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William D. Lucius, Esq.
Director, Special Needs Trusts
Raymond James Trust, N.A.

A Corporate Trustee's Perspective – Drafting Mistakes to Avoid

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

I. INTRODUCTION

Many practitioners in the special needs and disability rights space whether they be practicing attorneys, fiduciaries, advocates, and related professionals will undoubtedly find the representation of individuals with special needs and disabilities immensely rewarding. Housing, discrimination, access to a free and appropriate education, estate and long-term care planning, litigation, entry into the maze of state and federal governmental agencies, and criminal justice reform are a few of the many topical areas where a practitioner can add value to a client facing the myriad, daily challenges that are presented when living with a disabling mental or physical impairment.[1] Notwithstanding the benefits that inure to the client and practitioner alike in special needs planning and practice, the drafting and administration of special needs trusts ("SNT") [2] in particular carries with it a set of complex challenges unique to the overall legal, health, and social issues facing such a client.

Setting aside certain profound income and insurance-related public (or private) benefits,[3] for many SNT beneficiaries the trusts for which they maintain a beneficial interest often

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[1] In 2003, the National Academy of Elder Law Attorneys (NAELA), a premier nationwide consortium of elder law and disability rights attorneys, modified the organization's mission to include the provision of legal services to "improve the lives of people with special needs." *See* National Academy of Elder Law Attorneys, *History*, https://naela.org/Web/About_Tab/History_and_Standards/History_and_Standards_Sub_landing/History.aspx (last accessed September 2021). Accordingly, the definition of "elder law and special needs planning" is immensely expansive. Molly Abshire, CELA, *What is Elder Law?* https://www.naela.org/TXNAELA/Texas_NAELA_Blogs/AbshireWhatiselderlaw.aspx (last accessed September 2021).

[2] "Special Needs Trust" (SNT) as used in this outline will refer to both first-party SNTs, funded with the assets of a beneficiary with a disability and created pursuant to Title 42 U.S.C. § 1396p(d)(4)(a), as well as third-party SNTs, funded with the assets of a third party and an advent of state law. This outline will use "SNT" interchangeably but note the relevant distinctions between a first and third-party SNT where applicable. Intentionally omitted are Pooled Special Needs Trusts created pursuant to Title 42 US.C. § 1396p(d)(4)(c) and Qualified Income Trusts set forth in Title 42 US.C. § 1396p(d)(4)(b). The author will proceed with the understanding that the reader is familiar with the purposes, definitions, and distinguishing characteristics of all SNTs.

[3] Beyond the scope of this article are the myriad public benefits programs and attendant eligibility requirements, such as Supplemental Security Income ("SSI"), Medical Assistance ("Medicaid"), Supplemental Nutrition Assistance Program ("SNAP"), heating assistance programs, subsidized housing, and certain Veterans benefits. Also, entitlement programs and underlying eligibility parameters, such as Social Security Retirement and Disability Benefits and Medicare, will not be discussed. The author assumes the reader is familiar with these various programs and how such programs are relevant to the topic addressed in the outline.

represent the sum total of all income and assets that will be available to subsidize their immediate and long-term housing, medical, social, recreational, and therapeutic needs. For the practitioner, the establishment and preservation of public benefits eligibility, coupled with an objective to preserve the trust corpus for as long as possible while using the income and principal in such a way to enrich the beneficiary's life, can make the SNT drafting and administration process a herculean feat. At a time where the United States is seeing a marked increase in the number of clients to be served in the special needs planning space there also exists a concurrent rise in malpractice claims and fiduciary litigation that gives a drafting attorney and professional fiduciary pause.[4] To combat the challenging dichotomy between meeting the needs of an ever-increasing client base representing the most vulnerable among our population while doing so in a way that expands the number of practitioners willing to serve in this field requires, at a minimum, that a proper foundation is laid that best meets the client's needs and stated goals in a way that is compliant with applicable state and federal statutes, rules, and regulations.

For SNTs, the subset of special needs planning that will be the focus of this outline, both sound drafting and trust administration is paramount to achieve the above-stated aspirational goals requiring collaboration between the client, drafting attorney, and appointed fiduciary before, during, and after the establishment of the trust. What follows is a brief synopsis of select SNT drafting and administrative considerations from the vantage point of a corporate fiduciary,[5] to include issues of trust formation and termination; appointment, resignation, removal, and

[4] There are currently 61 million adults in the United States with a disability. Centers for Disease Control and Prevention, *Disability Impacts All of Us,* https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (last accessed September 2021). Furthermore, in Wisconsin, for example, estate, probate, and trust law produced the most legal malpractice claims in 2020. Thomas J. Watson, *Managing Risk: 2020's Top 5 Risky Practice Areas,* 94 Wis. Lawyer Vol. 2 (February 9, 2021).

[5] Although there are a variety of fiduciary capacities in which a layperson, professional, or corporate entity may serve, this outline will be from the vantage point of a corporate fiduciary serving in the role of trustee, co-trustee, or directed trustee. Not included in this conversation are considerations pertaining to an individual trustee, nor other fiduciary roles such as guardian, conservator, agent, etc.

successor trustee nomination; and challenging dispositive provisions. Beyond the scope of this article are discussions on whether a SNT is required in a particular instance, benefits eligibility issues, the appropriateness of naming a corporate fiduciary to serve as trustee or the difficulties that may arise when an individual trustee is called upon to serve.

With over fifty nationally chartered active trust companies currently regulated by the Office of the Comptroller of the Currency ("OCC") [6] in addition to the scores of state chartered trust companies throughout the nation — all managing hundreds of billions of dollars in fiduciary accounts that include numerous SNTs and settlement preservations trusts — the lens through which the corporate trustee sees a governing instrument should provide invaluable insight to the drafting attorney when counseling a client on the purposes, benefits, and administration of SNTs.

II. CREATION AND TERMINATION

As the first national codification of trust law in the United States, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all States the Uniform Trust Code in 2000.[7] This resulted from the rise in the use of trusts for commercial and family estate planning purposes, which by extension includes SNTs and other irrevocable trusts for the benefit of individuals with special needs or disabilities.[8] Comprising eleven Articles, the stated goal of the UTC is to provide "precise, comprehensive, and easily accessible guidance on trust law questions."[9] While only a model for adoption by the

[6] Office of the Comptroller of the Currency, *Financial Institutions Lists,* https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html (as of August 31, 2021).
[7] Uniform Trust Code (last revised 2010), *Prefatory Note.*
[8] *Id.*
[9] *Id.*

States, a majority of States have adopted the UTC in some form and those that have not continue to view the UTC as a model to follow as evidenced by the recent introduction in the New York legislature.[10] Accordingly, many corporate fiduciaries will look to the UTC, along with corresponding state and federal statute, for matters of trust interpretation and to assess the validity of a particular trust or trust provision. It is encouraged that drafting attorneys do so as well. Against this backdrop, the remainder of the outline will emphasize the corresponding provisions of the UTC, where applicable.

A. Creation - Compliance with Applicable Federal and State Law

Many corporate fiduciaries, especially those regulated by the OCC, have mandated written policies and procedures that include a required pre-acceptance review of a governing instrument, as well as the current assets comprising the investment portfolio, prior to the corporate trustee's acceptance to serve. The pre-acceptance process will often include a determination of whether the trust was validly created and properly executed. Although the drafting attorney should be intimately familiar with applicable state law on the creation of a trust, the UTC posits that a trust may be created by 1) the transfer of property to a trustee during the settlor's lifetime, by will, or other disposition taking effect upon the settlor's death; 2) a declaration that an owner of property holds identifiable property as trustee; or, 3) the exercise of a power of appointment in favor of a trustee.[11]

Moreover, among other elements, required for a valid trust the settlor 1) must have capacity and indicate an intent to create the trust; 2) the trust must have an ascertainable

[10] *See* Uniform Law Commission, *2000 Trust Code,* https://my.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d (last accessed September 2021).
[11] Unif. Trust Code § 401(1)-(3).

beneficiary; and 3) the trustee must have duties to perform.[12] In addition, most states will require certain formalities of execution to give rise to a valid trust even to the extent of requiring trusts be executed with the same formalities as a last will (i.e. in writing, signed by the settlor, properly witnessed, and in some states, notarized).[13]

Where third-party SNTs are largely an advent of state law, first-party SNTs have the higher burden of compliance with the federal enabling statute for SNTs.[14] This includes verification the trust 1) contains only those assets of an individual under age 65 who is disabled (as defined by 42 U.S.C. § 1382c(8)(3); 2) which is established "for the benefit of such individual;"[15] 3) by the individual, a parent, grandparent, legal guardian of the individual, or a court; and 4) with assurance in the governing instrument that the "State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter."[16]

To this end, during the pre-acceptance review process corporate fiduciaries will find simple yet profound errors that preclude acceptance based upon irregularities arising from the following general checklists:

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[12] Unif. Trust Code § 402.
[13] For example, Fla. Stat. Ann. § 736.0403(West)(current through 2021 Leg. Sess.), requires a revocable trust to be executed with the same formalities as a last will.
[14] Title 42 U.S.C. § 1396p(d)(4)(a).
[15] The "sole benefit rule" and the subsequent relaxing of this standard to a "primary benefit" application as set forth in the Social Security Administration Program Operations Manual System (POMS) is beyond the scope of this outline. The author will assume the reader's familiarity with the application of this rule to a SNT beneficiary receiving Supplemental Security Income (SSI). For a good article in this regard see Anna Sappington, *The Social Security Administration's Policy Overhaul: A Practitioner's Guide to the 2018 Special Needs Trust POMS Revisions,* https://www.naela.org/NewsJournalOnline/OnlineJournalArticles/OnlineSept2019/SSAPolicyOverhaul.aspx?subid=1096 (September 2019).
[16] Title 42 U.S.C. § 1396p(d)(4)(a).

1) Was the trust properly created through a transfer of assets, established under a last will or other testamentary document, or by a valid exercise of a power of appointment?
2) Is there any indication that the settlor lacked the requisite capacity to create a trust, and if applicable, did the person acting on behalf of the settlor have the legal authority to create the trust in the settlor's stead?
3) Were all required signatures present on the applicable documents (i.e., the last will, trust, power of appointment, amendments, etc.)?
4) Are all pages and corresponding amendments complete and available?
5) Was the trust properly witnessed, and if applicable, notarized? (Note – due to COVID certain states have leaned heavily on electronic notary statutes which have led to errors in execution)[17]
6) For first-party SNTs, was the trust a) properly established for the benefit of an individual under age 65; b) who has been determined disabled (as defined by 42 U.S.C. § 1382c(a)(3); c) containing only those assets of such person; d) created by only the permissible parties referenced in §1396p(d)(4)(a) (Note – if established by court order, is a copy of the final order on file with due notice to all interested parties and was the trust executed before or after the court order establishing the same?); e) irrevocable, and f) does the trust have a valid termination provision providing for Medicaid recovery?

Apart from confirming the validity of a particular trust by the corporate trustee being called upon to serve, this checklist is particularly relevant among SNTs insofar as the applicant

[17] Effective 2021, for example, in Florida any document requiring notarization may now be notarized electronically. Fla. Stat. Ann. § 117.021 and § 668.50(West)(current through 2021 leg. sess.).

for Supplemental Security Income (SSI) has an obligation to report all resources at the time of application, both excluded and countable, and the recipient of SSI has an affirmative obligation to timely notify the Social Security Administration of any changes, which includes the funding of a special needs trust for the recipient's benefit.[18] In certain states, this requirement extends to the applicable state Medicaid agency for recipients of, or applicants for Medicaid.

Regarding first-party SNTs, by providing a copy of the trust and trust account statement, a SSA representative will follow a nine-step, detailed trust review process to confirm the respective trust comports to the above-referenced requirements of § 1396p(d)(4)(a) and is thereby excluded as a resource.[19] Failure to comply with the many nuances of this agency requirement can result in an adverse determination and possibly the denial or termination of benefits, thus mooting the benefits of the SNT. For example, certain states do not allow for a trust to be established without "seed" funding.[20] For drafting attorneys who reference a Schedule of Assets in the governing instrument or provide for a $10 bill or other nominal amount as initial funding, it is paramount that the receipt of this initial funding is received by the trustee and deposited before any further funding so that it appears as the initial deposit on the trust account statement. As an aside, third-party SNTs can benefit from a completed schedule of assets referenced in the trust for taxation (i.e., original cost basis information) and accounting purposes.

Drafting attorneys should give due care to ensure that a SNT is properly created and funded. This includes confirmation that SSA (and the appropriate state Medicaid agency) has been notified by either the beneficiary, the beneficiary's representative, drafting attorney, or trustee via certified mail, if appropriate. Simple mistakes whether through drafting error that

[18] Social Security Administration Program Operations Manual System SI 02301.005.B
[19] Social Security Administration Program Operations Manual System SI 01120.203.I.
[20] For a general discussion on the treatment of "Medicaid Trust Exceptions" see Social Security Administration Program Operations Manual System SI 01120.203.I.

comes with trust document preparation software or the use of boilerplate language, failure to review the document prior to and after execution, a settlor's lack of requisite capacity or the absence of an agent's authority to create a trust on behalf of her principal, and non-compliance with the federal enabling statute for first-party SNTs can give rise to a litany of legal and benefits-eligibility issues before the trust administration process even begins. As the POMs posit, simply referring to a trust as a SNT, "OBRA '93 Trust," or "Medicaid Payback Trust," without more, does not make it so.[21]

B. Termination – State Medicaid Reimbursement and Disbursement Language

There are many types of trusts that serve many purposes; accordingly, there are a variety of reasons that a trust may terminate. Among these reasons, as posited by the UTC, a trust terminates to the extent it "…expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve."[22] In addition, judicial proceedings may be commenced by the trustee or beneficiary to request, approve, or disapprove a modification or termination.[23] Furthermore, with the rise of non-judicial modification agreements, a trust may terminate without court involvement by agreement and consent of all interested parties.[24] Lastly, a trust may also be terminated due to unanticipated circumstances,[25] as well as where the value of the trust corpus becomes uneconomic to administer.[26]

[21] Social Security Administration Program Operations Manual System SI 01120.203.B.10.
[22] Unif. Trust Code § 410(a).
[23] Unif. Trust Code § 410(b).
[24] Unif. Trust Code § 111(b).
[25] Unif. Trust Code § 412.
[26] Unif. Trust Code § 414. Note, terminating a SNT for this purpose should be met with caution insofar as the lump-sum distribution of the remaining trust corpus may interfere with the beneficiary's eligibility for certain means-tested benefits programs.

Because SNTs are primarily irrevocable trusts designed to last the length of the beneficiary's life a SNT often terminates at the death of the primary beneficiary, the recovery from a disability and subsequent disenrollment from entitlement programs, or upon exhaustion of the trust corpus notwithstanding the various other reasons and methods by which a trust may terminate as referenced above. Given the trustee's duty upon termination to "proceed expeditiously to distribute the trust property to the persons entitled to it"[27] a corporate fiduciary will be acutely aware of the termination provisions of a particular SNT prior to acceptance. Consequently, the drafting attorney should give equal attention to the termination provisions of a SNT as with other important dispositive provisions of the trust at the initial stages of the trust's formation.

Third-party SNTs are free of the strictures regarding mandatory state Medicaid reimbursement provisions discussed below and should not contain such provisions. Nonetheless, the termination provisions within such a trust require forethought between the drafting attorney and settlor alike. Overly burdensome termination language can dissuade a fiduciary from accepting *ab initio*, or more importantly, cause unintended downstream costs such as increased trustee fees, additional expenses, sustained tax reporting requirements, extended accountings, the possibility of judicial involvement, and more. For example, a SNT that 1) terminates upon the death of the beneficiary with the remaining balance to be distributed to a litany of resulting trusts for the benefit of numerous other individuals where the value of the remaining corpus is anticipated to be modest, 2) contains termination provisions with overly broad language that provides discretion to the trustee or other party on the ultimate disposition of the trust assets, or 3) has vague and ambiguous termination language requiring judicial intervention in the absence

[27] Unif. Trust Code § 817.

of insight from an available drafting attorney or settlor can all lead to an ineffective trust administration process. Although there has been a shift toward giving greater emphasis on beneficiary autonomy under a trust document,[28] this shift in focus does not circumvent the need for a drafting attorney to use the consultation period to outline the various challenges that may be presented upon the termination of the trust while attempting to comply with the settlor's objectives.

Conversely, the drafting attorney and settlor should be more clear-eyed on the termination provisions of a first-party SNT insofar as a valid first-party SNT must contain express language that the "State will receive all amounts remaining in the trust upon the death" of the beneficiary "up to an amount equal to the total assistance paid on behalf" of the beneficiary.[29] In fact, the trust must provide for Medicaid payback language for any state that may have provided the beneficiary with Medicaid benefits and not be limited to a particular state.[30] Recall for purposes of SSI eligibility, and in many states by extension Medicaid eligibility, "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, or a (MQT) is not sufficient to meet the requirements" of the trust exceptions set forth in the Social Security Act.[31]

This is not precatory in nature or scope. A drafting attorney shall provide for Medicaid recovery at the death of the beneficiary, must provide recovery for any state that may have provided Medicaid benefits to the beneficiary, and not limit said recovery to a particular state or to a specific period of time after establishment of the trust. In fact, the state must be listed as the primary remainder interest under the governing instrument and maintain a super priority over

[28] Thomas P. Gallanis, *The New Direction of American Trust Law,* 97 Iowa L. Rev. 215, 216 (2011).
[29] Title 42 U.S.C § 1396p(d)(4)(a).
[30] Social Security Administration Program Operations Manual System SI 01120.203.B.10.
[31] *Id.*

any other debt or expense except certain allowable but limited administrative expenses, such as state or federal taxes due from the trust as a result of the primary beneficiary's death and reasonable trust administration fees (i.e. court accountings, completion of filing documents, or "other required actions associated with terminating and wrapping up the trust").[32] The failure to include the required state Medicaid payback provision in a first-party SNT or an attempt by the drafting attorney to elevate other priorities above that of the state, like taxes due for residual beneficiaries, the payment of debts owed by third parties, payments to residual beneficiaries, and even funeral expenses, will be the death knell for the trust to be considered an exempt resource by SSA.[33]

Assuming the first-party SNT contains a valid Medicaid payback provision, to the extent funds remain after such repayment to the state(s) often the trust directs the remaining balance to be distributed pursuant to the valid exercise of a power of appointment, to the beneficiary's estate, or to the beneficiary's intestate heirs. Should the beneficiary fail to have exercised her power of appointment through incapacity or lack of planning, where possible provisions allowing for payment to the beneficiary's intestate heirs rather than to the beneficiary's estate may avoid the need and attendant costs of opening an estate where one may not have otherwise been required.

Trust creation and termination are the bookends of the trust administration process. Many drafting attorneys justifiably focus primarily on the dispositive provisions of the trust that will impact the beneficiary while alive and able to benefit from the many features of a properly created SNT; however, a drafting attorney should not overlook the importance of confirming the trust was validly created under applicable state and federal law and regulation and will terminate

[32] Social Security Administration Program Operations Manual System SI 01120.203.E.1.
[33] Social Security Administration Program Operations Manual System SI 01120.203.E.2.

in accordance with said law and regulation in order to best ensure the settlor's objectives are met, the beneficiary's eligibility to crucial state and federal benefits will not be impeded, and the fiduciary has clear guidance at the inception and conclusion of the lifespan of the SNT.

III. OFFICE OF TRUSTEE

A. Appointment and Compensation

While the drafting attorney, settlor, and other interested parties in the trust formation stages will have many important decisions to confront none may be as profound as the selection of a trustee(s). Considerations for the selection of an appropriate trustee (i.e., corporate/professional fiduciary vs. individual, layperson vs. professional, family members vs. disinterested party, etc.) are beyond the scope of this outline; however, it should be underscored that the drafting attorney can add immense value by discussing with the settlor the rights, duties, and obligations of a trustee under a SNT and should equally confirm with the proposed trustee the willingness, ability, and skills to accept such a role.[34]

Once a trustee has been identified, properly appointing the proposed trustee and securing a valid acceptance is critical so that the trust administration process may begin (or continue in the event a successor trustee is being called upon to serve). Though a person designated as trustee may act to preserve trust property or investigate trust property to determine his, her, or its exposure to liability without accepting the trusteeship,[35] a person or entity nominated as trustee must accept trusteeship by either 1) substantially complying with a method of acceptance provided in the terms of the trust; or 2) in the absence of express terms in the trust, by accepting

[34] Rebecca A. Hajosy, *Who Should be the Trustee of a Special Needs Trust,* https://thearc.org/blog/who-should-be-the-trustee-of-a-special-needs-trust/ (September 2015).
[35] Unif. Trust Code § 701(c)(1)-(2).

delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of trusteeship.[36] Of course, a nominated trustee may decline to serve and reject the trusteeship, and will be deemed to have rejected trusteeship if the nominated trustee does not accept within a reasonable time after being informed of the designation.[37] While there is not a requirement that a nominated trustee provide a formal rejection, best practices would suggest that the nominated trustee provide a "clear and early communication" of the rejection.[38] Securing a formal rejection will be necessary inasmuch as the successor trustee will likely ask for documentation confirming the prior, nominated trustee declined to serve.

Similarly, if possible, the drafting attorney should confirm and retain documentation evidencing the nominated trustee has formally accepted trusteeship through the method set forth in the governing instrument or applicable state law. Verifying the trustee formally accepted, in writing, is paramount for a variety of reasons to include 1) timely satisfying any notice requirements to qualified beneficiaries of the trustee's acceptance;[39] 2) ensuring there is proper documentation for future reference to continue the chain-of-title for recorded instruments pertaining to trust-owned property; 3) to evidence the authority of the trustee to transact business on behalf of the trust; 4) providing notice of trusteeship to any state or federal agency for which the beneficiary derives benefits; and 5) to preserve the record for any accounting issues or disputes that may arise later. There are many instances in which recently created SNTs lack the trustee (or other relevant party) signature on the governing instrument, or a formal acceptance

[36] Unif. Trust Code § 701(a)(1)-(2).
[37] Unif. Trust Code § 701(b).
[38] Unif. Trust Code § 701 cmt.
[39] For example, Fla. Stat. Ann. § 736.0813(1)(a) (West) requires "within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust…".

was not otherwise obtained, which creates administrative burdens when the putative trustee attempts to transact business on behalf of the trust.

When naming a corporate fiduciary, the drafting attorney should reach out to the fiduciary in advance of drafting the trust to determine whether the fiduciary has any suggested or preferred language that should be included in the governing instrument. Such language often will provide for the legal name of the trustee, acceptance of real property with the inclusion of language allowing the trustee to take action to abate environmental law violations, the release of liability of a successor trustee, the power to resign, the power of the trustee to engage affiliates or subsidiaries to provide investment management, brokerage, or custodial services on behalf of the trust, and trustee compensation. Open dialogue between the drafting attorney and nominated trustee during the trust formation and trustee nomination/acceptance process will minimize delay in the trustee acceptance process and receipt of initial funding (or the receipt of assets from a prior trustee).

Of course, the nominated trustee will likely ensure that the draft trust specifies the terms of the trustee's compensation and reimbursement of expenses. In the absence of express language in the trust, the trustee is entitled to compensation that is "reasonable under the circumstances."[40] The reasonableness standard takes into account the customary charges in the local community, the trustee's relevant skill and experience, the time devoted to trust duties, amount and character of the trust property, degree of difficulty and responsibility assumed in administering the trust (to include the need to make discretionary distributions), and the quality of the trustee's performance.[41] While a trustee and beneficiary may enter into an agreement for

[40] Unif. Trust Code § 708(a).
[41] Unif. Trust Code § 708 cmts.

trustee compensation,[42] it is likely that a corporate fiduciary will request the drafting attorney reference the fiduciary's published fee schedule. While courts do not automatically approve a corporate trustee's published fee schedule, such schedules are often approved notwithstanding they are subject to the same standard of reasonableness.[43] The drafting attorney should obtain the nominated trustee's published fee schedule and review the same with the client so that the settlor and other interested parties are fully apprised of all trust administration, investment management, and extraordinary fees and expenses that will be assessed to the trust account. Finally, to the extent that a particular state's Principal and Income Act or equivalent statute deviates from a fifty percent allocation of trustee compensation between trust principal and income, the drafting attorney should include in the trustee compensation language the proper allocation that is consistent with applicable state law.[44] An awareness of the total compensation to be assessed to a trust account by a nominated trustee is important for the drafting attorney to understand for a variety of reasons, including the likelihood of those costs increasing further when the drafting attorney is considering naming other professionals to serve alongside the nominated trustee.

B. Multi-Participant Trusts

As referenced previously, the selection of an appropriate trustee is often one of the more profound decisions made in the trust formation process by the drafting attorney, client, and nominated trustee. This is especially true for SNTs considering the trustee will not only be responsible for the investment management and administrative matters of a trust designed, in part, to sustain a beneficiary with special needs or a disability for as long as possible and enrich

[42] *Id.*
[43] *Id.*
[44] As set forth in § 501 of the Uniform Principal and Income Act (1997), trustee compensation is charged equally one-half to income and one-half to principal.

her life beyond what public benefits programs otherwise provide, but the trustee is often equally called upon to coordinate, manage, and supervise most facets of the beneficiary's life and wellbeing which goes to the provision of holistic legal services in the elder law and disabilities rights arena discussed previously.[45] As a result, the initial conversations on selecting an appropriate trustee often steer toward determining whether one trustee may be able to fully meet the needs of a SNT beneficiary or if others should be leveraged as well. The answer to this question may lead the drafting attorney to recommend the establishment of a multi-participant trust whereby the trust is comprised of multiple trustees, distribution directors, advisors, committees, or trust protectors ("powerholders") each with a distinct role and purpose.[46] These powerholders may be able to compel a trustee to take or refrain from taking an action and otherwise encroach upon the functions customary to the traditional trustee, but the powerholders may also provide the space for the trustee to focus on his, her or its core skillset.[47]

Multi-participant trusts, to include directed trusts, are an offshoot of the advent of trust protectors from several decades ago and can add value to the trust administration process by providing for trustee oversight, monitoring trustee conduct, opining on discretionary requests, changing situs, effectuating trust modification, ratifying trust investment concentrations and directing trust investment decision-making, providing insight to the needs of the SNT beneficiary, ensure the trust administration is consistent with the settlor's intent, resolve disputes, and remove/appoint successor trustees.[48] As evidenced by the increasing number of states adopting the Uniform Directed Trust Act, for example, multi-participant trusts will be more

[45] 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).
[46] William D. Lucius and Shirley B. Whitenack, *Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties, and Liabilities in Special Needs Planning,* 1 NAELA Vo. 15, 2 (Fall 2019).
[47] *Id*. at page 2.
[48] Whitenack, *supra* n. 46 at pg. 4.

commonplace in modern estate planning practices.[49] Yet, as the UTC warns "cotrusteeship should not be called for without careful consideration."[50] Nor should the creation of a multi-participant SNT comprised of a collage of dedicated individuals and professionals that may impede rather than improve an effective trust administration experience for the SNT beneficiary.

Foremost, when drafting multi-participant trusts the drafting attorney should ascertain the settlor's intent and objectives to be met in having a trust with more than one traditional trustee by determining whether such an arrangement is truly necessary under the circumstances. The drafting attorney should confirm with the settlor why a particular powerholder will add value to the beneficiary and trust administration process, as well as confirm with the settlor the likelihood increased fees will flow from the addition of powerholders to the trust.[51] Moreover, the drafting attorney should be aware of and consider language addressing dispute resolution among the parties if a multi-participant trust is determined appropriate to avoid inaction often arising from a committee decision-making process, in addition to clearly delineating the roles and responsibilities of all trust participants.[52] Of particular import to the nominated trustee (or the ability to locate a trustee willing to serve in a multi-participant trust), the drafting attorney should be aware of any protections afforded by state law to a trustee who may be directed by another party.[53] This last point may require the inclusion of exculpatory language to the extent consistent with state law.[54] In any event, caution should be employed by the drafting attorney where consideration is given to naming third parties to a trust agreement that may ultimately interfere

[49] *See* Uniform Law Commission, *2017 Directed Trust Act,* https://www.uniformlaws.org/committees/community-home?CommunityKey=ca4d8a5a-55d7-4c43-b494-5f8858885dd8 (last accessed September 2021).
[50] Unif. Trust Code § 703 cmt.
[51] Unif. Directed Trust Act § 16 cmts.
[52] For example, Unif. Trust Code § 703(a) states that "cotrustees who are unable to reach a unanimous decision may act by a majority decision," which does not give much guidance in the event there are only two trustees with no dispute resolution process outlined under the terms of the trust.
[53] Whitenack, *supra* n. 46 at page 12.
[54] Whitenack, *supra* n. 46 at page 16.

with a fiduciary's ability to achieve the fundamental objectives of the SNT. Nevertheless, multi-participant trusts may serve a particular client's need by using a cross-section of dedicated professional fiduciaries and individuals to best manage the profound needs presented at times by a SNT beneficiary who may require the immense support and services of others.

C. Resignation, Removal, and Successor Trustee Appointment

Vacancies in trusteeship occurs where 1) a person designated as trustee rejects trusteeship; 2) a person designated as trustee cannot be identified or does not exist; 3) upon trustee resignation; and 4) where the trustee is disqualified, removed, or dies.[55] Vacancies in trusteeship must be filled unless one or more cotrustees remain in office.[56] Accordingly, the drafting attorney should envision the events upon which a vacancy in trusteeship may arise and plan accordingly through the nomination of one or more successor trustees who have expressed the ability to serve if called upon. As the comments to Section 704 of the UTC posit, "good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies." In fact, the person or entity named in the governing instrument maintains the highest priority for appointment underscoring the importance of attention to the resignation, removal, and successor trustee appointment language employed.[57]

A drafting attorney should always provide for a trustee resignation process within the terms of the trust insofar as a vacancy in trusteeship most often arises through the resignation of the current trustee. Reasons for the resignation of a SNT trustee are varied, but may be

[55] Unif. Trust Code § 704(a)(1)-(5).
[56] Unif. Trust Code § 704(b).
[57] Unif. Trust Code § 704(c)(1).

influenced by 1) whether the trustee is a professional or layperson; 2) time commitment involved and substantive knowledge necessary to administer a SNT; 3) preserve familial relationships; 4) when the trust becomes uneconomical for a professional trustee to administer; 5) investment concentrations giving a fiduciary pause; 6) reputational risks; 7) capacity constraints on the part of the fiduciary; 8) to minimize conflict and/or avoid removal; or 9) to remediate a breach of trust. Regardless of the reason, where the trustee is no longer able to perform his, her, or its functions in the best interest of the beneficiary,[58] the trustee should consider resignation and the governing instrument should stand ready for the process to appoint a successor.

A trustee could not resign as a matter of right in the early 20th century and absent express language in the governing instrument the trustee was only permitted to resign by court approval or by consent of the beneficiaries.[59] Modern trust law has evolved and a trustee may now resign upon at least 30 days' notice to the qualified beneficiaries, settlor (if living), and all co-trustees; or, with approval of the court.[60] To the extent the drafting attorney and settlor do not wish for the default rules to apply the resignation provisions of the governing instrument should be reviewed thoroughly to best effectuate the settlor's intent. However, if the resignation provisions are overly burdensome it may be difficult to locate a professional trustee willing to serve. Corporate trustees, in particular, will often request draft language that provides for the ability to resign with 30 days' notice to the beneficiary(s) consistent with the UTC. Deviating from these established default rules can lead to increased trustee fees, court costs, and a delay in the transfer of assets to a successor trustee.

[58] Unif. Trust Code § 404 requires a trust and its terms must be for the benefit of its beneficiaries.
[59] Unif. Trust Code § 705 cmts.
[60] Unif. Trust Code § UTC 705(a)(1)-(2).

Apart from the voluntary resignation of a trustee, untoward action and serious breaches of trust have long been grounds for trustee removal.[61] Similar to resignation language, sound drafting practice dictates the inclusion of removal language in the governing instrument as well. Particularly, who possesses the authority to remove the trustee. Absent such language, a trustee of an irrevocable trust may be removed by court order.[62] Should the drafting attorney and settlor wish to avoid the attendant costs and expenses associated with seeking a court order for such purposes the governing instrument should clearly delineate who has the authority to remove the trustee, under what circumstances, and outline the process involved for taking such action. It should be noted, though, that while "trustee removal may be regulated by the terms of the trust"[63] it is not without pause. Vesting the power to remove in the settlor could cause the trust to be inadvertently included in the settlor's federal gross estate,[64] vesting the power to remove in the beneficiary of a SNT may be met with hesitation by SSA and the applicable state Medicaid agency as well as lead to a slippery slope where removal is sought over disputes arising from the denial of discretionary distribution requests, and vesting removal in a third-party powerholder may invite unnecessary or unwanted involvement in the trust administration process.[65] Regardless, the ability to remove a wayward trustee timely and in a cost-efficient manner only serves to better the trust administration process for the SNT beneficiary.

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[61] Unif. Trust Code § 706 cmts.
[62] Unif. Trust Code § 706(b) states that a court may remove a trustee if 1) the trustee has committed a serious breach of trust; 2) lack of cooperation among cotrustees substantially impairing the administration of the trust; 3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively; and 4) if there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries.
[63] Unif. Trust Code § 706 cmts.
[64] *Id.*
[65] For example, for trustees governed by the O.C.C., a holder of a power to remove is considered a "powerholder" and is subject to certain regulations under the federal statutes pertaining to the Bank Secrecy Act ("BSA") and Anti-Money Laundering Act ("AML").

Whether by resignation at-will or removal, a (soon-to-be) former trustee must act expeditiously to transfer all trust property within its possession to the successor trustee.[66] Although a court may impose other restrictions while the trustee remains in office,[67] most often the former trustee will wish to effectuate the asset transfer process as soon as practicable to terminate any ongoing fiduciary responsibilities. Of more import to the SNT beneficiary, the trusteeship transfer process can be cumbersome and cause much needed distributions to remain in flux or otherwise unnecessarily disrupted thereby giving greater weight to the drafting attorney on the inclusion of sound successor trustee appointment language.

The document should give guidance to the former trustee on the period of time allowed to effectuate the transfer of assets. Note, a timeframe of thirty days or less, for example, is often unachievable insofar as mutual funds can take 3-6 weeks to transfer in-kind between institutions. Furthermore, the preferred reserve that the former trustee may retain for final administrative expenses and debts of the trust should be stated in the document. As it relates to the successor trustee, most corporate fiduciaries will look for language providing for all powers, authorities, and discretions conferred upon the prior trustee to extend to the successor yet absolving the successor trustee from personal liability arising from the act or failure to act by a predecessor.[68] Lastly, the drafting attorney should discuss with the settlor whether a corporate fiduciary is required under all instances. Often drafting attorneys will include language stating a successor trustee must be a corporate fiduciary maintaining significant assets under management over a

[66] Unif. Trust Code § 707(b).
[67] Unif. Trust Code § 707 cmts.
[68] In certain states, such as Florida, a successor trustee is not personally liable for actions of the prior trustee, nor does the successor trustee have a duty to institute any proceeding against a prior trustee for any of the prior trustee's actions under limited circumstances. Fla. Stat. Ann. § 736.08125(1)(West).

certain threshold which may foreclose the service of other qualified professional (or individual) fiduciaries from serving.

IV. TRUST ADMINISTRATIVE CONSIDERATIONS

A. Dispositive Provisions to Avoid and Consider

In addition to the overriding duties of loyalty[69] and impartiality,[70] the trustee of a SNT also maintains the foundational duty to administer the trust in good faith consistent with its terms,[71] as well as with prudence exercising reasonable care, skill, and caution.[72] These duties, coupled with an understanding that the terms of the trust prevail (except for certain mandatory rules imposed by applicable state law) and such terms must be "for the benefit of its beneficiaries,"[73] should compel the drafting attorney to avoid the inclusion of improper, ambiguous, or challenging dispositive provisions within the governing instrument. Otherwise, a trustee will be hamstrung from serving the needs of a SNT beneficiary to the best of his, her, or its ability in a timely and cost-effective manner.

A corporate trustee holding itself out as having specialized skills in the special needs space has the vantage point of reviewing and serving under numerous SNTs throughout a particular State or the United States. To that end, the corporate trustee will understand that SNTs are not (and should not be) boilerplate templates. First-party SNTs established by court order will often be subject to local court rules that require the inclusion of specific language.[74]

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[69] Unif. Trust Code § 802.
[70] Unif. Trust Code § 803.
[71] Unif. Trust Code § 801.
[72] Unif. Trust Code § 804.
[73] *See* Unif. Trust Code § 105 (b) and § 404.
[74] For example, SNTs established by court order in California, Arizona, Pennsylvania, and New Jersey, among other states, will have specific trust language to be employed within the governing instrument as a prerequisite for court approval.

Similarly, first-party SNTs subject to States with restrictive Medicaid regulations may require a particular format be followed or the inclusion of language that Agency permission be received prior to a trust distribution.[75] Also, third-party SNTs may result from a trust or last will that is decades old employing archaic language when special needs trusts were first coming to light and modern trust law was evolving or only be a few paragraphs in length imbedded in a larger document. Regardless, at its core a SNT is usually an irrevocable trust conferring absolute discretion within a trustee who was presumably selected for his, her, or its "special skills or expertise."[76] As such, it is paramount for the drafting attorney to avoid language that could limit the trustee's ability to adequately serve, impede the beneficiary's eligibility for certain state or federal benefits programs, or require judicial modification to comport to the settlor's original intent of preserving the beneficiary's eligibility for such programs.

Prior to the Social Security Administration softening the "sole benefit rule," overly broad and lengthy trustee guidelines within a SNT gave an SSA or Medicaid agency representative fodder for treating the SNT as a countable resource.[77] Certain practitioners consider the adage "less is better" appropriate when drafting trustee guidelines within a SNT. This allows for the trustee to fully exercise the discretion conferred under the instrument, adapt to changing beneficiary circumstances, and respond to the constant evolution of law and regulation. While it is true that trustees may benefit from a robust understanding of the beneficiary's social, medical, and therapeutic needs best known by the settlor and an ability to have broad powers to meet

[75] *See* Arizona Health Care Cost Containment System, *ALTCS Policies on Special Treatment Trusts,* https://www.azahcccs.gov/Members/Downloads/Publications/DE-819_english.pdf (last accessed September 2021).
[76] Unif. Trust Code § 806 states that "a trustee who has special skills or expertise or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.
[77] Sappington, *supra* n. 15.

those needs, a "Statement of Intent" or other precatory document outside of the four corners of the trust may be a more appropriate avenue in which to outline those wishes.[78]

More importantly, the fundamental purpose of a SNT is to preserve the beneficiary's eligibility for public and private state or federal benefits programs. Therefore, the inclusion of language that would interfere with a beneficiary's receipt of such benefits must be avoided. By way of example, a SNT should not contain boilerplate ascertainable standards language that could give rise to a finding that the SNT is a basic support trust (i.e., health, education, support and maintenance). Similarly, the SNT should not employ 5x5 ("Crummy Power") provisions common in Irrevocable Life Insurance Trusts, conduit language through improper drafting when an Individual Retirement Account is involved, nor allow for mandatory distributions of income or principal to avoid such distributions being considered unearned income or countable resources after the month received.

Apart from avoiding language that could defeat the purpose of a SNT, the inclusion of various precatory provisions may be beneficial to guide the trustee throughout the administration process. Such provisions include, but are not limited to 1) permitting distribution(s) to an ABLE account for the benefit of the beneficiary provided that the contribution does not exceed the annual contribution limit (from all sources) imposed by the IRC;[79] 2) an ability to amend the trust to ensure compliance with applicable state or federal law or regulation affecting state or federal benefits eligibility and affecting any tax or legal changes impacting trust administration; 3) removing the requirement for a bond in the event the trustee is a financial institution;[80] 4) a

[78] Larry Rocamora, *Letter of Intent,* 6 Special Needs Alliance Vol 3. (June 2009).
[79] Title 26 U.S.C. § 529A.
[80] Unif. Trust Code § 702(c) states a "regulated financial- service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust."

power to delegate;[81] 5) providing for the ability to compensate caregivers or case managers as well as pay attorneys and professionals to assist in the advocacy and legal protection of the beneficiary; and 6) a statement on when circumstances may change or the trust becomes uneconomical to administer necessitating early termination.

Drafting attorneys should thoroughly review all dispositive provisions of the draft SNT prior to execution to ensure it conforms to the settlor's intent and provides necessary guidance to the trustee and beneficiary alike, while comporting to the myriad state and federal statutes, rules, and regulations pertaining to trust law and public benefits eligibility.

B. Restricted and Addicted Behaviors

Substance use disorder, defined generally as a "maladaptive pattern of substance use leading to clinically significant impairment or distress," has been on the rise with almost 22 million Americans who met the criteria of this definition in 2013.[82] The prevalence of substance use (i.e., illicit drugs, prescription medication, alcohol consumption, etc.) continues to trend upward with nearly one in ten Americans over age 12 using alcohol or illicit drugs.[83] The costs of such a dilemma impacts the public writ large whether through the judiciary, correctional institutions, child protective services, insurance marketplace, and public benefits programs;[84] whereas, treatment to overcome this disorder is a patchwork of residential, outpatient, community, and facility-based programs that often do not fill the gap between those who need treatment and those who receive it.[85] Other addictive behaviors suffer the same pattern. For

[81] Unif. Trust Code § 807(a) permits a trustee to delegate duties and powers that a "prudent trustee of comparable skills could properly delegate under the circumstances."
[82] The Pew Charitable Trusts, *Substance Use Disorders and the Role of the States,* https://www.pewtrusts.org/~/media/assets/2015/03/substanceusedisordersandtheroleofthestates.pdf (March 2015).
[83] *Id.*
[84] *Id.*
[85] *Id.*

instance, nearly one percent of the adult population in the United States has a gambling disorder engaging in pathological gambling.[86]

Unfortunately, those with special needs and disabilities are not immune from these behaviors and resulting addictions. Interestingly, in a National Comorbidity Survey the vast majority of lifetime pathological gamblers also met one or more of the psychiatric disorders observed in the survey.[87] In addition, while understudied, it is estimated that Americans with an intellectual disability disproportionately suffer from substance use due, in part, to the disadvantages of poor health, low academic achievement, and unemployment than those without disabilities.[88] Furthermore, it is approximated that over 4 million Americans with disabilities have a co-occurring substance use disorder. In fact, more than fifty percent of people with TBIs, spinal cord injuries, and mental health challenges either use or abuse drugs and alcohol.[89]

Consequently, it should not be a surprise to the drafting attorney that there has been a rise in the use of substance abuse language in trusts as an attempt to use the financial leverage of a trust to compel change in a beneficiary suffering from addictive or other behaviors that a settlor may find unsettling or upsetting.[90] While the appropriateness (or not) of substance abuse language within a trust is far outside the scope of this outline, the drafting attorney of a SNT should proceed with the utmost caution by employing such language within the SNT, and conversely, using a SNT to confront a purely substance abuse-related issue.

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[86] National Center for Responsible Gambling, *Gambling Disorders,* https://www.icrg.org/sites/default/files/oec/pdfs/ncrg_fact_sheet_gambling_disorders.pdf (last accessed September 2021).
[87] *Id.*
[88] Shawna Chapman, *Substance Abuse among Individuals with Intellectual Disabilities,* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3328139/pdf/nihms360215.pdf (July 2012).
[89] American Addiction Centers, *Drug Rehab Centers for the Physically and Mentally Disabled,* https://americanaddictioncenters.org/rehab-guide/physically-mentally-disabled (last updated June 2021).
[90] Lauren Detzel and James Marion, *Go to Jail, Do Not Pass Go, Do not Collect $200: The Debate about Drug and Behavior Modification Language* presented at the 2018 State Bar of Florida Attorney-Trust Officer Conference.

While mandatory income and principal distributions should not be employed in a SNT as discussed above, overly restrictive language that directs the trustee to terminate any and all discretionary distributions upon the happening of an event such as substance use consumption, failed drug/alcohol tests, confirmation of gambling behavior or other restricted behaviors, incarceration, entry into a treatment facility, and the like often seek to impede the trustee's ability to assist the beneficiary during a time where the beneficiary may need the support and services of the trustee the most. Moreover, to the extent such language is used the drafting attorney should consider expressly permitting the trustee to leverage clinical professionals with an understanding that substance abuse disorder and other behavioral health conditions are defined by the American Psychiatric Association as a medical condition, and accordingly, beyond the scope of a trustee's qualifications.[91] Recovery management, regular drug testing, and required participation by the beneficiary with the trustee in the recovery process should be developed within the substance abuse language of the trust.[92]

Overcoming addiction and discontinuing restrictive behaviors are an immense challenge for the strongest-willed individual. While a professional trustee of a SNT presumably has access to a vast network of professionals who can assist in this regard, even a robust trust with sufficient assets can prove defective against such a challenging medical condition. Conversations with the settlor, interested parties, beneficiaries, and trustee, where possible, can go far in clearly setting expectations and understanding the limitations that may be presented when faced with a beneficiary struggling from life's challenges.

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[91] William F. Messinger and Arden O'Connor, *Rethinking Trustee Responsibility for Addicted Beneficiaries,* https://oconnorpg.com/wp-content/uploads/2018/12/Rethinking-Trustee-Responsibility-For-Addicted-Beneficiaries-Trust-Estates-Magazine-March-2018.pdf (March 2018).
[92] *Id.*

C. Illiquid Assets and Trust Investments

A trustee has the general powers conferred by the trust instrument in addition to all powers which an "unmarried competent owner has over individually owned property" and any other power necessary to "achieve the proper investment, management, and distribution of the trust property."[93] Such general powers often encompass certain specific powers allowing the trustee to 1) acquire or sell property;[94] 2) deposit trust funds in a regulated financial-service institution;[95] 3) borrow and pledge;[96] 4) continue the business of a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business;[97] 5) transact stocks or other securities;[98] and 6) construct, repair, improve or demolish real property.[99]

Although a trustee has broad investment management powers over the corpus of a trust, illiquid, unique, and hard-to-value assets will give a fiduciary pause. In fact, most nationally chartered trust companies will have policies expressly stating that they do not consider such investments appropriate to acquire or retain. This results from the operational, compliance, strategic, and reputational risks that may flow from holding such "unique and hard-to-value assets."[100] The O.C.C. defines a unique asset as real estate, closely held businesses, mineral interests, loans and notes, life insurance, tangible assets, collectibles, and certain income-producing real property.[101] Corporate trustees maintaining such assets within a respective trust account will have certain regulatory requirements imposed upon it to mitigate against the

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[93] Unif. Trust Code § 815.
[94] Unif. Trust Code § 816(2).
[95] Unif. Trust Code § 816(4).
[96] Unif. Trust Code § 816(5).
[97] Unif. Trust Code § 816(6).
[98] Unif. Trust Code § 816(7).
[99] Unif. Trust Code § 816(8).
[100] Office of the Comptroller of the Currency, *Unique and Hard-to-Value Assets,* https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/unique-hard-to-value-assets/index-unique-hard-to-value-assets.html (August 2012).
[101] *Id.* at pg. 1.

aforementioned risks.[102] These requirements will include a pre-acceptance review of the asset prior to assuming the role of trustee, regular inspections and appraisals, and ongoing annual reviews of the particular asset.[103] These heightened duties often result in additional charges under the trustee's published fee schedule. Accordingly, the drafting attorney should discuss these restraints with the settlor seeking to fund a SNT with unique assets, and if deemed appropriate, employ robust language in the trustee powers provision of the governing instrument to provide a corporate trustee the space needed to comply with the many regulatory and legal restrictions imposed when investing in assets other than traditional marketable securities (i.e., equities, fixed income, cash).

For third-party SNTs that often arise through legacy planning and generational wealth transfer, the trust may be funded with those unique assets identified above, concentrations in a particular security or other investment, or a non-income producing illiquid asset that the settlor may prefer the trustee retain. In such instances, the drafting attorney should add language directing the trustee to retain the asset, specifically identifying the asset to be retained, state the reason why retention is warranted, and waive the trustee's duty to diversify with specific reference to the applicable state statute on diversification. Even in such instances concentrations and the retention of unique assets may not be sufficient to compel the trustee to maintain the specific asset. As it relates to first-party SNTs, the initial trustee generally receives liquid cash arising from the settlement or jury award and will then invest the proceeds pursuant to the trust's established investment objective. However certain states, such as California, may restrict what a trustee can invest in without prior court approval to obligations of the United States or a State not maturing later than five years, treasury bonds, securities listed on an established stock exchange,

[102] *Id.* at pg. 2.
[103] *Id.* at pg. 42.

money market mutual funds and common trust funds.[104] Where a trustee is limited to certain investments the drafting attorney should state such limitations in the governing instrument to avoid adverse findings in the first annual court accounting. Lastly, to avoid violating the fiduciary's duty of loyalty,[105] the drafting attorney should consider the inclusion of language permitting the corporate trustee to engage its affiliates or subsidiaries and to compensate them from trust assets for the provision of investment management advice, serving as broker/dealer, and investing in mutual funds, stocks, securities and other accounts offered or managed by the affiliate or subsidiary.

As an aside, real estate is most often the primary illiquid asset acquired by a SNT trustee insofar as housing is of primary concern for the SNT beneficiary.[106] To that end, the trust should expressly permit the trustee to acquire, construct, or modify a principal residence for the use and benefit of the beneficiary, as well as satisfy all carrying costs, maintenance expenses, and pay consultants or vendors necessary to ensure the home can accommodate the specific needs of the beneficiary's disability. Recall that a trustee may investigate trust assets prior to trusteeship to ascertain the trustee's exposure to liability for violation of any applicable state or federal environmental law.[107] While not required, language should be considered allowing the trustee to regularly inspect or investigate the property and take any action necessary to prevent, abate, or remedy any actual or potential violation of an environmental law.[108]

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[104] California Probate Code § 2574 (West)(eff. 1/1/2015).
[105] Unif. Trust Code § 802(f).
[106] Amy R. Tripp, *Owning a Home with a Special Needs Trust,* https://thearc.org/blog/owning-home-special-needs-trust/ (May 24, 2017).
[107] Unif. Trust Code § 701(c)(2).
[108] Unif. Trust Code § 816(13).

V. CONCLUSION

Though immensely rewarding to represent the interest of a client with special needs or a disability, especially as it relates to drafting and executing a special needs trust for the client's long-term benefit, certain pitfalls exist for the drafting attorney that can impede the client's overall objectives. Due care should be given to ensure the draft trust will comport to the settlor's wishes, be compliant under applicable state and federal law and regulations, and most importantly, lay out the framework for the trustee to achieve an effective trust administration process that will best serve the interest of the beneficiary. From trust creation to termination, as well as shaping the office of trustee and developing relevant dispositive provisions within the governing instrument, the drafting attorney should work alongside of the settlor, beneficiary (or her representative), and nominated trustee to best capture and employ the appropriate language to be included in a properly drafted SNT. By doing so, the drafting attorney may rest assured that the SNT beneficiary will benefit immensely from the many advantages of the drafting attorney's final work product.