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Problematic Trust Administration Issues

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Problematic Trust Administration Issues

- Sticky administration issues may arise for Trustees of 1st Party or 3rd Party SNTs
 - Examples: pets, guns, cryptocurrency, caregivers, Medicaid appeals, and distribution requests for hobbies
- Be aware of the scope of the Trustee’s authority
- Consider the terms of the trust, do they offer solutions?
- If the Trustee is unsure of the implication of a distribution, it is best to *slow down* and seek guidance

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Scope of the Trustee’s Authority

- Does the Trustee have the ability to resolve the issue?
- What do the terms of the trust say?
 - Authority to hire professionals and delegate
 - Is there a Trust Protector?
 - Exculpatory Clause
- What guidance does the law, and case law provide?
- Express vs. Implied duties
- Duty of Prudent Administration

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Strong Provisions to Empower Trustees

- Distribution Guidelines
 - Sole and absolute discretion!
- Denial of Distribution
 - This should go without saying
- No Right for the Beneficiary (or other party) to direct distribution
- It is impossible to anticipate and address every potential problem

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Animals

- If the Beneficiary owns a pet, what responsibility does the Trustee have as to the animal?
 - Animals are personal property. Do not permit assignment to the Trust.
 - What kind of animal(s) are we talking about?
 - Is the Beneficiary able to care for the animal without assistance?
 - Did the Beneficiary select the animal?
 - Where is the animal living?
 - Therapeutic purpose?
 - Distribution of trust assets to purchase an animal vs. ongoing expenses to care for the animal.
 - Animals may live for a long time. There should be a long-term plan.

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Firearms

- What if trust property includes a firearm or other weapon?
- What if the Beneficiary has a gun and wants a distribution to:
 - Purchase ammo or related supplies and accessories;
 - Take a safety class;
 - Join a gun club;
- Does it matter what type of firearm (or weapon) it is?
- What duty does the Trustee have to report requests or information to Agent, Guardian, Doctor or Court?

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Cryptocurrency

- What if trust property includes bitcoin or other cryptocurrency?
 - Identify trust property
 - Account for trust property
 - Traditional record keeping does not work with cryptocurrency
- What is the purpose of holding cryptocurrency?
- Cryptocurrency versus other potential “investments”
- Digital Assets Provisions
- Using cryptocurrency creates more headaches

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Caregivers

- The Trustee’s involvement in decisions related to caregivers may complicate the trust administration.
 - Other decision-makers (eg: Guardians, Beneficiaries and medical providers) will be involved
- What is the role of the Trustee?
 - Does the Trust pay caregivers (privately) or through an agency? Payroll?
 - Can any caregiving expenses be covered through Medicaid?
 - Who hires/fires/trains/communicates with and oversees caregivers?
 - Liability Issues for the Trust and the Trustee
 - Power to hire agents, advocates (caregivers?)

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Medicaid Appeals

- Was the Beneficiary receiving benefits before the trust was established?
- Get information/evidence of benefits (or denial) in writing
- What is the role of the Trustee?
 - No requirement to provide counsel to beneficiary and his/her guardian or agent regarding appeal (or application);
- Cooperation needed by Beneficiary, health care providers and Agent/Guardian if the Appeal is going to be successful
- Trust terms may need to be modified

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Distributions for “Hobbies”

- Hobbies may look like business ventures (and vice versa)
- Lots of opportunities to lose benefits like SSI and SSDI if income is earned and beneficiary is engaging in substantial gainful activity.
- Ask questions before making distributions for a hobby or activity. Is it entertainment?
- Do not issue reimbursement for equipment, supplies or related expenses....pay directly if possible.

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Trustee Powers

- The style and expertise of the drafting attorney usually defines how Trustee Powers are drafted in the Trust document
 - Advantages/Disadvantages of including specific Trustee Powers
 - Powers in 1st Party and 3rd Party SNTs should be similar
- What about the use of a Trust Protector?
- What about powers not conferred by the Trust, but granted under the “Uniform Trustee’s Powers Act,” as presently adopted in the State where Trust is administered?

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Some Helpful Trust Provisions

See Appendix

- Trustee Powers
 - Employment of Agents
 - Delegation
 - Authority to Select and Hire Advocates
 - Pets
 - Digital Assets
 - Other Powers
 - Exculpatory Clause

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Some Helpful Trust Provisions

See Appendix

- Definition of Special or Supplemental Needs
 - Who will be reviewing this definition?
 - Needs may change and the definition should be broad enough to evolve and adapt with the beneficiary's needs
 - Why give examples?
 - Consider the autonomy of the Beneficiary and how this definition can support distributions that might be unusual

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Summary

- SNTs often involve sensitive and unusual administration issues
- Sometimes the issues can be anticipated and avoided by careful drafting
- The Beneficiary may not be the party causing the issue
- Many times there are creative solutions
- Trusts and the rules that govern them will evolve, and so will the beneficiary and his/her needs.

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Questions?

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