

Identifying and Addressing Problematic Trust Administration Issues

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Stetson Law 2020 National Conference on
Special Needs Planning and Special Needs Trusts

- I. Introduction
 - A. Every trust administration is unique because the needs and circumstances of each Beneficiary are different. In the realm of special needs planning, many beneficiaries benefit from the use of a Special Needs Trust (“SNT”) so that they can receive supplemental assistance that may not be covered through Medicaid or another federal/state sponsored plan.
 - B. Uncomfortable administrative issues arise for Trustees and these issues can be particularly challenging for Trustees of 1st Party SNTs and 3rd Party SNTs because a Trustee’s actions may impair a Beneficiary’s eligibility for Medicaid, SSI and other benefits programs that consider someone’s income and resources.
 - C. In some cases, a Trustee may find themselves administering an SNT for a high functioning adult who lives independently and requires no assistance with activities of daily living and needs minimal assistance with routine expenses. Alternately, a Trustee may be faced with the challenge of administering an SNT for a Beneficiary who is non-verbal, and incapacitated. In these cases, the Beneficiary may never be able to communicate directly with the Trustee about their needs or be able to work in collaboration with the Trustee to address challenges, and instead depends on an Agent or Guardian to bring questions to the Trustee and seek solutions.
 - i. Some examples of potentially challenging administrative issues that a Trustee of an SNT (1st Party or 3rd Party) may face include: caring for or purchasing an animal for a Beneficiary, responding to request for distribution for the purchase of a firearm, learning that a Trust owns cryptocurrency (and accounting for this unique asset), paying and supervising caregivers, helping with a Medicaid appeal and/or creative request for distributions related to a hobby, or business venture.
 - D. Trustees of SNTs are provided with broad discretion to make distributions to or for the benefit of a Beneficiary. Experienced Trustees will consider the terms of the Trust and use their experiences to develop mutually agreeable solutions with a

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Beneficiary. If the Trustee is unsure of the implication of a distribution, it is best to *slow down* and seek guidance before approving or declining a request for distribution or making an administrative decision that may create further problems down the road.

II. What is the Scope of the Trustee's Authority?

- A. While some problematic trust administration issues, such as trying to decide whether to make a distribution for the purchase of a pet or a firearm, are completely within the scope of a Trustee's authority, there may be other issues, like the oversight of a caregiver or appealing a Beneficiary's eligibility for Medicaid, that would be considered a cross-over issue where the Beneficiary and/or their Agent or Guardian must play a role in order to resolve the issue.
- i. It can be frustrating for beneficiaries and their families when a distribution is declined or when the Trustee speaks up to explain that they lack authority to resolve the problem.
 - ii. Trustees must play an important role of advocacy on the Beneficiary's behalf and even in cases when the Trustee declines to exercise authority (the decision is more appropriate for the Beneficiary or their Agent or Guardian to make), the Trustee should be prepared to weigh in on the issue, make solutions about how the problem can be resolved and, when appropriate, make Trust resources available to or for the benefit of the Beneficiary.
 - iii. For example: If funds from the Trust are used to pay for a private caregiver and the Beneficiary reports that they do not like the way that the caregiver cooks, while the Trustee may decline to terminate the services of the caregiver or confront the caregiver about these issues, the Trustee can still offer ideas to the Beneficiary about how the issues may be resolved (e.g. the Beneficiary going grocery shopping herself with the caregiver, writing up a requested menu, offering to help with food preparation, or seeking assistance from another party (or food delivery service!) to make meals.
- B. In some cases, the terms of the Trust may offer solutions to the Trustee and Beneficiary. *See Appendix of Sample Language.* For instance, if a Beneficiary seeks help paying veterinary bills for the care of their companion animal, the broad discretionary terms of the Trust, and perhaps a power that specifically authorizes the Trustee to pay veterinary bills, will help the Trustee.
- i. The style and expertise of the drafting attorney usually defines how Trustee powers are drafted in the Trust document. There are advantages and disadvantages to the inclusion of multiple, specific Trustee Powers. Powers in a 1st Party and 3rd Party SNTs may be similar. Knowing that the powers bestowed on Trustees may change (and even expand further), it may be useful to include a catch-all power that might explain that, if a power is not conferred by the Trust, but granted elsewhere (e.g. the Uniform Trust's Powers Act), as presently adopted in the State where Trust is administered.
 - ii. Often, in order to make a decision related to the administration of the Trust, the Trustee's powers include authority to hire professionals and

delegate administrative duties to a person or entity that has stronger qualifications and experience.

1. For example, a Trustee may use their power to retain and delegate investment management to a professional investment advisor who helps navigate what do to about the Beneficiary's request that the Trustee invest in cryptocurrency, or purchase cryptocurrency (instead of making an outright distribution) to help with the ordinary living expenses of a Beneficiary that are not otherwise covered by the Beneficiary's own income or benefits.
- iii. A Trust Protector may be nominated in the trust document and is provided with broad powers. Sometimes, a decision that the Trustee is uncomfortable making or struggling to resolve, may be addressed with assistance by the Trust protector. For instance, if a Beneficiary's parent is the Trustee of the SNT and also receives compensation from the Trust as the Beneficiary's Guardian or caregiver, having an independent 3rd Party like a Trust Protector set compensation can avoid conflicts of interest and issues of self-dealing.
 - iv. A Trustee will always owe the duty of prudent administration, which means that the Trustee shall administer the Trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the Trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.² This suggests there if there is a problem or issue that demands specific expertise (which can only be provided by an expert or more highly credentialed professional than the Trustee), the Trustee should exercise their authority to hire this outside party to assist.
 - v. Many SNTs include distribution guidelines that may be helpful guidance for Trustees and beneficiaries. A well written SNT will explicitly state that a Beneficiary does not have any power to direct the disposition or management of the Trust assets, and the Trustee has absolute and sole discretion to approve or deny a request for distribution.
 - vi. Exculpatory clauses are frequently included in SNTs and may state that the Trustee shall not be liable for any loss, cost, damage, or expense sustained through any error of judgment or in any other manner except for, and as a result of, a Trustee's own bad faith or gross negligence. These clauses may not always shield a Trustee from poor decisions but may help a Trustee feel more comfortable exercising broad discretion.
- C. What guidance does the law, and caselaw provide to Trustees that are facing an unusual administrative issue?
- i. Uniform Trust Code and Restatement of Trusts
 1. The Trustee has a duty to administer the Trust, diligently and in good faith, in accordance with the terms of the Trust and applicable law. In administering the Trust, the Trustee's

² Uniform Trust Code § 804 (2010).

responsibilities include managing the trust estate to provide returns or other benefits from trust property.³

2. A Trustee has a duty to perform the responsibilities of the trusteeship personally, except as a prudent person of comparable skill might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a Trust, and thereafter in supervising or monitoring Agents, the Trustee has a duty to exercise fiduciary discretion and to act as a prudent person of comparable skill would act in similar circumstances.⁴
3. A Trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The Trustee shall exercise reasonable care, skill, and caution in:
selecting an Agent; establishing the scope and terms of the delegation, consistent with the purposes and terms of the Trust;
and periodically reviewing the Agent's actions in order to monitor the Agent's performance and compliance with the terms of the delegation.⁵

- ii. State Law & Caselaw: Many states have adopted the Uniform Trust Code. It is always important to review statutory authority in the state where the Beneficiary resides, as well as where the Trustee resides.

III. Problematic Trust Administration Issue: Pets. *See sample provision in appendix.*

- A. If the Beneficiary owns a pet what responsibility does the Trustee have related to the animal? Answer: probably none. If the animal provides comfort to the Beneficiary and could reasonably be considered something that improved the quality of life of the Beneficiary, making distributions to help provide to or for the animal would be appropriate.
 - i. Is the animal going to provide a specific therapeutic benefit? If so, a Trustee may decide to see if the expenses related to the animal could be justified as medical expenses.
- B. Animals are personal property. In the case of a 1st party Trust, do not permit the Beneficiary to assign the pet to the Trust. This is not necessary in order to justify making distributions for the care of the pet.
- C. What kind of pets, or other animal(s) are we talking about? The care and expense of an animal like a horse is far different than a kitten. Make sure to ask questions upfront if the Beneficiary seeks to have the Trust purchase the pet.
 - i. Is the Beneficiary able to care for the animal without assistance?
 - ii. Did the Beneficiary select the animal, or was the animal given to the Beneficiary by a family member who will be the primary owner?
 - iii. Where is the animal living?
- D. Speaking with the Beneficiary about distributions to help with the ongoing expenses to care for the animal needs to happen early, and if possible, before the purchase of an animal.

³ Restatement (Third) of Trusts § 76 (2007).

⁴ Restatement (Third) of Trusts § 80 (2007).

⁵ Uniform Trust Code § 807 (2010).

- E. Animals can live for a long time.⁶ There should be a long-term plan about who will provide care for the animal if the Beneficiary loses the ability to assist with feeding, grooming, etc.
- IV. Problematic Trust Administration Issue: Guns/Other weapons
- A. What if the trust property includes a firearm or other weapon? This creates serious liability for the Trustee and the Trust. Identify where it is and who has access to it. Seek legal advice about how to dispose of the property. Do not distribute the property to the Beneficiary or their Agent or Guardian for safekeeping.
- B. Ask for information about the weapon, so that you are able to verify who owns it and what type of weapon it is. If it is a firearm, ask for proof of registration, to verify that it is registered to the Beneficiary or their Agent (on their behalf), and ask questions about what safety training the Beneficiary has received and where the weapon is stored.
- C. If the Beneficiary is incapacitated and the law does not permit the possession of a firearm, the Trustee needs to be prepared to report knowledge of the weapon to the Court, along with other State agencies, medical provider(s), and the Beneficiary's Agent or Guardian.
- D. What if the Beneficiary has a firearm (properly registered to the Beneficiary) and wants a distribution to do any of the following:
- i. Purchase ammo or related supplies and accessories
 - ii. Take a safety class
 - iii. Join a gun club
 - iv. Go on a hunting trip
- E. Does it matter what type of firearm (or weapon) it is? Different types of firearms are regulated in very different ways. When confronted with a situation involving a firearm, first determine what type of firearm it is, then what law to apply.⁷
- F. Are there any standard provisions that should be included in an SNT about the Trustee's fiduciary role, and authority as it relates to firearms and other weapons that may be considered trust property, or property owned by the Beneficiary? It would be appropriate to include a provision forbidding the distribution for the purchase of a firearm or weapon, but that would be difficult for the Trustee to patrol. The laws regarding gun ownership are complex and including any

⁶ Digital Assets, Pets, and guns: Estate Planning Does Not Include Just Grandma's Cameo Brooch Anymore. A Presentation by Gerry W. Beyer at the Estate Planning Council of Central Texas January 7, 2014.

⁷ The Uniform Trust Code does not specifically address firearms. See Uniform Law Commission, Uniform Trust Code. In addition, state trust laws are silent on the ownership of firearms. But state laws are not silent on the overall possession and ownership of firearms. Each state has such statutes on its books governing the regulation, possession, and laws applicable to firearms and other weapons. Two major federal laws regulate firearms. Under the National Firearms Act (NFA), Pub. L. No. 73-474, 48 Stat. 1236 (codified at IRC Ch. 53) (June 26, 1934), Congress sought to impose a tax on the making and transfer of specifically enumerated firearms. In addition to the NFA, the second major federal law, the Gun Control Act of 1968 (the "Act"), Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-931 (2012)), regulates the interstate transportation of firearms. See 18 U.S.C. § 926A. Regular Firearms. Gerry W. Beyer & Jessica B. Jackson, What Estate Planners Need to Know About Firearms, EST. PLAN. DEV. TEX. PROF., April 2010. *See also* Digital Assets, Pets, and guns: Estate Planning Does Not Include Just Grandma's Cameo Brooch Anymore. A Presentation by Gerry W. Beyer at the Estate Planning Council of Central Texas January 7, 2014 and What to do if Your Client is Machine Gun Kelly? A Presentation by Gerry W. Beyer at the Southern Arizona Estate Planning Council January 30, 2015

standardized provision regarding firearms and other weapons in an SNT could cause more issues than it would resolve.

- V. Problematic Trust Administration Issue: Cryptocurrencies. *See sample provision in appendix.*
- A. What if trust property includes bitcoin or other cryptocurrency?⁸ In rare cases, a Trustee might take over the administration of a SNT that holds cryptocurrency. In this case, it is important for the Trustee to understand why the cryptocurrency landed in the Trust in the first place (effort to hide or disguise assets? Investment decision?).
 - B. A Trustee has a duty to account for Trust property to the Beneficiary, the IRS, and the State Department of Revenue, so the use of bitcoin or other cryptocurrency to hide or disguise Trust assets would be a violation and needs to be addressed as soon as the trust property is identified.
 - i. Due to the unique nature of cryptocurrency, a Medicaid agency will likely raise questions if an accounting is provided that provides an inventory of assets that includes cryptocurrency. Providing ownership of cryptocurrency is exceedingly difficult and it could be considered an available resource to the Beneficiary even if it was purchased by the Trustee and owned by the SNT.
 - ii. If cryptocurrency is listed on an inventory of Trust assets one year, but is gone the next year, the Trustee should be prepared to answer questions and provide information about how it was sold, and what income was earned on the sale. This may be difficult to document.
 - C. It is conceivable that a Beneficiary might argue that an investment in cryptocurrency is worth considering. The Trustee has a duty to prudently manage Trust assets, and this includes diversification of investments. It is a good practice to retain an outside investment advisor in order to provide an opinion on whether cryptocurrency is an appropriate asset to include alongside other investments of the Trust.
 - D. It is not advisable for the Trustee to purchase cryptocurrency for the benefit of a Beneficiary and then transfer the cryptocurrency as a form of distribution to the Beneficiary. There are serious ethical issues that this raises and would likely endanger the Beneficiary's existing and future eligibility for benefits.
 - E. There are recent laws regarding digital assets and a question may arise whether any special considerations are needed when managing a SNT.⁹ It is important to recognize the significant likelihood that the SNT may have digital assets. The Revised Uniform Fiduciary Access to Digital Assets Act (hereinafter "RUFADAA") defines "digital asset" as "an electronic record in which an individual has a right or interest."
 - i. While SNTs assets are not considered available resources, a Trust beneficiary is entitled to information about their interest in trust property, and this likely includes digital assets.

⁸ Cyber Estate Planning and Administration Presented by Gerry W. Beyer at the Annual Convention of the State Bar of Arizona on June 15, 2017

⁹ Digital Assets and Special Needs Planning Written by Kerri G. Nipp and Gerry W. Beyer and Presented by Gerry W. Beyer at the Special Needs Alliance Meeting on March 23, 2018

- ii. There are two primary federal laws that are relevant in the discussion regarding a fiduciary's access to digital assets: (1) the Stored Communications Act ("SCA"), a federal privacy law, and (2) the Computer Fraud and Abuse Act ("CFAA"), a federal criminal law.
 - iii. It is advisable that a Trustee be prepared to have a discussion, with the Beneficiary or their Agent or Guardian, about maintaining digital records, and how the Trustee stores and exchanges information about the Beneficiary or assets that the Trust owns.
- VI. Problematic Trust Administration Issue: Caregivers.
 - A. Caregiving services, which would include the hiring and oversight of caregivers, and the use of trust resources to compensate caregivers, are common issues that cause conversations and challenges with regard to decision making between Trustees of SNTs, beneficiaries, guardians, and medical providers. Preliminary conversations with the Beneficiary and their Guardian/health care agent/family about the role of Trustee is important. Meet privately with the Beneficiary and their health care agent/Guardian before involving the whole family. Discuss the shared goals and encourage the Beneficiary to self-direct their care (to the degree they are able).
 - B. It is especially important to consider the authority of the Trustee of an SNT when analyzing the question of whether the Trustee should be involved in the hiring/oversight of caregivers who assist the Beneficiary. While the terms of the SNT will likely provide discretion to the Trustee to assist with most, if not all, responsibilities related to the employment of a caregiver, whether the Trustee *should* be involved in this, is another question.
 - C. In many cases, the Trustee of an SNT will limit their role to oversee the compensation of caregivers, or the caregiving agency who the Beneficiary or their Agent or Guardian contracts with. Establishment of the contract may be something that the Trustee provides input on, but the terms of the caregiving arrangement, and ongoing oversight of the caregiver(s) are most often not something the Trustee will manage.
 - D. It is always important for Trustees to consider whether any caregiving expenses are being covered through Medicaid, or another program that the Beneficiary may be eligible to participate in. In addition, these questions are important to consider:
 - i. Who is responsible for making healthcare decisions if the Beneficiary is unable to participate in conversations about their needs and care?
 - ii. What kind of caregiving services are needed and who is responsible for creating a job description, doing the interviewing, training, and oversight?
 - iii. What are the specific family circumstances that make the caregiving arrangement unique?
 - E. While there may be a HIPAA waiver in the trust document that allows the Trustee to engage in collection of the Beneficiary's medial information, there are very serious issues related to privacy and HIPAA when Trustees become involved in discussions regarding caregiving services provided to or for the benefit of the Beneficiary.
 - F. Tips for Trustees when there are caregiving services paid for by the SNT:

- i. Periodically discuss how the caregiving arrangement is working with the Beneficiary and their family. Do not wait for problems to arise before reviewing the system and caregiving arrangement.
 - ii. Stick to your lane: Trustees must resist the temptation to perform work outside of the scope of the Trust. Providing an opinion on an issue may create expectation that the Trustee is obligated to provide solutions or will get involved to work out an issue between the caregiver and family.
- VII. Problematic Trust Administration Issue: Medicaid Appeals.
 - A. If a Beneficiary or their Agent or Guardian seeks assistance from the Trustee with a Medicaid appeal, it is important to understand whether the Beneficiary was receiving benefits before the Trust was established and funded.
 - B. It is not uncommon for Beneficiaries and their providers to be incorrect about exactly what program or agency is responsible for providing certain benefits. For this reason, if the Trustee is notified that there is a problem with the Beneficiary's eligibility for Medicaid, the next step is to gather information/evidence of benefits (or denial) in writing, from the Beneficiary. With this information, the Trustee can determine what degree of involvement is appropriate (and possible) to provide.
 - C. Frequently questions about whether the trust assets are available resources to the Beneficiary may be answered by simply providing a copy of the SNT to the Medicaid agency.
 - i. Whoever completed the initial application and received notice that benefits would be discontinued, is the appropriate party to be the primary point of contact between the Beneficiary and the Medicaid agency. Using trust funds to pay for legal counsel to help with the appeal, and make any necessary modifications to the SNT, is an entirely appropriate expense of the Trust.
 - D. Trustees should discuss the release of financial information about trust property with the Beneficiary before providing information to any other party, and this includes the State Medicaid agency. While the Beneficiary does not own the trust assets or control them in any way, it could feel like a violation to a Beneficiary if the Trustee shares information that the Beneficiary feels should be private.
 - E. Before any accounting of trust property is provided to a government agency, the Trustee should carefully review the accuracy of the information and make sure there is supporting documentation for distributions, and that the accounts titled to the Trust have been properly reconciled. Involving experienced legal counsel to help navigate reporting issues, as well as an advisor who can properly review the accounting of the Trust, are important steps for a Trustee who is trying to figure out what information about Trust property to disclose.
 - F. Trustees of SNTs are often eager to assist with Medicaid appeals and do whatever need to be done to help the Beneficiary receive benefits. It is critically important to remember that cooperation will be needed by Beneficiary, health care providers and Agent/Guardian if an Appeal is going to be successful.
- VIII. Problematic Trust Administration Issue: Distribution Requests for Hobbies
 - A. Finding creative ways to use funds from a SNT often involves distributions for entertainment, or hobbies that a beneficiary may be interested in.

- B. It is important to know what kinds of benefits a beneficiary is receiving before making a distribution or reimbursing a beneficiary for expenses related to a hobby. This is because if the beneficiary is receiving a benefit like SSI and/or Medicaid, which have asset and income restrictions, there could be a reduction in benefits if a beneficiary is reimbursed directly for purchases made related to a hobby. This can happen not because making a disbursement for a hobby itself is a violation of trust terms, instead it could be that the manner in which the disbursement was made created problems (e.g. reimbursement directly to the beneficiary rather than payment directly to the store or vendor).
 - i. If a hobby involves routine costs those should be included on any anticipated disbursement form, or budget that the State Medicaid agency may request.
- C. Some hobbies, like painting, drawing, making music or building things could become a business venture. If income is earned from the sale of a product/or craft that the beneficiary engaged in using funds from the SNT, the beneficiary could lose eligibility for SSI, Medicaid, and also SSDI.
 - i. Wages, Self-Employment Income or Hobby?¹⁰
 1. It is important to distinguish IRS rules (focuses on tax liability) from Social Security (focuses on SS coverage)
 2. Income generated by endeavors started as a hobby treated as unearned income, although continuation with intent to make a profit will likely be seen as self-employment income
 - a. SSA makes the final decision as to whether or not activity is employment or self-employment for SGA determinations and SSI payment calculations.
 - b. People with disabilities may choose self-employment as it gives flexibility in schedules and they can often work at home. Engaging in the arts will be self-employment most of the time Social Security treats self-employment income differently than wages in both the SSI and Title II disability programs in some important ways
 3. Primary concern for SSDI is whether or not the endeavor is substantial gainful activity. If the production of income is considered a hobby, those earned funds have no impact on SSDI.
- D. No part of the undistributed assets of the SNT should be considered available to Beneficiary for purposes of determining Beneficiary's eligibility for public benefits, however if the beneficiary makes frequent requests for assistance with a hobby that may generate income, things for both the Trustee and the beneficiary could become complicated.
- E. Beneficiary shall have no right to direct a distribution from their SNT in order to make any provision for their food and shelter or to direct a distribution from the Trust for any other purpose. Trustees should keep this in mind (and cite specific terms of the trust) if the beneficiary routinely requests distributions.

¹⁰ Helping Clients Who Make Income from Music, Art, Writing and Other Work, a Presentation made by John Kitchen and Janet L. Lowder presented for the Special Needs Alliance Spring Meeting 2019

- IX. Summary
- A. Issues that may not at first appear problematic can create issues for Trustees of SNTs. Knowing the terms of the trust and the Beneficiary's circumstances (including what *specific* benefits a Beneficiary receives) are important factors to consider before making decisions about distributions or making purchases on behalf of a Beneficiary.
 - B. Trustees should always consider what the scope of their role is when a sticky trust administration issue (like a request for distribution or assistance with a benefits issue) arises.
 - C. Working with a Beneficiary who needs caregiving services that are paid for by the trust raises sensitive HIPAA issues and employment law issues. Sometimes there are cross-over issues that are medical-related and the disclosure of private health care information will require a Beneficiary's consent. In these circumstances Trustees need to work closely with the Beneficiary and their agent or Guardian.
 - D. Decisions about making a distribution for the purchase of a pet, or a hobby could create questions with Medicaid and other benefits programs that a trustee may not first expect. Developing a budget around ongoing expenses like pet care, hobbies and recreational activities is important for all parties and can help create a more manageable trust administration for the Trustee, and a more pleasant experience for the Beneficiary.
 - E. Trustees should become familiar with the characterization of digital assets and the State and Federal laws that govern a Trustee's duty to oversee and account for these assets.
 - F. Cryptocurrency is not recommended as an investment for SNTs because it is difficult to account for and the value of cryptocurrency can be subject to unexpected volatility than is hard to project when creating an investment strategy. Trustees should never make a distribution to beneficiary using cryptocurrency.
 - G. Many times there are creative solutions to requests from Beneficiaries. With a strong knowledge of public benefits eligibility criteria and rules, Trustees can find ways to use trust funds to help improve the beneficiary's quality of life.
 - H. Trusts and the rules that govern them will evolve, and so will the Beneficiary's needs. Trustees should not hesitate to see the expertise of legal counsel, and delegate certain projects to a party who has experience and a depth of knowledge that will help the Trustee make good decisions.
- X. Sample Trust Provisions *See Appendix*

Appendix

Identifying and Addressing Problematic Trust Administration Issues

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General Provisions

Maintain Public Assistance Eligibility

If any person or agency seeks to receive principal or income to or on behalf of Beneficiary to pay for benefits or services which such public assistance is otherwise authorized to provide, the Trustee is authorized to deny such request and is authorized in its discretion to take whatever administrative or judicial steps may be necessary to advocate on the beneficiary's behalf so that he or she may continue the public assistance program and/or remain eligible for benefits or services.

Reporting of Trust Assets

*Note this provision is tailored for a first-party special needs trust, and should be revised accordingly for use with a third-party special needs trust

Trustee shall furnish annual reports of the administration of the trust to the Beneficiary and/or her designated Agent. The Trustee shall not be required to file accountings with the Court; however, any party may at any time and from time to time, petition any appropriate Court to have a court of competent jurisdiction approve the trust accounting. Additionally, if so required, Trustee shall deliver an accounting to [name of State Medicaid agency] and any state agencies that requires reports from the Self-Settled Special Need Trust as a condition of determining that the assets in the trust shall be considered to be exempt resources for purposes of benefit eligibility.

Dispositive Provisions

Denial of Distribution.

In the event that Trustee is requested to release principal or income of the trust to or for the benefit of the Beneficiary to pay for equipment, medication or services which any government agency is authorized to provide, or in the event that Trustee is requested to petition any court or administrative agency for the release of trust principal or income for such purpose(s), Trustee is authorized to deny such request and to take whatever administrative or judicial steps may be necessary to continue the Beneficiary's eligibility for benefits, including by obtaining legal advice or representation for the trust or for the Beneficiary to recapture, continue or maximize the Beneficiary's entitlement to public benefits, or to seek and obtain from a court of competent jurisdiction a ruling that the trust principal is not available to the Beneficiary for eligibility purposes. The expenses of such representation, including attorney's fees, shall be a proper charge to the trust estate.

Distribution Guidelines.

In making or considering any distribution, the Trustee shall:

- i. Consider any other known income or resources of the Beneficiary which may be reasonably available;
- ii. Take into consideration all entitlement benefits from any government agency or charitable organization, including but not limited to Social Security disability payments, Supplemental Security Income, Medicare, Medicaid, Veteran's benefits or any other special purpose benefits for which the Beneficiary is or may be eligible;
- iii. Consider resource and income limitations of any such assistance program;
- iv. Make expenditures so that the Beneficiary's standard of living will be comfortable and enjoyable;
- v. Not be obligated or compelled to make specific payments;

- vi. Not pay or reimburse any amounts to any government agency or department, unless proper demand is made by such government agency or department, and reimbursement is required by the State OR unless payment of an arrearage accumulated by the Beneficiary would have the effect of increasing the amount of benefits payments to be received by the Beneficiary;
- vii. Not be liable for any loss of benefits.

No Right to Direct Distribution

Beneficiary shall have no right to direct a distribution from this Trust, to make any provision for her food and shelter or to direct a distribution from this Trust for any other purpose.

Trustee Powers

Employment of Agents

Employ such agents, attorneys, investment counsel or advisors, accountants, custodians, brokers and appraisers, including any who are affiliated with the Trustee as seem reasonably necessary, and to rely upon their legal, tax, or other expert advice, and to pay them reasonable fees for said services from the Trust Estate.

Delegation

Trustee shall have the power to employ and/or to delegate any of its discretionary and nondiscretionary powers to agents including, but not limited to, attorneys, investment advisers, appraisers or accountants, as it deems appropriate and to pay for such services from the Trust property.

Authority to Select and Hire Advocates

In addition to any other powers given to Trustee by this Agreement or by law, Trustee shall have the authority to employ a care manager and/or attorney for the Beneficiary, to advocate for the Beneficiary's needs or best interests or to advise Trustee on the best interests of the Beneficiary, his needs, rights or entitlement to public benefits. Trustee is urged to consult with and rely on the advice of such advocates in making determinations about the distribution or expenditure of funds from the trust. Trustee is specifically authorized and encouraged to utilize trust funds for the preparation and periodic review of an annual care plan, if one is not provided through the services of government program providers, or if Trustee determines that the annual care plan prepared by or through the auspices of a government service provider is inadequate. Trustee is also specifically authorized and encouraged to arrange and pay for periodic personal visits between the Beneficiary and any advocate selected by Trustee, whether in the advocate's office, in the Beneficiary's home or at some other appropriate location

Pets

To help maintain any pet(s) owned by the Beneficiary and to provide adequate funds to provide for such pets' health, care, exercise, and welfare of such pets including, but not limited to, training, veterinary care, food, toys, and kennel fees.

Digital Assets.

To access, take control of, handle, conduct, continue, distribute, dispose of, or terminate digital assets and digital accounts held by the Trust. "Digital assets" shall include, but not limit the Trustee's access to or authority over, files, emails, documents, images, audio, video, and similar digital files that currently exist or may exist as technology develops, whether stored on desktop computers, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, "cloud" or other internet-based storage services, and any similar digital device that currently exists or may exist as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored or the registration information for the service or account which provides access to the files or other digital assets. "Digital accounts" shall include, but not limit the Trustee's access to or authority over email accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name affiliate programs, and other online accounts that currently exist or may exist as technology develops;

Other Powers.

Any powers not here conferred upon the Trustee but granted by the "Uniform Trustee's Powers Act," as presently adopted in the State of [State Name] or as such powers may be expanded by subsequent amendment.

Exculpatory Clause

The Trustee shall not be liable for any loss, cost, damage, or expense sustained through any error of judgment or in any other manner except for, and as a result of, a Trustee's own bad faith or gross negligence.

Definitions

Definition of Special or Supplemental Needs. As used in this trust agreement, "special needs" or "supplemental needs" refers to the requisites for maintaining the Beneficiary's comfort and happiness when, in the judgment of Trustee, such requisites are not being provided by any public agency, office or department of the State of [Sate] or any other state, or of the United States, or by any private agency. The intent of this trust is to create a supplemental and emergency fund for the Beneficiary's benefit and not to displace assistance that might otherwise be available to him through or from various governmental assistance programs. The Beneficiary may have basic living needs such as medical and dental care, attendant support services, supplemental health care and related therapeutic care, which assistance programs may not otherwise provide, or may not provide in a timely manner. Trustee is directed to consider these basic living needs when making distributions, and to consider distributions for such items as residential expenses beyond basic rent costs, including furnishings, utilities, electronic equipment such as radios, televisions,

compact discs, video recording and playback devices, movies, payments for a companion or attendant, companions for travel, adaptive aids, other expenses related to leisure, recreation and cultural experiences, personal care (including hair, skin and nail care, massage or other therapies), prepaid funeral and/or burial expenses, mental or dental diagnoses, work or treatment for which there are not funds otherwise available, or for which funds are delayed to the detriment of the Beneficiary's well-being, and nonessential medical procedures.

In addition, "special needs" or "supplemental needs" may include occupational therapy, physical therapy and speech therapy not covered by public benefits, medical and dental expenses, annual independent checkups or periodic independent medical examinations and opinions, equipment, programs of training, education, treatment and rehabilitation, eyeglasses, transportation (including purchase and maintenance of a vehicle), insurance (including payment of life insurance premiums on the life of the Beneficiary or members of his family or caregivers) and supplementary dietary needs, when appropriate. Regular medical checkups and general preventive healthcare, including vision and dental checks, should be encouraged and provided as part of the Beneficiary's "special needs" or "supplemental needs," as should expenditures necessary or appropriate to permit the Beneficiary to remain at home rather than face institutionalization.