

Creative Writing Meets Drafting SNTs

a presentation for

**2021 Special Needs Trusts - The National
Conference**

by

Stuart D. Zimring

October 14, 2021

Law Offices Of

STUART D. ZIMRING

Attorneys & Counselors At Law

Creative Writing Meets Drafting SNTs¹

1. Introduction

What is the purpose of a Trust and in particular, a Special Needs Trust (“SNT”). At the beginning of Chapter 1 of *“Fundamentals of Special Needs Trusts”* my co-authors and I said:

“The primary purpose of a SNT is to improve the beneficiary’s quality of life by providing that monies are spent for the benefit of the beneficiary for items and services not covered by public benefits and to assist managing and expending assets for a beneficiary with special needs. In the more typical context of maintaining public benefits eligibility, it is said that a SNT is used to ‘supplement, and not supplant,’ a beneficiary’s public benefits.”²

Sounds simple. The Trustee simply has to determine what benefits are “not covered by public benefits” and then do whatever she wants with the Trust’s assets to “improve the beneficiary’s quality of life.” But is it simple? Of course not. If it were simple probably none of us would be at this conference. There are many reasons why it’s not simple. Determining what benefits are not provided by the respective public agencies (and the inconsistencies between public agencies) is one reason (*i.e.* if the State Medicaid Agency could provide a service or health care procedure but can’t at the time the Beneficiary is in need, is that service/procedure no longer provided by the public agency,. At least at that point in time?). Another reason is determining what will “improve the beneficiary’s quality of life.” How is “quality of life” defined? Finally, for better or for worse, “simple” does not seem to be a concept embraced by the legal profession. In reading some documents and especially legal decisions, one could form the opinion that the authors are

¹Thanks to Alexis Erica, my Research Assistant on this project and a 3rd year student at Stetson University College of Law for her invaluable research on this project.

²Stuart D. Zimring, Rebecca C. Morgan, Bradley J. Frigon and Craig C. Reeves, *Fundamentals of Special Needs Trusts* (LexisNEXIS 2021) (hereafter “Fundamentals”).

being paid by the word or column inch.

On the other hand, looking back on decades of trust drafting and litigation centered around the question “what did the Settlor mean by that?” careful drafters of SNTs have learned that for better or for worse, more is sometimes better, or at least safer. So now we will sit down with our clients and ask them “what does ‘quality of life’” mean to you in your beneficiary’s situation? What is it you want your trustee to do?” Based on the answers we will then put pen to paper or fingers to keyboard and attempt to create documents that will carry out their wishes. This may be a SNT or a Letter of Intent or both.³ One of the hopes is that when the beneficiary comes calling and says “I want you to buy me a [pick anything],” the documents we will have created will give our trustee a sufficient basis upon which she can intelligently and correctly respond.⁴

Probably 90% of the time, the client’s responses to our questions are ones we’ve heard before. But not always. The clients may have specific concerns regarding the beneficiary and her needs and desires that can result in drafting challenges for us as drafters and similar (if not greater) challenges for the trustee who will be called upon to implement those instructions. This paper will try to address those situations and hopefully give drafters some guidance in navigating the rough waters of “I want my trustee to do [pick anything].”

2. **The Trustee - It’s Not Just a Job, It’s A Sentence**

A. In the Beginning

At some point, hopefully during the initial interview, we ask our clients “who do want to be the Trustee of your child’s SNT?” Depending on the family structure, 95% of the time the answer

³See *Fundamentals* §4A.11

will either be “Her brother. He’s promised to take good care of her.” If there is no sibling the answer may well be Uncle Fred or Aunt Ida, but one thing is certain: it is not going to be a Private Professional Fiduciary (whether individual or institution.) And therein lies the seed of the issue that will continue to germinate throughout the drafting process: what is the level of sophistication, wisdom, empathy and knowledge of the trustee?

It is at this point that we need to focus the clients’ attention on exactly what is going to be involved in being the Trustee. The time to do it is early on in the engagement and to continue to reinforce the importance of the skill set that the Trustee must possess.

We need to be prepared to ask some potentially difficult and uncomfortable questions:

1. What does the proposed Trustee know about the Beneficiary’s condition?;
 - a. How important is it (given the nature of the Beneficiary’s disability) that the Trustee have some medical/psychological/health care knowledge or background?
2. Does the proposed Trustee have any familiarity with government benefit programs and if so, which ones?
3. How much time is the Trustee able to devote to the job of being Trustee both in terms of interacting directly with the Beneficiary and in handling the Trust portfolio?
4. How good is the proposed Trustee at money management?
5. Is the proposed Trustee able to obtain a fiduciary bond?
6. Does the proposed Trustee have a built-in, inherent conflict of interest?

Interestingly, it is the last question that acts as a “wake up call” for my clients more than the

others. When I acknowledge that John most certainly loves his sister Jane and may well intend to take very good care of her as the Trustee of her SNT, can we really ignore the fact that at the end of the day John stands to inherit whatever is left in Jane's SNT and is it really humanly possible for anyone to ignore that reality in making distributions decisions that ultimately will deplete John's inheritance?

By asking these questions and others and the questions that arise from the answers (both asked by the client and by me), I try to educate my clients to see that being the Trustee of an SNT is not a part-time, get-to-it-when-you-can kind of job. It's a career. Or possibly a life-time sentence. As a result, my mildly sarcastic introduction to the whole subject when the clients tell me that John will be the Trustee of his sister's SNT is to say "really! I thought you loved John! Why are you saddling him with this burden?" And then I start going down the list.

In my perfect world, the result of this colloquy would be a decision by the client to use a professional fiduciary along with the family member as Trust Advisor or as a member of the Trust Advisory Committee. My success rate in that regard probably leaves much to be desired, but I continue to try. And it is that failure that leads to further discussions as to the details of what the job entails and the role of discretion in carrying out the task.

In the beginning, (*i.e.* 30 or 40 years ago when we first started drafting SNTs), the role of the Trustee could be broken down into two components: what the Trustee couldn't do and what the Trustee could do. The Trustee could not make distributions for "food, clothing or shelter," the original three sins that would cause a Beneficiary to lose her SSI benefits. The Trustee could make distributions so long as they "supplemented but did not supplant" the Beneficiary's entitlement to other public benefits. I refer to this as the "biblical" version of SNTs, the "Thou Shalt Nots."

Time marched on, we all became more sophisticated draftspersons and the law changed. The Social Security Administration no longer cared about clothing and dropped it from the prohibited list, causing no end of consternation among Trustees who felt they were still constrained from making distribution for clothing because that language appeared in the trust.⁵ In retrospect, while these SNTs gave relatively clear guidance as to what the Trustee could not do, there didn't seem to be a lot of guidance as to what the Trustee could or should do for the benefit of the Beneficiary other than "improve the Beneficiary's quality of life." Whatever that meant. And those would be accomplished by the Trustee exercising her "discretion" or her "sole and absolute discretion." Whatever that meant. As a result, the attorneys for the Trustees found themselves responding to an ever-increasing deluge of questions from both the Trustees and the Beneficiaries always starting with the phrase "Can I buy a [fill in the blank]?" Practitioners like Robert Fleming responded by producing Trustee Operating Manuals answering the most common questions and this has become a valuable resource for many of us.⁶

However, the need for better guidance as to what Trustees of SNTs should and could do was clear and the need for this guidance came from two very different directions. On the one hand, Settlers, Trustees and Beneficiaries all wanted clear roadmaps. On the other hand, Medicaid Agencies, the Social Security Administration and the courts all started having their own opinions of what Trustees of SNTs could and should do and began challenging decisions made by Trustees. As a result, attorneys drafting and assisting in the administration of SNTs started paying greater

⁵This problem is about to come up again as the SSA is issued a proposed regulation eliminating the prohibition on distribution of food in calculating In Kind Support and Maintenance. See www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=0960-A160.

⁶A version of this manual is available at www.specialneedsalliance.org.

attention to what “discretion” and more importantly “sole and absolute discretion” meant (and means) in assisting the Trustees to do their job, especially in the context of a mandate to improve the Beneficiary’s “quality of life.”

3. **Discretion, Discretion, Discretion - Says Who?**

A. Introduction

“Discretion” is defined in Black’s Law Dictionary as “Wise conduct and management; cautious discernment; prudence.” In like manner, a “fiduciary is defined as “a person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence and candor.”⁷

Putting the two together, it seems a key element in advising the Trustee of a SNT would be to guide her as to the best way to act wisely, cautiously and in good faith on all matters within the scope of the relationship for the benefit of the beneficiary. And because our clients have total confidence in the person or entity they have chosen as Trustee, they want or may want the Trustee to be exercise this extensive power without someone looking over the Trustee’s shoulder, hence the phrase “...the Trustee in the Trustee’s sole and absolute discretion may...” But if that’s all the direction the Trustee is given, we end up with a clause that looks something like this:

“The Trustee, in the Trustee’s sole and absolute discretion shall do whatever the Trustee, in the Trustee’s sole and absolute discretion deems appropriate to maintain and improve the Beneficiary’s quality of life so long as those actions and/or distributions supplement but do not supplant the Beneficiary’s public benefits.”

Since the Trustee is trusted (pun intended), the goal is to shield the Trustee from being second guessed or questioned on any exercise of discretion, the inference here is that the Trustee

⁷Black’s Law Dictionary, 3rd Pocket Edition.

knows or will know exactly what is in the Beneficiary's best interests and what "quality of life" means. And we know that in reality that is most often not the case. So our goal as drafters is, in the first instance, to assist the Settlers in setting forth, either in the Trust or in a Letter of Intent, at least some guidelines as to what is meant by "supplement but not supplant" or "quality of life" while at the same time not restricting the Trustee's ability to act in her "sole and absolute discretion."

The best way to do this is to have the clients focus on what their definition of "quality of life" is for the Beneficiary, being as specific as possible both in the short term and the long term and then "translating" that into SNT legalese hoping not to make either too complex or too amorphous (images of Goldilocks and the Three Bears can easily permeate a conversation like this).

b. Is More Better than Less?

Looking over the landscape, it appears that drafters of SNTs have, over the years become comfortable with variations of the following types of clauses:

Beneficiary: The Trust shall be primarily for the benefit of BENEFCIARY, and the rights of the remainder beneficiaries shall be of secondary importance. The Trustee shall not be required to distribute income currently. The Trustee shall not be held accountable to any remainder beneficiary if part or all of the principal shall be depleted as a result of distributions under this Trust in accordance with the terms of this Trust. Any income not distributed shall be added to and become a part of the principal. Any determination made by the Trustee in good faith as to the manner in which or the extent to which the powers granted by this Trust shall be exercised shall be binding and conclusive upon all persons who might then or thereafter have or claim any interest in the Trust property.

1. Supplemental Benefits and Special Needs:

a. General Provisions: In accordance with the purpose of this Trust and subject to the guidelines provided below, the Trustee may pay to or apply for the benefit of the Beneficiary as much of the Trust net income and, if that income is insufficient, the Trust principal, as the Trustee determines, in the Trustee's sole discretion, to be necessary or desirable to meet the Beneficiary's supplemental or special needs. "Supplemental benefits" or "special needs" are items or services that the Trustee considers necessary for

the Beneficiary's health, protection, and welfare and that cannot, in the Trustee's opinion, be provided by grants, services, and supplies available through any public agency, office, or department of California, any other state, or the United States. Supplemental benefits or special needs may also include funds, items, or services that enhance the Beneficiary's quality of life.

b. Examples of Supplemental Benefits and Special Needs: May include, but are not limited to, the following:

- i. Recreational therapies, athletics, adventure programs, theater/drama, creative art, music or pet therapies;
- ii. Participation in hobbies, wellness or spiritual activities;
- iii. An automobile and/or van for the benefit of BENEFICIARY, and modification, improvement and maintenance of such vehicle(s);
- iv. Companions for BENEFICIARY and reimbursement to said companions for transportation and other expenses incurred in visiting BENEFICIARY;
- v. The maintenance of contact between BENEFICIARY and other family members and friends, including lodging, transportation and related expenses, for the benefit of BENEFICIARY;
- vi. Recreational opportunities, trips, family visits, visits to and from friends and/or relatives, and any other tangible or intangible items which in the sole discretion of the Trustee will enrich or benefit BENEFICIARY;
- vii. Purchase of tickets for attendance at or participation in recreational or cultural events;
- viii. Travel and vacations;
- ix. Items by which BENEFICIARY' life will be enriched and made more enjoyable, including, but not limited to, furniture, radios, televisions, audio, video and computer equipment, musical instruments, electronic devices and/or equipment, and the maintenance of same;
- x. Items beyond necessary clothing, such as a coat which is "extra" but which is desirable because it is newer, more stylish, warmer, etc;

- xi. Laundry, hair cutting and styling, bedding, medical apparatus;
- xii. Exercise equipment or special medical equipment, if not available through other third party sources;
- xiii. Vocational rehabilitation or habilitation, if not available through other third party sources;
- xiv. Membership in book clubs, health and/or workout clubs, record clubs, video clubs, etc.;
- xv. Subscriptions to magazines and newspapers;
- xvi. Advocacy, including Personal Care Consultant;
- xvii. Services of a Representative Payee or Conservator, if not available through other third party sources;
- xviii. Intervention or respite when BENEFICIARY is in crisis, if not available through other third party sources;
- xix. Procurement for BENEFICIARY of more sophisticated medical, psychological and/or dental treatment, experimental or holistic rehabilitative therapies, private rehabilitative or educational training, and additional home care beyond the care available from any government program(s);
- xx. Attorney's fees and disbursements and Court fees relating to any Conservatorship proceedings, or other legal proceeding involving BENEFICIARY, and attorney's fees related to the maintenance of this Trust;
- xxi. Any tax obligations of BENEFICIARY or the Trust; and
- xxii. The purchase of burial services, funeral services, burial plots, or crypts for BENEFICIARY and his family, and irrevocable burial arrangements.

2. Home and Automobile for Beneficiary

- a. Residential real property may be an asset of the Trust for the Beneficiary's benefit, and if so the Settlor intends that BENEFICIARY be able to live in such residential real property without a loss of his public assistance benefits. Accordingly, the Trustee shall manage the Trust in a manner that will allow BENEFICIARY to reside in any such residential property without

causing a loss of his public assistance benefits of any city, county, state, federal or other governmental agency which has a legal responsibility to serve persons with disabilities which are the same or similar to BENEFICIARY' impairments. The Settlor recognizes that the decisions made by the Trustee may cause a reduction in the level of such benefits. If the Trust does not own suitable residential property, the Trustee may expend such amounts as the Trustee deems necessary for BENEFICIARY's housing or residential accommodations, but only such amounts as may be supplemental to his benefits under SSI or other government programs. Because of BENEFICIARY's supplemental and special needs, the Trustee, in the Trustee's discretion, may arrange for him to live in a residential facility where board and care are provided to the residents, or, if the Trustee deems it appropriate, the Trustee may arrange for BENEFICIARY to reside in a house or apartment (for example, by purchasing a condominium using the funds of the Trust) and also provide for full-time or part-time supervisory personnel and other care providers to assist BENEFICIARY with his daily living needs to the extent that these services are not funded by public benefit programs.

b. If a vehicle is an asset of this Trust, then that vehicle may be made available to the person or persons hired to assist BENEFICIARY, to be used for his transportation. If no such vehicle is allocated to this trust, then the Trustee is specifically empowered to purchase an appropriate vehicle for that purpose and the Trustee shall purchase insurance with respect to the automobile. Any such vehicle may be sold from time to time, and another vehicle may, at the Trustee's discretion, be purchased for those purposes.

c. The Trustee shall have all necessary powers to make whatever arrangements the Trustee deems suitable for BENEFICIARY' residence, care and supervision, and to pay for all such needs from income or principal of this Trust, subject to the supplemental and special needs provisions thereof.⁸

Is all this verbiage really necessary? If our clients have such faith in their chosen Trustee that they are vesting her with "sole and absolute discretion," why this laundry list of suggestions/directions? There are a number of reasons: 1) Neither our clients nor we as drafters have so much faith in the chosen Trustee that we *really* want them to have total, unfettered

⁸See "Fundamentals," chapter 4 for other examples.

discretion without some guidance; 2) The chosen Trustee may not always be the Trustee (and in many situations this is almost a certainty); 3) We want to be helpful - it's in our genes and we want to do whatever we can to make sure that our clients' wishes are set forth tangibly, something like a SNT "Guide for the Perplexed ; 4) we love to write and love to read what we've written; and 5) we now know from bitter experience that in some cases, if we don't specify the Trustee's authority, someone, somewhere may/will cry "foul - that's an abuse of the Trustee's discretion!" and challenge the Trustee's "sole and absolute discretion."

c. Abuse of discretion - I Know It When I see It. Or do I? - the 20/20 Hindsight Conundrum

In 1964, Justice Potter Stewart penned one of the most frequently quoted statements of any Supreme Court decision in his concurring opinion in *Jacobellis v. Ohio*. This famous case dealt with whether or not a particular film was "hard core pornography" and therefore not protected by the First Amendment. In his concurring opinion, Justice Stewart said: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."⁹

A review of a number of cases around the country show that judges frequently have the same problem in determining what is and what is not an abuse of discretion. What is clear is that regardless of any attempt by the drafter (carrying out the wishes of the Settlor) to insulate the Trustee from any oversight by giving her "sole and absolute discretion," the law has consistently granted courts the capacity to intervene when appropriate (and that of course begs the question of

⁹Jacobellis v. Ohio, 378U.S.184 (1964).

when is it appropriate?).

According to the Restatement of Trusts (Third):

“(1) A discretionary power conferred upon the Trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee. (2) The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlors purposes in granting the discretionary power and in creating the trust.”¹⁰

Comment b. goes on to state: “A court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. *Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.* [emphasis added].”¹¹

Various courts have attempted to define the undefinable and unlike Justice Stewart have a bit more success in at least setting some parameters. As one court put it: “Notwithstanding the breadth of discretion granted to a trustee in the trust instrument, including the use of such terms as ‘absolute,’ ‘sole,’ or ‘uncontrolled,’ the trustee shall exercise a discretionary power in good faith.”¹²

Probably the best explication on the factors a court should use to determine whether or not a trustee has abused her power is found in *In re Trusts A & B of Divine* where the court held:

“(1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; [and] (6) the existence or nonexistence of an interest in the trustee conflicting with that of the

¹⁰*Restatement (Third) of Trusts* §50 (2003),

¹¹*Id.*

¹²*Mesler v. Holly*, 318 So. 2d 530, 533 (Fla 2d DCA 1975).

beneficiaries.”¹³

So, as indicated above, in today’s litigious society (keeping in mind that I practice in probably the most litigious State in the US), the practical reason we go into as much detail as we do is to (hopefully) avoid challenges to what the Trustee is doing by clearly delineating what she should/can/hopefully will do. But the fact is that regardless how much discretion the Trustee is given and how much guidance we put in our documents to assist her, someone, somewhere will object. My favorite all-time objection to a Trustee’s abuse of discretion is *In re Irrevocable Supplemental Needs Trust of Collins*.¹⁴ In that case, the discretionary provision of the trust provided:

“It is the intent of this agreement to create a Supplemental Needs Trust for the benefit of Jennifer Collins. . . . The purpose of the Trust is to provide for Jennifer Collins' reasonable living expenses and other needs when benefits from publicly funded benefit programs are not sufficient to provide adequately for those needs. . . . The Trustee shall expend such sums from the principal of the Trust to or for the benefit of Jennifer Collins only for purposes which supplement benefits from publicly funded programs. Such expenditures may include but are not necessarily limited to entertainment, education, vacations and travel, comfort, convenience and reasonable luxuries, as the Trustee, in the Trustee's sole discretion, deems advisable. . . . The Trustee may also pay for . . . companion services. . . .”

The Trustee petitions for court review of the first five annual accountings. The trial court disallowed \$2093.00 of non-medical expenses specifically including \$1,000 for a snowmobile and \$123 for tickets to a rock concert (Britney Spears).

The Court of Appeals in reversing the trial court stated:

¹³*In re Trusts A & B of Divine*, 672 N.W.2d 912, 920 (Minn. Ct. App 2004).

¹⁴*In re irrevocble Supplemental Needs Trust of Collins*, Minn. App. Ct. (2004) unpublished decision. May not be cited.

“The district court went on to say, “[These trusts] were not set up to accomplish trips to Disneyland, snowmobile rides, or anything of that sort. Dance lessons, yes; memberships in Shoreview's community center, yes. . . .” Deciding whether dance lessons are appropriate expenditures for an 11-12 year old, whether a snowmobile is an appropriate expenditure for a 13-year-old, or whether Britney Spears concert tickets are an appropriate expenditure for a 14-year-old requires an exercise of discretion: parents of disabled and nondisabled children are constantly faced with such discretionary decisions. Appellant is both parent and trustee; we conclude that he exercised, but did not abuse, his "sole discretion" in providing a child's snowmobile and concert tickets for Jennifer. The district court substituted its [*8] own discretion for appellant's when it arbitrarily disallowed these expenses from among the many made for Jennifer's entertainment and "reasonable luxuries.”

The district court's decision provides no guidance to appellant as to what entertainment disbursements will be allowed in the future. The district court approved some disbursements and not others, but provided no clear objective rationale for its decision. Reversed.”

It is painful to think about how much was spent on legal fees in order to obtain confirmation of what ought to be the basic rule that unless there is a clear abuse of discretion, the trial court should not substitute its opinion for that of the Trustee. Would the outcome have been different if the SNT simply granted the Trustee “sole and absolute discretion” without any guidance? Or if the guidance had specifically included concerts and vehicles? We cannot know the answers in advance and therefore while it would be nice (and more ecological) to be able to write less complicated, wordy documents, we probably cannot as long as there is the specter of judicial second-guessing.

4. **You Really Want The Trustee to Do That?**

The flip-side of the “how do we help the Trustee do her job” conundrum is “how do we convince the client not to attempt to exert too much control over the Trustee and/or the beneficiary?” One aspect of this issue was discussed at the last SNT Conference in my paper “Addiction & Trusts

- It Looks Great on Paper But does It Work?”¹⁵ That paper discussed some of the real world issues of requiring Trustees to determine the Beneficiary’s status *vis a vis* various addictive behaviors in determining whether or not to make distributions.

A corollary of that (or, as show below, a companion carrot/stick approach) is authorizing the Trustee (or mandating the Trustee) to make distributions as incentives to “good” (as defined by the client/Settlor) behavior on the part of the Beneficiary.

Consider the trust provisions in Appendix A. The client was very, very specific as to what he wanted. I tried to convince him that he (and his son) would be better off with a more simple “...in the Trustee’s sole and absolute discretion...” authorization but he had been hurt too many times by this child, was too angry and would have preferred to disinherit him entirely but for the entreaties of his wife. Hence, the language in Appendix A is a compromise. An elegant, concise, explicit quite probably unworkable set of distribution formulae that only a professional fiduciary will have the time to properly implement, at significant cost to the Trust. And of course, the named Trustee is a family member. But at the end of the day, we do what our clients instruct us to do regardless of our wisdom and experience that their plan may not work as they intended unless it is so anithetical to us that we are in a position to decline the representation under our respective Rules of Professional Conduct or the NAELA Aspirational Standards.

A perfect example of this application of the Law of Unintended Consequences is the saga of Tommy Manville who some of you might recall as the playboy heir of the Johns-Manville fortune. A trust was created for his benefit that provided, as an incentive for him to marry, that when he did he would receive \$250,000. He did marry, collected the \$250,000 and then repeated

¹⁵2020 Special Needs Trusts - The National Conference, October 2020.

that 12 more times, collecting \$250,000 each time, paying his wives \$50,000 each for a quickie divorce before doing it again.¹⁶

Another example of the Law of Unintended Consequences (and strange burial instructions) is the Last Will and Testament of William Henry Braun, Jr., attached as Appendix B. Mr. Braun died in 2005. His Probate Estate is still open. There is currently no acting Personal Representative (the named individuals have either died or declined to serve). No existing cemetery will permit the erection of his Mausoleum and efforts by one PR to purchase a cemetery on which to construct the edifice proved futile. However, after spending months in the mortuary's cold storage he was finally interred, above ground, but not in his chosen location. What would our advice have been to him had he come to any of us to draft his Will (other than telling him he needed a Trust)?

Several years after drafting the provision in Appendix A, I was faced with another unique situation. The Beneficiary of the SNT was a young ballerina whose budding career had been cut short by a vehicular accident. Her disabilities were all physical and she had her full mental faculties. She and her mother had been researching several experimental surgical and stem cell procedures in Europe and asked me to include specific language in the SNT authorizing the Trustee (a private professional fiduciary) to pay for any such procedures. After giving it serious thought and considering the parties, I sat everyone down and told them I didn't think we should be too specific given the fact that it was unknown when (if ever) these treatments would take place or where, and that in this case, since the Beneficiary had mental capacity, the Trustee was very sophisticated in SNT administration and could seek independent advice and counsel (legal and medical), the best

¹⁶J. Peder Zane, *Ideas & Trends: The Rise of Incentive Trusts; Six Feet Under and Overbearing*, N.Y. Times Section 4, page 5 (March 12, 1995).

way to proceed was to expand some of the language in the “guidance” section of the SNT by adding specific references to experimental, holistic and non-Western medicine treatments/procedures. I believed that this language, coupled with the general “sole and absolute discretion” language and the fact that the Trustee could obtain whatever releases from liability it wanted specific to a given situation (rather than try to figure it out in advance in the SNT) made more sense. Everyone was in agreement and we proceeded. Unfortunately, none of the hoped for treatments have proved viable for the Beneficiary, but the hope (and ability) are still there.

5. **Some Final Thoughts**

In researching this paper I contacted a number of colleagues around the country asking them to send me their favorite “weird/strange/outlier Trust or Will provisions that they had drafted over the years. I was somewhat surprised and impressed when more often than not, the response was “I really try to avoid doing that. I try to convince my clients to keep things simple and direct and I’m usually successful.” But sometimes we’re not, and in those cases the best we can do is to consider, as we put fingers to keyboards, not only what our clients ask us to do, but do it in a way that will enable to Trustee to carry out the Settlor’s wishes with as little risk of “20/20 hindsight” as possible.

Appendix A

The Trustee shall hold, administer and distribute the Trust share allocated for BENEFICIARY as follows:

1. Distribution of Income Subject to the provisions set forth below, the Trustee shall distribute to BENEFICIARY an amount of the Trust's distributable net income computed as follows:

a. For every calendar quarter BENEFICIARY remains drug and alcohol free (as determined pursuant to the provisions set forth below), BENEFICIARY will receive an amount equal to twenty-five percent (25%) of one-half ($\frac{1}{2}$) of the Trust's annual distributable net income for the preceding calendar year.

b. For each consecutive quarter that BENEFICIARY remains drug free the amount distributable to him will increase as follows: Twenty-five percent (25%) of the base amount in the second quarter; fifty percent (50%) of the base amount in the third quarter; and seventy-five percent (75%) of the base amount in the fourth quarter. If BENEFICIARY has remained drug free for a full calendar year, the base amount will double in the second and following years.

c. Notwithstanding the provisions set forth above, during the first year the BENEFICIARY Trust is in operation, BENEFICIARY must remain drug and

alcohol free for the first two calendar quarters in order to receive the distribution set forth above. Thereafter, distribution shall be made quarterly as provided above.

d. For example: Assume that the Trust's distributable net income for the preceding calendar year was \$12,000.00. The amount distributable to BENEFCIARY in the first calendar quarter is one-fourth (1/4) of one-half (1/2) of \$12,000.00 or \$1,500.00. If he remains drug free, the amount distributable to him in the second quarter will be one hundred twenty-five percent (125%) of \$1,500.00 or \$1,875.00. The amount distributable in the third quarter will be one hundred fifty percent (150%) of \$1,500.00 or \$2,250.00 and so forth. Should he remain drug free the entire year, the amount distributable to him in the second and following years will be one hundred percent (100%) of the net distributable income.

e. During the first year of operation of the Trust, the Trust distributable net income for the preceding year shall be an amount estimated by the Trust's Certified Public Accountant.

f. In the event BENEFCIARY fails a drug or alcohol test in any quarter, any increases in distributions that he has earned are revoked and the formula calculations start over.

g. Any income not so distributed shall be added to principal.

2. Incentive Distributions In addition to the income distributions provided above, the Trustee shall distribute to BENEFCIARY (again subject to the provisions set forth below regarding drug and alcohol testing), an incentive distribution based

on earned income. For every \$500.00 of earned income BENEFICIARY receives, the Trustee shall distribute to BENEFICIARY \$50.00. BENEFICIARY shall provide the Trustee on a quarterly basis payroll stubs, photocopies of paychecks or other evidence satisfactory to the Trustee verifying the amount he has earned in gainful employment. Distributions under this paragraph shall be first from income and then from principal.

3. Testing Requirements

a. If the Trustee reasonably believes that BENEFICIARY uses or consumes any illegal drug or other illegal substance, or is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a board certified medical doctor or psychiatrist in a current program of treatment supervised by such doctor or psychiatrist, and if the Trustee reasonably believes that as a result of such use or consumption BENEFICIARY is incapable of caring for himself or is likely to dissipate his financial resources, the Trustee shall request BENEFICIARY to submit to one or more examinations (including laboratory tests of bodily fluids) determined to be appropriate by a board certified medical doctor or psychiatrist selected by the Trustee. The Trustee shall request BENEFICIARY to consent to full disclosure by the examining doctor or facility to the Trustee of the results of all such examinations. The Trustee shall maintain strict confidentiality of those results and shall not disclose those results to any person other than BENEFICIARY without the his prior

written permission.

b. The Trustee shall not make any distributions to BENEFCIARY until he consents to the examination and disclosure to the Trustee.

c. If in the opinion of the examining doctor or psychiatrist the examination indicates current or recent use of a drug or substance as described above, BENEFCIARY shall consult with the examining doctor or psychiatrist to determine an appropriate method of treatment (for example, counseling or treatment on an in-patient basis in a rehabilitation facility). If BENEFCIARY consents to the treatment, the Trustee shall pay the costs of treatment directly to the provider of those services from the income or principal of the Trust.

d. It is not Settlor's intention to make the Trustee (or any doctor or psychiatrist retained by the Trustee) responsible or liable to anyone for BENEFCIARY's actions or welfare. Trustee shall have no duty to inquire whether BENEFCIARY uses drugs or other substances as described in this Section. The Trustee (and any doctor or psychiatrist retained by trustee) shall be indemnified from the trust estate and held harmless from any liability of any nature in exercising its judgment and authority under this Section, including any failure to request BENEFCIARY to submit to medical examination, and including a decision to distribute suspended amounts to BENEFCIARY.

4. Principal Notwithstanding the provisions of Paragraph 4.8.a. above, the

Trustee may apply for the benefit of BENEFCIARY (but not pay to BENEFCIARY directly) as much of his Trust share as the Trustee, in the Trustee's sole and absolute discretion, shall deem necessary for his health, education, maintenance and support, after taking into consideration, to the extent the Trustee shall deem advisable, any other income, resources, or public benefit entitlements of BENEFCIARY known to the Trustee.

5. Distribution If BENEFCIARY remains drug and alcohol free for five consecutive years, the Trustee shall distribute the balance of BENEFCIARY's Trust share to him and the Trust shall terminate. If this condition has not been satisfied within ten (10) years after the death of the Surviving Settlor, this Trust shall terminate and be distributed in accordance with paragraph 4.8.f. below as if BENEFCIARY had died without issue.

Appendix B

LAST WILL AND TESTAMENT

OF

WILLIAM HENRY BRAUN, JR.

I, WILLIAM HENRY BRAUN, JR. a resident of Los Angeles County, California, state that this is my Last Will and Testament, and I revoke all Wills and Codicils which I have previously made.

ITEM I

I am not married, and I have never been married. I have no children, and I have never had any children.

ITEM II

I have numerous blood relatives, and I have already given them everything that I want them to have. Regardless of what circumstances exist now, or occur in the future, I do not want any of them to receive any portion of my Estate. If anyone appears who claims to be a blood relative, or claims that I don't know him or her, or claims that I have forgotten him or her, then I still do not want this individual to receive any portion of my Estate.

ITEM III

I appoint Clarence Stratton Lindenmeyer to be Executor of my Estate, to act without Bond. He is currently living at 4544 Talofa Avenue, Toluca Lake, California 91602. In the event that he is not willing or able to be the Executor of my Estate, then I want the following individuals to be offered the position of Executor of my Estate: First, RICHARD KAPNICK, who is

William Henry Braun Jr

currently living at 10741 Moorpark Avenue, Apartment #19, North Hollywood, California 91602. Then next in line is David Gibson, who is President of David Gibson Escrow Company, which is located at 6351 Owensmouth Avenue, Suite 101A, Woodland Hills, California 91367. Then next in line is Peggy Ann Gibson, wife of David Gibson, who works at the same address as David Gibson.

ITEM IV

I direct my Executor to pay all my just debts.

ITEM V

I specifically do NOT want to be buried in the ground, even on a temporary basis. I do NOT want to be cremated. I want my physical body to be placed in a Mausoleum. I want a parcel of land to be purchased as a Memorial Park, and I want my Mausoleum to be built there. I want the land to be in either Ventura County, California or Los Angeles County, California, but preferably Ventura County. I want the base of the Mausoleum to be at least Thirty Feet by Fifty Feet (30 x 50 feet), and the height to be at least Twenty Feet (20 feet). If I die before the Mausoleum is complete and ready for me to occupy, then I want my physical body to be stored above ground until it can be placed in my Mausoleum. I also want several other building to be constructed in the Memorial Park, including but not limited to a house for a full time security guard for the Memorial Park, and a building for an office in which to manage the Memorial Park, and a small

William Henry Braun Jr
2.

Mausoleum for my friends.

ITEM VI

I want my Executor to keep my Estate in tact. I want the cost of my Mausoleum not to exceed Fifty Percent (50%) of the total value of my Estate, and the cost of the land for the Memorial Park not to exceed Ten Percent (10%) of the total value of my Estate.

ITEM VII

I want at least Twenty Five Percent (25%) of the net income from my Estate to be set aside for the guarding, protecting and maintenance of my Mausoleum and Memorial Park, and any money not spent one year to be added to the money for the following year.

ITEM VIII

My Executor should feel free to take whatever money he thinks is fair and proper as compensation for his work and effort, but not to exceed Twenty Five Paercent (25%) of the net income from my Estate.

ITEM IX

The money remaining from the net income of the Estate,, I want to be divided into two equal parts. The first part shall be added to the Estate so that the Estate will increase in value each year. The second part shall be used to provide scholarships for students majoring in Computer Science, Mathematics and Art.

William Henry Braun Jr

ITEM X

If any person challenges this Will, then that person will receive
One Dollar (\$1.00)

ITEM XI

I have signed each page in this Will in this manner: "William
Henry Braun, Jr."

William Henry Braun Jr June 1, 2004
William Henry Braun, Jr.

G. Deering
Witness

[Signature]
Witness