with the beneficiary's own assets.[45] In situations where the trustee of a first-party special needs trust does not obtain a separate taxpayer identification number for the trust, the beneficiary's social security number is reflected as the taxpayer identification number for the trust, and a separate informational Form 1041 is not generally filed.

HUD – Housing Choice Voucher Program - The Department of Housing and Urban Development (HUD) is the federal agency that administers programs with the goal of creating sustainable, inclusive communities and quality affordable homes. The housing choice voucher program Section 8 of the Housing Act of 1937 assists low income families, the elderly, and individuals with disabilities to afford housing in the private market. The housing choice voucher program is a federal program administered locally by public housing agencies (PHA)[46], and distributions of income can disqualify some Beneficiaries from the voucher program.[47] A family that is issued a housing voucher is responsible for finding a suitable housing unit of the family's choice where the owner agrees to rent under the program. A housing subsidy is paid to the landlord directly by the PHA on behalf of the participating family. The family then pays the difference between the actual rent charged by the landlord and the amount subsidized by the program.[48]

---

[44] "Poverty Guidelines." *U.S. Department of Health and Human Services*. https://aspe.hhs.gov/poverty-guidelines
[45] Pleat, *The Voice*, March 2014, Vol. 8, Issue 2
[46] "The Housing Choice Voucher Fact Sheet." *The U.S. Department of Housing and Urban Development*. https://www.hud.gov/topics/housing_choice_voucher_program_section_8
[47] *DeCambre v. Brookline Housing Authority*, 826 F.3d 1 (2016).
[48] https://www.benefits.gov/benefit/710

ISM - In-Kind Support and Maintenance (ISM) is unearned income in the form of food or shelter provided by a third party to an SSI recipient. When an SSI recipient receives ISM, there is a reduction in the recipient's monthly SSI benefit. The SSA uses two rules for determining the value of ISM—the one-third reduction rule (VTR) and the presumed maximum value rule (PMV).[49] When application of the VTR or PMV rule is necessary, review the SSI amount that will result from the reduction in the benefit. At times, the best decision may be to forego SSI and the requirements of the federally based SSA and apply only for Medicaid through state offices.

Judicial Modification - Judicial modification of an irrevocable trust refers to the petitioning of a court under a state statute to amend the terms of the trust. This typically occurs when the trust is silent on modification and there is no state statute that allows for non-judicial modification of the trust. When state law does permit non-judicial modification with the consent of the Trustee and the present and future beneficiaries, consider a best practice to be getting a court order anyway. Court orders will often get deference by SSA or Medicaid even though in unrelated trust practice non-judicial modification can be the most efficient means to achieve the goal.

Mandatorily Eligible – When state Medicaid plans were written in 1972, each State was required to identify people whom they would mandatorily cover with state services regardless of the number of persons who met the eligibility criteria. Mandatorily eligible populations are a significant problem for states which cannot predict the number of persons who will be entitled to state plan benefits in the coming fiscal year. State governments don't like budget unpredictability. Each state was free to choose which groups of individuals would receive mandatory services; common mandatorily eligible populations were low-income families, qualified pregnant women and children, and individuals receiving SSI, among others. Demographic changes and medical improvements have made many 1972 decisions about mandatorily eligible populations obsolete, and some program services are ineffective as a result..

Medicaid - Established in 1965, Medicaid is a joint federal and state program administered by the states that provides health coverage to individuals with low incomes and limited resources. The program is jointly funded by the states and federal government, with the federal government paying states for a specified percentage of program expenses based on per capita income, called

[49] POMS SI 00835.310.

the Federal Medical Assistance Percentage (FMAP). According to the Kaiser Family Foundation, by March 2023, 95 million Americans will be enrolled in a Medicaid program.[50] This doesn't include the 21 million children enrolled in the CHIP program. Federal law requires that State Medicaid plans cover certain mandatory populations and provide mandatory benefits. States have the flexibility in providing optional benefits and may extend coverage to other additional groups such as medically needy populations.[51] Note that the increase in the number of enrollees was directly tied to pandemic related eligibility regulations and are anticipated to change with the end of the Public Health Emergency on May 11, 2023.[52]

Medicaid Payback - Under the congressional mandate that every state adopt a program to recover Medicaid expenditures from the estates of Medicaid recipients, states can attach liens to personal or real property to seek recovery for Medicaid expenses. States are required to seek recovery from a Medicaid recipient's estate if the recipient received nursing facility services, home and community-based services, and related hospital and prescription drug services at the age of 55 or older. States may recover payments for all other Medicaid expenses provided to all Medicaid recipients; however, states are prohibited from recovering from the estate of a Medicaid recipient who is survived by a spouse, a child under age 21, or a blind or disabled child, or when such recovery would cause an undue hardship as defined by the state Medicaid program.[53] *Of particular importance to the special needs practitioner is that estate recovery for beneficiaries of a self-settled special needs is not limited to individuals who have received long term care services after age 55.*[54] Medicaid payback may not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.[55] All Medicaid benefits paid during the beneficiary's lifetime are subject to recovery. The impact of the amount of Medicaid payback is frequently not thoroughly considered when special needs planning is begun.

Medically Needy - States have the option to establish a "medically needy program" for individuals with significant health needs whose incomes are too high to otherwise qualify for

---

[50] https://www.kff.org/coronavirus-covid-19/issue-brief/analysis-of-recent-national-trends-in-medicaid-and-chip-enrollment/
[51] 42 U.S.C. Ch. 7, Subchapter XIX.
[52] https://www.kff.org/policy-watch/the-end-of-the-covid-19-public-health-emergency-details-on-health-coverage-and-access/
[53] 42 U.S.C. § 1396p(b).
[54] POMS SI 1120.203B(10)
[55] Id.

Medicaid under other eligibility groups. The Medically Needy population falls under the "categorically eligible" standard; these individuals are not entitled to mandatory coverage absent a state waiver. Medically needy individuals can still become eligible by using medical expenses incurred to reduce or spend down their amount of income in order to qualify for Medicaid coverage. Once an individual's incurred expenses exceed the difference between the individual's income and the state's medically needy income level (the "spenddown" amount), the person can be eligible for Medicaid. The Medicaid program then pays the cost of services that exceed what the individual had to incur in the way of expenses in order to become eligible.[56] Sometimes, clients who are seeking the protection of a special needs trust may not be eligible for the program that they most want. Reviewing programs and eligibility criteria is important to providing guidance. Many clients will know more than you do about these programs but verify what they believe they understand by asking your professional colleagues.

Medicare Eligibility for ESRD and ALS - Individuals with Amyotrophic Lateral Sclerosis (ALS) and End Stage Renal Disease (ESRD) are eligible for Medicare without the 29-month waiting period. An individual with ERSD is eligible for Medicare generally three months after a course of regular dialysis or after a kidney transplant. An individual with ALS is eligible for Medicare immediately upon collecting SSD benefits, which occurs five months after receiving a disability determination by the SSA.[57] At times, the purpose of special needs planning is to cover that 29-month period before Medicare begins. If that's the case, then individuals with ALS and ESRD may not need to move ahead with special needs planning.

Medicare Set-Aside - A Medicare Set-Aside is a trust arrangement established to hold settlement proceeds for future medical expenses. During litigation, an evaluation is done of the beneficiary's future medical needs, and the evaluation includes an amount that should be set aside for future medical care related to the injury upon which the settlement is based, and which Medicare would normally have covered. The calculated portion of the settlement funds are then either placed in the Medicare Set-Aside account in one lump-sum or the account is funded with an annuity. These "set-aside" funds must be spent before Medicare will step forward and cover additional expenses. The administrator of the Medicare Set-Aside trust may use the funds only to

[56] https://www.medicaid.gov/medicaid/eligibility/index.html
[57] 42 U.S.C. § 426(h); 42 U.S.C. § 1395rr.

pay for medical care related to the personal injury, leaving Medicare or your private insurance to provide coverage for medical expenses that are not related to your injury. Medicare Set-Aside companies provide services specifically intended to assist with this process. The MSA may be created as a provision of a SNT.[58]

OBRA '93 - The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) mandated Medicaid estate recovery by States and authorized the creation of self-settled (d)(4)(A) SNTs, qualified income trusts[59] and pooled (d)(4)(C) SNTs, among other things. States must seek recovery of the cost of medical assistance paid to a Medicaid recipient who was 55 years of age or older at the time he or she received nursing home services, home and community-based services, and related hospital and prescription drug costs. States have the option to expand recovery within certain limitations.[60] A budget reconciliation act is a federal budget act and many provisions which don't succeed as individual bills can be amended onto the budget act as a result of compromises. OBRA '93 began the first-party trust practice as we know it today.

PMV - The Presumed Maximum Value (PMV) is the cap on the amount of In-kind Support and Maintenance (ISM) that SSA can deduct from an SSI recipient's monthly SSI benefit. PMV is used when the claimant receives ISM but does not receive *both* food and shelter from a third party. When the claimant receives both food and shelter from a third party, SSA uses the one-third reduction (VTR) rule instead of PMV. PMV is equal to one-third of the Federal Benefit Rate (FBR) plus $20.[61]

POMs - The Program Operations Manual System (POMS) is the regulation manual (similar to a state Medicaid manual in some ways, but a more persuasive source of regulation) used by Social Security employees to process claims for benefits that are administered by the Social Security Administration. The POMS is available online and used by practitioners to gain information on drafting special needs trusts and to be updated on the SSA's interpretation of federal law.[62]

---

[58] Zimring, Morgan, Frigon & Reaves. "Medicare Set-Aside." *Fundamentals of Special Needs Trusts* § 7.03 (2017)
[59] 42 U.S.C. § 1396p(d)(4)(B)
[60] 42 U.S.C. § 1396p(b); 42 U.S.C. § 1396p(d)(4)(A), (C).
[61] POMS SI 00835.300.
[62] SSA Program Operations Manual System (POMS). *Social Security Administration*. https://secure.ssa.gov/apps10/.

Qualified Disability Trusts - A Qualified Disability Trust is a designation for a special needs trust established for an individual with a disability that meets the requirements under 5 I.R.C. §642(b)(C). The beneficiary of a Qualified Disability Trust must be receiving SSI or SSDI and is under the age of 65 at the time the trust is established. The trust must be irrevocable and established for the sole benefit of the beneficiary. Qualified Disability Trusts are entitled to receive the same personal exemption allowed to individual taxpayers, which can result in significant tax savings.[63]

QMB, SLMD, Q1 – The Qualified Medicare Beneficiary Program, Specified Low-Income Beneficiary Program and Qualified Individual Program and some of the most sought-after Medicaid benefits because applicants for these programs will receive coverage for many or all of Medicare's non covered costs, such as deductibles, co-insurance, co-payments and Part A and B premiums. For low-income individuals, eligibility can mean avoiding poverty as well as getting proper health care.[64] Income limits vary by program and an increase in a pension amount or social security COLA can take a previously eligible person out of QMB (individual income maximum is $1061 monthly; and into SLMB (individual maximum income is $1269 monthly) or QI (individual maximum income is $1426 monthly), where benefits are more limited. The 2019 resource limitation is $7730.

Seed Trust - If a legally competent, disabled adult does not establish his or her own special needs trust, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money or, if State law allows an empty or dry trust. After the seed trust is established, the legally competent, disabled adult may transfer his or her own assets into the trust, or another individual with legal authority (such as a power of attorney) may transfer the individual's assets into the trust for a beneficiary who lacks the capacity to do so.[65]

Self-Settled Trust - A self-settled, first party "(d)(4)(A)" SNT is a trust that meets the statutory requirements under 42 U.S.C. § 1396p(d)(4)(A) and is funded by money owned by the beneficiary of the trust. The trust must be irrevocable, for the sole benefit of the beneficiary who is under 65 when the trust is established, and subject to a state Medicaid pay-back provision, meaning that upon the beneficiary's death, of the remaining trust account, an amount equal to the

[63] 5 I.R.C. §642(b)(C).
[64] 42 U.S.C. § 1396a(a)(10)(E).
[65] SI 01120.203(C)(2)(B).

total amount of medical assistance paid on behalf of the beneficiary under the State plan will be paid to the State. The trust is treated as an exempt asset for Medicaid eligibility purposes, and a transfer to the trust, by an applicant for Medicaid, is an exempt transfer. This type of trust can be established by the beneficiary, or the beneficiary's parent, grandparent, legal guardian, or a court.[66]

Settlement Preservation Trust - Settlement Preservation Trusts (SPTs) are trusts that hold settlement funds for the beneficiary and are used to preserve settlement proceeds, protecting the funds from wasteful spending and the beneficiary from exploitation. Settlement Preservation Trusts are used for beneficiaries who are not receiving public benefits but who need asset management, personal assistance and protection. A settlement preservation trust may be a good option for a client deciding between applying for public benefits but whose financial and health status is such that public benefits can be avoided.

SNAP - Food Stamps - The Supplemental Nutrition Assistance Program (SNAP) offers nutrition assistance to millions of eligible, low-income individuals and families and provides economic benefits to communities. The Food and Nutrition Service works with State agencies, nutrition educators, and neighborhoods to ensure that those eligible for nutrition assistance can make informed decisions about applying for the program and can access benefits.[67] SNAP benefits are not income for SSI eligibility purposes.[68]

SNT & Retirement Accounts - A SNT can be named as a beneficiary of an inherited retirement account without affecting the child's eligibility for public benefits. Before advising a client in naming a SNT as a beneficiary of his or her retirement accounts, there are a number of factors to consider, such as possible adverse tax consequences and whether any contingent beneficiaries of the SNT will affect the required minimum distributions (RMDs) from the account.[69]

Sole Benefit Rule - Some public benefit programs such as SSI, require that a special needs trust be established and administered for the sole benefit of the beneficiary, without regard to

---

[66] 42 U.S.C. § 1396p(d)(4)(A).
[67] 7 U.S. Code Chapter 51; 7 C.F.R. Chapter II, Subchapter C.
[68] https://www.ssa.gov/ssi/text-income-ussi.htm
[69] Hook, Andrew H., CELA. "Retirement Funds and SNTs". *Special Needs Alliance*. https://www.specialneedsalliance.org/retirement-funds-and-snts/; Zimring, Morgan, Frigon, & Reaves. "Naming a SNT as a Beneficiary of a Retirement Account." *Fundamentals of Special Needs Trusts* § 12.14 (2017).

remainder beneficiaries. The POMs provide guidance, interpretation, and exceptions to the sole benefit rule such as reasonable administrative expenses associated with the trust and third-party payments for goods or services received by the trust beneficiary.[70] Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life. Do not consider a trust that allows for the trust corpus or income to be paid to, or for the benefit of, a beneficiary other than the SSI applicant or recipient as a trust established for the sole benefit of the applicant or recipient.[71]

Special Needs Trust Fairness Act - Signed into law on December 13, 2016, the Special Needs Trust Fairness Act authorizes individuals with disabilities to establish their own self-settled special needs trust. Before this law went into effect, self-settled SNTs could only be established by a parent, grandparent, guardian or a court.[72]

Spigot Trust - Spigot Trust is the context of SNT planning is a trust that contains a distribution standard permitting the trustee to make a distribution from the trust that would reduce the beneficiary's eligibility for public benefits.

SSDI - Social Security Disability Income (SSDI or SSD) is a monthly cash assistance program administered by the Social Security Administration to people who cannot work because they have a medical condition that is expected to last at least one year or result in death. To be eligible for SSDI benefits, the recipient must have paid into the Social Security system for a certain time period. Unlike SSI, there are no asset or unearned income restrictions to become eligible. SSDI recipients receive Medicare benefits but must wait 24 months from the date of entitlement to SSDI cash income before Medicare coverage begins.[73]

SSI - Supplemental Security Income (SSI) is a monthly cash assistance program administered by the Social Security Administration to people with limited income and resources who are disabled, blind, or age 65 or older. In 2019, the maximum SSI benefit is $771. Any income received by an SSI recipient will reduce his or her SSI benefit. The receipt of in-kind

[70] POMS SI 01120.201(F)(2).=
[71] POMS SI 00120.201(F)(1)
[72] 21st Century Cures Act (P.L. 114-255), Section 5007.
[73] 42 U.S.C. Ch. 7, Subchapter II.

support and maintenance (ISM) can reduce SSI benefit up to 1/3rd. An SSI recipient cannot own more than $2,000 in resources; certain assets such as a homestead and vehicle are excluded as resources. In many states, SSI eligibility brings automatic Medicaid coverage.[74] While $771 is the maximum benefit in 2019, each year the maximum benefit varies due to optional state supplementation, earnings rules, new exclusions and changes in other benefit numbers. Start with the maximum amount of the annual benefit, but don't end from there.

Structured Settlement - A Structured Settlement is a type of court settlement, typically from a personal injury or malpractice case, that is typically funded through the purchase of annuity, where the settlement proceeds are paid out over a period of time instead of as a lump sum. Payments can be structured to reflect the beneficiary's needs as he or she ages. A SNT can be the receptacle of a structured settlement annuity, but pre-planning should be done to determine whether an annuity or lump sum might be a better choice.[75] This can be challenging for the attorney whose client is the structured settlement company, but solid working relationships help when doing planning at this stage.

"True Link" and other administrator managed debit cards: The administrator-managed prepaid cards are a type of restricted debit card that can be customized to block the cardholder's access to cash, specific merchants, or entire categories of spending. Typically, the trustee is the account owner and administrator, and the trust beneficiary is the cardholder. This may not be the case when an ABLE account is involved. To evaluate the income and resource implications of trust disbursements to administrator-managed prepaid cards, a determination must be made as to who owns the prepaid card account. If the trustee is the owner of the prepaid card account, whether the trust beneficiary receives income from trust disbursements depends on the type of purchase reflected in the card statement.[76]

Trust Protectors and Trust Advisory Committees - Trust Protectors (TPs) or Trust Advisory Committees (TACs) can be included in a SNT to ensure that a beneficiary's specific needs are met, typically when the trustee is an institutional trustee and there is concern that the trustee may not be aware of or responsive to the beneficiary's needs. A TAC is a group of

[74] 42 U.S.C. Ch. 7, Subchapter XVI.
[75] Zimring, Morgan, Frigon, & Reaves. "Structured Settlements." *Fundamentals of Special Needs Trusts* § 4.08 (2017).
[76] POMS SI 00120.201(I)(1)(e).

individuals who are given the authority to do specific tasks such as advising the trustee, reviewing actions of the trustee, and removing and replacing the trustee. A TP has similar authority to a TAC but can also have the ability to amend the SNT so that it complies with tax and/or public benefit laws. TACs or TPs can have fiduciary responsibilities depending on the terms of the trust and case law.[77]

Waiver Program - States may use federally approved waivers to test new or existing ways to deliver and pay for health care services in Medicaid and CHIP. There are four primary types of waivers and demonstration projects: § 1115 Research & Demonstration Projects; § 1915(b) Managed Care Waivers; § 1915(c) Home and Community-Based Services (HCBS) Waivers; and Concurrent § 1915(b) and 1915(c) Waivers. In some states, income limits are waived, or other standard requirements are changed. States which had tightly structured state plans when they entered into a Medicaid program agreement with the federal government need waivers to meet the needs of today's populations. The term "waiver" may be used slightly differently in each state, and it's critical to know whether the income and asset limits are waived. Severely disabled children whose can cost hundreds of thousands of dollars per year may receive care without being subject to the normal income and asset limitations.

V. Should I Stick to The Basics?

Every special needs trust which you present to a client should have the basic elements discussed earlier in this paper. Yes, you have to stick to the basics before you can create more sophisticated elements. "Basic" trusts require broad knowledge of the field. Whether your trust agreement is short in length, or runs the length of the Bill of Rights, your objective is to get the trust approved by SSA, ensure that the proper protections are in place for the Beneficiary and name Trustees best able to meet their fiduciary relationships. Basics are hard, and you'll learn new basics regularly. Reading the sources available to use and having colleagues to guide us provides value to our clients well beyond the concept of basic abilities.

[77] Zimring, Morgan, Frigon, & Reaves. "Trust Protector/ Trust Advisory Committees." *Fundamentals of Special Needs Trusts* § 4.09 (2017).

THE BASICS OF SPECIAL NEEDS TRUSTS:

IN A WORLD WHERE NOTHING IS TRULY BASIC!

- 2023 FUNDAMENTALS OF SNTS
- APRIL 21, 2023
- Mary Alice Jackson, Boyer & Boyer, P.A.
- Sarasota, Florida

1

LET'S DIGRESS!

- What is a trust, anyway?
- Where did trusts get their start?
- Who thought this was a good idea?

2

FRIENDS, ROMANS, COUNTRY PERSONS!

- "Fiducia" – a Roman term referring to a contract between two people where one person transfers property to another for security reasons in a time of danger, under the condition that it would be returned, or if necessary, further administered

3

FIDUCIA CUM AMICO

- An agreement between the "fiduciant" (n/k/a "Settlor") and "ficuraries" (n/k/a "Beneficiary") stipulating that property entrusted to the fiduciant is <u>not owned</u> by the fiduciant, but is instead administered according to terms set out in an accompanying letter (n/k/a "the Trust Agreement").

4

ET TU, BRUTUS?

Breach by the fiduciant, known as "**infamia**", meant a total loss of legal or social standing

5

MOVING ALONG TO ENGLAND, THE 12TH CENTURY, AND THE CRUSADES…

- A Crusader conveys ownership in lands to another who would administer it responsibly (hopefully) until the Crusader got home (hopefully)
- Under English law, conveyance meant legal title in the conveyee
- When the Crusader wandered back home, the Conveyee wasn't always willing to return the land!

6

COURTS OF CHANCERY (EQUITY)

Crusader then petitions the Court of Chancery

Court typically sided with Crusader

Reasoned that the Conveyee (Trustee) was just holding the property for the Crusader (Grantor/Beneficiary)

7

THUS BEGAN THE TRUSTEE RELATIONSHIP

- A Trustee is "entrusted" with property for the benefit of another
- Legal concept behind trusts is that the parties can set the terms of the trust – and in "OBRA 93", Congress set the terms statutory first party SNTs – d4A, d4C
- Social Security Administration (SSA) sets the terms of countability of first and third party special needs trusts

8

PB LINGO

- Entitlement: benefits which the recipient invested in while working, e.g. social security retirement; Medicare; social security disability (social insurance programs) – *We don't need SNTs to protect these benefits*
- Means-tested: benefits which the recipient receives by virtue of meeting prescribed income and asset requirements (social welfare programs) – *This is our world, long term care supports and services, need SNTs to access benefits*

9

SNT PLANNING FUNDAMENTALS

- To protect access to means-tested public benefits
  - In the present, benefits currently available or being received
  - In the future, benefits which might be needed; HOWEVER
- …Will means-tested public benefits may ever come into play?
  - Health and well-being of beneficiary
  - Changes in public policy

10

FINANCIAL LIMITS

- **ASSETS**: $2,000+ depending upon program
  - E.g. SSI asset limit $2,000; Medicare Savings Program QMB asset limit $8,400 (2023)
- **INCOME**: Varies by program; some programs have no limits, some limit income to 300% FPL

11

NON-FINANCIAL COST OF SNTS

- Permanent loss of right to manage first party funds
- Treating family members with disabilities differently with third party testamentary planning
- Personal money managed by professional entities/individuals can create impersonal results

12

DISTINGUISHING SNTS

- **First party SNTs are**:
  - Funded with assets belonging to Beneficiary
  - Governed by individual trust agreements or master pooled trust agreements
  - Terms of trust subject to federal law under 42 U.S.C. 1396p(d)(4)(A) or (d)(4)(C)
  - Medicaid pay back required unless funds retained in a d(4)(C)
  - Referred to as self-settled, payback, sole-benefit, d4A's, d4C's, first party

13

DISTINGUISHING SNTS

- **Third Party SNTs are**:
  - Funded with assets belonging to someone other than the beneficiary or their spouse
  - Inter vivos/Stand-Alone
  - Testamentary
  - Irrevocable
  - Revocable
  - NOT subject to Medicaid payback

14

DOES THE TRUST HAVE TO BE CALLED A SNT? NO.

- Trusts do not have to be labeled SNTs, or Supplemental Needs Trusts, to be excluded as a resource
- Trust terms must include those items required under POMS
- Use the language provided in POMS

15

GOAL OF A SPECIAL NEEDS TRUST

- KEEP YOUR EYES ON THE PRIZE:
- TO KEEP THE PROCEEDS FROM BEING COUNTED AS AN ASSET FOR PURPOSES OF MEANS-TESTED BENEFIT ELIGIBILITY

16

WHAT MAKES ANY SNT A COUNTABLE RESOURCE (POMS SI 01120.200)

- Trust principal **is** a resource for SSI purposes if a trust beneficiary has legal authority to revoke or terminate the trust and then use the funds to meet his or her food or shelter needs…also a resource for SSI purposes if the trust beneficiary can direct the use of the trust principal for his or her support and maintenance under the terms of the trust.
- Additionally, if the trust beneficiary can sell his or her beneficial interest in the trust, that interest is a resource.

17

WHAT JEOPARDIZES BENEFIT ELIGIBILITY?

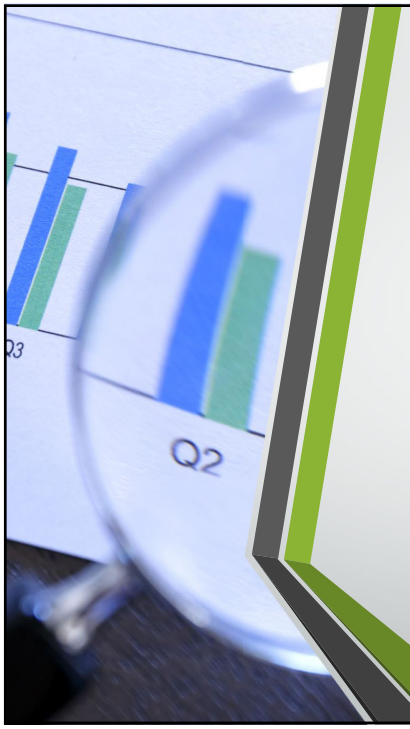
- Failing to draft the trust in accordance with federal and state laws and regulations
- Making an impermissible distribution which causes the distribution to be counted as income to the beneficiary, resulting in an unacceptable diminishment or elimination of the income or services being provided

18

EXAMPLES OF PROBLEMATIC DISTRIBUTIONS

- CASH OR CASH EQUIVALENT
  - INCLUDES GIVING BENEFICIARY $$ TO MAKE A PERMISSIBLE PURCHASE
- GIFTS, OR EXPENDITURES FOR LESS THAN FMV
- PAYING FOR THE WHOLE CROWD
- SHELTER (MAYBE FOOD) WHICH REDUCES SSI

19



SSA SCRUTINY

- SSA reviews trusts on initial presentation
  - Regions vary significantly in their procedures
- SSA can return to a trust which was never rejected and claim overpayment
- Some SSA regions never check distributions
- State Medicaid agencies vary in trust review process and reviewing periodic accountings

20

FIRST PARTY TRUST BENEFICIARIES WITH DISABILITIES

- Beneficiary characteristics:
  - Successful PI plaintiff of any age
  - Adult diagnosed with chronic progressive or life-limiting illness
  - Recipient of adult child support funds
  - Recipient of divorce proceeds

21

FIRST PARTY TRUST PLANNING

- Available Trustee?
- Trust: the Non-Legal Type
- Family Member Stresses and Stressors
- Predicting the Future
- Medicare Set-Asides, Commutation clauses; Irrevocable assignments
- Pay-back

22

PAYBACK DRAFTING IMPERATIVE

- Pay-Back Verbiage: "…the **State(s) will receive all amounts remaining** in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State(s) Medicaid plan(s)." POMS SI 01120.203B.1
- Changing the words can cause the trust to be countable!

23

FIRST-PARTY SNT ALTERNATIVE

- **OUTRIGHT DISTRIBUTION**
  - CAN'T FORESEE HEALTH OUTCOMES/NEED FOR SERVICES
  - NO SUITABLE TRUSTEE
  - BENEFICIARY RESISTANCE
  - LOTS OF MONEY $$$
    - MATCH BENEFICIARY/LEG REP WITH FINANCIAL PLANNER INSTEAD

24

THIRD PARTY TRUST BENEFICIARIES

- Myriad of disabilities
- Age of onset varies
- Some disabilities never formally diagnosed (often mental health)
- Potential beneficiaries may not currently be getting benefits
- Some beneficiaries may improve and have no need for PB
- Often children of grantors

25

THIRD PARTY TRUSTS: NOW OR LATER?

- A TRUST WHICH COMES TO LIFE NOW, OR AFTER THE DEATH OF THE GRANTOR?
  - Nature of the assets – real property, investments, military dependent benefits, life insurance, retirement accounts
  - When might the money be needed?
  - When is the desired Trustee available?
  - Intent of Grantor

26

TESTAMENTARY TRUST

- Allows Grantor to allocate $ predictably between beneficiaries
- Less upfront legal cost
- No need for early funding, expense of maintaining financial accounts
- Easier if beneficiary is likely to predecease Grantor

27

STAND ALONE TRUSTS

- A stand-alone SNT provides a handy receptacle that can receive gifts from the beneficiary's relatives and friends without interfering with his or her public benefits.
- A stand-alone SNT permits real-time approval from government agencies resulting in peace of mind.
- A stand-alone SNT creates comfort and familiarity for a family member trustee.

28

STAND ALONE TRUSTS

- Exception to Transfer Penalty - 42 USC § 1396p(c)(2)(B)(iii) and (iv)
- Transfers made to an individual with a permanent disability for the sole benefit of that individual; or to a trust, including a trust created in conformance with 1396p(d)(4), for the sole benefit of an individual under the age of 65 who is disabled shall not result in ineligibility for medical assistance.

29

STAND ALONE TRUSTS

- A stand-alone SNT offers the family an opportunity to establish rapport with a corporate trustee.
- A stand-alone SNT avoids delays in setting up and funding a SNT at death.
- A stand-alone SNT offers privacy; LWTs and revocable trusts may be seen by others

30

STAND ALONE TRUSTS

- A stand-alone SNT can be included as a beneficiary for retirement accounts, bank accounts, insurance, and other assets that use pay-on-death, transfer-on-death, or other beneficiary designations.
- A stand-alone SNT will not be eliminated by mistake. Once established and funded, the stand-alone SNT cannot be inadvertently or unintentionally eliminated when updating an estate plan.
- A well-drafted stand-alone SNT will generally be a more comprehensive and customized document.

31

WE'RE OUT OF TIME.
THE END.

THANKS FOR BEING HERE!

- THERE'S ALWAYS MORE TO KNOW…COME BACK NEXT YEAR!

32

STETSON LAW

2023 Fundamentals of Special Needs Trusts Administration Webinar

Friday, April 21, 2023
1:20 P.M. – 2:10 P.M.

Ethics in Special Needs Trust Planning

Presenter:
Stuart D. Zimring

- Materials
- PowerPoint

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Ethics In Special Needs Trust Planning- A Guide to the Perplexed and Sometimes Frustrated

a presentation for

The Fundamentals of Special Needs Trust Administration Webinar

by

Stuart D. Zimring

April 21, 2023

Law Offices Of
STUART D. ZIMRING
Attorneys & Counselors At Law

Ethics In Special Needs Trust Planning-

A Guide to the Perplexed and Sometimes Frustrated

1. Introduction - Setting the Scene

It's 4p.m. on a Friday afternoon. You are just beginning to close your briefcase and head out for the weekend when your phone rings. It's Marvin the Med-Mal Maven, an attorney whose advertisements you've seen and heard but have never met. He informs you that he has just settled the biggest case of his career. It's a multimillion dollar settlement of a personal injury case involving a 16 year old young woman, Giselle, a ballet prodigy who was hit by car rendering her a paraplegic. She has decision making capacity and is firmly convinced she will dance again and wants the settlement funds directed towards making that happen. Marvin, the defendants, the structured settlement brokers, life care planners and the young girl's mother,(who is her Guardian ad Litem (GAL)) had all agreed on the terms when the mother informed him that her best friend had asked why they monies weren't going into a Special Needs Trust? Marvin consults with the structured settlement brokers and the life care planner who all agree that's not a bad idea (especially given the kind of long term therapy and surgeries Giselle may need if it appears she can dance again), and why didn't they think of it first, and suggest Marvin contact you to send him one of those "special needs trust things" so he can take it to the Judge on Monday (when they've all been ordered to appear to put the settlement on the record..)

You explain to Marvin that it's not quite that simple and suggest that he get the matter continued so that you can meet with his client and the other players involved so that you can do your

job as well as Marvin has done his. With some grumbling Marvin agrees and a meeting is set for the following week.

2. The Cast of Characters

A. First Steps

You need to decide who should be involved in this first meeting. In a SNT arising out of litigation, it may be appropriate for you to meet with Marvin first, without anyone else present, to get the background information and "lay of the land." However, unless Marvin is the one who is going to employ you (and even if he is) you are still going to want to meet Giselle. her mother/GAL and quite possibly confer with the structured settlement brokers and the life care planners. A Warning bell should go off and you should consider withdrawing from the matter if Marvin insists on shielding his client from you. You should consider requesting copies of pleadings and discovery and especially any life care plans that have been created in advance of the meeting.

B. The Players

1. The Attorney: As noted, Marvin may well insist on being part of the planning process even though he knows nothing about SNTs. Usually, this is because he believes (and rightly so) that Giselle is dependent on him for advice and counsel therefore Giselle needs him as part of the planning process. In other cases the litigation attorney may fear that you are going to "steal" the client notwithstanding the fact that you do no personal injury or medical malpractice litigation.

In either case, participation by the litigation attorney should be welcome since

she or he is more familiar with the legal issues involved and condition of the plaintiff/beneficiary than almost any other person and will be able to communicate the information to you in terms appropriate to the legal issues involved in the drafting process.[1]

2. The Beneficiary, Guardian ad Litem and/or Guardian

It goes without saying (but sometimes needs to be said) that the plaintiff who is going to be the Beneficiary of the SNT should participate in the drafting of the SNT if she is able to do so. In our hypothetical, Giselle has capacity (other than still being a minor), so she should definitely be part of the process.

If you are told that the Beneficiary lacks capacity to participate in the planning process in a meaningful way, you should make an independent investigation to verify the accuracy of this conclusion. On the other hand, if a GAL or Guardian has been appointed, that is the person with whom you should be dealing, keeping in mind (and constantly reminding the GAL/Guardian) that she/he stands in the shoes of the person with the disability and in legal reality it is that person who may well be your client.[2]

Where the GAL or Guardian is a family member you should analyze whether the relationship raises the possibility of a potential conflict of interest. The easiest example is where one spouse is the GAL for the other and there is a claim for loss of consortium. In such cases, when the case settles, can the spouse/GAL fairly negotiate

[1]See Neal Winston, *the Role of the SNT Attorney or Trust Administrator in Working with Probate, Personal Injury and family Law Attorneys and Their Clients,* Stetson University College of Law 2021 National Conference on Special Needs Planning and Special Needs Trusts (Oct. 2021).

[2]Model R. Prof. Conduct 1.14; NAELA Aspirational Standard, 2nd Ed. B.2.

the allocation of the settlement between the ward and the spouse/GAL? In my experience this issue is rarely addressed during the settlement process by the ligation attorney, but it is a critical ethical issue for all when the time comes to determine the amount of the settlement to fund the SNT. If the issues are not addressed early on, all of the attorneys involved may find themselves with serious conflict-of-interest problems necessitating their withdrawal from the representation.[3]

3. Life Care Planners & Other Experts

Life Care planners, health care professionals and social welfare professionals involved in the litigation can be invaluable resources in obtaining the information necessary to draft the SNT. Both sides in a case may have prepared Life Care Plans and it is useful for you to review both. Keep in mind these are advocacy pieces but they all have common goals: dealing with and predicting the present and future needs of the Beneficiary, albeit from differing perspectives. Having access to these analyses will enable you to create a better structure in your SNT to cover the cost of care over the Beneficiary's lifetime.[4]

4. Structured Settlement Brokers

A "structured settlement" refers to a settlement of a litigated matter in which the settlement amount is to be paid out in a series of period payments over a period of time rather than in a lump sum. A structured settlement can be and often is

[3]Model R. Prof. Conduct 1.7(a)(2) (*see* comment 29); NAELA Aspirational Standards, 2nd Ed, D.2; Home Ins. Co. v Wynn, 493 S.E. 2d 622 (Ga. App. 1997).

[4]For more information about Life Care Plans, see www.aanlcp.org and www.Rehabpro.org/sections/ialcp.

combined with a lump sum payment. Virtually all structured settlements s are funded through the purchase of one or more Structured Settlement Annuities, negotiated by Structured Settlement Brokers and issued by insurance companies.[5] While you may not need or want to be part of the negotiating process for a structured settlement, you should at least verify that the proposed stream of payments off the structure are properly going into the SNT and that remainder beneficiary designations in the SNT coincide with Court Orders or settlement agreements providing for the disposition of the remaining funds in both the structured settlement and the balance remaining in the SNT on the death of the Beneficiary or other termination of the SNT.

5. Family Members

It is almost axiomatic that family members will want to be involved. This can create serious ethical issues for you since the family members do not want to hear about "attorney-client privilege" - they want to be part of the decision making process and unfortunately, frequently believe they have not only a right to be part of that process but an economic interest in the settlement or award.

There is nothing wrong with having family involved and in fact it can be very useful since these people constitute (hopefully) a built in support system for the Beneficiary. However, you need to be vigilant to make sure everyone understands who the client is (and note, that is a subject we have yet to address in this paper!),

[5]For a more complete description of Structured Settlements and the process, see Stuart D. Zimring, Rebecca C. Morgan, Bradley J. Frigon and Craig C. Reaves, *Fundamentals of Special Needs Trusts,* §4.08 (Lexis Nexis 2022) (hereafter "Fundamentals").

and to whom you can provide information and advice. All too frequently friends and family believe the you "represent" them as well as your client. When these people are participating in the discussion, regardless of the amount of their involvement, you must obtain appropriate waivers of the attorney-client-privilege together with disclosure authorizations when the client wants you to discuss the case with others.[6]

6. The Trustee

If the identity of the Trustee is known, the Trustee should be a participant in the discussions. The ultimate decision as to whom the Trustee is going to be is up to the client (or in some cases), the Court. However, you, by virtue of your experience are in a position, and may well have a duty to advise the client regarding the choice of Trustee.[7]

3. The Drama Unfolds - We Deal with the Elephant(s) In the Room

A. The Elephant in the Room - Who is the Client?

The various parties are assembled around your conference table (on in their separate little "Hollywood Squares" boxes in your zoom call). The first and most pressing question is: Who is your client?. Secondarily, an equally pressing question is: How and by whom are you going to get

[6]Model R. Prof. Conduct 1.14 (*see* comment 3), NAELA Aspirational Standard , 2nd Ed. E.1, B.2. *See also* John B. Henry, III, *SNT Planning: A Family Matter,* Stetson University College of Law 2021 National Conference on Special Needs Planning & Special Needs Trusts (oct. 2021).

[7]See *Fundamentals,* §404[1][f]. *See also* David S. Banas, *Trustee School! How to Train Family Member Trustees,* Stetson University College of Law 2019 National Conference on Special Needs Planning and Special Needs Trusts (Oct. 2019) and Peter Wall and Prof. Roberta Flowers, *Multi-disciplinary Liability and Defining the Trustee's Role,* Stetson University College of Law 2020 National conference on Special Needs Planning and Special Needs Trusts (Oct. 2020).

paid?

B. Identifying the Client

1. "Who is the client?" may well be the most important question you ask during this or any representation. The answer will govern much of what happens later in terms of the scope of your representation, the source of payment for your services, to whom you owe a duty of loyalty and the scope of the attorney-client privilege and waivers of it. Given the list of players in a litigation context the answer is not necessarily simple. It therefore behooves you to ask the question as early as possible. And, you should answer the question (or drive the answer to the question) in a way you want it to be answered, rather than the way someone else may want it to be answered.

2. In making this decision it is critical that you consider all the usual criteria that an attorney uses in agreeing to represent a client:

a. Does the person have the capacity to retain counsel?[8]

b. Are there existing or potential conflicts of interest that must be disclosed and if so, can they/should they be waived?[9]

c. Is there mutual respect and an ability to work together within the cont3ext of the attorney-client relationship?[10]

---

[8] *See* in particular Model R. Prof. Conduct 1.14 regarding an attorney's duties in dealing with clients with diminished capacity and NAELA Aspirational Standards 2nd Ed. Standard G.

[9] Model R. Of Prof. Conduct 1.7, 1.8, 1.9; NAELA Aspirational Standards 2nd Ed., Standard D.

[10] NAELA Aspirational Standards 2nd Ed. Standard H; Model R. Prof. Conduct 1.14, 2.1.

d. Is Court approval required to enter into the attorney-client relationship?

e. Is the Beneficiary/plaintiff the one creating the SNT?

In our hypothetical, the GAL, mom would most likely be the client on behalf of Giselle. Does your state law require prior court approval of the retention? If so, who is responsible for obtaining court approval? You or Marvin? These issues must be addressed and answered before the relationship commences.

C. Conflicts of Interest

Litigation is, by definition, a stress-filled process. Add to this a mix of familial relationships, emotions and lives torn apart by the underlying trauma that is the reason the litigation exists and it is easy to see how and why various types of conflicts can and will occur over the course of the litigation and its resolution.

Conflicts of interest are often subtle and therefore a potentially invidious element and create a real trap for the unwary. From the very outset you must be vigilant in identifying the areas of potential or actual conflict of interest and respond to them in a professional and ethical manner. In some cases you will find that the potential conflicts are waiveable in accordance with the applicable Rules of Professional Conduct[11] and in other cases, while the potential conflict may be theoretically waiveable, the practical reality is that the game is not worth the candle. That said, the key points to remember here are that (a) the fact that there may be *potential* conflicts does not mean you cannot be involved in the representation as

[11]Model R. Prof. Conduct 1.7(b)(4); NAELA Aspiration Standards 2nd Ed. Standard D.2. For deeper discussion of conflicts of interest in this context *see* Fundamentals, §2.05

long as they are properly disclosed and acknowledged; and (b) if there is a real conflict even though the Model Rules state that it can be waived does not mean it should be waived. Where a real conflict exists or arises after the representation begins, the safest course is probably to withdraw from the representation.[12]

D. Determining Client Capacity

Once you have determined who the client will be, you need to determine whether that person has the capacity to (a) enter the attorney-client relationship and (b) whether the potential client has the capacity to knowingly and intelligently participate in the representation? In this regard your analysis will be no different than how you deal with any other potential client. Thus, as you would do in any other case, if necessary and appropriate reference to Model Rule of Professional Conduct 1.14 and the cases and ethical opinions cited therein will be useful along with a review of the ABA Commission on Law and Aging publication "*Assessment of Older Adults with diminished Capacities: A Handbook for Lawyers* (2nd Ed.. 2021)[13]

E. Duties to Non-Clients

The soon-to-be-Beneficiary of the soon-to-be-created SNT is often surrounded by a constellation of family members, friends, caregivers, and others all of whom believe they should be involved in every aspect of the Beneficiary's life. As a result, maintaining the attorney-client privilege barrier as well as the duty of undivided loyalty to the client can often

[12]Model R. Prof. Conduct 1.7(a).

[13]Available from the ABA at www.americanbar.org/pruducts/inv/book/411701219. *See also,* Fundamentals §§2.06 *et seq.*

be difficult and can require a good deal of diplomacy and tact (and sometimes that's not enough, unfortunately). Third parties need to understand (and you can try to help them to understand) that they are not your client, you owe them nothing, and you have no obligation to protect their interests (and are therefor not liable to them for professional negligence.)

However, there are exceptions to this rule. The most applicable exception in the SNT world is that you may well have a duty to a non-client where the basic purpose of your representation is to create benefits for a third party. In our hypothetical, if Marvin was consulting you in connection with the case and he retained you to draft the SNT on behalf of his client (rather than the GAL), your duty would flow to Marvin's client even though she was not your client.[14] Of course, if the client wishes to waive the attorney-client privilege, she is free to do so and can authorize you to disclose as much or as little information to whomever she wishes. A form Disclosure Authorization is attached to these materials.

F. Getting Paid

1. As in any other representation, good practice requires that you fee arrangement be in writing so not only the client, but in this case, everyone involved in handling the economics (Marvin, the GAL, the Structured Settlement Broker, *etc.*) clearly understand what it is you are going to do for the client, how much you are going to be paid and how that fee is calculated.[15] In particular, I think it is important for you to set forth in your Retainer Agreement (and in subsequent correspondence

[14] *See* A. Frank Johns, *Fickett's Thicket: the Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth,* 32 Wake Forest L. Rev. 445 (1997); Fundamentals §209.

[15] Model R. Prof. Conduct 1.5(a).

and pleadings as appropriate) who is responsible for negotiating and seeing to the payment of Medicaid liens due and payable out of the settlement proceeds prior to funding the SNT, contacting Medicare regarding appropriate Medicare set-aside arrangements and proper funding amounts and subrogation rights that any insurance companies may have in the matter. In my experience, this is something litigation counsel sometimes loses sight of when their eye is on the prize.

2. In the litigation context, it may turn out that the person paying your fee is not your client. This is permissible as long as the appropriate disclosure, waivers and consents are observed and obtained. For example, in our hypothetical, assume the GAL, with Court approval has retained you to prepare the SNT for Giselle. However, Marvin has agreed that he will pay your fees out of his contingent fee award (it does happen and therefore you fee should not be subject to court approval since it's not part of the settlement!). In cases like this, you need to make specific disclosures to the GAL and consents must be obtained from both the GAL and Marvin acknowledging that by agreeing to pay your fees, Marvin does not acquire any rights to be involved in your representation, and/or to direct your actions or obtain information regarding the case that may be in your files rather than his. On the other hand, your well drafted third-Party Payer Agreement and Retainer Agreement will also have the GAL acknowledge that she is primarily responsible for the fees and if Marvin fails to pay, she remains liable. A form Third-Party Payer Agreement and

corresponding language for the Retainer Agreement are attached.[16]

3. In situations where your fees are going to be paid out of the settlement or judgment, you must check your State's relevant statutes, Court Rules and Local Rules since any or all of them may require that your fees (separate and apart from the GAL's initial approval to retain your services) be approved by the Court.[17] When fees are going to be paid from the SNT itself, upon its creation, the Court Order should specifically authorize payment of legal fees for its creation. You should also ascertain beforehand whether such orders and payment provisions do not run afoul of your local Medicaid regulations.

4. Be aware that while many of us use a "fixed fee" methodology in creating SNTs, this may not sit well with a Court that is used to basing fee awards on "reasonable value" based on hours worked, *etc*. So even if you have agreed to a fixed fee arrangement, I suggest you keep detailed time records just in case the Court asks for them. Also consider having two (2) fee arrangements: (a) a fixed fee for the drafting of the SNT (if that's what you want) and (b) an hourly rate for time you may have to spend in Court explaining the SNT structure to the Judge or even handling the preparing of the pleadings dealing specifically with the approval of the SNT by the Court.

4. A Successful Outcome

[16]Model R. Prof. Conduct 1.8(f), 1.6; NAELA Aspirational Standards (2nd Ed. 2021) Standard D.4.

[17]*See for example* Cal. Prob. Code §§2580 *et seq.* regarding court authorized petitions for substituted judgment in conservatorship proceedings and Cal. Prob. Code §3604 specifically dealing with court authorization of SNTs created in connection with litigated matters.

Being prepared is half the battle. Understand that at your meeting you will be the most knowledgeable person in the room; the only one with a total grasp of every aspect of the case, the "big picture" and probably the only one (or one of the few) whose sole interest is protecting the plaintiff by seeing to it that not only will she be receiving compensation for her injuries (keeping in mind she will never be made whole) but that you and you alone are the one who is safeguarding that fund for her future.

5. A Final Thought

The focus of this paper has been on protecting litigation settlements and judgments through the use of SNTs. However, you should keep in mind that the exact same tools, skills and concepts apply in Domestic Relation matters. Spousal and Child Support payments as well as an individual's property allocated during a dissolution of marriage proceeding can be used to fund SNTs. This is especially critical in cases where the award of Spousal Support or allocation of property could cause a termination in SSI or Medicaid benefits.[18] From a "marketing" standpoint I think this is an untapped area of potential business for SNT drafters and planners and a perfect application of NAELA's maxim of "doing well by doing good."

[18]20 C.F.R. §4.16.1121(b), POMS SI 01120.200G.1.d, Fundamentals §3.06. *See also* Kim Martin, *Divorce and the Special Needs Child: How to Save the Day by Knowing A Lot About A Little,* Stetson University College of Law 2021 National Conference on Special Needs Planning and Special Needs Trusts (Oct. 2021).

DISCLOSURE AUTHORIZATION

I have retained the services of the Law Offices of Stuart D. Zimring as my attorneys. I understand that all communications between me and the Law Offices of Stuart D. Zimring are confidential and that any facts or other information that I give to my attorneys will not be revealed to any person or persons without my express permission. With full knowledge of this right, I specifically authorize the Law Offices of Stuart D. Zimring to take the following steps (check the appropriate boxes):

[**X**] To answer questions presented by the person(s) listed below and to otherwise share any and all:

[**X**] Information

[**X**] Copies of correspondence

[**X**] Documents requested by such person(s).

[ ] To answer questions presented by the person(s) listed below and to otherwise share any and all information, copies of correspondence and documents requested by such person(s) ONLY in the event that such person(s) indicates that there

is, in such person(s) judgment, an emergency with regard to my financial and/or physical well-being.

I further understand that I will be billed for the time and costs incurred to respond to such questions, calls and other inquiries at the then prevailing rates.

Dated: _____, 2020 _____

FRED FLINTSTONE

Authorized Person(s)

BARNEY RUBBLE

Third Party Payer:

You have requested that we accept payment for the services to be rendered to you from your _____. By initialing this paragraph, you indicate your understanding that you are primarily responsible for the fees and costs described and that you will be liable for them if _____ fail or refuse to pay. (_____). (_____).

We are not aware of any conflicts or potential conflicts that exist or may exist in connection with the payment by _____ of our fees and by initialing this paragraph and signing this Agreement, you indicate that you have given your informed consent to payment by them. (_____). (_____).

Third Party Payor:

Client has requested the Firm accept payment for the services to be rendered to Client from ~_____ who is the Client's ~_____.

Client understands that the Client is primarily responsible for fees and costs incurred under the Agreement and will be liable for same if ~_____ fails or refuses to pay.

Client acknowledges Client has been informed in writing of any potential conflicts that may exist in connection with the payment by ~_____ and the Client has given his/her/their informed consent to payment by ~_____.

Ethics In Special Needs Trust Planning -

A Guide to the Perplexed and Sometimes Frustrated

1

Setting the Scene

- 4 p.m. Friday. You're out the door.
- Marvin the Med Mal Mavin (he of many billboards and late night TV) calls.
- It's the case of a lifetime – Poor Giselle!
- Can you send him one of those "Special Needs Trust Things" before you leave?

2

The Cast of Characters

- Who's In the Room Where it Happens?
  - Marvin
  - Giselle
  - GAL
  - Structured settlement folk
  - Life care planners
  - Trustee (?)

3

Dealing With the Elephant(s) In the Room

Who is the client?

Identifying the client

Determining client capacity

Conflicts of Interest

Duties to non-clients

4

More Elephants

Getting paid (very important!)

- By whom (3rd party payor?)
- From Where?
- How to calculate?

The Devil is in the details

- Medicaid/Medicare/Subrogation issues- who's responsible?

5

Success!

- Being prepared is half the battle.
- You are probably the only one who see the entire picture, *i.e.* Giselle in 30 years.
- A perfect example of NAELA's motto:
  - Doing Well by Doing Good

6

A Final Thought

- Domestic Relations, Spousal & Child support and SNTs – the Next Frontier?

7

STETSON LAW

2023 Fundamentals of Special Needs Trusts Administration Webinar

Friday, April 21, 2023
2:10 P.M. – 2:50 P.M.

Guardian and Trustee: A Marriage Made in …

Presenter:
Slade Dukes and Kerry Tedford-Coles

- PowerPoint

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

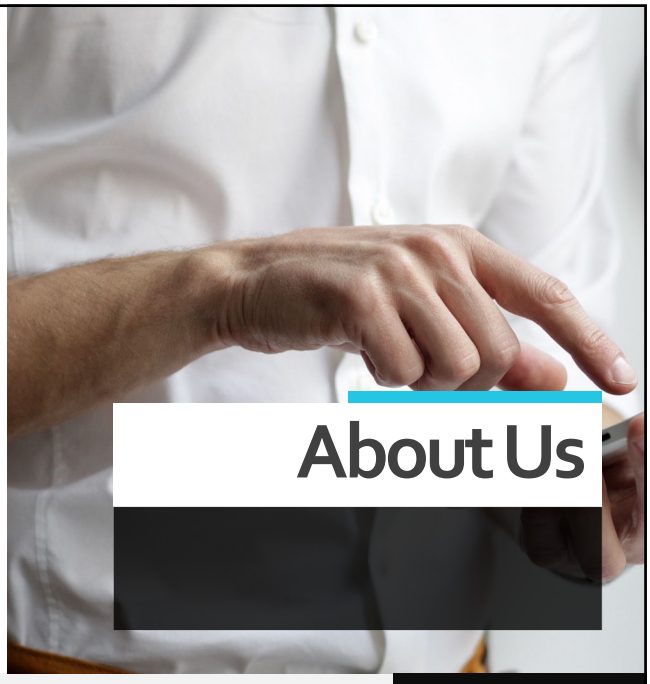
The Guardian and The Trustee:
a marriage made in . . .

Presented by: Kerry Tedford-Coles & Slade V. Dukes

1

Kerry is the Executive Director of PLAN of CT and the National PLAN Alliance. PLAN of CT acts as trustee for Special Needs Trusts.

Slade (he/him/his) is an attorney in Florida with the firm Boyer & Boyer, P.A., where he focuses on guardianships, probate and trust administration, and estate planning. He is a proud member of and advocate for the LGBTQ+ community.



About Us

2

2

Parties and Perspectives

The Parties

- Trustee
  - Family, Corporate/Professional
- Guardian/Conservator (person, property, both)
  - Family/Professional
- Settlor
- Beneficiary/Ward
- Court
- Family/Friends/Others

The Perspectives

- Fiduciary, Legal, Relational, etc.
  - Trust
  - Statute
  - Court
    - Reporting
    - Approval to Act
  - Ward/Beneficiary
    - Needs vs Wants
    - Safety/Wellbeing/Care
    - Best Interest
    - Health Maintenance Education Support Etc.

Roles, Duties, and Responsibilities - Interplay and Overlap?

3

3

Trustee and Guardian/Conservator of Person

Benefits

- Allows for additional assistance in managing the needs of the client
- Will often make arrangements for beneficiary
- Often guarantees stable consistent housing.
- Extra protection from people, creditors etc.
- Excellent resource to identify ways to assist the beneficiary
- (if family) can give historical insight
- Stopgap for impulsive requests
- Has a clear overall picture of the beneficiary
- Can arrange for approval to speak to other service providers

Complications

- Can limit the communication between the trustee and beneficiary and others that are providing services.
- There can be a lack of communication about upcoming financial needs
- Stigma and shame of being conserved. Responsibilities can be too great and beneficiary lacks direction.
- Lack of transparency
- Often are overworked and difficult to get in contact with which causes delays in distributions
- May not always have a clear understanding of the client's financial matters.
- May not understand fiduciary duty of a trustee

4

4

Trustee and Guardian/Conservator of Property

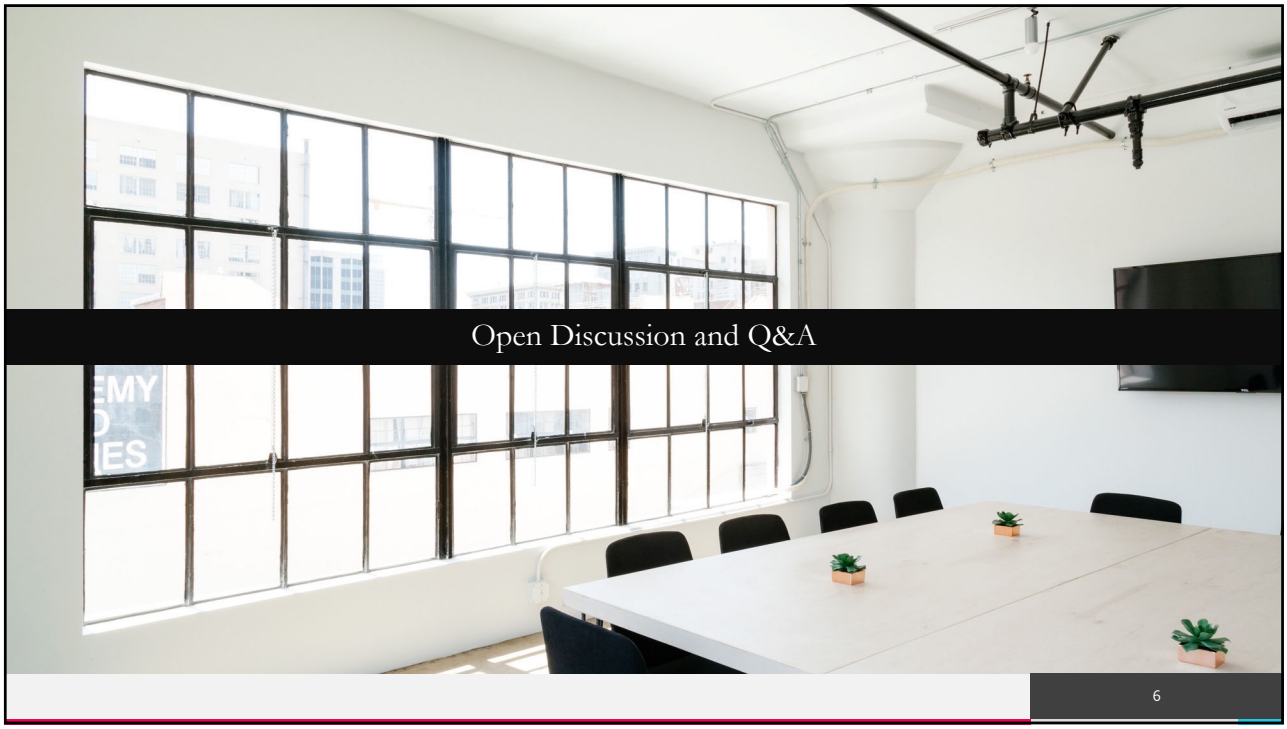
Benefits

- Ensure necessary bills (like rent) are paid
- Different perspective regarding funds
- Financial protection and long term planning
- May be aware of additional resources available
- Assist with proper documentation the trustee may need
- Offers a profession understanding of financial information
- Familiar with financial decisions most appropriate for the beneficiary
- Sharing of information to best support the beneficiary financially

Complications

- Mismanagement of funds and will rely on trust to get out of trouble
- Lack of programs to teach beneficiaries financial competency
- Limits communication between trustee and beneficiary
- Difficulties being on the same page financially
- Difficult to reach/unresponsive
- Relationship between beneficiary and COE can be strained
- May not know enough about the beneficiary personally

5



6

Difficult Scenario 1-Can we please just sell this house?!

- D4a trust funded with mom's money so she could qualify for Title 19 in SNF. She has left her the family home outside of trust
- Beneficiary is 33 with a developmental disability
- Has lived most of her life in this same home in a rural affluent area. Does not want to move
- Mom never finished applying for assistance through the Department of Developmental Disabilities (DDS)
- Aging/legally blind neighbor is guardian
- Conservator of Property believes DDS will place a roommate in the home and it will cover the expenses to run the house.
- Trustee believes it is highly improbable that a roommate will be found and if there is a roommate that it will cover the carrying costs of the home
- Trustee begs the conservator to consider selling the home
- Trustee attempts to press DDS to move forward, pays for property taxes, home expenses etc.
- Year 2 a "burn letter" is sent to conservator including the trust may no longer distribute for home related expenses
- Urge guardian to have a conversation with beneficiary that moving may be the only option

7

Difficult Scenario 2- Banging your little trustee head against a wall

- All responses to trustees emails and phone calls results in "I have no clue"
  - Does the beneficiary need anything?
    - "I have no clue"
  - Does the beneficiary have a pre-need funeral?
    - "I have no clue"
  - Does the group home ever go on short or long term trips?
    - "I have no clue"

8

Difficult Scenario 3-Trying to do the right thing

- Beneficiary has multiple mental health diagnoses
- Has always been in a supported setting
- Is often non-compliant/ doesn't work the program. Program threatens to kick him out
- Conservator decides he's going to get him his own apartment to "increase his self esteem and he can't stay in the program anyway"
- Beneficiary goes from rental to rent due to his behaviors
- Trust is often call upon to pay for hotel rooms while in transition, repairs, storage and moving fees.

9

Success Story 1- Family guardian to the rescue!

- Abuse suspected when beneficiary is found to have injuries during a doctor visit.
- Guardian set up a move to a different residence and contacted trustee
- Trustee went to group home and ensured items were properly moved to new living situation
- Trustee and guardian evaluated what would make him most comfortable in the new living space and items were provided
- Multiple reports regarding beneficiary's happiness in the following months

10

Success Story 2- Finding happiness as a team

- Individual who is deaf and in a group home becomes depressed and begins refusing meals
- Guardian and trustee review information and find the some of his fondest memories are when his mom and dad took him to the circus
- Trustee arranges for a clown to visit for his birthday
- Clown provides balloon animals and a pantomimed show
- Pictures were taken of the day and he shows everyone the pictures and smiles.

11

12

STETSON LAW

2023 Fundamentals of Special Needs Trusts Administration Webinar

Friday, April 21, 2023
3:00 P.M. – 3:40 P.M.

Welcome! Now What?: Beneficiary Intake and Onboarding

Presenter:
Megan Brand and Yolanda Mazyck

- PowerPoint

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

Welcome! Now What?: Beneficiary Intake and Onboarding

Megan Brand, E.D.
CFPD
And
Yolanda Mazyck, CEO
Shared Horizons, Inc.

1

OUR FOCUS TODAY

This presentation will provide options for inclusion when developing or revising a comprehensive intake and onboarding process for special needs trust practitioners.

2

If We May Borrow And Adapt An Iconic Line From Sophia Petrillo Of The Golden Girls:

PICTURE IT…

May 20, 2022, Stetson's Webinar - Fundamentals of SNTs.
We presented on Basic Trust Distributions…which included the importance of person-centered language and planning.

We will revisit a few of those concepts in this presentation, so bear with us, it will make sense in the end.

3

4

Who Conducts The Initial Meeting?

- Intake Coordinator
  - In Person
  - Over the Phone
  - Video Conference
- Sometimes we just receive a packet and check in the mail
- Sometimes the Executive Director
- Sometimes a Director or Case Manager

We cross train in our organization to ensure a variety of positions are able to conduct an initial meeting:

- Director of Trust Services
- Trust Administrators
- COO
- CEO
- We too conduct the meeting:
  - In Person (office or off-site)
  - By Phone
  - Video Conference
- We also receive completed Joinder Agreements with checks. Not our preference.

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

5

How do you convey essential elements of your trust services?

- Focused on the individual and their questions
- Talking Points
- Beneficiary Handbook
  - General Information
  - Understanding Expenditures
  - Frequently Asked Questions
  - Trust Distribution Policies
  - Appendix (forms)
  - Notification: updated on our website

- We start with a person-focused conversation:
  - ✓ The Who, What, Where, and Why
- Then we share written materials developed at varied reading levels from sixth grade up procedures
- We review the written materials sent:
  - Brochure
  - Newsletter
  - Joinder Agreement and Exhibits
  - Policies and Procedures
- Repeat as needed through conversation

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

6

Do You Sell OR Share?

- Mitigate potential conflict between intake and trust administration later
- Important not to give Legal Advice
- 65 and Older—Need for a spending plan before funding

We allow the sharing of information sell the organization.

- We provide general trust information then share how we handle the process
- We will often inform them of other PSNTs in the area, and inquire if they have talked to other PSNTs to ensure their choice is a good fit
- We also share information about ABLE if the amount is under that program's threshold
- Again, we do not apply pressure to join

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

7

Do you overpromise?

- Its important not to make promises
- Document, document, document
- Focus on Allowable Trust Expenditures and Discretion!
- Sample Disclaimer: *Disclaimer*: These are general rules. Distributions are based on each person's unique benefits. Each request will be reviewed on a case-by-case basis. Further, Trust requests for minors will be evaluated alongside Parental Duty of Support rules.

It is tempting, especially for larger accounts, but NO,

- Overpromising will create distrust, an adversarial, and confusion relationship
- Be clear about what you as trustee can and cannot do
  - We adopt the phrase: our trust policy or benefits prohibit that disbursement, but we can do_____ instead.
  - Doing this can counter negative feelings and it fosters a partnership

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

8

9

WHAT HAPPENS AFTER AGREEMENT IS SIGNED?

- First Party trusts are signed by the beneficiary but are not fully executed until the funding has been received and deposited. Date of Transfer of Funds will be before the agreement is signed.
- Number is assigned and trust added to our platform once the check is in hand.

- Our Joinder Agreements (JA) are fully executed when accepted and signed by the CEO.
- Copies of the JA are provided to interested parties along with the Welcome Packet
  - Includes:
    - Nonprofit Information
    - Contacts
    - Trust Policies
    - Trust Procedures
    - Request Instructions and Forms
- Trust Administrator (TA) is assigned, and Information is entered into the database.

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

10

What Is The Process Once Funded?

- Validated in our system
  - Documents received in intake move to our system for managing beneficiaries
- Notifications to SSA (if applicable) and Medicaid
- Welcome Letter to the beneficiary
  - Assigns the Case Manager

- An account number is assigned when deposit is made.
- Verification of Receipt is sent
- TA contacts beneficiary to share next steps and schedule the Quality-of-Life Plan (QLP)

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

11

What Is The Process Once Funded? Continued…

- Case Manager reaches out to the team to set the Assessment and Plan meeting
- Meeting:
  - In Person
  - Video Conferencing
  - Phone
  - (about half of our meetings take place in person, which is our preference)

- The TA schedules the QLP meeting. It includes:
  - Beneficiary
  - And support network, if applicable
  - Meeting can be:
    - In Person
      - Office
      - Residence
      - Neutral place
    - Virtual
    - Telephone

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

12

What Is The Process Once Funded? Continued…

- Assessment and Plan:
  - Demographic information to include benefits and contacts
  - Preferred method of contact, best time to reach them and best way to address the individual
  - "Anything you'd like us to know"
  - Background
  - Housing
  - Medical (Physician's statement received at intake)
  - Mobility
  - Dental/Vision, cont.

- Goals of QLP Meeting:
  - Secure information from the beneficiary related to:
    - Their vision on how the trust can enhance their life
    - Demographics
    - Identification of Support Network
    - The beneficiary's disability
    - Determination Letter
    - Benefits
    - How they use their cash benefit
    - Essentials not covered by benefits

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

13

What Is The Process Once Funded? Continued…

- Assessment and Plan, cont.
  - Social
  - Education
  - Employment
  - Transportation
  - End of life plans
  - Current Needs/Requests

- Goals of Quality-of-Life Planning Meeting:
  - Secure information from the beneficiary related to, continued…
    - Identification of immediate needs
    - Intermediate needs
    - Long-term needs
    - Any large expense items
    - End of life plans
  - We also encourage folks to think outside the box:
    - Music, massage, art, and other therapies not covered by Insurance

cfpd

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

14

What Is Your Planning Process?

- Meeting
- Write up of Assessment and Plan
- Supervisor (who will also be approving distributions) reviews the Assessment and Plan
- All plans for individuals over 65 are completed and written prior to funding and also approved by the Executive Director

- Identify participants
- TA will schedule and conduct meeting
- Write up the Quality-of-Life Plan for accounts with $25K+, accounts with less is limited to the completion of the QLP Form
- Share with participants

15

Do You Develop A Budget?

- Always for 65 and older
- Always for individual trusts
- It depends for all others

- We develop a budget using the information from the planning meeting. We also consider:
  - Other critical needs
  - Anticipated large expenses
  - Monthly distributions
    - PEX, True Link, other
    - Cable, Internet, Mobile
  - Account Balance
- All accounts receive a budget plan

16

Why Is The Process So Important?

- Taking the time in the beginning helps to develop a stronger relationship with the beneficiary
- Not overpromising in intake makes the work of onboarding so much better
- It reduces conflict and confusion
- Beneficiaries have told us it takes at least six months to get used to the process of making requests and understanding the “rules” in SNT Administration.

cfpd SHARED HORIZONS ENHANCING LIVES, PROTECTING FUTURES

8/05/20XX CONFERENCE PRESENTATION 17

17

What If There Is A Conflict?

- Ask Good questions in the intake process (Application)
- Listen – Restate – Reiterate key points
- Create written contracts or action plans – have beneficiary or representatives acknowledge by signature (suggested)
- Involve Key Players.
  - Sample Language: If it ever becomes necessary, does the Client have a person in their life they would trust to communicate their needs to CFPD or SH? e.g., Power of Attorney, trusted friend, family member, community member, etc.
- Make sure you have a Conflict Resolution Policy and Procedure that is shared with the beneficiaries and their support network.
- Be willing to resign/transfer the trust

cfpd SHARED HORIZONS ENHANCING LIVES, PROTECTING FUTURES

8/05/20XX CONFERENCE PRESENTATION 18

18

19

OUR CONTACT INFORMATION

Megan Brand, Executive Director
CFPD - Colorado Fund for People with Disabilities
1355 South Colorado Boulevard
Suite 920
Denver, CO 80222
Direct: 303-476-6315 Main: 303-733 2867
Fax: 303-531-0469
mbrand@cfpdtrust.org www.cfpdtrust.org

Yolanda Mazyck, CEO
4301 Connecticut Avenue NW
Suite 140
Washington, DC 20008
Tel: 202-448-1460
Fax: 202-448-1461
ymazyck@shared-horizons.org
http://www.shared-horizons.org

cfpd
managing means protecting benefits

SHARED HORIZONS
ENHANCING LIVES, PROTECTING FUTURES

20

STETSON LAW

2023 Fundamentals of Special Needs Trusts Administration Webinar

Friday, April 21, 2023
3:40 P.M. – 4:20 P.M.

The Trust Protector

Presenter:
Shirley Whitenack

- Materials
- PowerPoint

STETSON UNIVERSITY

Center for Excellence in Elder Law

ACCESS AND JUSTICE FOR ALL®

NAELA JOURNAL

National Academy of Elder Law Attorneys • Volume 15 • e-Issue • Fall 2019

Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties, and Liabilities in Special Needs Planning

By William D. Lucius, Esq., and Shirley B. Whitenack, Esq., CAP, Fellow

NAELA
National Academy of Elder Law Attorneys

NAELA Journal (ISSN 1553-1686) is published annually by the National Academy of Elder Law Attorneys, Inc., 1577 Spring Hill Road, Suite 310, Vienna, VA 22182, and distributed to members of the Academy and to law libraries throughout the country. Two e-Issues are published — one in Spring and one in Fall.

NAELA's mission is to educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law.

Elder and special needs law topics range over many areas and include: preservation of assets, Medicaid, Medicare, Social Security, disability, health insurance, tax planning, conservatorships, guardianships, living trusts and wills, estate planning, probate and administration of estates, trusts, long-term care placement, housing and nursing home issues, elder abuse, fraud recovery, age discrimination, retirement, health law, and mental health law.

Articles appearing in *NAELA Journal* may not be regarded as legal advice. The nature of elder and special needs law practice makes it imperative that local law and practice be consulted before advising clients. Statements of fact and opinion are the responsibility of the author and do not imply an opinion or endorsement on the part of the officers or directors of NAELA unless otherwise specifically stated as such.

A subscription to *NAELA Journal* is available to law libraries for $70 per year. A combined subscription to *NAELA News*, distributed four times a year, and *NAELA Journal* is available to law libraries for $135 per year. Back issues of *NAELA Journal* and *NAELA News* are available to NAELA members and subscribing law libraries in electronic format on www.NAELA.org. Address changes or other requests regarding subscription information should be directed to Nancy Sween, Sr. Director of Communications and Publications, nsween@naela.org.

Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties, and Liabilities in Special Needs Planning

By William D. Lucius, Esq., and Shirley B. Whitenack, Esq., CAP, Fellow

About the Authors

William D. Lucius, Esq., a member of the Florida, Michigan, and Wisconsin bar associations, speaks frequently on special needs trusts and special needs planning at the state and national level. Having practiced extensively in the areas of estate planning, elder law, and disability rights across Michigan and Wisconsin, Mr. Lucius is currently the director of special needs trusts at Raymond James Trust, N.A., at its headquarters in St. Petersburg, Florida, where his department oversees the administration of numerous special needs and settlement preservation trusts across the nation. He also serves as co-editor of the weekly *NAELA eBulletin* online publication, is an adjunct professor at Stetson University College of Law, and serves on the Hillsborough County (Florida) Council on Aging.

Shirley B. Whitenack, Esq., CAP, Fellow, is a partner at Schenck, Price, Smith & King, LLP, where she co-chairs the firm's Elder and Special Needs Law Practice Group as well as the Estate and Trust Litigation Practice Group. A member of the New Jersey State Bar Association, she has appeared before the U.S. District Court for the District of New Jersey and the U.S. Court of Appeals for the Third Circuit. Ms. Whitenack, whose practice focuses on elder and special needs law, estate planning and administration, and trust and estate litigation, is a NAELA Past President, a NAELA Fellow, and a member of NAELA's Council of Advanced Practitioners. In addition to her membership in many other organizations focused on elder law and disability rights, Ms. Whitenack has served as an adjunct professor in the JD and LLM elder law programs at Stetson University College of Law. She also publishes and lectures at the state and national level on topics related to guardianship, elder and special needs law, estate and trust litigation, and probate mediation.

I. Introduction

The provision of legal services in the fields of elder law and special needs planning has expanded over the past decade into a client-focused, holistic, and collaborative approach.[1] Consequently, this developing philosophy has permeated into the estate plans and trust instruments related to these fields, such as special needs trusts (SNTs)[2] and settlement preservation trusts (SPTs),[3] wherein the selection of an appropriate fiduciary is no longer a choice between two or among several individuals or corporate trustees. Nontraditional "multiparticipant trust agreements,"[4] in which the "powerholders"[5] may be a potpourri of trustees, co-trustees, distribution directors, investment advisers, trust advisory committees, and trust protectors, are becoming more commonplace.[6] With the advent of directed trusts, these powerholders may now encroach upon the traditional trustee's once overarching authority and compel the trustee to act (or not act) in furtherance of the trust's objective.[7]

Consider the case of Nathaniel.[8] Like most 4-year-olds, Nathaniel was curious and adventurous in equal measure. Due to the alleged negligence of a day care employee, Nathaniel left his day care facility through an open gate and wandered unsupervised to an adjacent parking lot. When Nathaniel attempted to climb through a half-open car window, his head became stuck and he could no longer support his

1 Rebecca C. Morgan, *Elder Law in the United States: The Intersection of the Practice and Demographics*, 2 J. Intl. Aging L. & Policy 103, 106 (Summer 2007).

2 SNTs are commonly referred to as either first-party or third-party SNTs depending on the source of funds used to establish them. A first-party SNT, funded with the assets of a beneficiary with a disability, is created pursuant to Title 42 U.S.C. § 1396p(d)(4)(a) (2018); a third-party SNT, funded with the assets of a third party, is largely a creature of state law. For purposes of this article, "SNT" is used to refer to both types of SNTs because the distinction does not bear heavily on the topic of this article. Moreover, intentionally omitted from this article are pooled SNTs authorized by Title 42 U.S.C. § 1396p(d)(4)(c) and Qualified Income Trusts as found in Title 42 U.S.C. § 1396p(d)(4)(b). The authors assume the readers are knowledgeable of the definitions, types, and purposes of SNTs.

3 SPTs are a type of irrevocable, discretionary support trust commonly used in special needs planning. SPTs do not have a federal authorizing statute and do not protect the beneficiary's ability to receive means-tested benefits (e.g., Supplemental Security Income, Medicaid); therefore, they do not need to comply with the Medicaid payback requirements of Title 42 U.S.C. §1396p(d)(4)(a). In addition to affording a minimum level of creditor and spendthrift protection, SPTs may be useful planning tools for minor beneficiaries, beneficiaries with incapacity considerations, and those who may be vulnerable or susceptible to undue influence. *See* Thomas D. Begley Jr., *Settlement Protection Trusts*, 30 NAELA News 4 (Nov. 2018).

4 A multiparticipant trust, unlike the traditional single-fiduciary trust, employs a team of multiple trustees and/or advisers with specific roles and responsibilities. *See* John P.C. Duncan & Anita M. Sarafa, *Achieve the Promise — and Limit the Risk — of Multi-Participant Trusts*, 36 ACTEC L.J. 769, 772 (2011).

5 Powerholders are loosely defined in this article to include trust directors, trust advisers, trust protectors, trust advisory committees, and other parties with the power to direct another fiduciary on some aspect of the trust instrument.

6 Duncan & Sarafa, *supra* n. 4, at 773.

7 John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 1 (Winter 2019).

8 Nathaniel's story is loosely based on the real events of a beneficiary of an SNT administered by one of the authors. Although Nathaniel's guardian gave permission to share his story, Nathaniel's name and certain substantive facts have been changed to protect his privacy.

weight. The near-strangulation caused a significant, irreversible traumatic brain injury. Now 8 years old, Nathaniel is incapacitated, has no gait strength or swallowing reflexes, has frequent seizures, and requires 24-hour supervised care. Nathaniel's parents sued the day care provider and parking lot owner, securing an $8 million cash settlement, which includes a 40-year guaranteed structured annuity payment of $4,500 per month, adjusted 3 percent annually. The court that approved the settlement ordered the establishment of a first-party SNT for Nathaniel's benefit that included, in part, the following language:

> Art. 1.1 — Trust Company, N.A., shall serve as the initial Corporate Trustee. Distribution Directors, Inc., shall serve as the initial Distribution Director under this Agreement. Each of the entities shall serve as fiduciaries but shall only be responsible for the decisions that fall within their respective authorities as defined hereunder. Both may rely conclusively on the other if that instruction relates to a matter under the other's purview, and neither shall have a duty nor obligation to review the underlying actions of the other.
>
> Art. 1.2 — During the lifetime of Nathaniel, Distribution Director may direct Corporate Trustee to distribute, from income, principal, or both of this Trust, such amounts as the Distribution Director, in its sole, absolute, and unfettered discretion, may from time to time deem advisable or reasonable for Nathaniel's special needs.
>
> Art. 9.1 — Nathaniel's mother is appointed as Trust Protector. The Trust Protector shall not be entitled to compensation for services rendered but shall be entitled to reimbursement of reasonable expenses in the exercise of her services. The Trust Protector is authorized, in her sole and absolute discretion, to remove from office, without Court approval, any Corporate Trustee or Distribution Director appointed herein, with or without cause and for any reason whatsoever, and may replace such Corporate Trustee or Distribution Director with another Corporate Trustee or Distribution Director who is not related to or subordinate to the Beneficiary (within the meaning of Internal Revenue Code § 672(c)) to act in place of the Corporate Trustee or Distribution Director so removed.[9]

In Nathaniel's case, by ordering a trust with bifurcated duties among various parties, the court followed the advice of the guardian ad litem, who recommended a multiparticipant directed trust arrangement to best address the investment management and discretionary decision-making complexities that will likely last the length of the trust's administration.

A. The Confluence of Multiparticipant and Directed Trusts

A directed trust, similar to Nathaniel's SNT, includes individuals or entities with a power to direct the trustee on some aspect of the trust, such as investment management, administration, and distribution decisions, powers historically reserved to the trustee.[10] In Nathaniel's case, the distribution director is the directing party (the powerholder) on matters pertaining to discretionary distribution decisions; therefore, the traditional trustee is a "directed trustee"[11] insofar as the distribution director holds the power to direct and compel the trustee to act (or not act) in this regard.

---

9 This sample language is a consolidation of various trust provisions from governing instruments spanning multiple jurisdictions. This language is being offered for example only and should not be construed as language suggested for use.

10 Unif. Directed Trust Act § 2 cmt (5).

11 Unif. Directed Trust Act § 2(3) defines "directed trustee" as a "trustee that is subject to a trust director's power of direction."

This article emphasizes this "power of direction"[12] as well as the attendant powers, duties, and liabilities of powerholders and directed trustees. Although a directed trust is a multiparticipant trust by design, because there must be both a directing party and directed party, it does not follow that all trusts with multiple parties are directed trusts or that all parties to a directed trust are powerholders.[13] Although Nathaniel's mother, in her capacity as trust protector, has the authority to remove and appoint the trustee or distribution director, the governing instrument in this case does not afford her any powers to direct the trustee or distribution director in the administration of the trust. It is the inclusion, or absence, of a power of direction in the governing instrument that is dispositive.

Powerholders are often referred to inconsistently among practitioners; however, powerholders are most commonly known as trust protectors, trust or investment advisers, trust advisory committees, and trust directors.[14] Each role has its own advantages and limitations. Again, each may or may not be a powerholder, depending on whether the individual or committee has been provided a power of direction in the governing instrument.

Trust protectors originated in the early 1990s in response to the increased use of then-popular foreign-based asset protection trusts.[15] Trust protectors have morphed into a check on trustees of SNTs and discretionary support trusts by providing increased oversight of the trustee-beneficiary relationship.[16] A trust protector, a person or entity the settlor nominates to ensure that the trustee adheres to the settlor's wishes, is distinct from a trust adviser inasmuch as the trust protector is often granted broader powers, including the ability to remove and appoint trustees and amend or terminate the trust.[17] Certain states now embody the definition of "trust protector" in their probate codes and enumerate the rights and responsibilities of the role.[18]

The value of a trust protector is found in his, her, or its ability to monitor the trustee's conduct and interaction with the beneficiary, amend burdensome or unintended dispositive provisions, change situs, and modify or terminate the trust. However, this value is restrained by whether the trust protector serves in an active or passive role, the relationship the

12 Unif. Directed Trust Act § 2(5) defines "power of direction" as "a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of administration. ..."

13 Morley & Sitkoff, *supra* n. 7, at 10.

14 Unif. Directed Trust Act, *Prefatory Note.* Also note that the term "trust director" is defined in § 2(9) of the Uniform Directed Trust Act as a "person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust."

15 J. Andy Marshall, *Trust & Estates Law — Trust Protectors — Increasing Trust Flexibility and Security While Decreasing Uncertainty of Liabilities for Doing So: How Amending Ark. Code Ann. § 28-73-808 to Better Conform With the Modern Trend of Clarifying Trust Protection Could Effectively End the Fiduciary Guessing Game in Arkansas*, 35(4) UALR L. Rev. 1137, 1140 (2013).

16 *Id.* at 1141.

17 Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 Real Prop. Tr. & Est. L.J. 319, 321 (Summer 2010).

18 Idaho Code § 15-7-501 (West) (Current through ch. 329 of 2019 reg. sess.)

trust protector has with the trustees and beneficiaries, additional fees imposed due to this added layer of protection, and most important, whether the trust protector is considered to be serving in a fiduciary capacity, which varies by state and presumably impacts who may be willing to serve.[19]

Trust advisers, trust advisory committees, and trust directors are prevalent in special needs planning inasmuch as they may assist a trustee, in particular a professional trustee, who may not know the beneficiary well, may not fully understand the beneficiary's special needs, or may be removed geographically from the beneficiary.[20] These roles may be filled by one or several advisers (e.g., relative of the beneficiary, attorney, financial adviser, accountant, case manager, advocate, health care professional) who provide a range of insight and services for the trustee.[21] The Uniform Trust Code posits that a trust adviser assists with certain trustee functions (e.g., determining the appropriateness of a particular distribution request, opining on the structure of an investment portfolio), whereas a trust protector connotes a grant of larger powers.[22]

Trust advisers, trust advisory committees, and trust directors may support the trustee; provide guidance in helping the trustee understand the nature and extent of the beneficiary's medical, social, and therapeutic needs; review investment management decisions to ensure that they are consistent with the settlor's investment philosophy; direct distributions; identify government and private benefits programs; resolve disputes among co-trustees; and remove and appoint trustees. Yet these entities can frustrate the trust administration process if the trust is drafted in such a way that their purpose, the extent of their authority, or their relationship with the trustee is ambiguous. Without a clear dispute resolution and governance process, a lack of consensus among these entities and trustees can stall the trust administration process.[23] And trust advisers, advisory committees, and directors may be too disinterested, lack the time and commitment, or be too ill-informed to adequately perform their obligations under the governing instrument.

Just as the comments on § 703 of the Uniform Trust Code caution that "cotrusteeship should not be called for without careful reflection," by extension, when employing multiple parties to a trust who may be called upon to hold a power of direction over the trustee, drafting attorneys must proceed judiciously and balance the utility of the nontrustee participant's role and services with the settlor's objectives. Attorneys also must be mindful that the use of multiple participants in a trust has eclipsed the available case law and state statutes that define and govern these various roles.[24]

19 Alexander A. Bove Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77 (2011).

20 B. Bailey Liipfert III, *Trust Advisory Committees Can Guide Trustee Decisions*, Spec. Needs Alliance (2016), https://www.specialneedsalliance.org/trust-advisory-committees-can-guide-trustee-decisions (accessed Apr. 24, 2019).

21 *Id.*

22 Unif. Trust Code § 808 cmts. (2000).

23 Daniel P. Felix, *Opportunities and Pitfalls in the New Illinois Directed Trust Statute*, 101 Ill. B.J. 6 (June 2013).

24 Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, ABA Real Prop., Trust & Est. L. (Mar. 14, 2018), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2017/january_february_2017/2017_aba_rpte_pp_v31_1_article_huber_trust_protectors (accessed Apr. 24, 2019).

B. A Departure From Traditional Delegation Principles

To better understand the concept of a directed trust arrangement, contrast this structure with what it is not — delegation, whereby the trustee's authority over a particular function is transferred or delegated to another party.[25] Historically, trustee delegation rules generally limited trustees from delegating any function that a trustee could be reasonably expected to perform himself or herself, including investment management.[26] Trustees were (and still are) required to rely on any special skills they have in the administration of a trust, especially in cases in which the settlor relied upon those skills when selecting the trustee.[27]

The Uniform Prudent Investor Act, Restatement (Third) of Trusts, and Uniform Trust Code have since changed course and now encourage trustees to evaluate whether they are competent enough to perform the obligations and duties imposed on them by the governing instrument and if they are not, whether and to whom they should delegate this authority.[28] The two-fold dilemma with delegation is not only that the trustee has an ongoing statutory duty to exercise "reasonable care, skill and caution" in selecting the agent, establishing the scope of the agent's authority, and reviewing the agent's actions[29] but also that the settlor may not want the selected trustee to have complete autonomy in outsourcing key components of the trust administration and investment management process.[30]

Rather than using the top-down approach that accompanies delegation, a directed trust separates assigned trust functions *ab initio* among the multiple participants pursuant to the settlor's intent and without necessary consideration of the trustee's preference or selection of those participants.[31]

C. Avoiding the Paralysis of Decision-Making by Committee

Directed trusts are a response to the always-evolving area of sophisticated estate planning, which has been impacted by a renewed focus on achieving the settlor's objectives.[32] An increase in regulatory and litigious activity, complex dispositive provisions, the consequences of improper distributions, and portfolios that contain significantly concentrated positions in assets that are not traditional marketable securities — which have long plagued wary fiduciaries — become more palatable through a directed trust arrangement.[33] With proper planning, a powerholder under a directed SNT may do the following:

- Direct the trustee to hold a concentrated position;
- Invest in illiquid assets including busi-

25 Unif. Trust Code § 807(a) (2010).

26 *Restatement (Second) of Trusts* § 171 cmt. (h) (1959).

27 Unif. Trust Code § 806.

28 Unif. Prudent Investor Act § 9 (1994); *Restatement (Third) of Trusts* § 171 (2003); Unif. Trust Code § 807.

29 Unif. Trust Code § 807(a)(1)–(3).

30 David A. Diamond & Todd A. Flubacher, *The Trustee's Role in Directed Trusts*, 149 J. Wealth Mgt. Trust & Ests. 11, 24–25 (Dec. 2010).

31 Todd A. Flubacher, *Directed Trusts: Panacea or Plague?* NAEPC J. Est. Tax Plan. (Sept. 2015), http://www.naepcjournal.org/journal/issue22i.pdf (accessed Apr. 24, 2019).

32 For example, Florida Senate Bill 478 was introduced in 2017 to amend the Florida Trust Code to ensure, in part, that the settlor's intent is paramount in trust interpretation, thereby relegating the best-interest-of-the-beneficiary standard.

33 Diamond & Flubacher, *supra* n. 30.

ness entities, real estate and timber, and oil and gas interests;
- Structure and manage the portfolio;
- Provide asset valuations for hard-to-value assets;
- Remove and appoint trustees;
- Communicate with third parties on behalf of the trust; and/or
- Compel or prohibit distributions.[34]

Directed trusts are also a counterbalance to the old adage that a "camel is a horse designed by a committee" and may be employed to clear the logjams that are common in decision-making associated with multiparticipant trusts, in which roles and responsibilities are often blurred, overlapping, or ambiguous.[35]

The efficacy of directed trusts is not without limitations. State law remains scattered and judicial guidance is limited regarding the powers, duties, and liabilities imposed on the directed trustee and powerholder. In Massachusetts, the trust protector and the trustee of a trust in which the trust protector has the authority to advise the trustee on socially responsible investing[36] has fiduciary considerations that are entirely different from those of a directed trustee and investment adviser of a trust with an Alaska situs in which the investment adviser holds a power of direction on the same socially responsible investment philosophy.[37]

Would a directed SNT really benefit Nathaniel? Are the additional fees and other costs that result from removing traditional trustee functions (e.g., the exercise of discretion) and transferring them to a distribution director reasonable? What protections, if any, are afforded the directed trustee, powerholder, and beneficiary? This brief primer on the bifurcation of trust powers, duties, and liabilities in the context of special needs planning attempts to answer these questions by first summarizing the legislative evolution of directed trusts. Next, the various ap-

34 *Id.*

35 Morley & Sitkoff, *supra* n. 7, at 44–50.

36 Socially responsible investing is an investment management strategy that combines financial return with the investor's desire to bring about positive social and/or environmental change through selected investments. *See* Adam Connaker & Saadia Madsbjerg, *The State of Socially Responsible Investing*, Harv. Bus. Rev. (Jan. 17, 2019), https://hbr.org/2019/01/the-state-of-socially-responsible-investing (accessed Apr. 26, 2019).

37 Massachusetts, for example, follows the Uniform Trust Code approach to directed trustee liability and admonishes the trustee not to act in accordance with the attempted exercise of power by another if doing so would be "manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust." Mass. Gen. Laws ch. 203E, § 808(b) (West)(Current through Ch. 12 of 2019 First Annual Sess.). Alaska protects directed trustees and absolves them from liability for following the instructions of a powerholder by stating that a directed trustee "required to follow the directions of the advisor is not liable, individually or as a fiduciary, to a beneficiary for a consequence of the trustee's compliance with the advisor's directions, regardless of the information available to the trustee, and the trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of a power of the trustee if the exercise of the power complies with the directions given to the trustee. An advisor under this subsection is liable to the beneficiaries as a fiduciary with respect to the exercise of the advisor's directions by a trustee as if the trustee were not in office, and the advisor has the exclusive obligation to account to the beneficiaries and to defend an action brought by the beneficiaries with respect to the exercise of the advisor's directions by the trustee." Alaska Stat. § 13.36.375(c) (West)(Current through 2018 Second Regular Sess. of 30th Legis.)

proaches states employ in addressing the powers, duties, and liabilities imposed on a directed trustee and powerholder are proffered. The article concludes with drafting and other practitioner considerations that clearly delineate the rights and duties among the various parties while balancing the best interests of the beneficiary with the settlor's intent.

II. Evolution of Directed Trust Law

A. Restatement (Second) of Trusts and Restatement (Third) of Trusts

Published in 1959, the Restatement (Second) of Trusts first addresses directed trusts in § 185, which states the following:

> If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.[38]

The premise of the first part of § 185 is that a trustee has a general duty to act in accordance with a powerholder's direction. This duty is not absolute, however, given the trustee's obligation to ensure that the powerholder's direction does not violate the terms of the trust or the powerholder's fiduciary duty.

The comments on § 185 suggest that the trustee's level of inquiry depends on whether the powerholder's exercise of the power of direction in a fiduciary capacity was in favor of the powerholder or whether the powerholder exercised this power for the beneficiary's benefit.[39] If the powerholder's exercise of the power of direction was in favor of the powerholder only, the trustee's inquiry is limited to confirming whether the direction was consistent with the terms of the governing instrument.[40] But if the powerholder exercised his or her power of direction in favor of others, the trustee must determine whether any applicable fiduciary duty the powerholder owed was violated.[41] Should the trustee have doubt about, or knowledge of, a breach of duty by the powerholder, the trustee should not follow the disputed direction and instead petition the court for instructions.[42]

Although the Restatement (Third) of Trusts likewise opined on directed trusts nearly a half-century later, as evidenced by the following excerpt, the trustee's analysis when weighing the appropriateness of the powerholder's direction remains largely unchanged:

> if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the *trustee knows or has reason to believe* that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.[43]

38 *Restatement (Second) of Trusts* § 185.

39 *Id.* at § 185 cmts. (b)–(f). *See also* Richard W. Nenno, *Directed Trusts: Can Directed Trustees Limit Their Liability?* 21 Prob. & Prop. 45 (Nov/Dec 2007).

40 *Restatement (Second) of Trusts* § 185 cmts. (c), (d).

41 *Id.* at § 185 cmts. (c), (e).

42 *Id.* at § 185 cmt. (f).

43 *Restatement (Third) of Trusts* § 75 (emphasis added).

The most noticeable deviation from § 185 of the Restatement (Second) of Trusts pertains to the trustee's review of the powerholder's direction that was exercised in a fiduciary capacity. In such instances, under § 75 of the Restatement (Third) of Trusts, the trustee must refuse to comply with the direction if he or she knows, or has reason to suspect, that the powerholder is violating a fiduciary duty. This is a less exacting standard than § 185, which does not take into account the trustee's knowledge, or lack of knowledge, about whether the powerholder was in breach.

B. Uniform Trust Code

The Uniform Trust Code, considered the first national codification of trust law, was promulgated by the National Conference of Commissioners on Uniform State Laws in 2000 and was last amended in 2010.[44] According to the Uniform Trust Code Prefatory Note, the commissioners realized that, given the greatly expanding use of trusts, trust law was thin and fragmentary in many states. The Uniform Trust Code was drafted to provide a comprehensive guide on trust law issues and was modeled on California's trust statute in close coordination with the Restatement (Third) of Trusts.

The Uniform Trust Code formerly contained § 808, titled "Power to Direct." It stated:

> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.
>
> (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.
>
> (d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.[45]

The comment on Uniform Trust Code § 808 noted:

> Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts § 64(2) (Tentative Draft No. 3, approved 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business.[46]

Importantly, the comment is also the first codification that the holder of a power of direction is "presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction."

Section 808 was removed when the Uniform Trust Code was amended in

44 Natl. Conf. of Commrs. on Unif. St. Laws, *Uniform Trust Code*, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e9c00113-601a-cd94-3aec-97c75a9f6d5a&forceDialog=0 (accessed Apr. 26, 2019).

45 Unif. Trust Code § 808.

46 *Id.* at § 808 cmts.

2010. A legislative note was added, stating, "A state that has enacted the Uniform Directed Trust Act (UDTA) should repeal Section 808 and revise certain other provisions of the [Uniform Trust Code] as indicated in the legislative notes to the UDTA."[47] Former Section 808 was vague regarding the power to direct. Accordingly, some states, such as New Jersey, added specific provisions dealing with the power to direct to their versions of the Uniform Trust Code.[48]

C. Uniform Directed Trust Act

In the ongoing statutory evolution of multiparticipant trusts and in an effort to corral the various state approaches to directed trusts, which are discussed in Section III of this article, the National Conference of Commissioners on Uniform State Laws commissioned the Uniform Directed Trust Act Drafting Committee

47 Unif. Trust Code, *Legislative Note* on former § 808 (last revised or amended in 2010).

48 *See e.g.* N.J. Rev. Stat. § 3b:31-62 (2018), which states:

a. When one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, such persons shall be considered to be investment advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides.

b. If a governing instrument provides that a fiduciary is to follow the direction of an investment adviser, and the fiduciary acts in accordance with such a direction, then except in cases of willful misconduct or gross negligence on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

c. If a governing instrument provides that a fiduciary is to make decisions with the consent of an investment adviser, then except in cases of willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such investment adviser's failure to provide such consent after having been requested to do so by the fiduciary.

d. For purposes of this section, "investment decision" means with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof or rights therein and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

e. Whenever a governing instrument provides that a fiduciary is to follow the direction of an investment adviser with respect to investment decisions, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

(1) Monitor the conduct of the investment adviser;

(2) Provide advice to the investment adviser or consult with the investment adviser; or

(3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the investment adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the investment adviser's authority, such as confirming that the investment adviser's directions have been carried out and recording and reporting actions taken at the investment adviser's direction, shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument. Such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the investment adviser or otherwise participate in actions within the scope of the investment adviser's authority.

to draft proposed legislation.[49] According to the Uniform Directed Trust Act Prefatory Note, the drafting committee was charged with designing a uniform act that combines a settlor's value for "freedom of disposition" with increasingly conservative trustees who seek limited liability in following the direction of a third party, while imposing mandatory minimum fiduciary duties on both the directed trustee and the powerholder in order to protect the beneficiary. The drafting committee's efforts culminated with the final adoption of the Uniform Directed Trust Act during the July 2017 annual conference of the commissioners.

The Uniform Directed Trust Act contains 20 sections, yet the integral part of the Act lies in §§ 6 through 8, which outline the duties, powers, limitations, and liabilities of the powerholder and directed trustee. The remainder of the Act considers ancillary technical differences between the Act and existing state law as well as often-overlooked drafting considerations.[50]

Much like the Restatement (Second) of Trusts, Restatement (Third) of Trusts, and Uniform Trust Code § 9, the Uniform Directed Trust Act requires a directed trustee to comply with a powerholder's exercise (or nonexercise) of a power of direction and is not liable for doing so.[51] Unlike both Restatements and the Uniform Trust Code, however, the Uniform Directed Trust Act does not require the trustee to follow the powerholder's direction if the exercise (or nonexercise) of the power of direction requires the trustee to engage in willful misconduct.[52] No longer is the trustee required to look at the powerholder's duties or actions in determining whether to follow a direction. Instead, the trustee must only look at himself or herself to ensure that the direction given does not cause the trustee to knowingly or intentionally engage in misconduct. Therein lies the principal cornerstone of modern directed trusts.

Regarding the powerholder's powers, duties, and liabilities, although the trust instrument may confer a broad power of direction to the powerholder, absent contrary language in the trust document, § 8 of the Uniform Directed Trust Act imposes on the powerholder the same fiduciary duties and attendant liabilities in the exercise (or nonexercise) of a power of direction as a trustee "in a like position and under similar circumstances."[53] The Uniform Directed Trust Act Drafting Committee believed that because the powerholder acts much like a fiduciary of a traditional trust, the powerholder should have the same duties as a similarly situated trustee and the directed trustee's duties with respect to the powerholder's power should be reduced accordingly.[54] For example, in New Jersey, where a trust vests the power to make investment decisions in a person other than the trustee, the trustee cannot be liable, absent willful misconduct or gross negligence, for any loss that may result from the retention or sale of an investment.[55]

By inference, a powerholder with the power of direction over discretionary dis-

49 Natl. Conf. of Commrs. on Unif. St. Laws, *Unif. Directed Trust Act* (2017), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=eedab7b6-8fd9-29f1-835f-ed4f385e12aa&forceDialog=0 (accessed Apr. 26, 2019).

50 *Id.*

51 Unif. Directed Trust Act § 9(a).

52 *Id.* at § 9(b).

53 *Id.* at § 8(a)(1)(A).

54 *Id.* at *Prefatory Note*.

55 N.J. Rev. Stat. § 3b:31-62(b), (d).

tributions from an SNT would presumably have the same fiduciary responsibility in exercising his, her, or its discretion as a sole trustee of a similar trust; thus, the directed trustee's liability pertaining to discretionary decision-making would be reduced. This fact is punctuated by the Uniform Directed Trust Act's mandate that a powerholder be subjected to the same rules as a trustee in a similar position regarding Medicaid payback provisions necessary to comply with the requirements of Title 42 U.S.C. § 1396p(d)(4)(a).[56]

Both the powerholder and the trustee are required to share information necessary to fulfill their duties.[57] But under the Uniform Directed Trust Act, the trustee does not have a duty to (1) monitor the powerholder or (2) inform or advise the settlor or beneficiary concerning an instance in which the trustee may have acted differently from the powerholder.[58] It is in these two provisions that a directed trust, at least through the lens of a directed trustee, becomes more palatable than delegation, as discussed in Section I of this article.

States are beginning to view the Uniform Directed Trust Act as a model as the special needs, estate planning, and fiduciary communities are beginning to view multiparticipant trusts as comprehensive, beneficiary-centered, and holistic planning tools.[59] In Michigan, a recent state to amend its trust code to conform to the spirit of the Uniform Directed Trust Act (with support from the State Bar of Michigan Probate & Estate Planning Section Governing Council), practitioners have already opined that the recent legislative changes will allow fiduciaries to seriously consider a settlor's desire to bifurcate administrative duties in a directed trust, previously viewed as posing unnecessary fiduciary risks and being labor intensive, which in turn should incentivize pricing competition among professional fiduciaries.[60]

Unfortunately, states, even those that have adopted or are considering adopting the Uniform Directed Trust Act, largely remain divided on directed trusts, the level of trustee oversight required, and attendant trustee liability to impose. Therefore, drafting attorneys must be cautious when employing a directed trust and be familiar with the law in the state the trust is situated.

III. State Approaches and Other Considerations

A. State Approaches to Directed Trustee Liability

In today's regulatory and litigious environment, most fiduciaries are keenly aware that when held to account, a court will impose upon them an exacting standard that Justice Benjamin Cardozo eloquently described as "not honesty alone, but the punctilio of an honor the most sensitive."[61] It follows, therefore, that in the context of directed trusts involving

56 Unif. Directed Trust Act § 7(1).

57 *Id.* at § 10(a).

58 *Id.* at § 11(a)(1)(A)-(B).

59 Eleven states have recently introduced or enacted legislation to adopt some version of the Uniform Directed Trust Act: Utah H. 314 (2019), Conn. H. 7104 (2019), R.I. H. 5476/R.I. Sen. 344 (2019)(introduced), Colo. Sen. 105 (2019), Ark. H. 1765 (2019), Mich. H. 6130 (2019), Neb. Legis. Doc. 536 (2019), Maine Legis. Doc. 1468 (2019), Indiana Sen. 265 (2019), Ga. H. 121 (2018), and N.M. S. 101 (2018).

60 James P. Spica, *Michigan's Proposed Adoption of the Uniform Directed Trust Act,* 97 Mich. B.J. 11 (Nov. 2018).

61 *Meinhard v. Salmon*, 164 N.E. 545, 465 (N.Y. 1928).

multiple parties, a directed trustee would be hesitant to serve in such a capacity if the trustee would be responsible for the acts of the powerholder. Directed trusts tend to be preferable arrangements — at least from the directed trustee's perspective — only when state law imposes a lower standard on a trustee acting at the powerholder's direction.[62]

Apart from the six states that do not have a directed trust statute on point,[63] 13 states and the District of Columbia follow the Uniform Trust Code § 808 approach,[64] one state follows the Restatement (Second) of Trusts § 185 approach,[65] and 30 states have statutes that protect directed trustees.[66] Ten of the states that protect directed trustees have enacted some version of the Uniform Directed Trust Act.[67] Those states that follow either the Restatement (Second) of Trusts § 185 approach or the Uniform Trust Code § 808 approach effectively gut the bifurcated arrangement[68] insofar as both approaches require the trustee to affirmatively monitor the powerholder to ensure that the exercise of the power of direction (a) is not "inconsistent with the terms of the trust,"[69] (b) is not "manifestly contrary to the terms of the trust,"[70] or (c) does not constitute a serious breach of fiduciary duty that the powerholder owes to the beneficiaries.[71] Imposing on a directed trustee a continued obligation to monitor a third party's actions, with the potential for liability in the event of a breach by the third party, does not distinguish this arrangement from that of traditional delegation, except that the directed trustee had no opportunity to select the powerholder at trust inception.

Even though directed trustees clearly have an advantage in states that have protective statutes, the protection afforded by these statutes varies broadly.[72] Several states completely limit a directed trustee's liability for complying with a powerholder under the idea that "duty should follow power."[73] Other protective statutes, consistent with the Uniform Directed Trust Act approach, apply a willful or intentional misconduct standard premised on the idea that the trustee — a pinnacle of the trust relationship — bears some modicum of duty to the beneficiary simply because the settlor chose not to make the powerholder the sole trustee.[74] It is important to note that the protective approach does not limit the recourse a beneficiary has in the

62 Diamond & Flubacher, *supra* n. 30, at 26.

63 Those states are California, Hawaii, Louisiana, Minnesota, New York, and Rhode Island. Rhode Island recently introduced legislation to adopt the Uniform Directed Trust Act.

64 Those states are Alabama, Florida, Kansas, Maryland, Massachusetts, Montana, New Jersey, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and West Virginia.

65 This state is Iowa. Only Iowa, however, deviates from the language in § 185 and includes a requirement that the trustee not act if the trustee knows that the powerholder is not competent. Iowa Code § 633A.4207(2) (West)(Current through legis. effective May 22, 2019, subj. to change by Iowa Code Editor for Code 2020).

66 Those states are Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida (only if powerholder is a co-trustee), Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming, and Texas.

67 *Id.* at n. 59.

68 Diamond & Flubacher, *supra* n. 30, at 26–27.

69 *Restatement (Second) of Trusts* § 185.

70 Unif. Trust Code § 808(b).

71 *Restatement (Second) of Trusts* § 185; *id.*

72 Unif. Directed Trust Act § 9 cmt.

73 *Id.*

74 *Id.*

event of a breach.[75] The beneficiary may bring an action against the powerholder for breach of fiduciary duty and against the directed trustee for any willful misconduct — the liability does not necessarily shift among the parties.

Interestingly, the Uniform Directed Trust Act Drafting Committee decided to use the willful misconduct standard based on findings that states that have updated their directed trust statutes (e.g., Delaware) are abandoning the Uniform Trust Code § 808 approach in favor of legislation more protective of the trustee.[76] According to the drafting committee, such trustee protection need not be unlimited. The drafting committee rejected the suggestion that the Uniform Directed Trust Act eliminate the fiduciary duty of a directed trustee entirely, even a directed trustee's duty to avoid engaging in willful misconduct, finding that Delaware's "prominent directed trust statute" is workable for practitioners and that the more protective total exclusion standard is "unnecessary to satisfy the needs of directed trust practice."[77] Of course, prefatory language in a uniform act is not binding, and as states such as Michigan continue to adopt their modified versions of the Uniform Directed Trust Act, the issue of directed trustee liability will continue to evolve.

Although the statutory landscape of directed trusts may appear to be adapting and evolving, the inconsistencies among state laws, especially regarding directed trustee liability, require increased due diligence by drafting attorneys and fiduciaries operating in this space.

B. Planning Considerations

When engaging in special needs planning that involves a directed trust, the threshold the drafting attorney should consider is whether the trust jurisdiction authorizes such an arrangement.[78] If the jurisdiction has a directed trust statute, the practitioner should determine the approach the state takes in addressing directed trustee liability because this could impact the identification of fiduciaries willing to serve under the instrument. Should the state employ the more restrictive approach of Uniform Trust Code § 808 or Restatement (Second) of Trusts § 185 (or simply have no statute at all), the drafting attorney will need to review the choice-of-law principles of the trust's home state to determine whether a state with more favorable directed trust statutes may be selected as the law that governs the trust.[79]

When parties seek to modify or amend the governing instrument of an existing trust to include directed trust provisions, counsel must undertake the more arduous process of determining whether the trust may be amended, modified (either by judicial or nonjudicial means), or decanted into a trust that includes the preferred directed trust language.[80] Of course, counsel

75 *Id.*

76 *Id.* Delaware's directed trust statute was tested in *Duemler v. Wilmington Trust Co.*, 2004 WL 5383927 (Del. Ch. 2004) (unpublished trial order). The chancery court found that a corporate fiduciary did not engage in willful misconduct by failing to oversee or provide information to an investment adviser, who had the power to direct the trustee on investment management decisions, and upheld the trustee's statutory defense under Del. Code Ann. tit. 12, § 3313 (West)(Current through ch. 22 of 150th Gen. Assembly 2019-2020).

77 Unif. Directed Trust Act, *Prefatory Note*, § 9 cmt.; *see also* Del. Code Ann. tit. 12, § 3313.

78 Nenno, *supra* n. 39.

79 *Id.*

80 Diamond & Flubacher, *supra* n. 30, at 28.

must fully explore significant federal and state tax and government benefits eligibility issues (which are beyond the scope of this article) before attempting to modify, amend, or transfer the situs of an SNT. There is no guarantee that counsel will find a sympathetic judge willing to make substantive changes to a governing instrument. For example, *In re Will of Flint*, an unsympathetic judge expressly denied the petition of an income beneficiary of a testamentary trust seeking to change the trust from a traditional trustee-managed structure to a directed trust, which was governed by Delaware law rather than the original situs of New York, concluding the requested modification departed too far from the testator's intent.[81]

Once the choice-of-law analysis has been performed or consideration has been given to modification, the drafting attorney's attention should move to the specific language delineating the powerholder's and trustee's powers, duties, and liabilities. The Uniform Directed Trust Act, for example, does not contain statutory default powers and simply provides a powerholder those powers granted under the terms of the trust.[82] By affording a broad grant of power, the Uniform Directed Trust Act Drafting Committee attempted to validate a powerholder's power by deferring to the terms of the trust and, by extension, the settlor's intent.[83] The drafting committee contemplated that a trust may confer to a powerholder a broad breadth of powers, including powers to (a) direct investments; (b) modify, reform, terminate, or decant the trust; (c) change the trust's situs or governing law; (d) determine the capacity of a settlor, beneficiary, or trustee; (e) set fiduciary compensation; (f) grant permission or direct a trustee in the exercise of a power reserved to the trustee; and (g) release the trustee or another director from liability.[84]

The drafting attorney needs to structure how the powerholder will exercise the power of direction under the governing instrument. The settlor, in conjunction with counsel, must decide in what capacity the powerholder will serve, such as trust protector, distribution director, investment adviser, or trust advisory committee, because that will impact the specific powers and duties to be bestowed. When drafting powerholder language, it is important to be as detailed and comprehensive as possible, while limiting the trustee's and powerholder's powers only to those that the settlor intends each to have.[85] The powerholder's and trustee's respective powers under the governing instrument must be clearly delineated to avoid confusion, ineffective trust administration, and most important, overlap, which could give rise to additional trustee liability.[86] For example, an aggrieved SNT beneficiary could argue that although the trustee acted at the powerholder's direction, the trustee possessed a similar but independent power under the instrument that, if exercised prudently, could have mitigated the loss caused by the powerholder's exercise of the power of direction.[87]

Even though a settlor has wide latitude in shaping a directed trust, the practitioner must still consider whether the governing document should deviate from any statutory minimum default provisions. Such considerations should include at a

81 118 A.3d 182 (Del. Ch. 2015).
82 Unif. Directed Trust Act § 6(a).
83 *Id.* at § 6(a) cmt.
84 *Id.*
85 Diamond & Flubacher, *supra* n. 30, at 28.
86 *Id.*
87 Flubacher, *supra* n. 31.

minimum: (a) whether the powerholder should be held to a fiduciary standard; (b) whether the trustee should have a continuing duty to monitor the powerholder's actions; and (c) if state law allows, whether the trustee's liability should be limited to either willful or intentional misconduct or gross negligence.[88]

Regarding the allocation of liability, careful attention should be given to the inclusion of exculpatory clauses in the governing instrument and whether such clauses are consistent with and enforceable under state law. A governing document that completely relieves a directed trustee or powerholder of liability, rather than simply reduces the trustee's or powerholder's standard of care, may be unenforceable.[89] In fact, the Uniform Directed Trust Act applies the same rules as the Uniform Trust Code and Restatement (Third) of Trusts to the extent that if a directed trust fully exonerates the powerholder from liability, the powerholder nevertheless has the same liability as a trustee under a similar exculpatory clause.[90] Should there be concern about the potential mutual liability of a directed trustee and powerholder based on the acts of the other, practitioners may consider the use of indemnification provisions similar to the following sample provision, rather than complete exculpation:

> Art. 10.5 Indemnification of Trustee — Trust Company, N.A., and each of its agents, employees, heirs, successors, and assigns are hereby indemnified by Distribution Director, Inc., against all claims, liabilities, fines, or penalties and against all costs and expenses, including attorneys' fees and disbursements, imposed upon, asserted against, or reasonably incurred in connection with or arising out of any claim, demand, action, suit, or proceeding in which he, she, or it may be involved by reason of being or having been the Trustee or affiliated with the Trustee as set forth above, whether or not he, she, or it continued to serve as such at the time of incurring such claims, liabilities, fines, or penalties and costs and expenses or at the time of being subjected to the same. However, Trust Company, N.A., and each of its agents, employees, heirs, successors, and assigns shall not be indemnified with respect to matters as to which he, she, or it is finally determined to have been guilty of willful misconduct in the performance of any duty by a court of competent jurisdiction. This right of indemnification shall not be exclusive of, or prejudicial to, other rights to which Trust Company, N.A., and each of its agents, employees, heirs, successors, and assigns may be entitled as a matter of law or otherwise.[91]

Fiduciary compensation must also be addressed when recommending or draft-

88 Nenno, *supra* n. 39. In Arizona, for example, and under the Uniform Trust Code, unless the governing instrument provides otherwise, a powerholder is only "presumptively" a fiduciary. Ariz. Rev. Stat. Ann. § 14-10808(d) (West) (Current through legis. eff. May 27, 2019 of First Regular Sess. of Fifty-Fourth Legis. 2019).

89 *See e.g.* Fla. Stat. Ann. § 736.1011(1)(a)(West) (Current with chapters from 2019 First Regular Sess. of 26th Legis. in effect through June 7, 2019); Unif. Trust Code § 1008; *Restatement (Third) of Trusts* § 96. These state that a term of a trust relieving the trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for acts committed in bad faith or because of reckless indifference.

90 Unif. Directed Trust Act § 8 cmt. and § 14 cmt.

91 This sample language is a consolidation of various trust provisions from governing instruments spanning multiple jurisdictions. This language is offered for example only and should not be construed as language suggested for use.

ing a directed trust. Multiple parties can impact the overall fees assessed to a particular trust, which can be off-putting to fee-sensitive settlors, beneficiaries, and judges, regardless of whether a directed trust arrangement is appropriate under the circumstances. Unless the trust specifies otherwise, a fiduciary is only entitled to compensation that is reasonable.[92] Even if the trust specifies the compensation to be provided, a court may allow more or less compensation if the duties are substantially different from those contemplated or if the compensation specified under the agreement is unreasonably high or low.[93] Although the Uniform Directed Trust Act applies the reasonable compensation standard of the Uniform Trust Code and Restatement (Third) of Trusts to powerholders,[94] the Uniform Directed Trust Act Drafting Committee understood that fees in a directed trust arrangement may be higher, yet reasonable nonetheless.[95] To best mitigate fee disputes, the powerholder's compensation should clearly align with the services provided and the directed trustee should reduce his, her, or its fee accordingly for those powers removed from the directed trustee's purview.

C. Best Interests of the Beneficiary Versus Settlor Autonomy

University of Iowa Professor Thomas Gallanis posited:

> In navigating between the extremes of settlor control and beneficiary control, the law of trusts has at times taken a position more favorable to the settlor, and at other times a position more favorable to the beneficiaries. … American trust law, after decades of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries.[96]

It is true that certain states are shifting back to a focus on the settlor's intent in matters of trust interpretation and construction.[97] Even the Uniform Directed Trust Act was drafted with the goal of achieving maximum settlor autonomy consistent with fiduciary minimums.[98] But for those practitioners who operate in the special needs space and are accustomed to trust language that admonishes a trustee to administer the trust for the beneficiary's sole benefit and in a way that enriches the beneficiary's life and makes it more enjoyable, Professor Gallanis' forecast becomes clear that an SNT's foundational structure hyperfocuses on the beneficiary and the trust administration process's impact on the beneficiary's quality of life. Thus, when advising a client on the advantages and disadvantages of a directed SNT that presumably will be drafted because the settlor wishes to control the downstream actors who will be involved in the trust administration, the burden is on the practitioner to design a trust that, while mindful of the settlor's intent and a fiduciary's desire to limit liability, will further the beneficiary's interests above all. All fiduciaries under a trust instrument are bound by the unwaivable duties of loyalty, impartiality, and prudent administration.[99] Therefore, the practitioner should be cautious about adding third parties or creating a structure, directed or otherwise, that will impede a fiduciary's ability to achieve these foundational duties.

92 Unif. Trust Code § 708(a).
93 *Id.* at § 708(b)(1), (2).
94 Unif. Directed Trust Act § 16(3).
95 *Id.* at § 16 cmts.
96 Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 Iowa L. Rev. 215, 216 (2011).
97 *Supra* n. 32.
98 Unif. Directed Trust Act, *Prefatory Note*.
99 Unif. Trust Code §§ 801–803.

A directed SNT that provides the following is a relatively new planning tool:

- A trustee with investment management prowess and back-office capabilities (e.g., fiduciary tax preparation, accounting, statement and check issuance);
- A distribution director who, because of the trustee's lack of geographic proximity to the beneficiary, can provide a concierge-level of service for a beneficiary with catastrophic needs;
- A trust advisory committee attuned to the beneficiary's daily medical, social, and government benefits and therapeutic needs; and/or
- A trust protector related (or not related) to the beneficiary with the power to remove a powerholder to ensure an effective trust administration process.

As this niche practice area continues to advance in an integrated way while serving the best interests of the most vulnerable members of our population, a directed SNT should be considered.

IV. Conclusion

Nathaniel's mother remembers the settlement process as a time when profoundly confusing and complex long-term decisions had to be made in short order. With the assistance of counsel, she trudged through myriad state and federal laws and regulations concerning benefits eligibility and trust creation and administration issues. Her attorney drafted a comprehensive SNT that she believed focused on Nathaniel's best interests, preservation of his eligibility for much-needed government benefits, and protection and growth of the trust estate. Even as a layperson, when developing the SNT, Nathaniel's mother knew that her time was better served focusing on Nathaniel's daily needs rather than serving as a co-trustee (thus setting aside the apparent conflict of interest that would exist if she opted to serve in such a capacity). Even so, she wanted to maintain some level of review and control of the trustee's actions. She understood that Nathaniel would likely never receive employment-related income and that the corpus of his trust, although significant, represented the sum total of all available funds throughout his life, which underscored the need to select a reputable trustee with proven investment management capabilities. Finally, she wanted a person or entity involved in the day-to-day coordination and management of Nathaniel's 24-hour skilled care, housing, social, recreational, therapeutic, and benefits eligibility needs.

Counsel advised that a single-fiduciary trust would not likely achieve the creative decision-making approach the mother was seeking and encouraged her to consider taking a team approach by implementing a multiparticipant directed SNT. Tennessee, a state protective of directed trustees,[100] was the situs of Nathaniel's trust. Consequently, a corporate fiduciary with national recognition for investment management and special needs planning was comfortable serving as sole trustee alongside a local distribution director appointed under the document, who was charged with directing the trustee on all matters pertaining to discretionary distributions. Nathaniel's mother was selected as trust protector to satisfy her goal of fiduciary oversight and was vested with the authority under the trust and state law to remove and appoint trustees, advisers, and

100 Tenn. Code Ann. § 35-15-808(e) (West)(Current with laws from 2019 First Reg. Sess. of 111th Tenn. Gen. Assembly, eff. through May 17, 2019).

other powerholders.[101]

This article should not be construed as an endorsement to implement multiparticipant or directed SNTs under all circumstances. On many occasions, the traditional single-fiduciary approach or some other arrangement may be more appropriate or a directed trust is unavailable. While exploring whether to bifurcate powers, duties, and liabilities in the context of special needs planning, the practitioner should (a) clearly appreciate the settlor's objectives; (b) consider whether a trustee's power to delegate, rather than a bifurcated arrangement, may achieve the settlor's stated goals; (c) know what directed trustee and powerholder liability approach the state with jurisdiction over the trust employs; (d) draft the instrument to clearly define the powers, duties, and liabilities of all trustees and powerholders consistent with state law and the settlor's intent; and (e) be comfortable that the trust and all related parties have the best interests of the beneficiary at the forefront — the most important consideration in the context of special needs planning.

101 *Id.* at § 35-15-1201(a).

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

TRUST PROTECTORS, TRUSTEE ADVISORS, TRUST COMMITTEES:THE GOOD, THE BAD AND THE UGLY

Presented By:
Shirley B. Whitenack, Esq.
Schenck, Price, Smith & King, LLP
Florham Park – Paramus – Sparta, NJ
973-539-1000
sbw@spsk.com

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

WHAT ARE THEY?

- A trust protector is a person or entity that the grantor nominates to ensure the trustee adheres to the grantor's wishes.
- A trust advisory committee ("TAC") typically consists of 3 to 5 individuals who may be professionals, friends or relatives of the beneficiary
- A trustee advisor advises the trustee but does not actually make decisions, i.e., may advise on distributions to ensure adherence to public benefits laws.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

WHEN ARE THEY USED?

- Trustee advisors, TACs and trust protectors (hereinafter referred to collectively as "power holders") are often used when there is a professional trustee.
- They can provide increased oversight of the trustee-beneficiary relationship (checks and balances)
- Professional trustees may not know the beneficiary well, understand the beneficiary's specialized care needs or may be removed geographically from the beneficiary.
- Professional trustees may not want to serve as co-trustees with family members.
- Gives the family the ability to participate.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

COMMON TRUST PROTECTOR POWERS

- A trust protector is often granted the ability to
  - remove and appoint trustees
  - amend burdensome or unintended provisions
  - Modify, terminate or decant the trust
  - receive and review financial statements on a periodic basis
  - change trust situs
  - change governing law

CONTRAST WITH DELEGATION

- Delegation is the transfer of a trustee's authority over a particular function to another party.
  - Examples: tax preparation, accountings
- Trustee selects an agent and establishes the scope and terms of the delegation consistent with the purposes and terms of the trust.
- Trustee monitors the agent's actions.
- Rather than top-down approach of delegation, trust document separates assigned trust functions at the outset pursuant to the grantor's intent regardless of trustee's preference.

COMMON TAC POWERS

- A TAC is often granted the ability to:
  - share information about the beneficiary's needs
  - assess trust investments
  - render advice regarding distributions
  - assess government benefits programs that may be suitable for the beneficiary
  - remove and appoint trustees
  - amend the trust
  - Establish or approve a distribution plan

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

COMMON TRUSTEE ADVISOR POWERS

- A trustee advisor is often granted the ability to
  - review the trust's financial records
  - meet with the trustee and the family to ensure smooth trust administration
  - serve as a neutral third party in disputes between the trustee and the beneficiary
  - remove and replace the trustees

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

COMMON PROBLEMS

- Trust document is ambiguous regarding the purpose of the advisor, the advisor's authority or the interrelation with the trustee.
- May see their role as a sounding board only.
- There is confusion over trust's objectives.
  - Preserve government benefits eligibility at all costs?
  - Meet specific goals for the beneficiary's future even if the result is a loss of government benefits?

COMMON PROBLEMS

- Disagreements among TAC members which results in paralysis.
- No mechanism in place for a TAC to nominate and elect members.
- Lack of information on which to render meaningful advice.
- Advisors, protectors, or TACs may try to micromanage the trustee, which can frustrate trustee decision-making.
- Liability issues: Are they fiduciaries?

CAUTION: SUBORDINATE OR RELATED TRUST PROTECTOR

If the trust protector is acting in a fiduciary capacity

and

The protector's powers can be exercised in favor of the protector or his or her creditors or creditors of his or her estate

then

Protector will have retained a general power of appointment unless limited by ascertainable standard (i.e., health, education, maintenance, and support)

but

Cannot have ascertainable standard in an SNT

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

STATE LAWS

- The Uniform Trust Code ("UTC") formerly contained Section 808, titled "Power to Direct."
- Section 808 stated that the power holder is presumptively a fiduciary who is liable for any loss that results from breach of a fiduciary duty.
- Section 808 was removed from the UTC when it was amended in 2010.
- Some states retained the language of Section 808.
- Some states enacted the Uniform Directed Trust Act ("UDTA") and repealed Section 808
- Some states have no statutes on point.
- State law should be considered when drafting "powers to direct."

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

Uniform Directed Trust Act

- Trustee does not have duty to monitor the power holder.
- Trustee does not have to comply with power holder's exercise or nonexercised of a power if it would require the trustee to engage in willful misconduct.
- The power holder is considered as a fiduciary.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

PLANNING CONSIDERATIONS

Consider state statutes regarding liability of power holders as it may impact identifying individuals or entities willing to serve.

When seeking to modify or amend an existing trust to include power holders, determine whether the trust can be amended or modified or whether the trust assets can be decanted to a new trust.

Consider effect of modifying, amending or decanting on public benefits.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

DRAFTING CONSIDERATIONS

- In what capacity will the power holder serve?
- Be as detailed and comprehensive as possible.
- Limit powers only to those the grantor wants the power holder to have.
- Clearly delineate the powers of the trustee and the power holder to avoid confusion, ineffective administration and overlap, which could give rise to additional trustee liability.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

DRAFTING CONSIDERATIONS

- Should power holder be held to fiduciary standard?
- Should trustee have a continuing duty to monitor the power holder's actions?
- If state law allows, should the trustee's liability be limited to either willful or intentional misconduct or gross negligence?
- Should the power holder be compensated or reimbursed for reasonable expenses in the exercise of his or her services?
- Should a TAC's decisions require a majority or unanimity?

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

SAMPLE TRUST PROTECTOR LANGUAGE

- **TRUST PROTECTORS.** (a) The Grantor's son, **LOUIS SANCHEZ**., shall be designated as the Trust Protector and may at any time remove and replace the then serving Corporate Trustee, if adequate cause for removal exists in the sole and nonreviewable judgment of the Trust Protectors.
- (b) Adequate cause for removal shall include, but not be limited to, (1) lack of attention to trust administration matters, (2) incompatibility or irreconcilable conflict with the beneficiary, (3) irreconcilable differences of opinion between the Trustees on matters relating to trust administration or investments, (4) residence of the beneficiary of the trust outside the state in which the Trustee being removed maintains its principal place of business or residence, or (5) any other grounds which would justify court removal of the Trustees. Such removal shall be accomplished by written notice signed by the Trust Protector, delivered to the Trustees being removed, to any Co-Trustees, to the person then indicated as the successor Trustee therefor, if any, and the adult beneficiary of the said trust. Upon receipt of said instrument, the then acting Trustee shall convey, assign and transfer the entire trust estate to such successor Trustee so designated. The powers of removal granted in this Paragraph shall not be deemed to be fiduciary powers, exercisable only in the interest of the beneficiaries of the trust hereunder.
- (c) The Trust Protector then serving, including an individual appointed under this subparagraph (c), may at any time and as often as deemed advisable, designate any individual, other than the Beneficiary, any descendant of the Beneficiary, or "related-party" of the Beneficiary as determined under the Internal Revenue Code, to serve as Co-Trust Protector together with a Trust Protector or successor Trust Protector to any Trust Protector, by instrument in writing, signed by the Trust Protector then serving, and delivered to the designated individual. Any such designation of a successor Trust Protector to take effect in the future may be revoked by instrument in writing, signed by the then serving Trust Protector, delivered to the designated Trust Protector by the person who made the designation at any time before the successor commences serving as Trust Protector, and any revoked appointment may be superseded by a new appointment. No more than two (2) Trust Protectors shall serve at any one time.
- (d) The Trust Protector then serving, including an individual appointed under subparagraph (c) above, may designate any substitute or successor Corporate Trustee or non-Corporate Trustee, other than the Beneficiary, any descendant of the Beneficiary, or "related-party" of the Beneficiary as determined under the Internal Revenue Code, to serve as Trustee, by instrument in writing, signed by the Trust Protector then serving, and delivered to the designated Corporate Trustee or non-Corporate Trustee. Any such designation of a successor Trustee to take effect in the future may be revoked by instrument in writing, signed by the then serving Trust Protector, delivered to the designated Trustee by the person who made the designation at any time before the successor commences serving as Trustee, and any revoked appointment may be superseded by a new appointment. No more than one (1) Corporate Trustee or two (2) non-Corporate Trustees shall serve at any one time.
- (e) The Trust shall pay all reasonable counsel, accountant and other professional fees incurred by the Trust Protector necessary and appropriate for the Trust Protector to perform his or her duties hereunder.
- (f) The authority of the Trust Protector is conferred in a nonfiduciary capacity; and the Trust Protector shall not be liable for any action taken in good faith. The Trust Protector shall not be liable for any act or omission to act and shall be reimbursed promptly for any costs incurred in defending or settling any claim brought against him or her in such person's capacity as Trust Protector, unless it is conclusively established that the act or omission to act was motivated by an actual intent to harm the beneficiaries of the trust or was an act of self-dealing for personal pecuniary benefit.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP

CASE STUDY

Barbara and David Sanchez have three adult children, Stephanie, Louis and Roxanne. Stephanie is 31 years old and has Down syndrome. Louis is 35 years old. Roxanne is 22 years old. Barbara and David want to leave a portion of their assets to Stephanie in a third party supplemental benefits trust which will be funded upon the death of the last surviving spouse. They are naming a trust company to serve as trustee. The trust company will not serve with a co-trustee. Barbara and David are comfortable with the trust company's ability to appropriately invest the trust assets but are concerned about the fact that the trust officers don't know Stephanie or her needs. Should they designate a trust protector, trust advisor or trust advisory committee?