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Pooled Trusts Intensive

Wednesday
October 18, 2023



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Center for Elder Justice

1401 61st Street South

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Phone: (727) 562-7393

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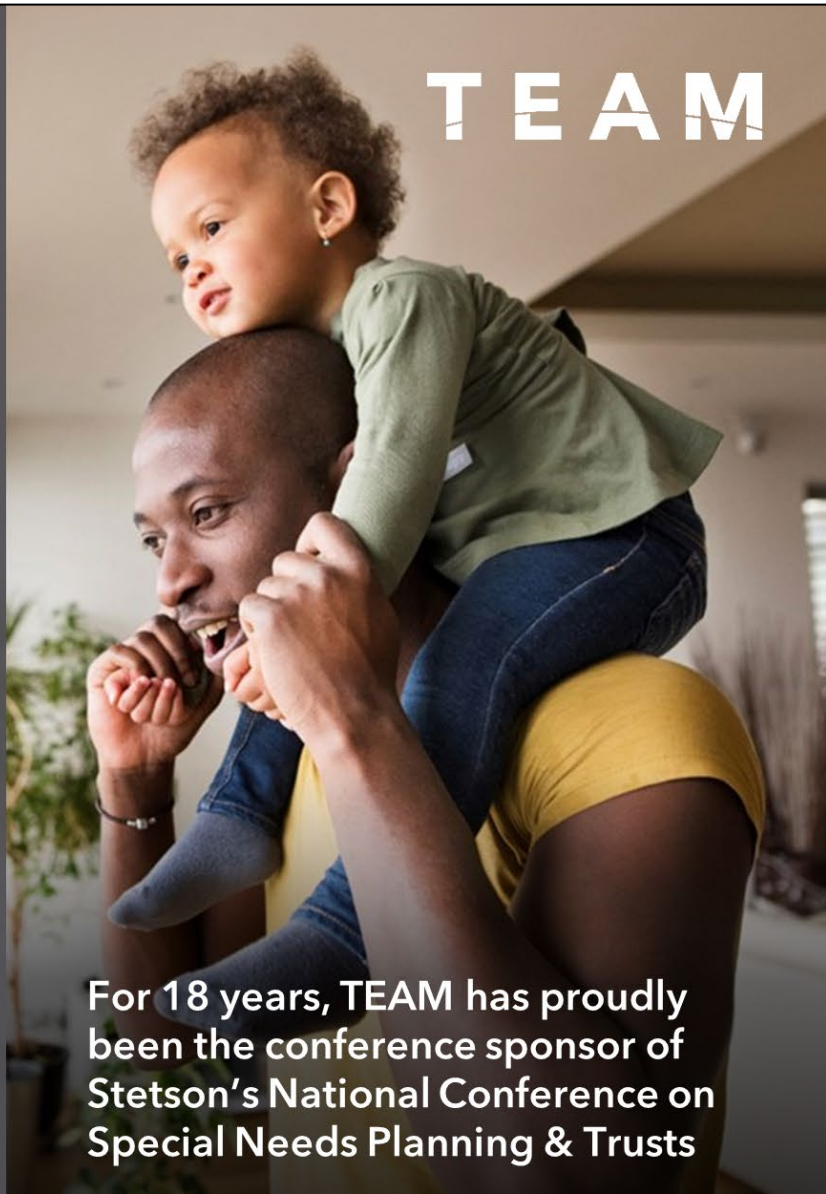
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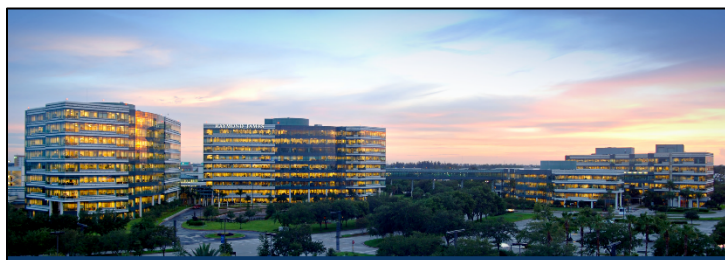
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ELDER LAW PLANNING™
Author/Advisor



Stephen J. Silverberg, CELA, CAP
ELDER LAW PLANNING™
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InterActive Legal
Advisor



Scott Solkoff
InterActive Legal
Advisor

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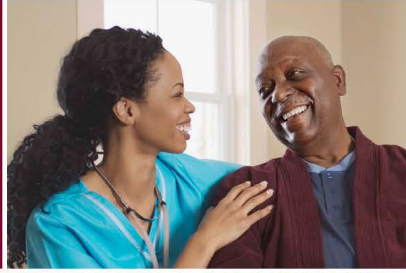
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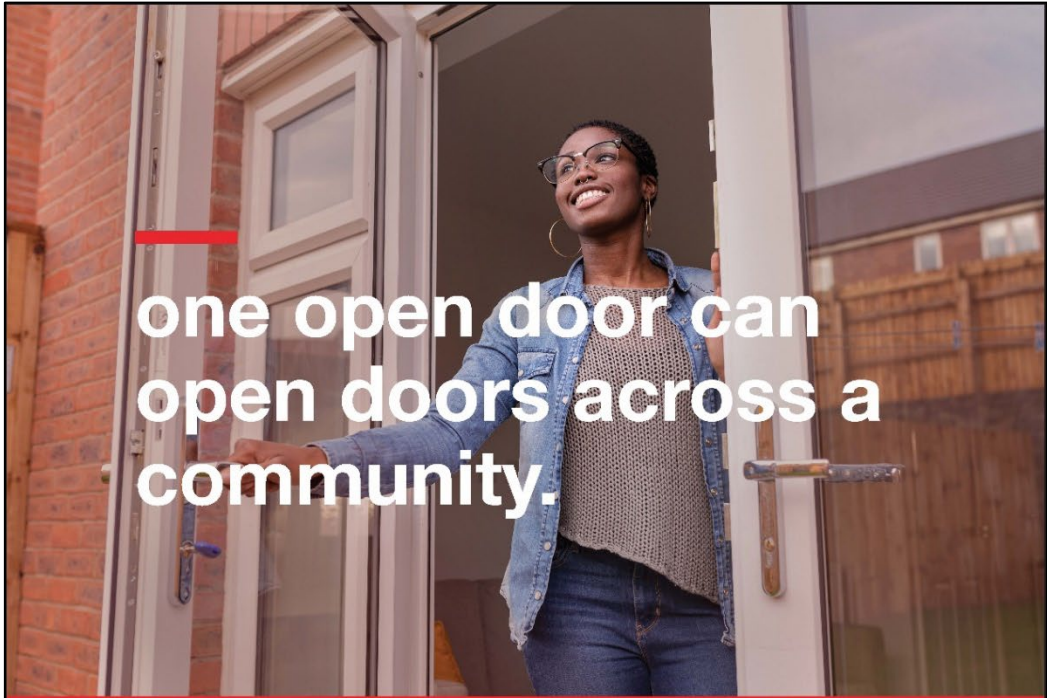
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Bringing Your Pooled Trust to the Next Level



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**Bringing Your PSNT to the Next
Level:
Creating and Managing Growth**

Ellen Nalven, M. Ed
Executive Director
PLAN|NJ
www.plannj.org
ellen.nalven@planng.org

Kevin Hayde
Executive Director
Wispect, Inc.
www.wispect.org
khayde@wispect.org

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A. Introduction

Pooled SNTs, which are managed by nonprofit organizations, combine the resources of many beneficiaries for purposes of administrative cost-effectiveness and investment optimization. Individuals have their own sub-accounts and usually receive a proportionate share of the entire fund's earnings.

A pooled SNT may be either a first- or third-party trust. A first party sub-account must be initially funded with resources belonging to the beneficiary, and can be established by the beneficiary themselves, a parent, a grandparent, or the court. A third-party sub-account can be created and funded by anyone except the beneficiary. In addition, the resources used to fund a third-party sub-account must have always been owned by someone else, a "third party," and not the beneficiary.

Depending upon the state, all or part of the funds remaining in a first party pooled trust upon the beneficiary's death may be retained by the trust. Federal law requires that if the nonprofit does not retain all or a portion of the remaining funds, Medicaid must be reimbursed for any services it covered during the individual's life from funds not retained. Once Medicaid has been compensated, any leftover funds can be distributed to designated beneficiaries. With respect to a third-party pooled trust, there is no requirement to reimburse Medicaid with funds remaining in a pooled third party trust, although some portion may still revert to the administering nonprofit. ¹

B. Preamble to Guidelines for Pooled Trusts

The Guidelines for Pooled Trust Organizations were initially developed in 2016 to support quality service delivery and develop standards for consistency in Pooled Special Needs Trust administration and management. They identify key factors to benchmark development of quality Pooled Special Needs Trust (PSNT) programs.

These Guidelines reflect views freely offered by many pooled trust organization executive directors with volunteer technical assistance offered by attorneys who have in some cases represented pooled trust programs for many years.

With our work specifically authorized by federal law (42 USC 1396(p)(d)(4)(C)) and with origins going back more than a century, it is recognized that developing aspirational Guidelines applicable across many states is challenging because of varying local circumstances, unique fact patterns and practical limitations.

These Guidelines may at times exceed what federal or state law requires. Discretionary trust decision making in a social services context serving people with disabilities is complex and important. With all of that said, these Guidelines should provide another milestone reference for our nonprofit pooled trust profession. They are to be consulted on a discretionary basis in conjunction with other reference guides and the exercise of independent research and professional judgement.

The National PLAN Alliance adopted the Guidelines for Pooled Trust Organizations in

September 2017 as aspirational standards and recommend that members and others use them to guide organizational growth and development. Smaller trusts organizations, newer trusts, growing trusts, will all find constraints in their budgets that preclude them from fully achieving the goals these Guidelines reflect. The Guidelines are a further step in the exploration of ideals to assist those who perform this important work.

It is our experience that the nonprofit pooled trust profession has largely been created and sustained by people with a great sense of public service seeking to provide services in a nonprofit context for people who have disabilities, and we thank everyone who has or will in the future help form these Guidelines.

Any entity adopting or referencing these guidelines should give attribution to the National Pooled Trust Standards Committees.

C. Guidelines for Pooled Trusts

1) MISSION

- a) To provide pooled trust services with integrity. The pooled trust program's mission and primary purpose should be adherence to its fiduciary duties and the sole benefit status of each trust beneficiary's account.

2) CHARITABLE STATUS

- a) A pooled trust program should be qualified as a charitable entity by the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code. All money earned through pursuing the organizations' mission should be used to benefit people with disabilities and to further the mission of the organization.

- b) Organizations should provide charitable services and seek donations and grants as needed in keeping with their charitable non-profit status.

3) COMPETENCE

- a) Organizations should hire competent staff and provide staff with ongoing training.
- b) Organization staff should possess or know where to obtain knowledge of trust laws specific to the applicable state, Medicaid laws and regulations specific to the applicable state; Social Security laws and regulations; HUD Section 8 laws and regulations; laws pertaining to other major programs; and law changes.
- c) Staff should possess or know where to obtain knowledge of the population served and receive ongoing training regarding the population served and changes in disability services.
- d) Organizations should conduct regular evaluations of staff.
- e) At times it may be helpful to have a Certified Public Accountant, physician, Certified Financial Planner or attorney, or others with relevant skills to serve on the Board of Directors.

4) POLICIES / INTERNAL OPERATIONS / FINANCIAL INTEGRITY

- a) Organization Policies
 - i. Organizational policies should be approved by the board of directors.
 - ii. The organization should have policies for the confidentiality of information and the privacy of beneficiaries.
 - iii. Organizations and their boards of directors should actively and regularly evaluate their operating reserves.
 - iv. Organizations should have regular audits of the organization, including internal financial operations, trust activity and Information Technology (IT) security.
 - v. The Pooled Trust Program should have a conflict-of-interest policy. The pooled trust organization should require all board members and officers to disclose any real or potential conflict of interest at the time it arises and in any event should annually request disclosure of such real or potential conflicts. Where an individual has a conflict

of interest, the board should take appropriate steps to protect the pooled trust organization from injury or undue influence arising from the conflict.

- vi. The organization should hold directors and officers and professional liability insurance.
- vii. The organization should have systems for tracking information and processes for accurate and timely availability of needed information.
- viii. Board members and officers should serve without compensation (other than expense reimbursement) except to the extent they are employees of the pooled trust organization.
- ix. No board member or officer should receive compensation or any other remuneration from any entity doing business with the pooled trust organization.
- x. This does not preclude a board member or officer from being paid out of an individual trust account for work on behalf of that beneficiary, or on behalf of the organization if approved by a disinterested member of the Board of Directors.

b) Trust Administration Policies

- i. The organization's program trust operations should be reasonably transparent for a beneficiary or that beneficiary's representative as applicable for that beneficiary's account.
- ii. Organizations should have a brief trust summary of each trust under management which could include names and contact information for grantors, trustees, beneficiaries and remainder beneficiaries, unusual provisions, financial restrictions, and examples of permissible purchases.
- iii. Individual trust accountings should be provided on a regular schedule.
- iv. When trusts are Court supervised, the organization should account to the Court for such trusts as required or upon request.

- v. Lateral transfers to and from another similar pooled trust should not be unreasonably denied to promote choice and options for beneficiaries, as appropriate.
- vi. The organization may refuse appointment as trustee, resign as trustee, name a disinterested co-trustee or other fiduciary to make a decision, make application to a Court for instructions or do trust modification as appropriate.

5) PRACTICES

- a) The pooled trust program should follow the terms of the trust instrument and applicable law.
- b) The organization should not make a warranty of eligibility for public benefits.
- c) The organization, with permission from the beneficiary or that person's representative as applicable, should provide public benefits authorities with an individual financial accounting upon request to avoid public benefits disqualification.
- d) The organization should make supplemental support services available to enhance fiduciary services and quality of life, either by direct service provision or referral or purchase of service. Services should be individualized, and person centered.

6) TRUST CREATION TRANSPARENCY

- a) The pooled trust program should disclose the operational features of its Trusts to each prospective beneficiary or that person's representative as applicable to set expectations of how the Trust may assist the beneficiary. The program should provide information related to trust irrevocability, sole benefit restrictions, in-kind support and maintenance restrictions, Trustee discretion, and restrictions on direct payments to beneficiaries.
- b) The pooled trust program should provide information to a prospective beneficiary or that person's representative as applicable about the details of how remaining funds are distributed upon the beneficiary's death, including the possibility of payback of funds to Medicaid agencies and retention of remaining funds by the organization pursuant to 42 USC 1396p (d)(4)(C).

- c) The beneficiary or that person's representative as applicable should be informed of the pooled trust program's typical time frame for processing distributions.
- d) The pooled trust program should encourage a prospective beneficiary or that person's representative as applicable to meet with independent counsel to discuss trust features and specific circumstances of Trust creation.

7) DISTRIBUTIONS TO BENEFICIARIES FROM POOLED TRUST ACCOUNTS

- a) The pooled trust program should maintain a professional relationship with the beneficiary and that person's representative as applicable, consider the needs of the beneficiary and respond to requests for trust distributions.
- b) The pooled trust program should have full discretion to decide if a beneficiary should have a written spending plan for each beneficiary that is provided to each beneficiary and that person's representative as applicable. This may include review of prior year spending, anticipated life of the trust, and considerations of principal and interest spending.
- c) The pooled trust program should not take retention by the organization into consideration when making distributions.

8) INVESTMENTS

- a) Pooled trust programs should develop or approve written investment policy statements and consider prudent investments and risk tolerance.
- b) Investment managers should comply with the organization's investment policy statement.
- c) Pooled trust programs should conduct regular investment performance reviews of the performance of the investment manager and should provide a written report of the findings of such reviews to the organization's Board of Directors.
- d) Pooled trust programs should, upon request, make written investment policy statements available to each beneficiary or that person's representative as applicable.

- e) Pooled trust programs should, upon request, provide information to each beneficiary or that person's representative as applicable regarding who manages investments.
- f) It is the trustee's duty to make the investment selection option. The Trustee may obtain and consider relevant information on beneficiary preference and risk tolerance.
- g) Roles should be clearly delineated between trustee and investment manager.

9) FEES/EXPENSES

- a) Fees charged by the pooled trust program should be reasonable and regularly reviewed.
- b) The executive director, in consultation with staff, should develop a fee schedule that is reviewed and approved by the board of directors on a regular basis to see whether the fees are reasonable and are sufficient to meet basic organization expenses. The Board does not review each specific bill sent out.
- c) Fee schedules pertaining to individuals should be provided to that person or that person's representatives or grantors as applicable and should indicate that fees are subject to change upon advance notice.
- d) Legal fees incurred by the organization should not be paid by a beneficiary's account if the expense is not related to that account. A decision that legal fees are related to individual trust accounts should be approved by the organization's Board of Directors. A particular matter might impact just a group within a pooled trust or just one person, or all the pooled trust beneficiaries.
- e) The pooled trust organization should monitor and consider all fees associated with investment management of trust accounts.

10) RETAINED FUNDS

- a) Funds retained by the organization upon the death of a pooled trust beneficiary should be used to benefit people with disabilities and to further the mission of the organization.

D. Conclusion

These Guidelines for Pooled Trust organizations were developed as part of an informal working group, the “National Pooled Trust Standards Committee”, comprised of members listed below, all stakeholders in non-profit organizations providing pooled trust services for beneficiaries with disabilities. Each author holds an undivided ownership interest in and to the final product in perpetuity until such right is extinguished by assignment back to the National Pooled Trust Standards Committee. It is the intent of the Committee that these Guidelines will be used in future academic, professional and industry publications, so as to advance and aid in standardizing the practices of pooled trust administration and management. To the extent these Guidelines are adopted or incorporated into subsequent publicly accessible third-party publications, proper attribution must be made to the National Pooled Trust Standards Committee and its authors.

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E. Acknowledgements

**CONTRIBUTING MEMBERS:	
Co-chair: Eric DeGroot	Kevin Hayde
Co-chair: Ellen Ball Nalven	Barbara Helm
Megan Brand	John Kitchen
Kerry Tedford-Coles	Ron Landsman (in Memorium)
Stephen Dale	Elena Lidrbauch
Heidi Flatt	Hannah Vaughn
Peter Grosskopf	

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www.johnkitchenlawoffices.com

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www.guardianship.org

National PLAN Alliance Standards Committee <https://nationalplanalliance.org/resources/>

¹ ‘When should you consider a Pooled Trust’ – Special Needs Alliance – Janet Lowder CELA and Elena Lidrbauch - <https://www.specialneedsalliance.org/blog/when-should-you-consider-a-pooled-trust/>

Bringing your PSNT to the Next Level: Creating and Managing Growth

PLAN of NJ and Wispect
 Stetson University Special Needs Trust Conference
 October, 2023

1

Introductions

Ellen Nalven
 Executive Director
 PLAN|NJ
 Planned Lifetime Assistance Network of New Jersey


Kevin Hayde
 Executive Director
 Wispect, Inc.



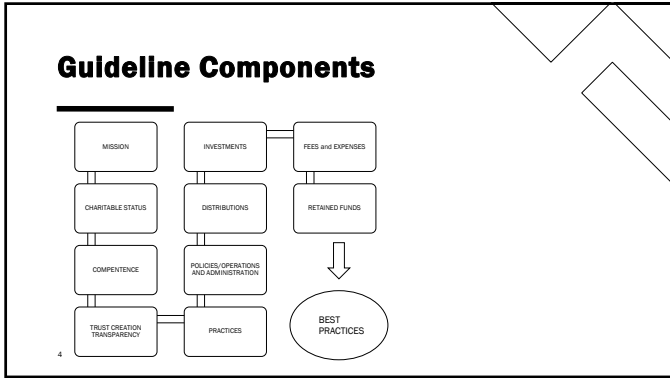
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Agenda

1. Wispect and PLAN|NJ then and now: Growth over time by two PSNT organizations
2. The Guidelines for Pooled Trust Organizations: How these standards support quality service delivery in SNT administration and organizational management
3. What actions have you taken to promote expansion in your PSNT? How is your growth reflected in the Guidelines?



3



4



5

Thinking Strategically: Applying The Guidelines for Pooled Trust Organizations

<p>Intent</p> <p>Consider the Guidelines for Pooled Trust Organizations as aspirational standards.</p> <p>Considerations</p> <ul style="list-style-type: none"> ➢ Smaller trusts organizations, newer trusts, growing trusts, will all find constraints in their budgets that preclude them from fully achieving the goals these Guidelines reflect. ➢ With our work specifically authorized by federal law 42 USC 1396(p)(d)(4)(C), local circumstances, unique fact patterns and practical limitations create challenges. 	<p>Rationale</p> <p>The Guidelines can guide assessment and strategic planning for organizational growth and development across states. They are a compilation of best practices by PSNT's across the country.</p> 
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A. EXAMPLES: CREATING AND MANAGING GROWTH - PLAN|NJ AND WISPACT

PLAN NJ	2005	2023
TRUST ASSETS	\$6,000,000	\$140,000,000
# beneficiaries	70 beneficiaries	600 beneficiaries
BUDGET	< \$200,000	\$2,000,000
STAFF	3 FT	18 FT, 9 PT
Wispact	2009	2023
TRUST ASSETS	\$75,000,000	\$185,000,000
# beneficiaries	800 beneficiaries	2500 beneficiaries
BUDGET	<\$400,000	\$2,600,000
STAFF	7 FT	18 FT

7

A. EXAMPLES CREATING AND MANAGING GROWTH: PLAN|NJ AND WISPACT

PLAN NJ	2005	2023
BOARD	9 members, majority aging parents	16 members; diverse professional skills; COI policy; active; approves policies; strong Board committee
Investment Oversight	Knowledgeable parents; CPA; Certified Investment Manager	Investment experts; Trust Audits, Charter; IPS; qtrly performance vs benchmark; fee monitoring; background checks of IM'S
Wispact	2009	2023
BOARD	12 members, majority elder law attorneys	16 members; diverse professional skills; COI policy; active; approves policies; region and national involvement
Investment Oversight	Finance Committee; Investment and trust professionals	Finance Committee; Investment and trust professionals; IPS; Trust Audits

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A. EXAMPLES: CREATING AND MANAGING GROWTH: PLAN|NJ AND WISPACT

PLAN NJ	2005	2023
Technology	QuickBooks, hand-written checks	EMS (accounting and CRM); Donor Perfect; Cyber security + training; network server
Marketing / Outreach	Newsletter (paper)	28 seminars/yr; Annual Report; LinkedIn; Podcast; Website; newsletter x2 print and e-letter; baseball game friend raising; Celebration of Abilities event
Wispact	2009	2023
Technology	QuickBooks, hand-written checks	Dynamics 365; Impact Business Solutions; Sharepoint File Mgt.; Cloud Server
Marketing / Outreach	Shared among various staff Newsletter (paper)	20 seminars; Annual Report; Website; Newsletters x4-electronic; Conference sponsorships; Annual CLE- WI State Bar

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A. EXAMPLES: CREATING AND MANAGING GROWTH: PLAN|NJ AND WISPACT

PLAN NJ	2005	2023
Services (in-house)	<ul style="list-style-type: none"> Life Planning (84 plans) Future (successor) Trusts (0) Case Mgt Home visits (30 people) Guardianship (20 people) Rep Payee (45 plans) 	<ul style="list-style-type: none"> Life Planning (321 plans) Future (successor) Trusts (404) Case Mgt (97 people) Guardianship (40 people) Rep Payee (55 plans)
Wispect	2009	2023
Services (contracted)	None	<ul style="list-style-type: none"> In-home care Support options recommendations Home maintenance and assessment options recommendations

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B. ORGANIZATIONAL FEATURE: TRUST ASSETS

GUIDELINE NUMBERS LEADING TO GROWTH
<p>4 POLICIES/OPERATIONS/FINANCES Trust Administration Policies</p> <ol style="list-style-type: none"> Transparent Trust operations Trust summary of each account Accountings provided <p>5 PRACTICES Terms of Trust; public benefits; support services available</p> <p>6 TRUST CREATION TRANSPARENCY</p> <ol style="list-style-type: none"> Disclose operational features; expectations; irrevocability; sole benefit Distribution of remainder funds, Medicaid payback Distribution timeframes Encourage use of independent counsel <p>7 DISTRIBUTIONS</p> <ol style="list-style-type: none"> Professional relationship with bene; consider needs and respond Don't take retention into consideration

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B. ORGANIZATIONAL FEATURE: TRUST ASSETS

Actions taken to spur growth	WHAT WE DID: PLAN NJ
<p>WHAT WE DID: Wispect, Inc.</p> <ul style="list-style-type: none"> Customer Service Rep and Beneficiary Specialists for distribution guidance to beneficiaries Individual Spending Plans developed at Trust creation Beneficiary has access to account information Beneficiary Guidebook outlines goods and services payable Require attorneys manage trust creation process: Retained Funds Creation Grants are available Implemented 5-year internal evaluation for all contracted services including Trustee 	<p>WHAT WE DID: PLAN NJ</p> <ul style="list-style-type: none"> Individual budgets developed at Trust creation Distribution and benefits guidance by Trust Coordinators Policy and Procedures manual for training Annual Trust procedures independent audit, report to Board Assess org practices with Guidelines for PSNTs: ID development priorities in Strategic Plan Benchmarks of success = efficiency, effectiveness and satisfaction Individualized customer service and responsiveness Life Planning seminars to family groups, social service agencies, schools funded by NJ State Bar Foundation

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B. ORGANIZATIONAL FEATURE: BUDGET	
GUIDELINE NUMBERS LEADING TO GROWTH	
8. POLICIES/OPERATIONS/FINANCES:	
<ul style="list-style-type: none"> a. Organization Policies <ul style="list-style-type: none"> i. Board approves policies ii. Operating reserves evaluated iii. Audits- finances; trust activity, Tech security 	
9 FEES / EXPENSES:	
<ul style="list-style-type: none"> a. Fee schedule regular review, approved by Board, subject to change 	
WHAT WE DID: Wispact, Inc.	
<ul style="list-style-type: none"> • Finance Committee • Fathom Budget • Legal fees coded as "beneficiary" or "Company" • Analysis of industry and regional fees 	
WHAT WE DID: PLAN of NJ	
<ul style="list-style-type: none"> • Diverse funding streams • Donations / PR events: focus on non-profit social service and fiduciary roles • Grants to fund seminars, inquiry calls • Charitable Remainder and Grants to fund Pro Bono Case Management, Rep Payee, Guardianship svcs 	
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B. ORGANIZATIONAL FEATURE: BOARD	
GUIDELINE NUMBERS LEADING TO GROWTH	
<ol style="list-style-type: none"> 1. Mission 2. Charitable Status 3. Competence (staff and Board) 4. Policies/Operations/Financial Integrity <ul style="list-style-type: none"> a. Organization Policies <ul style="list-style-type: none"> i. Approve policies ii. Confidentiality iii. Audits iv. Conflict of Interest v. Insurance (Professional Liability, D and O) 	
WHAT WE DID: <i>Wispact, Inc. and PLAN NJ</i>	
<ul style="list-style-type: none"> • Wispact: no more than 50% of attorneys may serve on the Board of Directors at any given time • Charters for Committees and BOD: authority and expectations • Independent Audits – financial, trust procedures, Cyber security • Refine Board member onboarding process –Board vs staff decision making • Board committees- diverse skills. Knowledge and commitment 	
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B. ORGANIZATIONAL FEATURE: INVESTMENT OVERSIGHT	
GUIDELINE NUMBERS LEADING TO GROWTH	
8. INVESTMENTS	
<ul style="list-style-type: none"> a. Investment Policy Statement (IPS) that considers prudence and risk tolerance b. Investment managers (IM) comply with IPS c. Performance reviews with reports to Board of Directors f. Investment selection is Trustee's duty g. Clear delineation of roles between Trustee and IM 	
9. FEES / EXPENSES	
<ul style="list-style-type: none"> • Monitor fees re investment mgt 	
WHAT WE DID: Wispact, Inc.	
<ul style="list-style-type: none"> • On-line access to account activity and quarterly statements • Trustee • Investment Manager; multiple asset allocations determined by Trustee • IPS reviewed annually = game plan for fiduciaries regarding asset management; reviewed annually 	
WHAT WE DID: PLAN NJ	
<ul style="list-style-type: none"> • Investment expertise on the Board and Committees • Investment Performance and fee monitoring reports to BOD • Investment Committee Charter • Background checks of Investment Managers; IPS reviewed annually 	
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B. ORGANIZATIONAL FEATURE: SERVICES	
GUIDELINE NUMBERS LEADING TO GROWTH	
1. MISSION: Provide all services with integrity; adhere to fiduciary duty and sole benefit status	
2. CHARITABLE STATUS: Qualified 501(c)3; use \$ earned to benefit PWD and org mission, seek donations and grants	
5. PRACTICES	
d. Make supplemental services available	
10. RETAINED FUNDS: benefit PWD and further mission	
WHAT WE DID: Wispact, Inc.	
<ul style="list-style-type: none"> • Pooled Trust Administration • Referral protocols to assist Beneficiaries to access contracted case management services • Retained Fund Committee to ID grant initiatives, govern Retained Funds to Wispact beneficiaries; limit size / number of grants to individual beneficiaries to ensure charitable nature of the grants. • 2019 Wispact Foundation; grants to non-profits • Endowed Funds at Greater Milwaukee Foundation 	
WHAT WE DID: PLAN NJ	
<ul style="list-style-type: none"> • Trust Administration: Pooled and Individual • Life Planning, Advocacy/Case Management Home visits, Guardianship • Pro bono social services: Case Management, Rep Payee, Guardianship • Partner with human service orgs to offer education on SNT's and Life Planning 	

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B. ORGANIZATIONAL FEATURE: MARKETING	
GUIDELINE NUMBERS LEADING TO GROWTH	
All guidelines, growth and outcomes are impacted by marketing / outreach efforts	
WHAT WE DID: Wispact, Inc.	
<ul style="list-style-type: none"> • Gather census data - what/where are underserved communities • Mass Media campaign • Net Promoter Score scoring • Strategic Plan 	
WHAT WE DID: PLAN NJ	
<ul style="list-style-type: none"> • 28 educational seminars/year: State and Local partner organizations • Annual Report • LinkedIn; Podcast; Website • Newsletter x2 print and e-letter • Events: Celebration of Abilities event, baseball game friend raising 	
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B. ORGANIZATIONAL FEATURE: STAFF	
GUIDELINE NUMBERS LEADING TO GROWTH	
10. COMPETENCE	
<ul style="list-style-type: none"> a. Provide ongoing training b. Training on trust laws c. Training on population served d. Performance Reviews e. Skilled Board members 	
WHAT WE DID: Wispact, Inc. and PLAN NJ	
<ul style="list-style-type: none"> • Onboarding; Human Resources • Training; how policies relate to mission and vision • Benefits • Employee recognition; appreciation and agency events • Ensure employees understand their purpose and connection to the mission, vision, and strategic plan • Include staff input in Strategic Plan • Focus on Continuous Quality Improvement through job-specific and leadership training and development • Staff educates Board members on roles, challenges, "a day in the life" stories 	
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**What actions have contributed to your PSNT's growth?
How do the Guidelines apply?**

Intent


The Guidelines identify key factors to benchmark development of quality Pooled Special Needs Trust (PSNT) programs.

Shared Industry Objective

The National Pooled Trust Standards Committee recognizes the need for industry standards of Best Practice to be in place.
The Standards Committee further recognizes that Pooled Trust orgs are not one-size fits all, but the basic principles of Best Practice may be applied by all.

Additional Resources:
In 2022, the Life Passages PSNT Best Practices Guidelines were published. These guidelines may be accessed via https://www.stetson.edu/law/academics/elder/home/media/Best_Practices_Guidelines_Final_42022.pdf

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Let's Hear From You

Integrating the Guidelines for Pooled Trust Orgs, what are some examples of how your organization has followed these principles of Best Practice?

What actions have you taken that has led to your organization's expansion?

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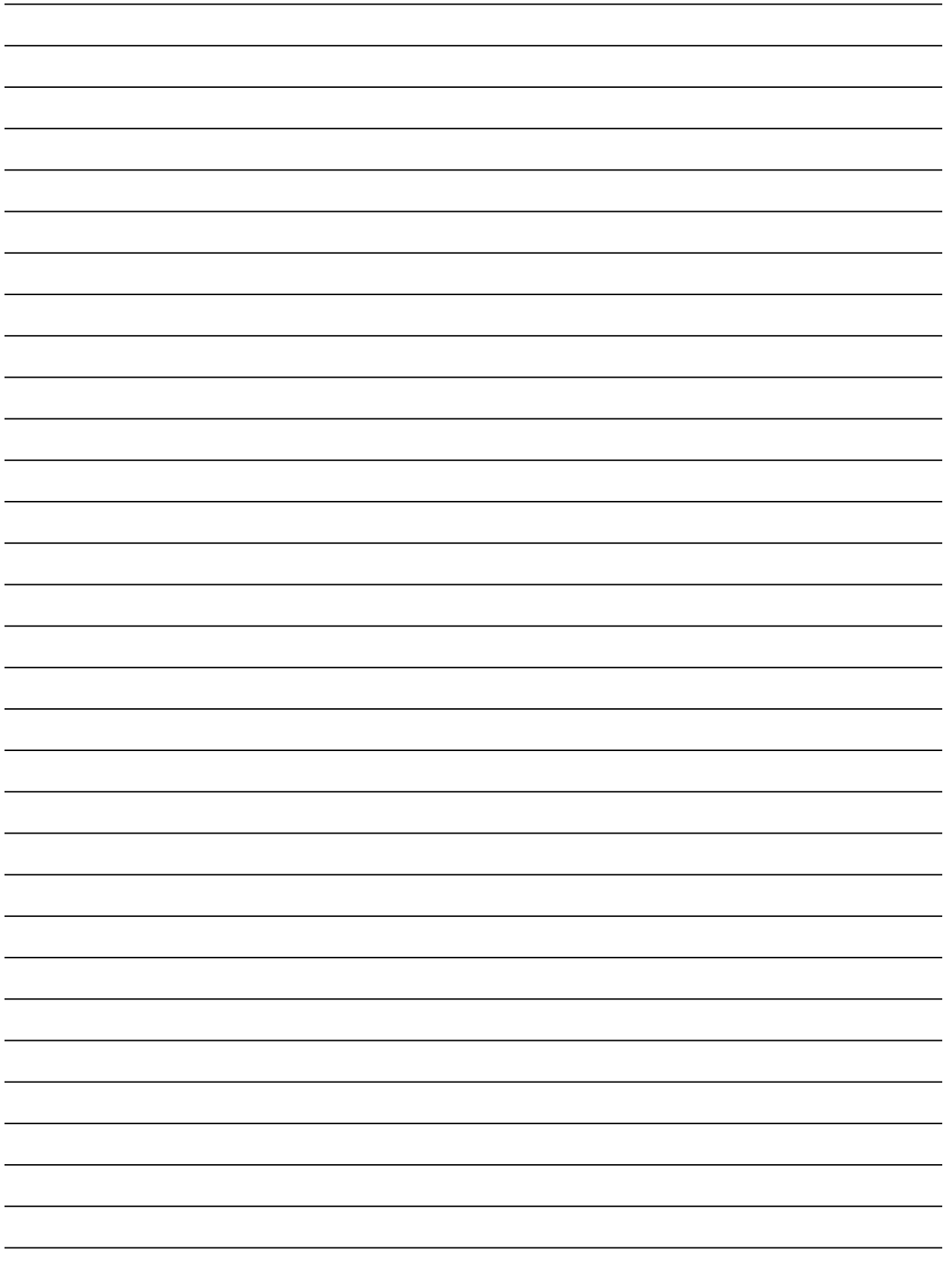


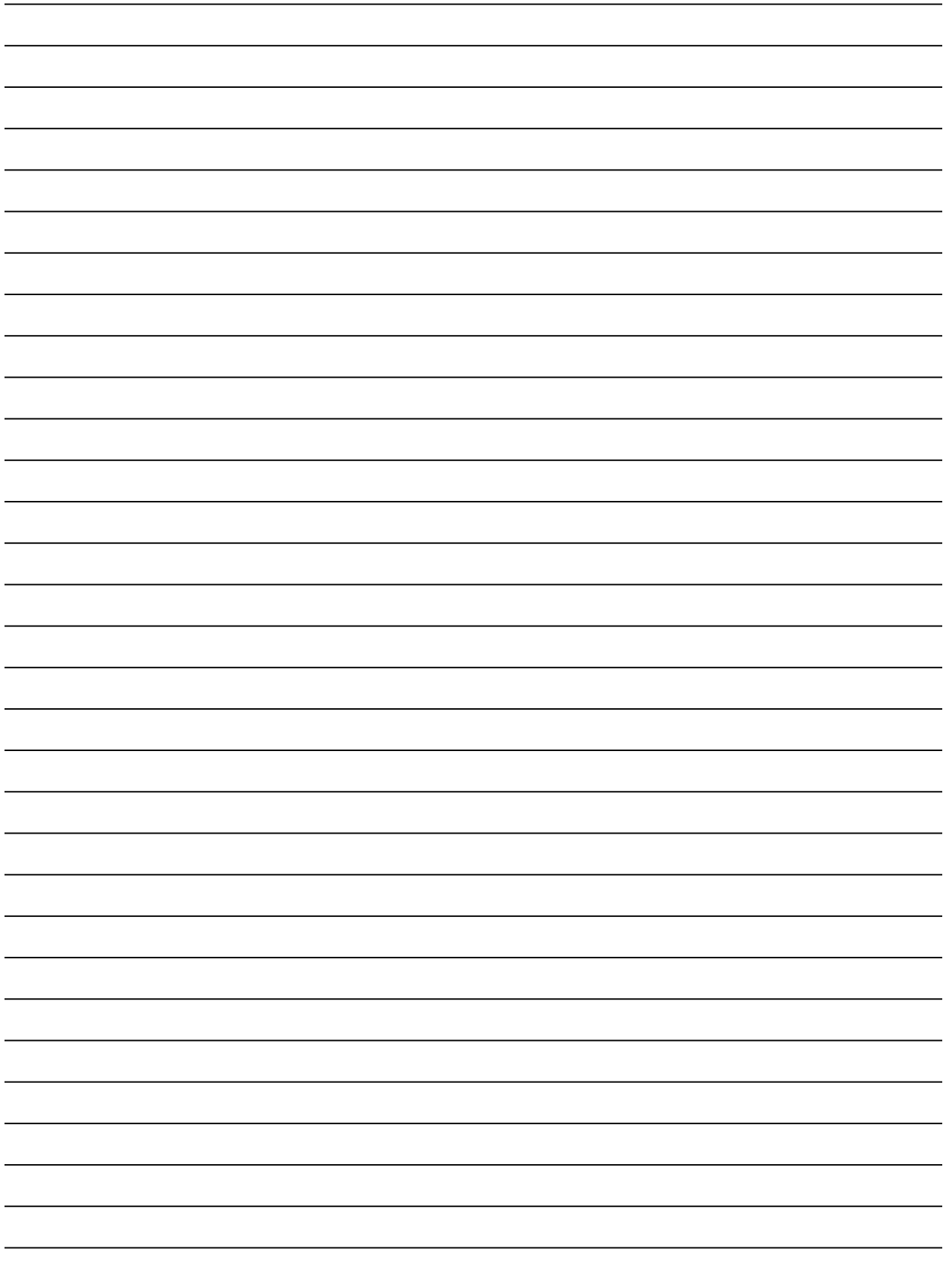
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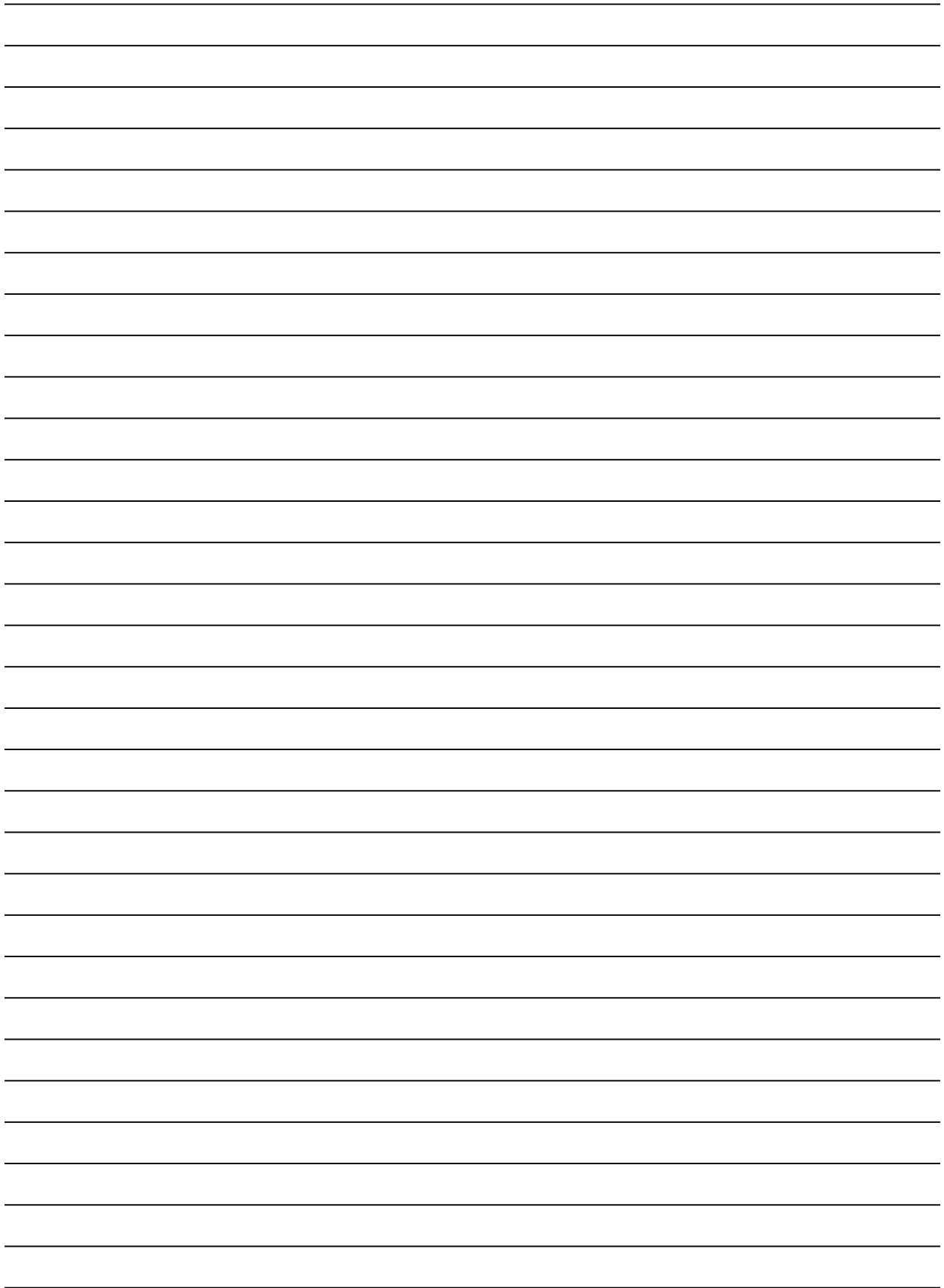
CONTACTS:
Kevin Hayde, Ex. Director, Wispact, Inc.
khayde@wispact.org
608.268.6006 Ext. 201

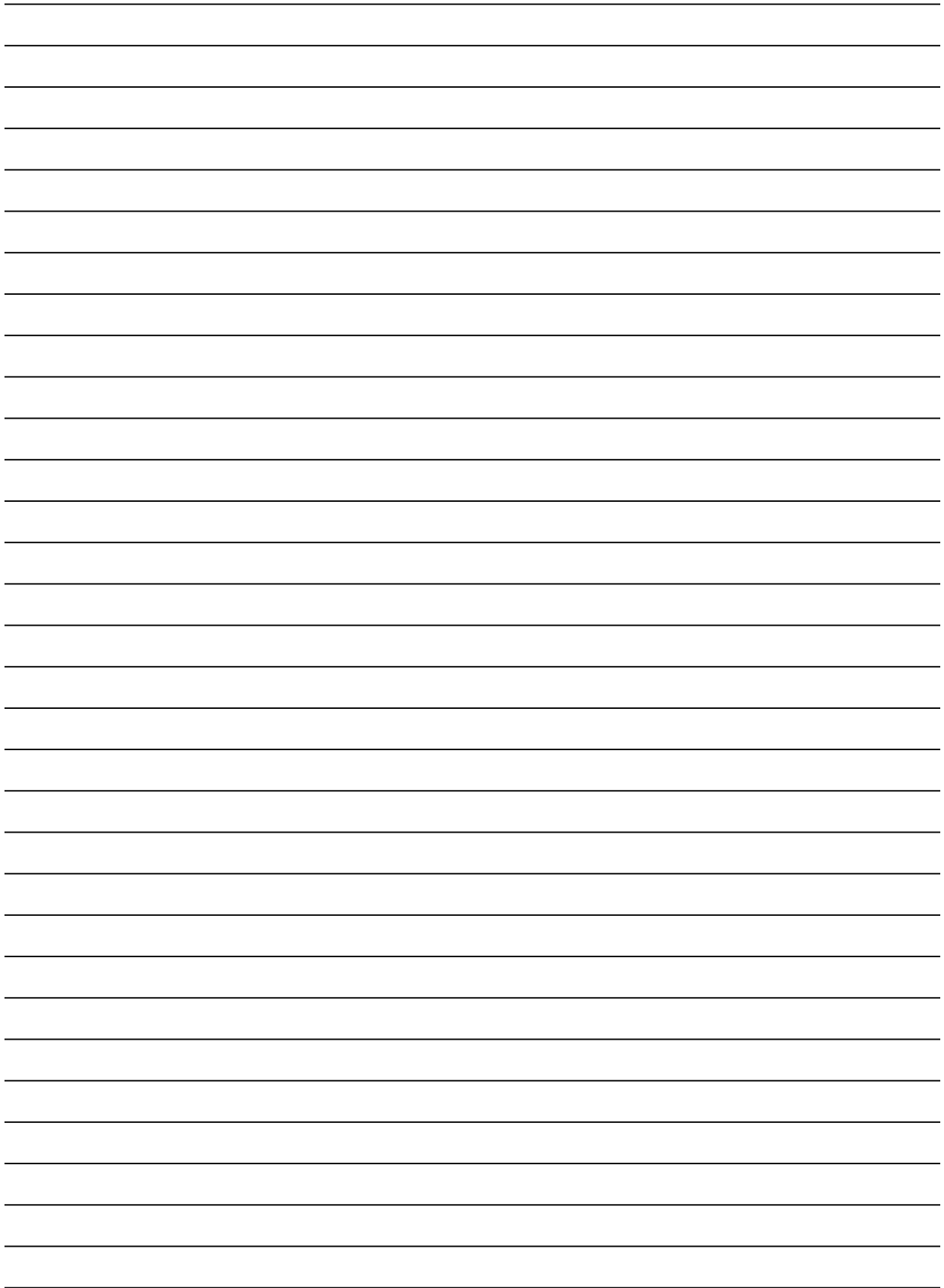
Ellen Nalven, Ex. Director, PLAN of New Jersey
ellen.nalven@plannj.org
908-575-8300 Ext. 11

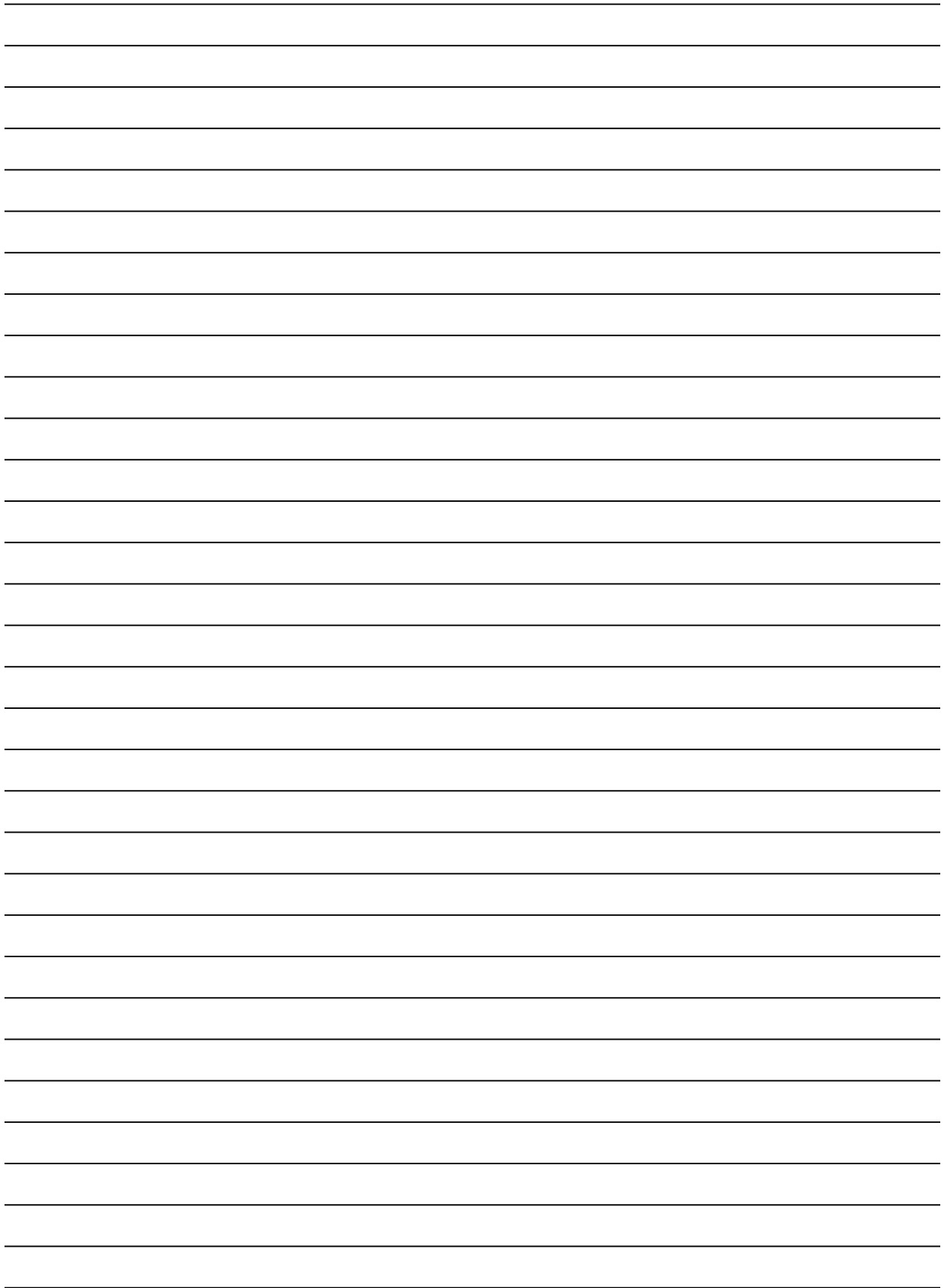
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STETSON LAW

Pooled Trusts Intensive

Wednesday
October 18, 2023

SECURE Act 2.0 – IRA Administration



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*2023 National Conference
on Special Needs Planning and Special Needs Trusts*



**SECURE Act 2.0
IRA Administration**

Bradley J Frion, JD, LLM, CELA, CAP

Law Offices of Bradley J. Frigon, LLC

www.bjflaw.com

bfrigon@bjflaw.com

Peter J. Wall

Director, Fiduciary Services

True Link Financial Advisors, LLC

www.truelinkfinancial.com

peter.wall@truelinkfinancial.com

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I. Introduction

Pooled Special Needs Trusts (PSNTs) are unique trust vehicles. PSNT trustees provide vital services for what may perhaps be the most underserved, yet most deserving, population in our country. A PSNT allows a person with a disability the opportunity to protect funds for supplemental needs while still qualifying for crucial means-tested public benefits.

As the U.S. population continues to age, there is even more need for competent Special Needs Trust (SNT) administration. PSNT trustees are uniquely situated to assist. This presentation will outline the opportunities available to PSNT trustees and their counsel in managing Individual Retirement Accounts (IRAs) for trusts for people with disabilities. It will cover taxation of IRAs as well as exciting new planning opportunities afforded under the Setting Every Community Up for Retirement Enhancement (SECURE) Act 2.0.

II. Demographics

Retirement savings in the United States continue to grow. Additionally, approximately 76 million baby boomers are living in the U.S. today. The choices baby boomers will make in terms of retirement and how they pass on their retirement savings will have a significant impact on trustees of all types of trusts, but potentially most significantly on trustees of SNTs.

According to research from [ICI](#), at the end of the second quarter of 2020, there was \$10.8 trillion in IRAs, representing 34% of all U.S. total retirement assets. This means that the remaining 66% of retirement assets, or approximately \$31.8 trillion, are in employer-sponsored retirement plans (401(k)s, 403(b)s, 457(b)s, profit-sharing plans, non-qualified deferred compensation plans, SEP plans, etc.). Additionally, the ICI research shows that about

82 million households (or 64% of the U.S.) had some type of tax-advantaged retirement savings. These figures suggest that there is a robust opportunity for SNT trustees who administer inherited IRAs for the benefit of SNTs.

It is important to note, however, that many people in the U.S. live much longer than the average of 78.7 years. According to the Social Security Administration, a healthy 65-year-old woman has a very good chance to live until age 86. This advanced life expectancy may translate into smaller inherited IRA assets. Additionally, more Americans are dipping into their retirement funds early. A recent TD Ameritrade survey showed that 44% of Americans ages 40 to 79 have taken money out of a retirement account. Accordingly, those counting on Social Security to fund post-retirement life may be in for a shock. The Social Security program is only guaranteed to be funded through 2035; according to *Business Insider*, after 2035, it may only be three quarters funded. This may mean that people already taking money from Social Security may see a drop in payments while new retirees may have trouble getting any money at all. Also, the number of people in the U.S. 65 and older is projected to increase from approximately 56 million today to more than 78 million by 2035. More people may, therefore, be eligible to receive benefits from Social Security while fewer people will be paying into the fund.

III. IRAs - General

An IRA is a tax-advantaged savings account that individuals can use to save for retirement. Any person who has earned income can fund an IRA. An IRA is very similar to an employer-sponsored retirement account (401(k), etc.), but it does not require the employer to be involved - thus the “individual” of “individual retirement account.” A person may have an IRA and an

employer-sponsored retirement account such as a 401(k). The only limitation is on the combined total amount of assets that a person may contribute to retirement accounts annually (\$22,500 for 2023).

There are several types of IRAs including traditional IRAs, Roth IRAs, Simplified Employee Pension (SEP) IRAs, and Savings Incentive Match Plan for Employees (SIMPLE) IRAs. Each type of IRA has different rules regarding taxation, eligibility, and withdrawals. For brevity's sake, this presentation will focus primarily on traditional IRAs, rollover IRAs, and inherited IRAs.

Early Withdrawals

Since IRAs are meant to be retirement savings vehicles, there is generally an early withdrawal penalty of 10% federal tax if a person takes funds out of the IRA before the age of 59½. There are notable exceptions to this penalty, however. Early withdrawals from an IRA without penalty are allowed in the following circumstances:

- Up to \$10,000 for a “first-time” home purchase (i.e., a person hasn't owned a home in the last two years)
- Qualified education expenses (e.g., tuition, fees, room and board, textbooks, etc.)
- Permanent disability
- Unreimbursed/uncovered medical expenses exceeding 7.5% of adjusted gross income (AGI)
- Health insurance premiums while unemployed 12 weeks or longer
- Substantially Equal Periodic Payments (SEPP)

Of note, early withdrawals are taxed as income just as Required Minimum Distributions (RMDs) are (covered later in this presentation) even if not subject to early withdrawal penalties.

Contributions

In most cases, contributions to an IRA are tax deductible. Put simply, if a person contributes \$2,000 to an IRA, their taxable income is reduced by that same amount. Funds in an IRA are usually invested, and IRA holders do not pay taxes on any growth. However, when a person withdraws funds from an IRA in retirement, the withdrawal amount is taxed at their ordinary income tax rate. This is why IRAs are sometimes referred to as “tax-deferred” vehicles. This is particularly advantageous for the growth of the IRA and the contributor’s personal taxable income reduction, but also because most Americans will have a lower ordinary income tax rate in retirement than they have when they are working.

For 2023, the annual individual contributions to traditional IRAs cannot exceed \$6,500 for people younger than 50. People older than 50 can contribute up to \$7,500 annually (aka a “catch-up contribution”). Beginning in 2025, new provisions in the SECURE Act 2.0 allow for catch-up contributions for people ages 60-63 of the greater of \$10,000 or 50% more than the regular catch-up amount to a workplace plan (which will be indexed annually for inflation). For an individual without an employer-sponsored retirement plan (e.g., 401(k)), traditional IRA contributions are fully tax deductible. For an individual (or their spouse) who does participate in an employer-sponsored retirement plan, the person’s modified adjusted gross income (MAGI) determines how much of the traditional IRA contributions can be deducted.

Roth IRAs

Contributions to a Roth IRA are not tax deductible. Because contributions to a Roth IRA are made with after-tax dollars, investment gains are not taxable either. Qualified distributions and distributions after retirement from Roth IRAs do not incur income taxes. Additionally, Roth IRAs have no Required Minimum Distributions (RMDs), which are discussed in more detail later in this presentation.

Rollover IRAs

A rollover IRA is an account used to transfer money from an employer-sponsored retirement plan, such as a 401(k), into an IRA. When done correctly, the funds maintain their tax-deferred status and do not lead to income taxes or early withdrawal penalties. The transfer of an employer-sponsored retirement plan into an IRA is sometimes referred to as a “custodian to custodian” transfer - meaning the nature of the account is staying the same, but the investment provider and/or asset custodian is changing.

When an individual leaves an employer, they typically have three options for their retirement plan: 1) leave it in the current plan, 2) roll it over into an IRA or a new employer’s plan, or 3) cash out the funds (thus triggering taxes and potential penalties). According to the aforementioned [ICI](#) research, approximately 6 in 10 traditional IRA-owning households indicated that their IRAs contained rollovers from employer-sponsored retirement plans. Ease of use, lower fees, greater investment options, and account consolidation are some of the most common reasons for IRA rollovers. Rollovers can be done into traditional IRAs or Roth IRAs depending on the nature of the account’s contributions (i.e., pre- or after-tax). Note that

rollovers do not count as contributions.

If a direct rollover, or custodian to custodian transfer, is completed correctly, there are no taxes to be considered. In an indirect rollover, the account owner (or trustee, personal representative, etc.) asks for a check to be made out to themselves from the employer-sponsored retirement plan. Generally, the person has 60 days from the date they receive that distribution to put the money into a rollover IRA. If that deadline is missed, the account holder owes ordinary income taxes on the amount of the check, plus the 10% early withdrawal penalty (if applicable). Often in an indirect rollover, the employer will withhold 20% of the individual's retirement account balance. To recoup these funds, the individual must deposit into their IRA the complete account balance. For example:

- An individual's employer-sponsored retirement account has a balance of \$100,000.
- If they are withholding 20%, the employer would send a check to the individual in the amount of \$80,000.
- The individual would need to deposit the \$80,000 check plus an additional \$20,000 into a rollover IRA to show the IRS that the complete account balance was deposited.
- If \$100,000 is deposited into the rollover IRA, the IRS would refund the \$20,000 withheld after the individual has filed their personal tax return.
- If only the \$80,000 check is deposited into the IRA, ordinary income tax would be owed on \$20,000, and the 10% early withdrawal penalty would apply.

Finally, most trustees will roll over assets in employer-sponsored retirement plans into IRAs once the IRA account holder has passed away.

Inherited IRAs

When a person or trust is named as the beneficiary of an IRA or employer-sponsored retirement plan, the heir or trustee will typically have to move assets out of the decedent's name to a newly opened inherited IRA in the heir's or trust's name. An inherited IRA is also sometimes referred to as a beneficiary IRA. Any type of IRA (and most employer-sponsored retirement plans) may be turned into an inherited IRA, and the taxation of the inherited IRA generally follows the same rules that applied when the original IRA owner was alive. In other words, accounts that were funded with pre-tax dollars (e.g., traditional IRAs) or after-tax dollars (e.g., Roth IRAs) maintain their same tax treatment.

Once the account is inherited, if the inheritor is a designated beneficiary (but not an eligible designated beneficiary as defined below in the following SECURE Act section below), they must transfer the assets into an inherited IRA in their name and take distributions over the next ten years. There is no Required Minimum Distribution (RMD) each year, but the inherited IRA must be fully depleted by December 31st of the tenth year following the decedent's year of death.

An inherited IRA is generally retitled as follows:

- John Doe, (Deceased) IRA fbo John Doe, Jr.
- John Doe, (Deceased) IRA fbo John Doe, Jr., Trustee of the Jane Doe Special Needs Trust, as created under the John Doe Living Trust Agreement, Dated May 1, 2015.
- John Doe, (Deceased) IRA fbo John Doe, Jr., Trustee of the Jane Doe Special Needs

Trust, as created under the Last Will and Testament of John Doe, Dated May 1, 2015.

The beneficiary must begin taking required minimum distributions (RMDs) from the inherited IRA as required by the Secure Act. For a beneficiary who inherits an IRA, RMDs must begin by December 31 of the year following the account owner's death. The 10% early withdrawal penalty does not apply to RMDs from an inherited IRA.

IV. SECURE Act

The Setting Every Community Up for Retirement Enhancement (SECURE) Act passed just before the end of 2019. Many planners in the community did not expect the Act to pass, and there was little warning before its passage. The SECURE Act ushered in some very important changes in how planners should evaluate the transfer of IRA assets to beneficiaries with disabilities. Now, the Secure Act 2.0 has made even further changes to the IRA landscape.

The most notable change brought about by the SECURE Act is the elimination of "stretching" RMDs for beneficiaries of an IRA in most cases. As noted above, earnings in a traditional IRA are generally not taxable to the beneficiary until they are distributed. Once funds are distributed for RMDs or otherwise, they are taxed as regular income at the beneficiary's applicable ordinary income rate. Before the passage of the SECURE Act, a beneficiary (other than a spouse) of an inherited IRA could choose to take distributions over their lifetime and pass any remaining funds onto future generations. This was colloquially known as the "stretch" option. The RMDs under the stretch option were calculated based on the beneficiary's life expectancy. As such, the younger the beneficiary, the smaller the annual distributions and the longer the inherited IRA funds could grow

tax deferred. Should the IRA beneficiary need to take out funds exceeding the RMD, they may certainly do so.

The SECURE Act now requires that most beneficiaries of an IRA withdraw all the money, and pay the applicable income taxes, from the IRA within ten years of the death of the IRA funder (or “holder”/“owner”). This provision applies to everyone who inherits an IRA beginning January 1, 2020. Three types of beneficiaries may now inherit a retirement account:

Non-Designated Beneficiaries (NDBs)

A non-designated beneficiary (NDB) must take its distributions from a retirement account within five years of the death of the account owner if the account owner was younger than age 72 at death. If the account holder was age 72 or older at the date of death, the NDB may take its RMDs over the decedent's life expectancy. This latter option is sometimes referred to as the “ghost expectancy rule” or the “at least as rapidly rule.” NDBs can be an estate, a charity (if the beneficiary is not an Eligible Designated Beneficiary as discussed later), or a nonqualified trust. A nonqualified trust is a trust that is not irrevocable as of the IRA account holder's death, is not valid under state law, and the beneficiaries are not specifically identified in the trust document.

Designated Beneficiaries (DBs)

Designated Beneficiaries (DBs) are now subject to a 10-year payout requirement. A DB may take funds out of the IRA whenever it is most convenient for them so long as the account is fully depleted by December 31st of the tenth year following the decedent's year of death. A DB can be

an individual or a see-through trust (defined later herein). If the IRA account owner died before their required beginning date (RBD), then a DB is not required to take any distributions until the tenth year following the decedent's year of death. If the IRA account owner died after their RBD, then the designated beneficiary must take annual RMDs during the ten-year period.

Eligible Designated Beneficiaries (EDBs)

The SECURE Act makes exceptions for beneficiaries with disabilities by preserving the life-expectancy option for five classes of Eligible Designated Beneficiaries (EDBs):

- Spouse
- Disabled beneficiary (IRC § 401(a)(9)(E)(ii)(III))
- Chronically ill beneficiary (IRC § 401(a)(9)(E)(ii)(IV))
- Individuals not more than 10 years younger than the decedent
- Minor children of decedent (during minority only)

This presents a fantastic planning opportunity for beneficiaries with disabilities. When withdrawals are made over many years, funds within the IRA are allowed more time to grow tax-deferred. Additionally, withdrawals spread out over time are less likely to push beneficiaries into a higher personal income tax bracket. The definitions of these EDBs are as follows:

- Disabled beneficiary over the age of 18: An individual who is “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental

impairment which can be expected to result in death or to be of long-continued and indefinite duration.”

- Disabled beneficiary under the age of 18: An individual with “a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration.”
- Chronically ill beneficiary: An individual who “if, without substantial assistance, (...) [is] unable to complete two or more of the activities of daily living (e.g., grooming, dressing, toileting, ambulating, eating, or transferring)” and the illness is “reasonably expected to be lengthy in nature.”

Of note, to be considered an EDB by having a disability, the EDB must provide documentation to the plan administrator/IRA custodian by October 31st of the year following the original account holder’s year of death. If the beneficiary has already been determined disabled by the Social Security Administration (42 U.S.C. § 1382(a)(3)(A) and (B)) as of the date of the original account holder’s death, they will automatically qualify as disabled/EDB as defined by IRC § 72(m)(7). To be considered an EDB by being chronically ill, documentation must include a certification from a licensed healthcare practitioner verifying the inability of the inheritor to complete two or more activities of daily living for at least a lengthy period.

Additionally, the SECURE Act provides that the IRA holder may designate an SNT as the beneficiary of the IRA (IRC § 401(a)(9)(H)(iv)), and the SNT trustee may use the IRA to fund the SNT for the beneficiary’s supplemental needs. When the SNT pays nothing to anyone other than the EDB, the life expectancy payout rules apply. This provision allows the SNT beneficiary to continue to qualify for means-tested public benefits by creating a see-through trust. As noted

previously, there are generally two types of see-through trusts: a conduit trust and an accumulation trust. In a conduit trust, the IRA would make distributions to the trust, and the trust would subsequently pass out these funds to or for the benefit of the beneficiary. This is advantageous from a tax perspective as the IRA funds would flow out to the beneficiary and be taxed at their personal tax rate, which is most likely lower than the compressed trust tax rates. However, this income distribution to the beneficiary is generally mandatory in the trust language and would most likely disqualify the beneficiary from means-tested public benefits eligibility (as the beneficiary would be over income). Conversely, in an accumulation trust, the IRA would make distributions to the trust, and the trustee may retain those funds or use them for the benefit of the trust's beneficiary at the sole discretion of the trustee. This may result in trapped income vis-a-vis Distributable Net Income (discussed later in this presentation) and discretionary distributions to or for the benefit of the beneficiary. While such trapped income may potentially be taxed at the higher compressed trust tax rates, proceeding as such will protect the beneficiary's vital means-tested public benefits.

Distribution Requirements

SECURE Act

	Death Before RBD	Death On/After RBD
Non-Designated Beneficiary (NDB)	Five Year Rule	Ghost Expectancy Rule
Designated Beneficiary (DB)	Ten Year Rule	Ten Year Rule

Spouse DB	Life Expectancy Rule	Life Expectancy Rule
Conduit Eligible Designated Beneficiary (EDB) Trust	Life Expectancy Rule (adj. for minors)	Life Expectancy Rule (adj. for minors)
Accumulation EDB Trust (Spouse, Child, or Person > 10 years younger)	Ten Year Rule	Ten Year Rule
Accumulation EDB Trust (Disabled or Chronically Ill)	Life Expectancy Rule	Life Expectancy Rule

**RBD = Required Beginning Date (for RMDs)*

See-Through Trusts

When a trust is designated as a beneficiary of an IRA, a review of the trust to determine if it is a qualified trust is necessary to determine if the trust is a conduit or an accumulation trust. To qualify as a “qualified trust” or “see-through trust”, the trust must comply with the guidelines set out in 26 CFR § 1.401(a)(9). Specifically, the following five requirements apply:

- The trust must be valid under state law.
- The trust must be irrevocable.
- A copy of the trust must be provided to the plan provider/asset custodian no later than October 31st of the year following the owner’s death.
- All countable beneficiaries of the trust must be identifiable.

- All countable beneficiaries of the trust must be individuals (and may include charities thanks to SECURE Act 2.0 provisions).

If the trust qualifies as a see-through trust, the trustee must determine if the trust is a conduit trust or an accumulation trust in order to determine the RMD structure.

Conduit trusts must be specifically drafted to require the trustee to distribute all withdrawals from the IRA in the same calendar year in which they are received to the lifetime beneficiary (26 CFR § 1.401(a)(9)-4(f)(1)(ii)(A)).

An accumulation trust is any trust that is not a conduit trust. Accumulation trusts (wherein the 10 year rule applies unless the primary beneficiary is an EDB) must be specifically drafted to allow the trustee, in their discretion, to accumulate income within the trust and only distribute such income in their discretion (26 CFR § 1.401(a)(9)-4(f)(1)(ii)(B)). A third party SNT is always an accumulation trust. For example, the discretionary distribution language of a third party SNT may read as follows:

“Our Trustee shall be responsible for determining what discretionary distributions shall be made from this trust. Our Trustee may provide for the benefit of Mary, that amount of net income which will not cause Mary to be ineligible for governmental financial assistance benefits, in the event Mary is receiving such benefits. If Mary is not receiving governmental financial assistance benefits, or our Trustee determines it is not in her interest to receive such benefits, then our Trustee has complete discretion to distribute income and principal to or for her benefit. Any undistributed income shall be added to principal. Our Trustee may distribute discretionary amounts of principal

to or for the benefit of Mary for those supplemental needs not otherwise provided by governmental financial assistance and benefits, or by the providers of services.”

To reiterate for emphasis, in a conduit trust, the IRA would make distributions to the trust, and the trustee must subsequently distribute these funds to or for the benefit of the beneficiary in the same calendar year. The language of the trust must make these distributions mandatory. This is advantageous from a tax perspective as the IRA funds would flow out to the beneficiary and be taxed at their personal tax rate, which is most likely lower than the compressed trust tax rates of up to 37%. Conversely, in an accumulation trust, the IRA would make distributions to the trust, and the trustee may retain those funds or use them for the benefit of the trust’s beneficiary at the sole discretion of the trustee. This may result in trapped income vis-a-vis Distributable Net Income and discretionary distributions to or for the benefit of the beneficiary.

Given the differences between these two types of trusts, settlors may prefer one over the other - particularly when family dynamics are involved. For example, in an accumulation trust, the trustee has full discretion as to how and when distributions are made. As such, under the new SECURE Act rules, a lifetime spendthrift trust for a designated beneficiary (e.g., a child or grandchild) may not work well since an IRA designated to the trust must be fully paid out within ten years of the account owner’s death.

Countable Beneficiaries

As noted above, to qualify as a see-through trust, all beneficiaries must be identifiable and individuals. The “tier” test may be used to determine which beneficiaries count in order to meet this requirement. The tiers are defined as follows:

- The current beneficiary is the first tier to be reviewed. The current beneficiary is defined in 26 CFR § 1.401(a)(9)-4(f)(3)(i)(A) as “any beneficiary who could receive amounts in the trust representing the employee’s interest in the plan that are neither contingent upon, nor delayed until, the death of another trust beneficiary....”
- The second tier of beneficiaries is defined as a beneficiary “that could receive amounts in the trust representing the employee’s interest in the plan that were not distributed to the beneficiaries described in paragraph (f)(3)(i)(A) of this section” (i.e., the first-tier beneficiaries).
- The third and final tier of beneficiaries to be reviewed is any beneficiary “who could receive amounts from the trust that represent the employee’s interest in the plan solely because of the death of another beneficiary described in paragraph (f)(3)(i)(B) of this section” (i.e., only after the death of the second tier beneficiary).

In other words, should the current beneficiary die, all remainder beneficiaries of the trust (current or contingent) until the very last one should be reviewed for eligibility. However, in a conduit trust, only the first-tier beneficiaries count for eligibility. In an accumulation trust, first- and second-tier beneficiaries count for eligibility. Prior to the passage of the SECURE Act 2.0, if any of those beneficiaries are a charity (or not an individual), the trust was then not considered a see-through accumulation trust and was most likely subject to a five-year or ghost expectancy payout schedule. Said differently, if the ultimate beneficiary of the IRA was a charitable organization

(such as a Pooled Special Needs Trust's charitable remainder fund), the five-year or ghost expectancy payout schedule would have applied. Under the SECURE Act 2.0, if a charitable organization (as described in I.R.C. § 408(d)(8)(B)(i)) is named as beneficiary, the charity is now treated as a Designated Beneficiary (I.R.C. § 401(a)(9)(H)(iv)(II) and I.R.C. § 401(a)(9)(H)(v)). This means that the EDB Trust may now take advantage of the life expectancy "stretch" option for IRA depletion.

Flexibility

Post-death fixes to amend intended (or create better) outcomes still exist under the SECURE Act regulations. By and large, multiple beneficiaries of an IRA are analyzed as a whole group. If there is one NDB in the group (e.g., a charity), then all of the beneficiaries are ineligible for DB or EDB status. The "September 30th Rule" ([IRS Publication 590-B, Distributions from Individual Retirement Accounts](#)) allows the NDB to be eliminated from such a group of multiple beneficiaries before September 30th of the year following the account owner's death. If the NDB is eliminated before this date, the remaining beneficiaries can qualify for DB or EDB status.

The "Separate Accounts Rule" ([IRS Publication 590-B, Distributions from Individual Retirement Accounts](#)) allows individual beneficiaries in a multiple beneficiary group to set up separate accounts to receive their share of the retirement account. Such separate accounts must be set up by December 31st of the year following the account owner's death. If done correctly, each separate account may apply its own appropriate payout rule. However, the Separate Accounts Rule cannot

be used in situations where a revocable trust is named as the primary beneficiary. The only exclusion to this is an SNT, which may separate itself and use the EDB rule if applicable.

This concept is particularly useful in an Applicable Multi-Beneficiary Trust (AMBT). An AMBT is a trust that has more than one beneficiary and at least one beneficiary is an EDB as defined by 26 CFR § 1.401(a)(9)-4(g)(1): “An applicable multi-beneficiary trust is a see-through trust with more than one beneficiary and with respect to which—(i) All of the trust beneficiaries are designated beneficiaries; and (ii) At least one of the trust beneficiaries is an eligible designated beneficiary who is disabled (as defined in paragraph (e)(1)(iii) of this section) or chronically ill (as defined in paragraph (e)(1)(iv) of this section).” Under the SECURE Act, separate sub-trusts are treated as separate accounts regardless of the beneficiary designation form. For an SNT created as a sub-trust under an AMBT, the life expectancy payout would then be applicable.

V. Required Minimum Distributions (RMDs)

Required Minimum Distributions (RMDs) are generally the minimum amounts that a retirement plan account owner must withdraw annually from their account the year they turn 72. The age 72 RMD requirement is new under the SECURE Act (previously age 70½), which became effective January 1, 2020. If an account owner turned 70½ before January 1, 2020, the RMDs must be taken when the account owner turns 70½. The SECURE Act 2.0 increases the RMD start age to 73 on January 1, 2022, and 75 on January 1, 2033. Full information and instructions on beneficiary start dates for RMDs may be found in [IRS Publication 590-B, Distributions from Individual Retirement Accounts](#).

The RMD rules apply to all employer-sponsored retirement plans as well as traditional IRAs and IRA-based plans such as SEPs and SIMPLE IRAs. As noted previously, however, Roth IRAs do not have RMD requirements. An account owner must take their first RMD by December 31st of the year in which they turn age 73. If an account owner has more than one retirement plan, they may take their full RMD from one account if they choose and not proportionately out of multiple accounts. All that matters is that the full amount of the RMD is properly calculated and distributed by December 31st.

Typically, an RMD is calculated by dividing the prior year's December 31st value by the life expectancy factor that the IRS publishes in its [IRS Publication 590-B, Distributions from Individual Retirement Accounts](#). There are three main tables to use for these calculations:

- **Joint and Last Survivor Table II:** For use if the sole beneficiary is the account owner's spouse and the spouse is more than 10 years younger than the account owner
- **Uniform Lifetime Table:** For use if the sole beneficiary is not the account owner's spouse or the account owner's spouse is not more than 10 years younger than the account owner
- **Single Life Expectancy Table I:** For use if the account owner is a beneficiary of an account (e.g., inherited IRA)

Example: Beneficiary A inherits an IRA via their properly drafted see-through Third Party SNT, making them EDB. Beneficiary A is 38 years old. The 12/31 fair market value of the IRA was \$450,000, and the decedent had been taking RMDs.

2021 Publication 590-B (sample)

TABLE I
(Single Life Expectancy)
(For Use By Beneficiaries)

Age	Life Expectancy	Age	Life Expectancy
5	79.8	35	50.5
6	78.8	36	49.6
7	77.9	37	48.6
8	76.9	38	47.7
9	75.9	39	46.7

Calculation:

$$\$450,000 / 47.7 = \text{RMD of } \$9,433.96$$

At the beginning of the year after an RMD is taken, the plan administrator/asset custodian will typically issue an IRS Form 1099-R for inclusion on the beneficiary's or the beneficiary's trust's tax return. This form will include the amount withdrawn, how much is taxable (if applicable), any taxes withheld, and a code indicating distribution type.

An IRS Form 5498 reports total annual contributions to an IRA account and identifies the type of retirement account the account owner has (e.g., traditional IRA, Roth IRA, SIMPLE IRA, etc.). Form 5498 will also report any amounts that the account owner rolled over or transferred from other types of retirement accounts into this IRA. This form can be especially helpful to trustees trying to figure out what kind of IRAs they are dealing with, annual contributions, and the like.

That said, it may be difficult to determine if the original IRA owner had taken their RMD in the year of their death. If the original owner had not taken their RMD, the beneficiary or trust must make sure that the minimum amount gets withdrawn. Failing to do so used to result in a penalty of 50%. Under the provisions of the SECURE Act 2.0, this penalty is now reduced to 25% and may even be reduced to 10% if the missed RMD is taken by the second year following the year it was due. Taking the appropriate RMD may be particularly difficult if the original IRA holder dies late in the year. December 31st is the deadline for taking all RMDs. If the decedent was not yet required to take RMDs, then no year-of-death distribution is required.

RMDs +

When reviewing the tax implications of RMDs, the PSNT trustee may be wary of withdrawing anything over and above the RMD annually. However, there may be times when it is prudent to withdraw more than the RMD annually. Consider the following examples:

- Taking only the RMD may subject children to higher income tax rates when they inherit depending on how their personal tax return is filed.
 - Potential solution: take the highest dollar amount possible without triggering the next higher tax bracket.

- Personal income tax rates and trust income tax rates are unlikely to decrease in the future.
 - Potential solution: maximize IRA withdrawals when prudent.
- It may be appropriate to accelerate IRA distributions in years in which the beneficiary has higher deductions, thus potentially reducing the income tax due.
 - Example: a beneficiary of an SNT wherein all income passes out to them (e.g., First Party SNT (Grantor Trust), Third Party SNT (Complex Trust) wherein distributions exceed income (DNI), etc.) may need a \$5,000/month payment to an assisted living facility. This could allow the trustee to take \$60,000/year more in withdrawals to be offset by this beneficiary's personal deduction.

VI. Private Letter Rulings (PLRs)

A private letter ruling (PLR) is a written statement from the IRS to a taxpayer that interprets and applies tax laws to the taxpayer's represented set of facts. A taxpayer must independently request the IRS to review their situation and issue a PLR. A PLR is generally issued by the Chief Counsel of the IRS and is used when a taxpayer wishes to confirm that a transaction will not likely result in a tax violation. Qualified retirement plan rules require the owner of the account to be an individual. A trust can be a beneficiary, but a trust cannot be the owner of the account. A beneficiary may lose their means-tested Medicaid benefits if they are named as a direct beneficiary of an IRA. The following PLRs are important to review in terms of IRA planning when a beneficiary receiving means-tested Medicaid benefits inherits an IRA.

Private Letter Ruling 200620025

This Private Letter Ruling (PLR) was brought about when Taxpayer A died while owning an IRA. This IRA named his four sons as beneficiaries through a beneficiary designation. One of his sons was a minor and receiving Medicaid benefits. If he received the money from the IRA distribution, he would lose his SSI and Medicaid eligibility.

The facts of PLR 200620025 are as follows:

- 1) The IRA shares for three of the sons were set aside in sub-IRA accounts for their benefit.
- 2) The disabled son's share was not distributed from the IRA. However, the RMDs were made to his guardian on his behalf.
- 3) The disabled son's mother was his legal guardian. She sought and obtained an order from the state court authorizing the creation of an SNT for her son's benefit.
 - i) The trust authorized by the court was a First Party SNT with a proper Medicaid payback provision.
 - ii) The disabled son was the sole beneficiary of the trust during his lifetime, and the trustee (his mother and guardian) could distribute as much principal and income as she determined.
 - iii) However, upon the son's death, Medicaid would receive reimbursement from the trust assets up to the amount of medical assistance they paid on the son's behalf during his lifetime.
 - iv) Any remaining trust assets would then be distributed to the son's heirs at law. The son's mother executed a disclaimer as to her contingent remainder interest in the trust.

To keep the son on Medicaid and fund the SNT with the IRA assets, the mother/guardian sought to transfer her son's share, as 1/4 beneficiary of his father's IRA, to an IRA benefitting the SNT authorized by the state court. As part of this process the mother sought a PLR from the IRS to establish two things: 1) that the transfer of the father's IRA to the SNT would not be considered a transfer under I.R.C. § 691(a)(2) and would therefore be disregarded for federal income purposes, and 2) that the mother as trustee could use her son's life expectancy to calculate the annual RMDs required under I.R.C. § 401(a)(9).

Private Letter Ruling 1: Transfer of IRA to Trust

The IRS begins the analysis of this question with an examination of whether or not the transfer from the IRA to an IRA for the benefit of the SNT qualifies as a taxable transfer. I.R.C. § 691(a)(1) provides that "all items of gross income that are not properly includible in a prior period shall be included in the gross income, for the taxable year when received, of: (A) the estate of the decedent, if the right to receive the amount is acquired by the decedent's estate from the decedent; (B) the person who, by reason of the death of the decedent, acquires the right to receive the amount, if the right to receive the amount is not acquired by the decedent's estate from the decedent; or (C) the person who acquires from the decedent the right to receive the amount by bequest, devise, or inheritance, if the amount is received after a distribution by the decedent's estate of such right." I.R.C. § 691(a)(2) continues stating that if a right described in § 691(a)(1) is received under the circumstances described in that section then "the fair market value of that right shall be included in the gross income of the estate or person receiving it. For the purposes of this section, a 'transfer' does not include the transmission at death to the estate of the decedent or a transfer to a person who has a right to receive it through bequest, devise, or inheritance."

Generally, the distribution to a beneficiary of a decedent's IRA that equals the amount of the balance in the IRA at the decedent's death, less any nondeductible contributions, is gross income in respect of the decedent under I.R.C. § 691(a)(1) and is includable in the gross income of the beneficiary for the taxable year the distribution is received (Rev. Rul. 92-47, 1992-1 C.B. 198). However, the rules are different when dealing with a grantor trust.

I.R.C. § 677(a) specifies that a "grantor shall be treated as the owner of any portion of a trust whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be (1) distributed to the grantor or the grantor's spouse; (2) held or accumulated for future distribution to the grantor or the grantor's spouse; or (3) applied to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse...." Furthermore, if a grantor is treated as the owner of a trust, the grantor is considered to be the owner of the trust assets for federal income tax purposes (Rev. Rul. 85-13, 1985-1 C.B. 184). As such, a transfer of the grantor's assets to the trust is not recognized as a sale or disposition for federal income tax purposes (Rev. Rul. 85-13, 1985-1 C.B. 184).

Based on this analysis, the IRS determined that the SNT was a grantor trust and would be treated as owned by the son under I.R.C. §§ 671 and 677(a). Therefore, it was determined that the transfer of the son's share of his father's IRA to the SNT was not a sale or disposition for the purposes of I.R.C. § 691(a)(2) and was not includible for federal income tax purposes.

Private Letter Ruling 2: Life Expectancy for Annual Distributions

The PLR in this case then moves on to analyze whose life expectancy should be used in calculating annual distributions from the IRA. Generally, a trust will not be considered a “qualified plan” unless the plan provides that the entire interest of each employee (i) will be distributed to such employee not later than the required beginning date, or (ii) will be distributed, beginning not later than the required beginning date, over the life of such employee or over the lives of such employee and a designated beneficiary or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary (I.R.C. § 401(a)(9)(A)). If a portion of the interest of a deceased IRA holder is payable to, or for the benefit of, a designated beneficiary, such portion will be distributed beginning not later than one year after the date of the deceased’s death and distributed over the life of the beneficiary (or a period not extending beyond the life expectancy of the beneficiary pursuant to I.R.C. § 401(a)(9)(B)(iii)). Finally, pursuant to I.R.C. § 401(a)(9)(E), the designated beneficiary is defined as any individual designated as a beneficiary by the employee.

The PLR next examines the rules that apply if the IRA of a deceased IRA holder is divided into separate accounts for the purposes of I.R.C. § 401(a)(9) (2004-26 I.R.B. 1082, 1098 (June 28, 2004)). These rules establish that if separate accounts are established under an IRA and the beneficiaries of one account differ from the beneficiaries of another account then the accounts are not aggregated with other accounts to determine whether they satisfy I.R.C. § 401(a)(9). This applies only as long as the separate accounts are established no later than the last day of the year following the calendar year of the IRA holder’s death. These separate accounts must have a separate accounting maintained for each that includes all post-death investments, gains and losses, contributions, and forfeitures for the period prior to the establishment of the separate accounts (Final Regulations § 1.401(a)(9)-8, Q&A-3).

After analyzing these requirements, the IRS determined that the “separate account” requirements of section 1.401(a)(9)-8 of the “Final” regulations, Q&As 2 had been met for the years after the father’s death. Additionally, the IRS determined that under the facts the trust was intended to qualify as a special needs trust and that it was appropriate to calculate the annual RMDs required under I.R.C. § 401(a)(9) by using the son’s life expectancy.

Key _____ *Facts*

There are two sets of facts in this case that facilitated a favorable ruling by the IRS. The first is that the RMDs were timely made from the IRA to the son’s guardian on his behalf. Had the beneficiary failed to take the first RMD by the required date, the rules automatically default to the five-year rule.

The second important set of facts in this case is that the mother, as the son’s guardian and the trustee of the SNT, disclaimed her contingent remainder interest in the SNT. As one of the son’s heirs at law she would otherwise have a contingent remainder interest under the SNT, which would be problematic as she was also the trustee of that trust. Under the grantor trust rules, this situation may have prevented the trust from qualifying as a grantor trust because she would have been an adverse party. Without this qualification as a grantor trust, the trustee-to-trustee transfer from the IRA to the trust would not have been possible. The only solution then would have been to liquidate the IRA, pay all the income tax, and place the remaining proceeds into the SNT.

Takeaways

Of note, PLRs cannot be cited as precedent but only as an indication of the IRS's position on the particular question. In this PLR, it behooved the planners and counsel to pay very close attention to deadlines for making distributions and filing any disclaimers. Additionally, cooperation between the IRA asset custodian and trustee was key.

Private Letter Ruling 201116005

The facts of PLR 201116005 are as follows:

- 1) The terms of the trust provide that *X* is the sole beneficiary of the trust during *X*'s lifetime.
- 2) The trustee shall apply so much of the net income of the trust as the trustee deems beneficial for the use of *X* taking into consideration the best interest and welfare of *X*.
- 3) If the income from the trust, together with any other income and resources possessed by *X*, including all governmental benefits, is insufficient to provide for *X*'s benefit, the trustee is authorized to invade principal.
- 4) In general, however, the trustee may not invade the principal if such act will serve to deny, discontinue, reduce, or eliminate any government entitlement or payment which *X* would otherwise receive.
- 5) Upon *X*'s death, any remaining principal and undistributed income of the trust shall be distributed to the State as reimbursement for assistance provided during *X*'s lifetime. After reimbursement to the State, all remaining principal and undistributed income will be distributed to *X*'s issue or, if there are no issue, to *X*'s siblings, then to their issue by representation.

The facts of the PLR do not disclose who was serving as trustee of the trust, and the ruling does not include any discussion as to what makes the trust a grantor trust for income tax purposes.

Takeaway

The IRS begins its analysis with a discussion of I.R.C. § 691(a)(1). Although the ruling does not mention whether this is an inherited IRA or the beneficiary's own IRA, the reference to Section 691(a)(1), income in respect of a decedent (IRD), indicates that the ruling is addressing an inherited IRA. As in Private Letter Ruling 200620025, the IRS cites Rev. Rul. 85-13, 1985-1 C.B. 184 and concludes that if a grantor is treated as the owner of a trust, the grantor is considered to be the owner of the trust assets for federal income tax purposes. Therefore, the trust, as represented in the PLR, will be treated as owned by *X*, and the transfer of *X*'s share of the IRA to the trust is not a gift by *X* and will not be treated as a sale or disposition for federal income tax purposes.

Private Letter Ruling 201117042

Although the IRS has issued favorable rulings on the transfer of an inherited IRA into a First Party SNT, the same cannot be said for a transfer of the SNT beneficiary's own IRA. In Private Letter Ruling 201117042 (Apr. 29, 2011), the IRS stated that "an individual retirement account cannot be set up and maintained in the name of a trust." Any transfer of an IRA to a trust should be treated as a taxable distribution by the financial institution making the transfer. The facts of PLR 201117042 are as follows:

- 1) The taxpayer, a person with muscular dystrophy, filed a petition to the state court to create a First Party SNT for his own benefit.
- 2) The taxpayer's only asset to be funded into the First Party SNT was his own IRA.
- 3) The taxpayer signed documents that he thought transferred his IRA into his SNT. Instead, the financial institution transferred the taxpayer's IRA into a non-IRA account and issued a Form 1099-R reporting a fully taxable distribution.
- 4) The 60-day rollover period lapsed, and the taxpayer requested a PLR for additional time to transfer the funds from a non-IRA account to an IRA account and for the IRA to be titled in the name of the First Party SNT.

Takeaways

Although the taxpayer prevailed on the waiver of the 60-day rollover requirement, the IRS refused to favorably rule on the taxpayer's request to transfer his own IRA to a First Party SNT. The ruling does not discuss or mention whether the SNT established by the taxpayer was a grantor trust. The IRS concluded that the financial institution correctly issued a Form 1099-R treating the transfer of the IRA as a fully taxable distribution.

VII. Decedent Proceedings

Many state Medicaid regulations specifically designate the state as a remainder beneficiary of a First Party SNT. When the State Medicaid department classifies itself as a remainder beneficiary of the First Party SNT, the trustee is faced with the issue of whether a distribution from the SNT for payment of the state's Medicaid claim is a payment of a debt due to a creditor or a distribution

to a beneficiary. The overall objective in determining as such is to lessen the potential tax burden of an IRA distribution to the trust and/or remainder beneficiaries in the final year of administration.

The amount due to satisfy a payback obligation to the state Medicaid office is determined based upon the “medical assistance” paid on behalf of the beneficiary. In effect, Medicaid is paying the beneficiary’s cost of care in exchange for a promise to repay the state with the trust assets upon the death of the beneficiary. The amount ultimately paid to the state is based upon the total medical assistance provided to the beneficiary. If the trust assets are insufficient to pay back the state, then the state receives only what is remaining in the trust. The residuary beneficiaries of the trust do not have personal liability for any unpaid amount due to Medicaid. Since the residuary beneficiary does not have personal liability for the payment of the state Medicaid claim the distribution is not a payment on behalf of a residuary beneficiary that will carry out DNI (I.R.C. §1.661(a)-2(d)).

The amount due to the state is based upon the cumulative medical assistance “advanced” to the beneficiary by Medicaid. In other words, the amount due to the state is not based upon a specific dollar amount or a percentage of the remaining trust assets, meaning the state is not entitled to any more from the trust than the amount owed for past medical assistance provided. For an insolvent trust, it is clear the phrase “beneficiaries” means those entities and individuals to whom the trust would have been distributed if it had not been insolvent. For an insolvent trust, the state will not be classified as a beneficiary.

As such, can the payment by the SNT of the state’s Medicaid claim create a corresponding deduction (as medical expenses) to the trust for its final tax filing? As a general rule, the medical and dental expenses of a decedent that are paid by the estate or trust are not deductible in computing the estate's or trust’s taxable income pursuant to IRS Pub. No. 559 (2005), p.19. Medical expenses are deductible only by the taxpayer who paid them (and only in the tax year in which they were

paid). In addition, expenses incurred by a taxpayer for their medical care but paid after his death out of their estate aren't among the allowable income tax deductions in respect of a decedent. However, medical expenses are treated as paid by the taxpayer at the time they were *incurred* if they are paid out of the deceased taxpayer's estate during the one-year period beginning with the day after the date of the taxpayer's death, as per IRS Reg. Sec. 1.213-1(d)(1).

As such, medical expenses are “incurred” for the purpose of deductibility in the year the medical services are rendered. If the services were rendered in a year for which a return has already been filed, an amended return must be filed for that earlier year. However, no credit or refund of tax will be allowed for any tax year for which the normal statutory period for filing a claim has expired.

Example: A, who filed his return on a calendar year basis, died on June 1, Year 2, after having incurred \$8,000 in medical expenses. \$5,000 of that amount was incurred during Year 1 and the balance of \$3,000 was incurred in Year 2. The decedent had filed his Year 1 personal income tax return on April 15, Year 2. His executor paid off the entire \$8,000 liability in August Year 2. The decedent's executor may then file an amended return for Year 1 claiming the \$5,000 medical expenses as a deduction thus securing a refund resulting from the increase in the decedent's Year 1 deductions. The \$3,000 of expenses incurred in Year 2 may be deducted on the decedent's final return.

If the conditions discussed above are not satisfied, the medical expenses cannot be deducted on the deceased taxpayer's income tax return.

Unfortunately, there is no clear answer when the trust has significant income in the year of termination due to an IRA distribution plus a large payback amount due the state Medicaid department. Most importantly, planners and trustees must proactively recognize when there will be this issue and devise a plan before the trustee pays the Medicaid claim. Once payment has been made to satisfy the Medicaid payback amount, it is likely too late to completely protect the trustee from liability. In most situations, the problem will occur when the First Party SNT's primary asset is an IRA.

The recommended course of action is for the trustee to withhold sufficient taxes on the IRA distribution. The Trustee should plan on a tax rate of 37% plus taxes due to the state. The trustee is usually authorized to pay federal and state income taxes prior to satisfying the state Medicaid claim. Taxes can be withheld even if the withholding causes the payback claim to not be paid back in full.

Alternatively, the trustee could treat the payment of the state Medicaid claim as a distribution to a beneficiary of the trust. The Trustee will be required to send a K-1 to the state Medicaid office that reflects the amount of the income allocated to the state as a beneficiary of the trust. A state agency or department does not pay federal or state income tax. As a result, there are no income tax consequences to the state for being treated as a beneficiary of the trust. The risk to the trustee here is twofold. First, the trustee risks being audited by the IRS and the distribution deduction claimed for the distribution to the state Medicaid office is disallowed. The trustee may be personally liable for any unpaid taxes and interest due to the disallowance of the distribution deduction. Second, classifying the state Medicaid office as a beneficiary of the trust may open

the trustee to more liability as the state has been elevated from creditor status to beneficiary status.

VIII. SECURE Act 2.0 Updates

The SECURE Act 2.0 brought approximately 90 new separate provisions to IRA administration, each with its own effective date. Some of the other salient provisions contained in the Act are as follows:

- **Student Loans (2024):** employers may match contributions to retirement plans based on employees' student loan payment amounts.
- **Qualified Tuition Program (QTP) - aka College Savings/529 Plan (2024):** a College Savings account may be rolled over to a Roth IRA under limited circumstances.
 - QTP must be maintained for 15 years
 - Annual limits for rollover must be within annual contribution limits
 - Lifetime limit of \$35,000
- **Qualified Charitable Donation (QCD) (2024):** \$100,000 charitable donation limit from an IRA is now adjusted for inflation beginning in 2024.
- **401(k) Lost & Found Database:** an online searchable database will be constructed for employees to find lost retirement plans (similar to a state escheatment office).
- **Saver's Credit → Saver's Match(2027):** a matching contribution to a retirement account will be provided for retirement account holders instead of a tax credit.
 - Limited to 50% of IRA or retirement plan contributions up to \$2,000 and is subject to income limits.

- **Roth 401(k)** (2024): are no longer subject to RMD rules before the account holder's death (but post death RMD rules still apply).
- **Surviving Spouse** (2024): may be treated as the deceased retirement account holder for RMD purposes. This may delay RMD beginning dates.
 - Election is irrevocable.
 - Surviving spouse must notify the account administrator of election.


Please note that the views and opinions expressed herein are solely those of the authors and do not necessarily reflect the views of True Link Financial Advisors, LLC.

STETSONLAW
2023 National Conference on Special Needs Planning and Special Needs Trusts

SECURE Act 2.0 IRA Administration

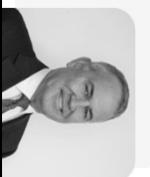
Bradley J. Frigon, JD, LLM, CELA, CAP
Law Offices of Bradley J. Frigon, LLC
www.bjflaw.com
bfri@bjflaw.com

Peter J. Wall
Director of Fiduciary Services
True Link Financial Advisors, LLC
peter.wall@truelinkfinancial.com
www.truelinkfinancial.com



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Presenter's Bio



Bradley J. Frigon
JD, LLM, CELA, CAP

- 38 years practicing attorney
- Focus in the elder law arena
- Extensive experience across estate planning, estate and probate litigation, special needs planning, guardianship and conservatorship matters, Medicaid, and taxation
- Nationally recognized expert in special needs planning and tax issues


Associations:

- Past-President of the National Academy of Elder Law Attorneys (NAELA), NAELA fellow
- Appointed member of the Special Needs Alliance, special counsel for the Colorado Fund for People with Disabilities
- Fellow of the American College of Trust and Estate Counsel (ACTEC)
- Certified Elder Law Attorney (CELA)
- Member of the Council of Advanced Practitioners (CAP)
- Adjunct Professor at Stetson University College of Law
- Member of True Link Financial Investment Committee

2

Presenter's Bio

20 years of professional trust administration - Focus in Elder Law & SNT Planning



Peter J. Wall
Director of Fiduciary Services
for
True Link Financial Advisors, LLC

Prior to joining True Link Financial Advisors, LLC:

- Developed and helped lead an Elder Law and SNT division of an \$80 billion nationally chartered trust bank
- Past President of the Centennial Estate Planning Council
- Member of the Board of Directors for Easter Seals
- Past President of VSA Access Gallery
- Member of the Academy of Special Needs Planners

Special needs trusts, estate planning, taxation, and trust administration faculty member and presentations include:

- 2016, 2018, 2019, 2020, 2021, 2022 & 2023 Stetson National Conference on Special Needs Planning and Special Needs Trusts
- CBA 2012, 2014, 2015, 2017 & 2022 CBA Elder Law Retreat
- 2013 National Down Syndrome Congress
- 2015 46th Annual Autism Society National Conference
- 2022 Schwab IMPACT®
- 2017 & 2021 National Conference for National Guardianship Association
- 2019, 2020 Special Needs Alliance
- 2019, 2020 & 2021 National NAELA Conference
- 2020 CA NAELA
- 2020, 2021, 2022 & 2023 PFAC Annual Conference

3

Inherited IRAs - General

Inherited IRAs


- a/k/a "beneficiary IRA"
- Maintains same tax treatment as initial vehicle
- Withdrawal rate determined as per SECURE Act
- RMDs must begin by Dec 31 of the year following account owner's death

Typical Inherited IRA Rerolling Formats

John Doe, (Deceased) IRA fbo John Doe, Jr.

John Doe, (Deceased) IRA fbo John Doe, Jr., Trustee of the Jane Doe Special Needs Trust, as created under the John Doe Living Trust Agreement, Dated May 1, 2015.

John Doe, (Deceased) IRA fbo John Doe, Jr., Trustee of the Jane Doe Special Needs Trust, as created under the Last Will and Testament of John Doe, Dated May 1, 2015



4

SECURE Act

Setting Every Community Up for Retirement Enhancement

- Passed at the end of 2019
- Followed by the **SECURE Act 2.0** (passed 12/29/2022)
 - **Securing a Strong Retirement Act of 2022**
 - **Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act (RISE & SHINE Act)**
 - **Enhancing American Retirement Now Act (EARN Act)**
- Eliminated RMD "stretch" for many beneficiaries
 - Generally, the inherited IRA was distributed over lifetime of IRA beneficiary
 - Now, most beneficiaries must withdraw all IRA funds (and pay applicable income taxes) within ten years of IRA owner's death (with certain exceptions)
- New RMD dates:
 - SECURE Act
 - RMDs begin at age 72 (previously 70 ½) if account owner turned 70 ½ after Jan 1, 2020
 - SECURE Act 2.0
 - RMDs begin at age 73 (2022), and 75 (2033)
- Applies to IRAs inherited January 1, 2020 +

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SECURE Act 2.0

Passed in December, 2022

Approximately **90!** separate new provisions - each with its own effective date

- **Catch-Up Contributions Increase** (2025): greater of \$10,000 or 50% more than regular catch-up amount @ 60, 61, 62, or 63 (indexed for inflation after 2025)
 - (2024): workers with incomes over \$145,000 can make catch-up contributions
- **Student Loans** (2024): employer can match contribution to retirement plan based on employee student loan payment amount
- **Qualified Tuition Program (College Savings/529 Plan)** (2024): plan account rollover to Roth IRA. (limited circumstances)
 - QTP must be maintained for 15 years
 - Annual limits for rollover must be within annual contribution limits
 - Lifetime limit of \$35,000
- **Qualified Charitable Distribution (QCD)** (2024): \$100,000 limit now adjusted for inflation beginning in 2024
- **401(k) Lost & Found database**

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SECURE Act 2.0

- **Saver's Credit → Saver's Match** (2027): matching contribution vs. credit
 - 50% of IRA or retirement plan contributions up to \$2,000 (subject to income limits/phase outs)
- **Missed RMD Penalty Reduction** (2023): penalty reduced from 50% to 25%
 - 10% if rectified by 2nd year following year due
- **Roth 401(k)** (2024): not subject to RMD rules pre-account holder death
 - (note: post death RMD rules still apply)
- **Annuities in IRAs/RMDs** (2024): multiple changes (Qualifying Longevity Annuity Contract (QLAC))
- **Surviving Spouse** (2024): may be treated as deceased owner for RMD purposes
 - Could delay RMD beginning dates
 - Election is irrevocable
 - Surviving spouse must notify account administrator

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SECURE Act

IRA Beneficiary Types

Non-Designated Beneficiaries (NDBs)

- Estate, charity or non-qualified trust
 - "Non-qualified trust": not irrevocable as of IRA account holder's death, not valid under state law and beneficiaries are not specifically identified in trust document
- Withdrawal rules:
 - If account owner was younger than 72: 5 years
 - If account owner was 72+: RMDs over decedent's life expectancy
 - "Ghost expectancy rule" or "at least as rapidly rule"

Designated Beneficiaries (DBs)

- Individual (non-spouse) or see-through trust
- Withdrawal rules:
 - 10 years
 - IRA owner died pre- Required Beginning Date (RBD): may wait until year 10
 - IRA owner died post- RBD: annual RMDs during 10 year period

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SECURE Act

IRA Beneficiary Types (cont'd)

Eligible Designated Beneficiaries (EDBs)

- Spouse
- Beneficiary with a disability
 - **IRC § 401(a)(9)(E)(i)(II)**
 - Over 18: "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration"
 - Under 18: "a medically determinable physical or mental impairment that results in marked and severe physical or mental impairment and that can be expected to result in death or to be of long-continued and indefinite duration"
 - **IRC § 72(m)(7)**
 - Disabled per SSA (42 U.S.C. § 1382(a)(3)(A) and (B))
 - Documentation required by Oct 31 of year following account owner's death (note: current regulations are unclear as to where to submit)
- Beneficiary who is chronically ill
 - **IRC § 401(a)(9)(E)(iv)**
 - Beneficiary who "if, without substantial assistance, [...] [is] unable to complete two or more of the activities of daily living..." and the illness is "reasonably expected to be lengthy in nature"
 - Documentation (including certification from licensed healthcare practitioner) required by Oct 31 of year following account owner's death (note: current regulations are unclear as to where to submit)
- Individuals not more than 10 years younger than decedent
- Minor children of decedent (**during minority only**)

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SECURE Act

IRA Beneficiary Types (cont'd)


Eligible Designated Beneficiaries (EDBs) (cont'd)

- SNTs (IRC § 401(a)(9)(H)(iv))

"See-Through Trust" / "Qualified Trust"

IRC § 401(a)(9)(H)(iv)(II):

- Valid under state law
- Irrevocable
- Copy of trust must be provided to plan provider (presumably) by Oct 31 of year following account owner's death
- All countable beneficiaries must be identifiable
- **All countable beneficiaries must be individuals**
 - SECURE Act 2.0: EDB trust remainder charities are now DBs!



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SECURE Act

IRA Beneficiary Types (cont'd)

Eligible Designated Beneficiaries (EDBs)

Withdrawal rules: life expectancy of beneficiary

Special Needs Trust Improvement Act

- Page 915 of 1,653-page Consolidated Appropriations Act, 2023
○ a/k/a Section 337 of SECURE Act 2.0

(a) In General.--Section 401(a)(9)(H)(iv)(II) is amended by striking "no individual" and inserting "no beneficiary".
 (b) Conforming Amendment.--Section 401(a)(9)(H)(v) is amended by adding at the end the following flush sentence:
 "For purposes of the preceding sentence, in the case of a trust the terms of which are described in clause (iv)(II), any beneficiary which is an organization described in section 408(d)(8)(B)(i) shall be treated as a designated beneficiary described in subclause (ii)". (c) Effective Date.--The amendments made by this section shall apply to calendar years beginning after the date of the enactment of this Act."

Advantages for EDBs:

- Continued qualification for means-tested public benefits
- More time for inherited IRA assets to grow tax-deferred
- Less likely to push beneficiaries into higher income tax bracket vs. 5-year or 10-year rule

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SECURE Act

IRA Beneficiary Types (cont'd)

Eligible Designated Beneficiaries (EDBs)

"See-Through Trust" / "Qualified Trust"

Conduit Trust:

- Must require trustee to distribute all withdrawals from the IRA in the same calendar year in which they are received to the lifetime beneficiary (e.g., "shall not may" - mandatory)
- 26 CFR § 1.401(a)(9)-4(f)(1)(ii)(A)

Accumulation Trust:

- Any trust that is not a conduit trust
- Trustee may accumulate income and only distribute such income in their discretion
- 26 CFR § 1.401(a)(9)-4(f)(1)(ii)(B)
- May lead to "trapped" income at the trust level (DNI)

2023 Simplified Federal Trust Income Tax Rates

Trust Taxable Income	Trust Tax Rate
\$2,900 or less	10%
\$2,901 - \$10,550	\$290 + 24% of excess over \$2,900
\$10,551 - \$14,450	\$2,126 + 35% of excess over \$10,550
\$14,451+	\$3,491 + 37% of excess over \$13,450

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SECURE Act

Countable - Tiered Beneficiary Rules (for use to qualify as a see-through trust)

First Tier:

- 26 CFR § 1.401(a)(9)-4(f)(3)(i)(A): "Any beneficiary who could receive amounts in the trust representing the owner's interest in the plan that are neither contingent upon, nor delayed until, the death of another trust beneficiary..."

Second Tier:

- A beneficiary "that could receive amounts in the trust representing the employee's interest in the plan that were not distributed to the beneficiaries described in paragraph (f)(3)(i)(A) of this section" (i.e., the first-tier beneficiaries)

Third Tier:

- A beneficiary "who could receive amounts from the trust that represent the employee's interest in the plan solely because of the death of another beneficiary described in paragraph (f)(3)(i)(B) of this section" (i.e., only after the death of the second tier beneficiary)

Takeaways:

- First tier beneficiaries always count
- Third tier beneficiaries appear to never count
- Conduit trust: first tier beneficiaries are the only ones that count; second tier beneficiaries do not count
- Accumulation trust for EDB: first & second tier beneficiaries count (if all second tier beneficiaries are DBs, EDB life expectancy is used for RMDs)
- Always disregard beneficiaries who predecease account owner

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Distribution Requirement Table

SECURE Act

	Death Before RBD	Death On/After RBD
Non-Designated Beneficiary (NDB)	Five Year Rule	Ghost Expectancy Rule
Designated Beneficiary (DB)	Ten Year Rule	Ten Year Rule
Spouse (DB)	Life Expectancy Rule	Life Expectancy Rule
Conduit EDB Trust	Life Expectancy Rule (adj. for minors)	Life Expectancy Rule (adj. for minors)
Accumulation EDB Trust (Spouse, Child, or Person > 10 years younger)	Ten Year Rule	Ten Year Rule
Accumulation EDB Trust (Disabled or Chronically III)	Life Expectancy Rule	Life Expectancy Rule

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SECURE Act

Required Minimum Distributions (RMDs)

- Minimum amounts a retirement plan account owner must withdraw annually
- Minimum amount inherited IRA beneficiary must withdraw annually
- Not applicable to Roth IRAs
- If multiple accounts: may be taken from any account as long as full amount is withdrawn by Dec 31
- Calculated by dividing prior year's 12/31 value by IRS life expectancy factor

TABLES

IRS Publication 590-B, Distributions from Individual Retirement Accounts

Joint and Last Survivor Table II:

- for use if sole beneficiary is account owner's spouse (more than 10 years younger than account owner)

Uniform Life Table:

- for use if sole beneficiary is not the account owner's spouse of the account owner's spouse is less than 10 years younger than account owner

Single Life Expectancy Table I:

- for use if account owner is a beneficiary of an account (e.g., inherited IRA)

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SECURE Act

Flexibility

"September 30th Rule"

- NDB may be eliminated from a group of multiple beneficiaries before Sept 30 of year following account owner's death
- Remaining beneficiaries may then qualify for DB (10-year) or EDB (10-year or Life Expectancy) status

"Separate Accounts Rule"

- Allows individual beneficiaries to set up separate accounts to receive their share of inherited IRA
- Must be complete by Dec 31 of the year following account owner's death
- If done correctly, each separate account applies its own payout rule
- Cannot be used when a revocable trust is named primary beneficiary
 - Exception: SNT, which may separate itself and use EDB (if applicable) rule

Applicable Multiple Beneficiary Trust (AMBT)

- Trust for more than one beneficiary and at least one beneficiary is EDB
 - "An applicable multi-beneficiary trust is a see-through trust with more than one beneficiary and with respect to which—(i) All of the trust beneficiaries are designated beneficiaries; and (ii) At least one of the trust beneficiaries is an eligible designated beneficiary who is disabled (as defined in paragraph (e)(1)(iii) of this section) or chronically ill (as defined in paragraph (e)(1)(iv) of this section)."
- For an SNT created as a sub-trust of an AMBT: Life Expectancy rules
- Includes charity as DB for EDB Trust

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Scenario #1 - The Basics

Fact Pattern 1:

- Beneficiary with a disability:
 - 3rd Party SNT sub-account (accumulation trust)
 - Beneficiary is 50 years old
- Beneficiary's uncle (deceased) designated 3rd Party SNT as IRA beneficiary
- Beneficiary's sister is 3rd Party SNT remainderperson
 - Sister is 40 years old

Fact Pattern 2:

- Beneficiary with a disability:
 - 3rd Party SNT sub-account (accumulation trust)
 - Beneficiary is 50 years old
- Beneficiary's uncle (deceased) designated 3rd Party SNT as IRA beneficiary
- Beneficiary's sister is 3rd Party SNT remainderperson
 - Sister is 60 years old

Fact Pattern 3:

- Beneficiary with a disability:
 - 3rd Party SNT sub-account (accumulation trust)
 - Beneficiary is 50 years old
- Beneficiary's uncle (deceased) designated 3rd Party SNT as IRA beneficiary
- The PSNT is 3rd Party SNT remainderperson

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Scenario #1 - The Basics

Fact Pattern	1st Tier Beneficiary	2nd Tier Beneficiary	Measuring Life	Life Expectancy	RMD (\$500,000 IRA)
1	Beneficiary (50)	Sister (40)	Beneficiary	36.2	\$13,812
2	Beneficiary (50)	Sister (60)	Beneficiary	36.2	\$13,812
3	Beneficiary (50)	The Arc of Texas	Beneficiary	36.2	\$13,812

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Scenario #2 - Accelerated Distributions

Fact Pattern:

- Minor beneficiary
 - 1st Party PSNT sub-account
 - Age: 17
 - Current tax bracket: 12%
 - \$11,000 - \$44,725 (2023 bracket)
- Beneficiary of parents' (deceased) IRA
 - \$400,000
- Age of majority: 21
- Expected tax bracket at age 21: 22%
 - \$44,726 - \$95,375 (2023 bracket)



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Scenario #2 - Accelerated Distributions

Age	Life Exp.	RMD*	Taxes
17	68	\$5,882	\$706
18	67	\$5,882	\$706
19	66	\$5,882	\$706
20	65	\$5,882	\$706
10 Year Rule**	10	\$37,647	\$8,282
10 Year Rule**	9	\$37,647	\$8,282
10 Year Rule**	8	\$37,647	\$8,282
10 Year Rule**	7	\$37,647	\$8,282
10 Year Rule**	6	\$37,647	\$8,282
5 remaining years - 10 Year Rule**	5	\$188,235	\$41,410



RMD Only Analysis

Total paid in taxes: **\$85,647**

Or: 21% of original corpus

**assumes no investment growth
**assumes equal payments*

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Scenario #2 - Accelerated Distributions

Age	Life Exp.	RMD*	Taxes
17	68	\$5,882 + \$30,000	\$4,304
18	67	\$5,882 + \$30,000	\$4,304
19	66	\$5,882 + \$30,000	\$4,304
20	65	\$5,882 + \$30,000	\$4,304
10 Year Rule**	10	\$25,647	\$5,642
10 Year Rule**	9	\$25,647	\$5,642
10 Year Rule**	8	\$25,647	\$5,642
10 Year Rule**	7	\$25,647	\$5,642
10 Year Rule**	6	\$25,647	\$5,642
5 remaining years - 10 Year Rule**	5	\$128,235	\$28,210



RMD+ Analysis

Total paid in taxes: **\$73,636**

Savings: **\$12,008**

**assumes no investment growth
**assumes equal payments*

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Scenario #2 - Accelerated Distributions

- RMDs+**
- Many trustees are reticent to take anything more than the RMDs annually from an IRA
 - Distributions in excess of RMDs should be made when the beneficiary's SNT funds are insufficient to cover their discretionary distribution needs
 - Potential scenarios where taking more than the RMD is prudent, regardless of immediate beneficiary need:
 - Current minor beneficiaries
 - Taking only the RMD allows the IRA to continue to grow tax-deferred
 - When the minor becomes an adult, the IRA exhaustion rate may be accelerated, therefore creating a higher tax burden
 - Potential solution: take the highest dollar amount possible from the IRA without triggering the next higher tax bracket
 - Personal and trust income tax rates are unlikely to decrease in the future
 - Potential solution: maximize IRA withdrawals as prudent
 - Beneficiaries who have higher deductions
 - In years where a beneficiary has higher medical deductions, the trustee may wish to accelerate IRA distributions to lessen the tax burden
 - Example:
 - Beneficiary of an SNT (wherein income passes out fully - DNI)
 - \$5,000/month to ALF
 - Trustee may take \$60,000 (\$5,000 x 12 months) in IRA withdrawals potentially offset by beneficiary's personal deduction

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Scenario #3 - Decedent Proceedings

- Issue:**
- Most state Medicaid regulations designate the state as remainderperson up to the amount of medical assistance provided to the beneficiary
 - "Advanced" to the beneficiary
 - If assets remaining in the trust are insufficient, the state receives only remaining funds
 - Insolvent trust: state is not a beneficiary
 - IRA funds may need to be distributed to the SNT upon beneficiary death to satisfy Medicaid claim
 - Taxable as income
 - I.R.C. § 1.661(a)-2(d): residuary beneficiaries do not have personal liability for Medicaid claim, therefore payment on behalf of the residuary beneficiary does not carry out DNI
 - Medical distributions paid after death from estate aren't allowable income tax deductions
 - Would require amendments of prior returns to capture

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Scenario #3 - Decedent Proceedings

Fact Pattern 1:
First Party SNT beneficiary dies with the following assets/liabilities:

- Assets:**
- Trust: \$16,000
 - IRA fbo Trust: \$150,000

- Liabilities:**
- State payback claim: (\$42,000)
 - Misc bills due through DOD: (\$2,000)
 - Final allowable expenses: (\$6,000)
 - Final allowable trustee fees: (\$14,400)

Beneficiary of the IRA is the trust, trust terms dictate payment to state Medicaid claim - remainder to beneficiary's mother

In trust's final year, trustee pays all liabilities and remaining funds (\$101,600) to beneficiary's mother

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Scenario #3 - Decedent Proceedings

Fact Pattern 1:

First Party SNT Final 1041:

Income In Respect To Decedent (IRD): distribution to SNT)	\$150,000 (IRA
Less:	
Deductible Administration:	<u>(\$14,400)</u>
Taxable Income:	\$135,600
Less:	
Distribution Deduction:	(\$101,600)
Exemption:	<u>(\$100)</u>
Taxable Income:	\$33,900
Federal Tax Due:	\$12,500

- Issue:**
- Trustee requests mother to return \$12,500 to pay tax due
 - Mother has already spent the funds

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Scenario #3 - Decedent Proceedings

Fact Pattern 2:

First Party SNT beneficiary dies with the following assets/liabilities:

Assets:

- Trust: \$16,000
- IRA fbo Trust: \$150,000

Liabilities:

- State payback claim: (\$42,000)
- Misc bills due through DOD: (\$2,000)
- Final allowable expenses: (\$6,000)
- Final allowable trustee fees: (\$14,400)

Beneficiary of the IRA is the trust, trust terms dictate payment to state Medicaid claim - remainder to beneficiary's mother; trustee treats state Medicaid as remainder beneficiary

In trust's final year, trustee pays all liabilities and remaining funds (\$101,600) to beneficiary's mother

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Scenario #3 - Decedent Proceedings

Fact Pattern 2:

First Party SNT Final 1041:

Income In Respect To Decedent (IRD): distribution to SNT)	\$150,000 (IRA
Less:	
Deductible Administration:	<u>(\$14,400)</u>
Taxable Income:	\$135,600
Less:	
Distribution Deduction (mother):	(\$101,600)
Distribution Deduction (Medicaid):	<u>(\$42,000)</u>
Taxable Income:	\$0
Federal Tax Due:	\$0

- Issue:**
- Trustee sends Form K-1 to state Medicaid office (???)

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Scenario #4 - Equal Treatment

Fact Pattern:

- Parents (settlors) have twin daughters (age 50)
- One daughter has a significant disability and will need assistance for the rest of her life (standard life expectancy)
 - Expects to have significant potential medical expense deductions
- Dispositive provisions of parents' trust = equal shares (1/4) of remaining estate to each daughter
 - Daughter with a disability → 3rd Party SNT
 - Daughter w/o disability = remainderperson
 - Daughter w/o a disability → outright
- Presumed assets upon parents' passing:
 - IRA: \$500,000
 - Life Insurance: \$500,000
 - Investments: \$500,000
 - Will qualify for step-up in cost basis to date of death
- Tax brackets:
 - Daughter with a disability: 12% (SSI + trust income)
 - Daughter without a disability: 32% (wages)
- Assume all 3rd Party SNT income passes out to daughter with a disability via Distributable Net Income (DNI)

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Scenario #4 - Equal Treatment

IRA Analysis

	1st Tier Beneficiary	2nd Tier Beneficiary	Life Expectancy	RMD*	Taxes Due
3rd Party PSNT	3rd Party PSNT	Daughter w/o a disability	36.2	\$13,812	\$1,657
			35.3	\$13,773	\$1,652
			34.3	\$13,773	\$1,652
			33.4	\$13,732	\$1,648
			32.5 etc.	\$13,688 etc.	\$1,643 etc.
Daughter w/o a disability	Daughter w/o a disability	3rd Party PSNT	n/a - 10 years	\$50,000 each year**	\$16,000 each year

*assumes no investment growth
**assumes equal payments

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Scenario #4 - Equal Treatment

	3rd Party SNT	Daughter w/o a disability
IRA	Taken over EDB life expectancy	10-year rule
	Income passes out of trust to be taxed at lower personal income tax rate	Income taxed at higher personal income tax rate
	Income may be offset by medical deductions + standard/itemized deductions	Income may be standard/itemized deductions
	Allowed to grow longer tax-deferred	10-year rule
Life Insurance	Tax free	Tax free
Investments	Tax free (step-up)	Tax free (step-up)
Taxes	QDT Exemption	No QDT Exemption

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Scenario #5 - Countable - Tiered Beneficiary

Fact Pattern:

- Beneficiary receiving SSI inherits IRA from parents
- IRA designation form names beneficiary personally as inheritor
- Beneficiary wishes to establish 1st Party SNT to maintain SSI eligibility
- Beneficiary and SNT trustee petition court to allow funds to remain in IRA FBO 1st Party SNT
- Court "assigns" IRA to 1st Party SNT
- Court requires IRA to be paid to beneficiary's estate upon death of beneficiary to preserve potential Medicaid payback claim

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Scenario #5 - Countable - Tiered Beneficiary

Countable - Tiered Beneficiary Rules (for use to qualify as a see-through trust)

First Tier:

- 26 CFR § 1.401(a)(9)-4(f)(3)(i)(A): "Any beneficiary who could receive amounts in the trust representing the owner's interest in the plan that are neither contingent upon, nor delayed until, the death of another trust beneficiary..."

Second Tier:

- A beneficiary "that could receive amounts in the trust representing the employee's interest in the plan that were not distributed to the beneficiaries described in paragraph (f)(3)(i)(A) of this section" (i.e., the first-tier beneficiaries)

Third Tier:

- A beneficiary "who could receive amounts from the trust that represent the employee's interest in the plan solely because of the death of another beneficiary described in paragraph (f)(3)(i)(B) of this section" (i.e., only after the death of the second tier beneficiary)

Takeaways:

- First tier beneficiaries always count
- Third tier beneficiaries appear to never count
- Conduit trust: first tier beneficiaries are the only ones that count; second tier beneficiaries do not count
- Accumulation trust for EDB: first & second tier beneficiaries count (if all second tier beneficiaries are DBs, EDB life expectancy is used for RMDs)
- Always disregard beneficiaries who predecease account owner

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Trustee Policy & Procedures

Account Opening

Contra-firm Complications

Ex: John Smith IRA transfer to beneficiary IRA fbo PSNT: not "like-titled" accounts, most likely rejected by contra-firm

Solutions:

1. Establish new inherited IRA fbo PSNT at contra-firm and ask for contra-firm to transfer in-house
 - a. Once account is established and transfer is complete, transfer funds from new inherited IRA fbo SNT to current investment provider's account with same name ("like-titled")
2. Retain counsel
3. Petition court

Best Practice Tip: ensure contra-firm will accept court order before petition

Best Practice Tip: capital gains are rarely taxed in IRAs (absent early withdrawals) - liquidating all funds in an IRA and transferring cash produces clear transactional documentation and is generally most prudent

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2023 National Conference on Special Needs Planning and Special Needs Trusts

Thank You!

Bradley J. Frigon
JD, LL.M., CELA, CAP
Law Offices of Bradley J. Frigon, LLC
www.bjflaw.com
brjfrigon@bjflaw.com

Peter J. Wall
Director of Fiduciary Services
True Link Financial Advisors, LLC
peter.wall@trueinkfinancial.com
www.trueinkfinancial.com



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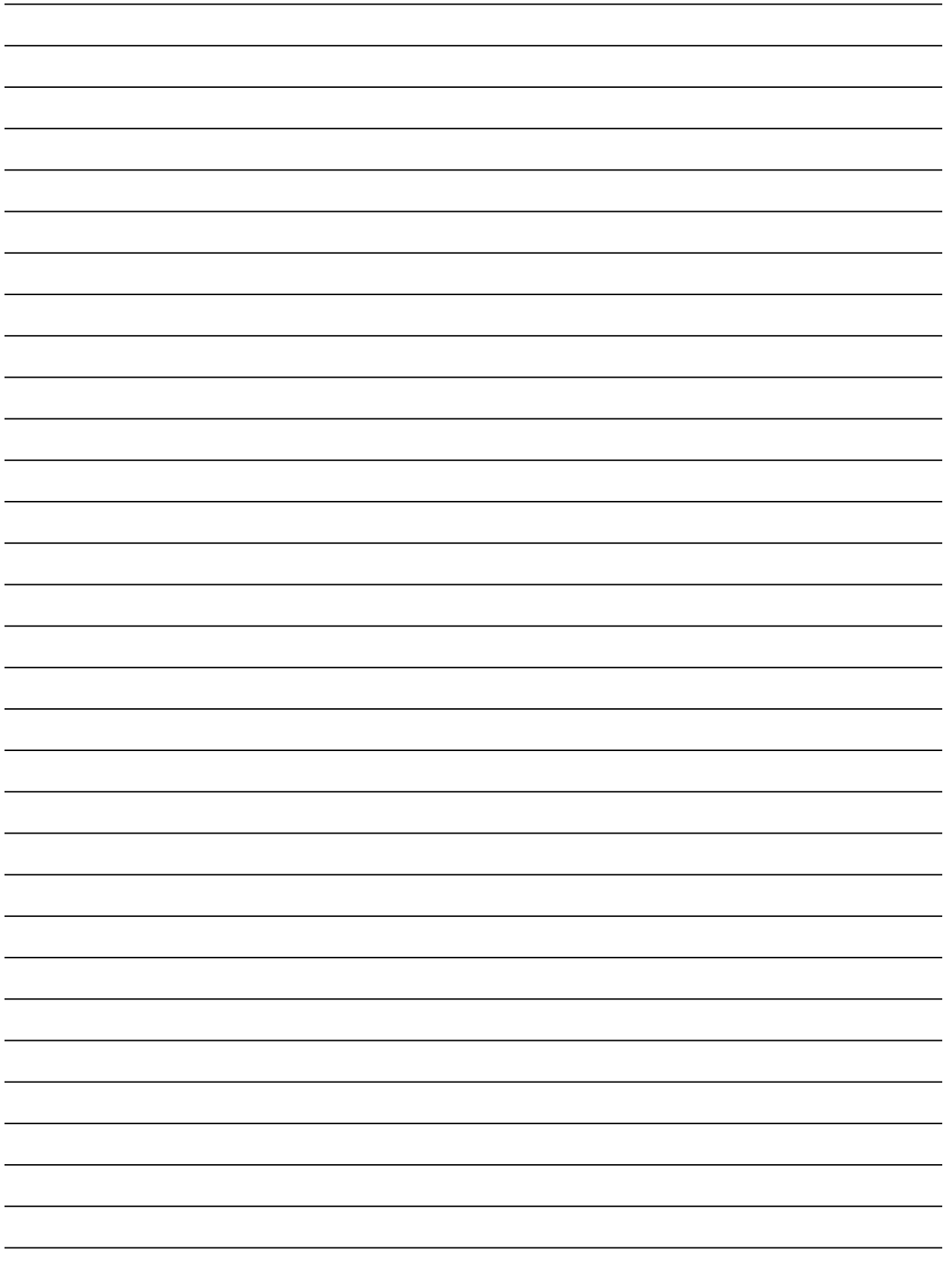
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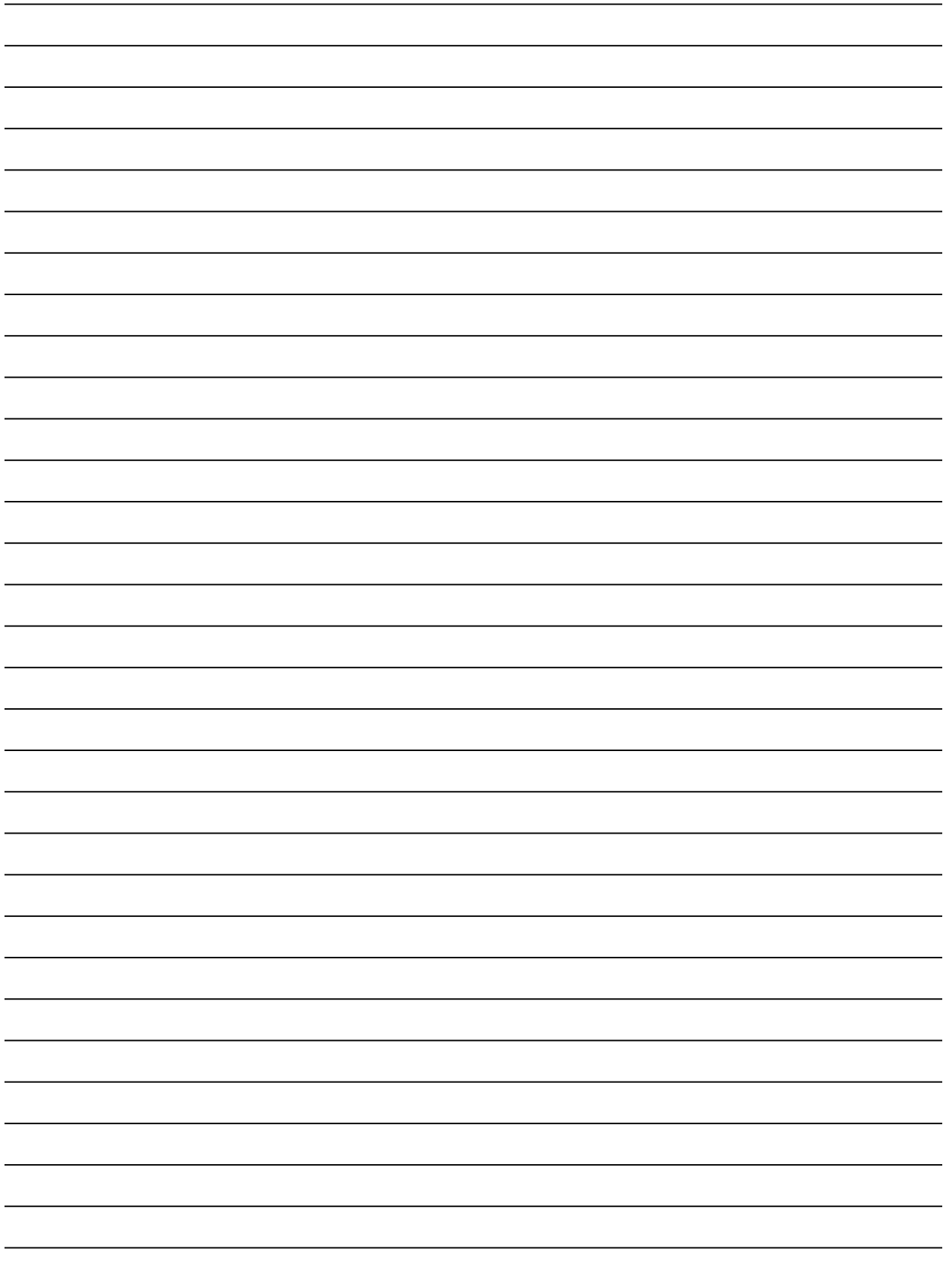
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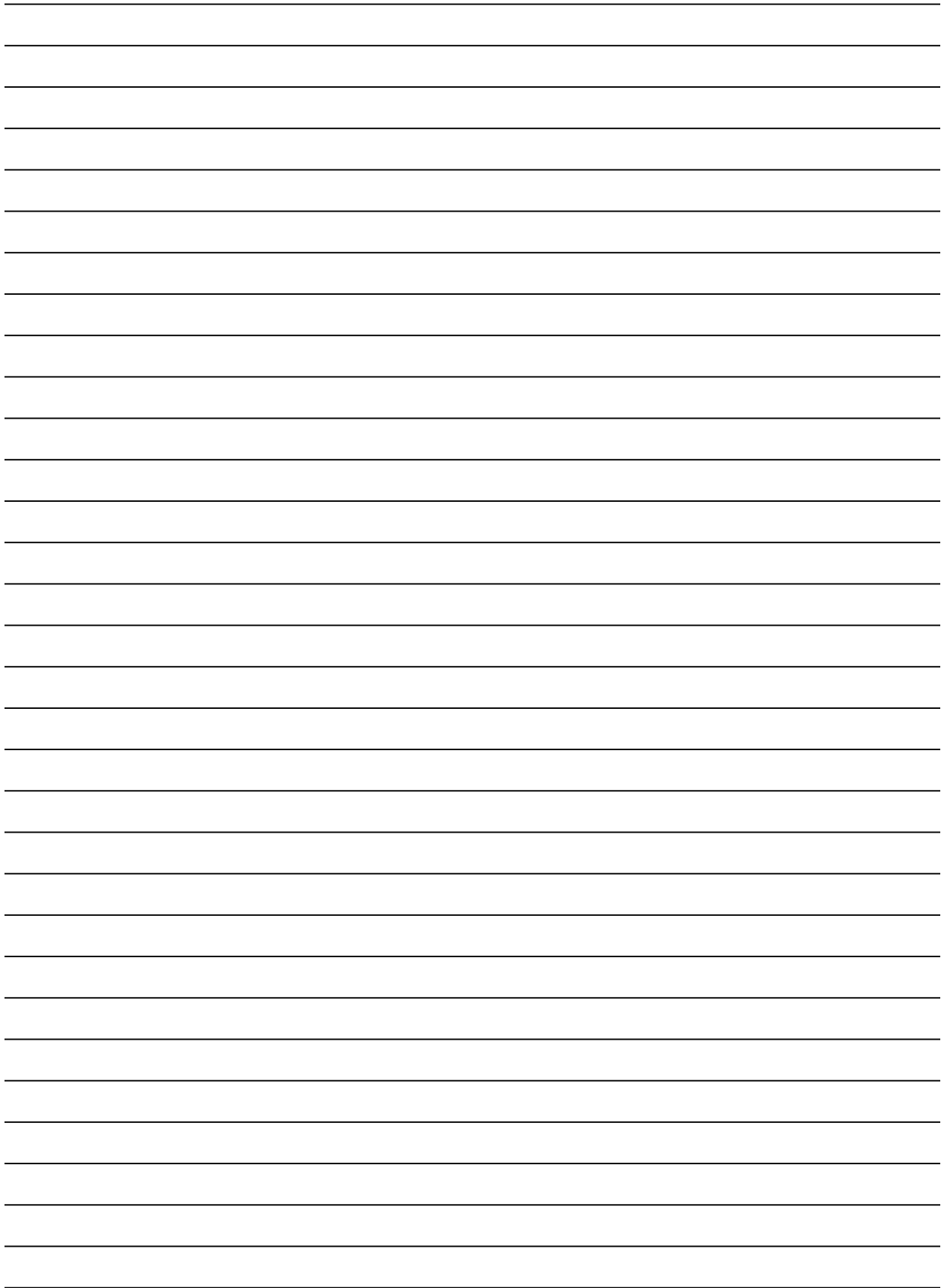
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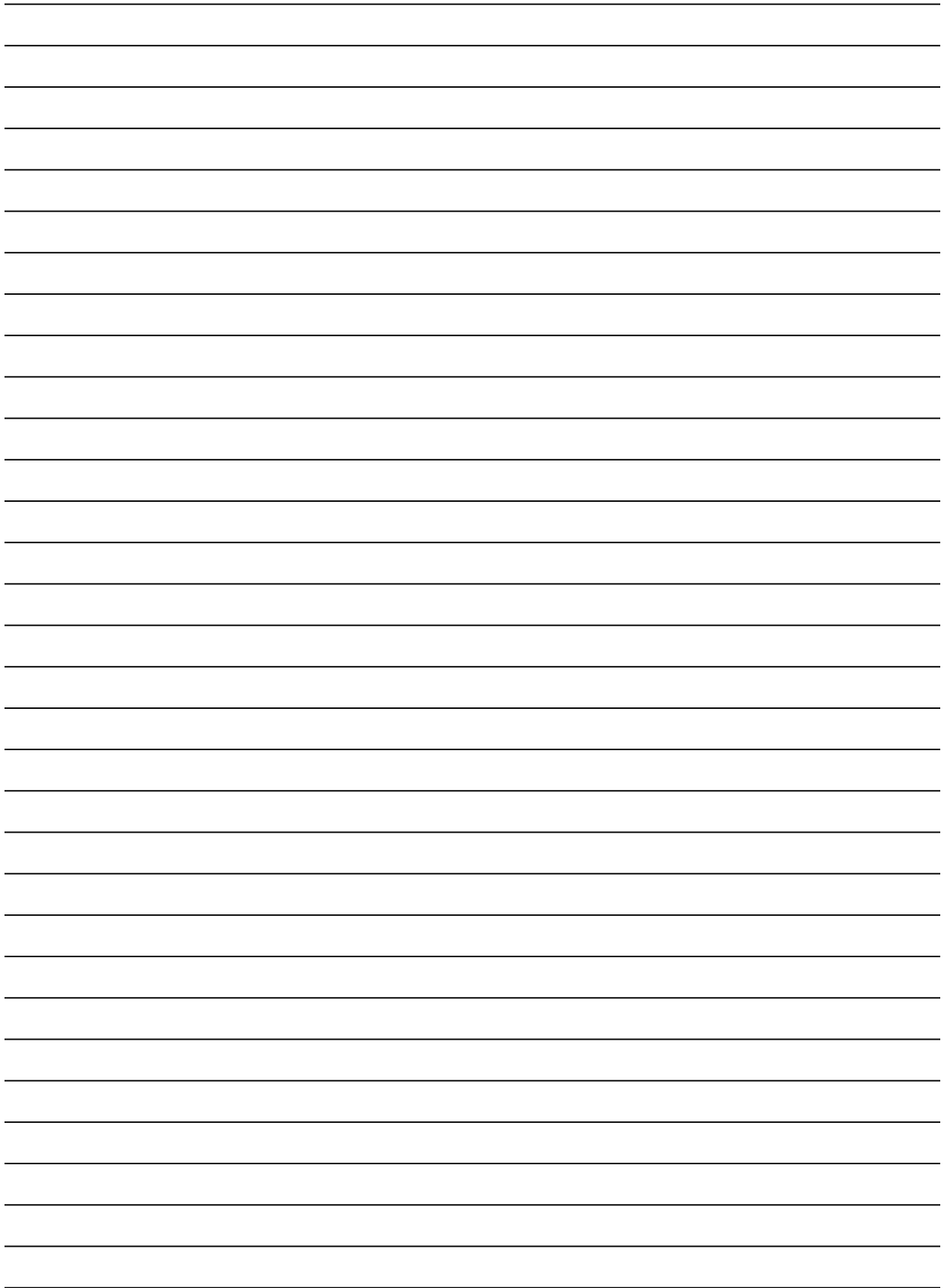
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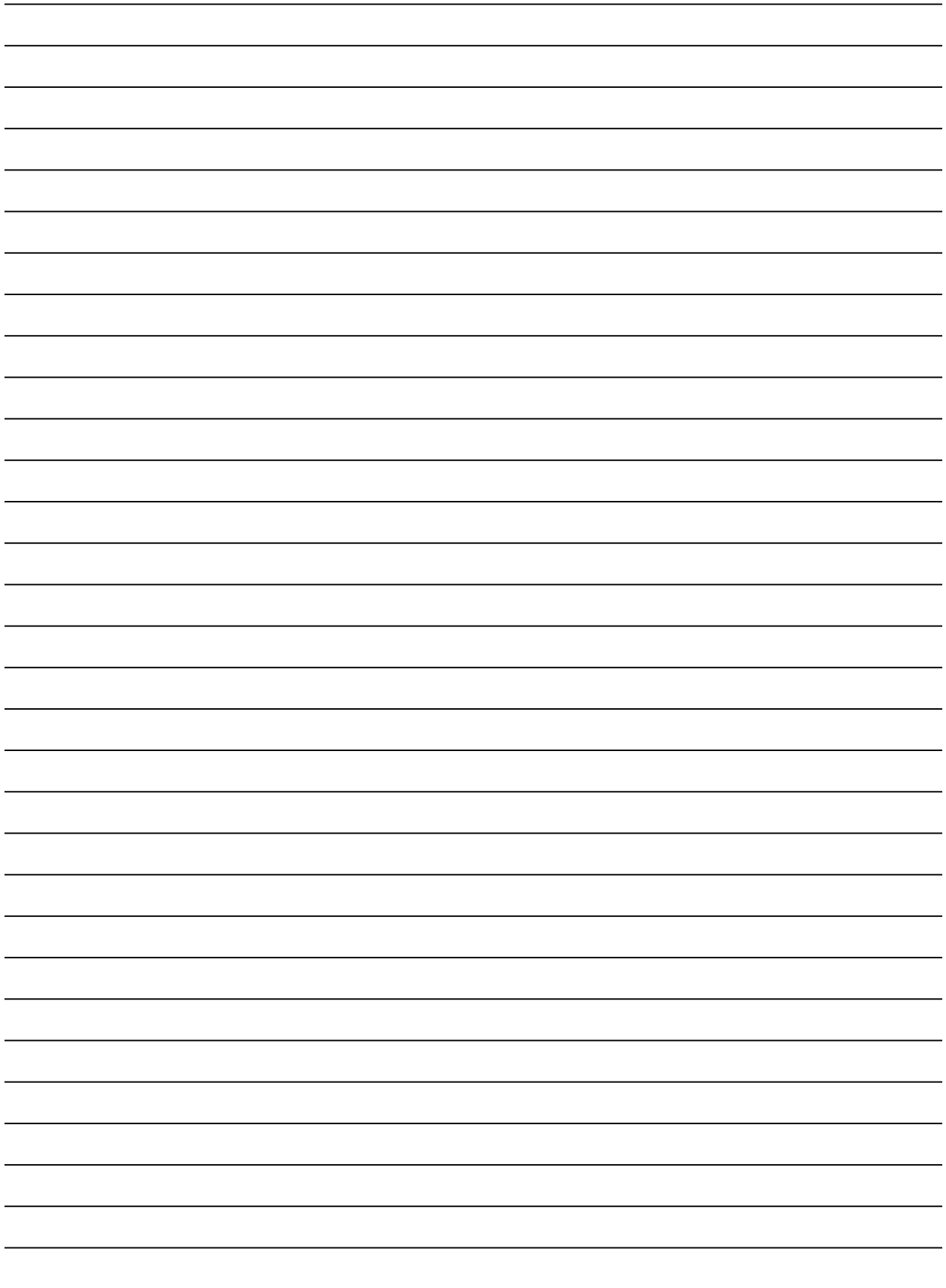
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STETSON LAW

Pooled Trusts Intensive

**Wednesday
October 18, 2023**

Discretionary Distributions in Today's Political Climate



STETSON
LAW

*Center for
Elder Justice*

Access and Justice For All®

Discretionary Distributions in Today's Political Climate

Assessing Politically Charged Requests

Megan Brand, Executive Director
Colorado Fund for People with Disabilities (CFPD)

Kerry Tedford-Coles, Executive Director
Planned Lifetime Assistance Network of CT (PLAN of CT)

Research Assistance from Natalie J. Taylor, Stetson University Law School Student

Introduction

All fiduciaries and their counsel consider requests for distributions from multiple beneficiaries¹ daily. Most of such requests are standard and follow a semi-predictable pattern. However, just as quickly as the trustee believes that they have seen it all, they receive a request that puts them in uncharted waters, often outside of their comfort zone. Some requests may seem particularly challenging in today's political climate where partisan gaps can be witnessed broadly across the United States, but also in personal family matters and in the workplace. Rash decisions by the trustee without proper forethought, inaction by the trustee, or action contrary to current case law are all avenues which can quickly subject the trustee and their beneficiary (as well as the financial assets of both parties) to enhanced scrutiny, public shaming, and potential litigation.

It is especially important for all trustees to have a standard for making distribution decisions, even in cases where guidance may be provided by a trust instrument. Many times, a trustee must decide for themselves the definition of amorphous and vague trust discretionary distribution standards such as 'emergency' or 'comfort'. Having a consistent policy and procedure in place ensures all beneficiaries are receiving fair and consistent treatment of their requests. This presentation will review the framework for decision making, understanding the difficulty of setting personal beliefs aside and case studies examining the potential politically charged requests.

¹ For purposes of these materials, the authors use the terms "beneficiary" or "beneficiaries" consistently throughout the outline. For purposes of brevity, the authors have chosen not to add "protected person", "ward," or "principal" in every instance where the terms "beneficiary" or "beneficiaries" is used. It is noted this session and supporting materials are about atypical requests. Therefore, the case law and statutory authority pertaining to a request by a beneficiary, protected person, ward, or principal may differ slightly or greatly depending on the fiduciary relationship of Trustee/Beneficiary, Conservator/Protected Person, Guardian/Ward, and Principal/Agent.

I. Framework: Request Evaluation

Establishing and executing a framework for the evaluation of requests is critical to maintain consistency and fairness to the beneficiary and for properly documenting the trustee's file in the event of discovery. Such framework does not necessarily mean that similar requests from different beneficiaries (or even from the same beneficiary at different times) will result in the same outcome. Each beneficiary and their unique circumstance and reasoning for the request must be evaluated.

a. Appropriateness for the Individual

With each beneficiary request, one of the first steps taken is analyzing the appropriateness of the request for the individual. It is helpful if the trustee knows the beneficiary and their circumstance well. However, if a trustee is not able to personally evaluate the needs of the individual, they can ask for assistance from a case/care manager, trust protector/advisor, investment advisor, or CPA. Oftentimes, a trustee may rely on the recommendations from a family member or close friend of the beneficiary. Extra care must be taken in these circumstances to maintain the confidentiality of the beneficiary's protected information and the impact it may have on the familial relationship.

i. Identify the Need

A trustee must document all facets of requests and the decision making process, especially when it is a unique request. One of the most telling pieces of information in any situation is *who* made the request. If a new "player" suddenly enters the life of the beneficiary, it could be one of the first signs of exploitation or undue influence. The vulnerable population consists of those who are aging, disabled, or incapacitated. Since most fiduciaries are employed to prevent the exploitation of vulnerable populations, the *what* and *why* factors are equally

important. Recently, a pooled trust beneficiary moved to their first apartment and requested furniture that was likely out of their price range and potentially unable to fit in the one-bedroom apartment. The request for a \$2000.00 desk at first glance seemed inappropriate, until the explanation provided made it clear that it was the most appropriate desk for her wheelchair.

Another important factor for consideration is When the request is made, or how frequently it is made. One of the best tools a trustee has is time. Following an initial conversation regarding a request, a beneficiary may often call to change their mind or rescind the request. Further, there are some beneficiaries that, due to the nature of their disability or incapacity, make requests so frequently that the trustee learns to only follow up on the requests that are consistently reiterated. The consistently repeated request becomes the trustee's signal that the beneficiary is serious about the distribution.

ii. Relation to Disability

Thankfully, *Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012) found that distributions from Special Needs Pooled Trusts cannot be limited to the treatment of one's disability. However, this decision does not mean that the disability of the individual should not be considered when making a decision on any type of trustee structure. Consideration should be taken as to the benefit or detriment a distribution may have for the person with the disability. Considerations regarding one's intellectual capacity, stability, and life expectancy related to their disability should be made. When the trustee feels they are not capable of determining the impact of the disability, it is wise to look for recommendations from a professional.

iii. Recommendation from a Professional:

- i. Medical professional
 - ii. Social Worker
-

iii. Mental Health Professional

iv. Case Manager

An opinion from a professional working with the beneficiary can be a great resource. A medical professional, for instance, has a much different relationship with the beneficiary than a trustee, and can provide insight into the person's needs. Further, an approval or denial in writing from a professional can go a long way in justifying any expenditure and is highly recommended to properly document the trustee's file. As such, if appropriate, it is recommended that the trustee obtain a Health Insurance Portability and Accountability Act (HIPAA) Release so that all the beneficiary's applicable medical records are available to the trustee.

iv. Impact on Public Benefits

The purpose of a Supplemental Needs Trust's ("SNT") is to protect a person's governmental benefits while still giving them access to the funds held in the trust. A trustee often finds themselves administering an SNT for a person who is receiving public benefits.

Accordingly, the primary focus of a trustee in these cases should be to maintain these critical benefits that provide income, food, shelter, and medical care. For any requests, there always must be a comparison of it to the individual's governmental benefits. As we know, 'one size does not fit all' and 'prices and participation may vary' when it comes to Medicaid. Medicaid offers a multitude of programs with different income and resource limits that vary state to state.

One of a trustee's greatest challenges with governmental benefits and atypical beneficiary requests is the differentiation between federal and state laws. For example, marijuana laws within states have been rapidly changing across the United States with shifts towards legalization in the past 10 years. However, marijuana use is not legal under federal law. A trustee must consider these rules and a beneficiary's reliance on federal benefits such as Section 8 housing or

Food Stamps, when deciding to purchase medicinal or recreational marijuana. Therefore, while marijuana use may be legal in the state where a beneficiary lives, a trustee may inadvertently make the beneficiary ineligible for a federal benefit if they approve the purchase of marijuana. Also, some benefit programs such as Section 8 housing also vary from county to county within the same state. There is hope that the new Housing Opportunity Through Modernization Act (HOTMA) will offer some consistency for housing regulations.¹

v. *Trust Language/Ascertainable Standards*

Oftentimes, a trustee encounters a trust document where the settlor intent is not properly defined or denoted in the discretionary distribution language. Ambiguous terms such as ‘comfort’, ‘manner in which the beneficiary is accustomed to living’, or ‘emergency’, may have widely variable interpretations. Also, how far must a trustee research and document when considering ‘outside resources’ before making a distribution? Most problematic can be ‘incentive’ trusts which reward the beneficiary for sobriety (how does a trustee test the beneficiary without privacy invasion?), marriage (just the first marriage or do subsequent marriages count?), the birth of a child (physical birth or adoption?), completion of college (trade school or university?), etc. Fortunately, there is some case law and guidance for some of these issues:

1) “Comfort”

- a. “A state of physical ease and freedom from pain or constraint” –
Merriam-Webster
- b. “As equivalent to the ‘station of life’ to which beneficiary is
‘accustomed’” - *Restatement (Third) of Trusts* § 50, American Law

¹ <https://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-01617.pdf> 8/14/2023

Institute, Restatement of the Law Trusts, Volume 2, As Adopted and Promulgated by The American Law Institute at Washington, D.C., May 16, 2001, © 2003 The American Law Institute

c. *Rock Island Bank v. Rhoads*, supra at 141-142, 187 N.E. 139 (1933)

2) “Emergency”

a. “An unexpected and usually dangerous situation that calls for immediate action” – *Merriam-Webster*

b. “Emergency” is restrictive terminology that “are construed as authorizing distributions only when the described conditions or circumstances arise, and then only to the extent appropriate to alleviate the emergency” Restatement (Third) of Trusts § 50 (2003) Comment d(4) on Subsection 2.

c. Emergencies fall outside the ascertainable standard as not sufficiently related to health, education support and maintenance. TAM 9044081 (IRS TAM), 1990 WL 700885. See Restatement (Third) of Trusts § 50 (2003) Comment d.

d. Emergencies are things such as prolonged illness (*Warner v. Trust Company Bank*, 250 Ga. 204, 296 S.E.2d 553 (1982)); but have been defined so far as to be the “general inadequacy of resources and earning capacity” *Application of Sabol*, 20 Misc.2d 112, 191 N.Y.S.2d 773 (Sup.Ct.1959). See Restatement (Third) of Trusts § 50 (2003) Comment d.

3) Outside Resources

a. “It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is *required* to take account of the beneficiary’s other resources, (ii) is *prohibited* from doing so, or (iii) is to consider other resources but *has some discretion* in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these. Specifically, ...the presumption is that the trustee is to take the beneficiary’s other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee’s discretionary judgment, the settlor’s intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.” *Restatement of the Law Third*, American Law Institute, Restatement of the Law Trusts, Volume 2, As Adopted and Promulgated by The American Law Institute at Washington, D.C., May 16, 2001, © 2003 The American Law Institute

4) “Manner In Which They Are Accustomed To Living”

Matter of Estate of McCart 847 P.2d 184 (Colo.App.1992) – directed the trustee “to maintain, not ascertain, a standard of living calculated upon a *non-variable* factor”, using financial information cataloging the beneficiary’s expenditures for years prior. However, many of these ambiguities may be solved by the drafting attorney more eloquently in the document itself or via a *Settlor Letter of Intent*. Trustees often find these *Settlor Letters of Intent* quite helpful in defining the discretionary distribution standards in the trust instrument and the true intent and

desires of the Settlor. Although precatory, a *Settlor Letter of Intent* or inclusion of intent into the trust instrument itself will arm the trustee (as well as the courts, should their involvement become necessary for reformation or interpretation) with a better understanding of the settlor's goals.

vi. Financial Plan/Budget

No matter what the request, a trustee must always consider the corpus of the beneficiary's estate or trust, other expenditures (ongoing or otherwise contemplated) of the beneficiary, the request at hand, overall goals and desires of the beneficiary, and the beneficiary's estate's projected longevity. SNTs, for example, are meant to be wasting trusts, meaning they are used to enhance the quality of life of their beneficiaries. However, this is not an excuse for a trustee to be frivolous about expenditures. Focusing on 'optimal outcomes' or long-term financial goals of the beneficiary is imperative for any discretionary decision made by a trustee. 'Optimal outcomes' are the end results or driving factors desired by beneficiaries for the management of their funds. Oftentimes, these desired outcomes include long term goals such as college tuition, purchasing a home, or comfortable retirement. However, sometimes, desired outcomes simply include annual vacations, material goods, or the continued preservation of public benefits. It is highly recommended that a trustee knows and records these desires at the onset of their relationship with the beneficiary. When a trustee must deny a beneficiary's request, having 'optimal outcomes' recorded in the trustee's file can serve as a great reminder to the beneficiary of their overall goals long-term versus a potentially frivolous immediate desire. Additionally, by utilizing an estate longevity projection, a trustee may be able to "let the numbers do the talking" when explaining the reason for denying a particular beneficiary request. Lastly, the tax implications of any distribution must be considered.

b. Sole vs. 3rd Party Benefit

Due to the nature of individuals served by trustees, clients are often vulnerable to exploitation. Again, as with any request, the trustee has a duty to evaluate *who* is benefitting from the request. Also, it is important to keep in mind that the POMS clarification in SI 01120.201 Section F3 states that third party goods or services must be for the “primary benefit of the trust beneficiary” and there can be collateral benefit.

c. Federal/State Law

Certainly, federal and state law must be evaluated with any beneficiary request, but enhanced due diligence by the trustee is particularly important when evaluating an atypical beneficiary request. The law surrounding the requests of firearms, abortion, assisted suicide, and gender affirming care vary from state to state. In addition to this variance, now more than ever, many of these areas of the law are constantly in flux.

i. *Trustee “Values Check”*

- i. Personal Experience
- ii. Paternalism
- iii. Religious or Moral Context

Trustees are human, meaning they are prone to biases and prejudices tempered by their own life experiences. As such, every trustee must be aware of their own bias when making decisions, especially when it involves controversial issues. For example, a trustee may come from a background or belief that any sexual activity outside of marriage is immoral. The trustee can also easily slip into a paternalistic position of approving or denying a request simply on what *they* think is best. However, a trustee has a duty of impartiality not only between beneficiaries (such as in a family trust with multiple beneficiaries), but also to separate their own personal partiality

from the decision-making process. One option is to have at least two parties involved with every beneficiary request. A case manager or family member may make the request and advocate the desires of the beneficiary. The independent trustee can then make the decision based on the information presented and the other components of the framework discussed above. Finally, an opinion of outside counsel is always available when a trustee is perplexed, or the beneficiary has appealed a denial by the trustee and asks that it be reconsidered. This should also include providing an opt-out ability for staff and Board members if they feel that they cannot morally be part of the decision-making process.

Title VII of the Civil Rights Act of 1964 protects all religious observance and practice. This includes traditional organized religion as well as moral or ethical beliefs that are held with the strength of traditional religious views. The law requires that employees must reasonably accommodate worker's religious observance or practices unless doing so would pose an undue hardship. This should also include ensuring that a policy is in place that will not allow for retaliation in the workplace setting, since some employees may fear expressing their beliefs out of concern of losing their job or feeling intimidated.

The recent *Groff V DeJoy* (2023) decision has allowed for more employee empowerment with religious freedom in the workplace. The decision in this case clarified that the onus is on an employer to demonstrate that granting the exemption would incur "substantial increase costs" compared to the normal costs of business. This case was brought by a postal worker who was denied his request to have Sundays off. In the past, an employer could simply state that it would impact the bottom line by having to pay a worker overtime or having it negatively impacting other employees. Now, the responsibility is on the employer to prove it is substantial. As a result,

an analysis should be done regarding costs and burden on other employees if a staff member refuses to be involved with beneficiaries/decision making based on their religious beliefs.

II. When You Need More Support in the Decision

- a. If as a trustee you're waffling about a decision, consider the following:
 - i. *Use of cross discipline advisors or care/case managers to review the request.*

Fellow fiduciaries often have similar backgrounds and experiences that may not be a viable sounding board for atypical beneficiary requests. The use of cross discipline advisors, medical professionals, care/case managers, or even the beneficiary's family members, can be very helpful in doing a 'values check', exploring alternatives, and reviewing legal implications. Again, particular care must be taken to avoid violating attorney-client privilege by not divulging any of the beneficiary's non-applicable protected information. A prudent trustee will thoroughly document their files with such opinions in writing.

- ii. *Use of outside advisors such as counsel well-versed in SNTs or other areas of the law.*

Asking for an opinion letter from outside counsel can be extremely helpful. Separate from professionals already working with the beneficiary, a trustee may want to enlist the help of a criminal law attorney, a professor who has studied the area or another independent, or a third party opinion. As previously stated, a properly documented beneficiary file is crucial.

- iii. *Use of court intervention.*

A trustee may want to seek court intervention or instruction from the court for a particularly adversarial beneficiary or difficult decision for either a protected person, ward, or agent. This may include but is not limited to, utilizing such statutes as the Trustee Oversight Act,

C.R.S. 15-10-501, et. seq. (in Colorado), or in certain instances petitioning the court for “...instructions concerning trustee responsibility”. Another option is to seek a Guardian Ad Litem appointment and make recommendations to the Court in a protective proceeding to opine on an atypical request. A Guardian Ad Litem may also be sought where there is a civil action based on the denial of, or seeking approval of, an atypical request or a request of the court may be made under to “make such order as it deems proper for the protection of the infant or incompetent person”(C.R.C.P. 17(c) in Colorado). A Guardian Ad Litem may be able to further research the request, needs of the party (protected person, ward, beneficiary, etc.) and implications in the law for the approval or denial of a request. Employing the opinion of another professional such as a Guardian Ad Litem also puts the trustee and beneficiary in a particularly difficult situation or may in fact assist the court with a request for instruction. The utilization of court intervention may be able to settle the matter between the trustee and the beneficiary, but it also could relieve the trustee of most liability of that decision and further reduce the chance of avoiding potential future litigation surrounding the denial or approval of atypical requests.

iv. Use of a disinterested party (mediator, etc) to review the situation and give an opinion.

Based on the specific nature of the request, a trustee may decide to hire a professional to give an objective opinion or alternative solution regarding the request (Ex: Require a hunter’s safety course and recommendation from the instructor that the beneficiary can safely handle a firearm).

v. Use of a Trust Protector/Trust Advisor.

A trustee may always rely on the advice and input of a Trust Advisor or Trust Protector. Having trustee or non-trustee appointments in trust documents can prove to be very useful in the

trustee's decision-making process. Individuals acting as Trust Protectors/Advisors are typically advocates for the beneficiary and know the beneficiary's ideals and desires better than the professional trustee. However, it must be noted that the advice or recommendation of the Trust Protector/Advisor does not typically relieve the trustee of any liability for approval or denial of any distribution request.

b. If the decision is "no", practice the "no, but..."

There are always alternatives to saying "no" outright when it comes to beneficiary requests. A trustee may consider the following options: (i) approve a separate expenditure to free up additional personal income for the beneficiary, (ii) always document your decision (as well as the due diligence performed) in writing, (iii) give a thorough explanation for the 'why' of the denial. Cite the law or trust document if applicable, or (iv) educate the beneficiary about your appeal process.

III. Analysis of Potentially Politically Charged Requests

Each of the following topics are discussed to help educate about potentially politically charged requests. This includes examining the background, cases, and potential impacts on beneficiaries and the trust organization.

a. Firearms

Firearms can be beneficial to the owner for many reasons including hunting and personal protection. Hunting may be a source of food or may be a social or familial activity. Many proponents of firearms argue the importance of possession for personal security and individual liberty. Additionally, a beneficiary who needs a trustee often feels physically vulnerable, and firearm possession may be of utmost importance to them.

Accordingly, the consideration of a firearm for a person with a mental illness or diminished capacity must be contemplated thoroughly. The ownership of a firearm by a person with mental illness is illegal under federal law. Under 18 U.S.C. § 922(d), it is unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing, or having reasonable cause to believe, that such person “has been adjudicated as a mental defective or has been committed to any mental institution.” In addition, forty five out of fifty States in the United States have laws in regard to possession of firearms by people with mental illness. Not surprisingly, the definition of ‘Mental Illness’ is quite varied from state to state. When defining ‘Mental Illness’, some states disallow possession of firearms for those who have been adjudicated incapacitated, while other states look at the adjudication of mental illness or court ordered mental health treatment. Additionally, some states instead look at the admittance to a treatment facility for drugs and alcohol. Finally, a few states even look at the person being found not guilty of a crime due to reason of insanity.

To the best of our knowledge and research, there has not been a case brought against a trustee for purchasing a firearm for a beneficiary who then committed a crime, but one may hypothesize similar circumstances into potential future litigation. Any trustee contemplating a firearm purchase should be well versed in 18 U.S.C. § 922(d), The Federal Firearm Possession Prohibition statute. The trustee should also consider “constructive possession” (*U.S. v Booth, et.al.* 111 F.3d 2 [1st Cir. September 1997]) or the availability of access to firearms by the beneficiary, potentially in an unmonitored or unsecured estate asset. Lives can be at stake when weighing a firearms purchase for a beneficiary. For example, the James Holmes Aurora Theater shooting case in Arapahoe County, Colorado involved Sandy and Lonnie Phillips, who were mother and stepfather of victim Jessica Ghawi. In this case, the parents sued the companies that

supplied Holmes with ammunition and body armor in 2014. The Phillips claimed that the suppliers were negligent because they sold the goods to Holmes over the internet without ever seeing his face or addressing his state of mind. The suit sought for an injunction requiring dealers to stop their ‘negligent and dangerous business practices’, but did not ask for any damages. Denver U.S. District Court sided with the dealers and dismissed the case. (*Phillips v. Lucky Gunner, LLC*, No. 14-CV-02822-RPM, 2015WL 1499382 (D. Colo. Mar. 27, 2015)). The court also ruled that the dealers were entitled to fees and costs from the Phillips. It was ordered that the Phillips pay Lucky Gunner \$111,971.10 for the fees and costs of their defense.²

Conversely, the Connecticut Supreme Court allowed for Newtown shooting victims’ families to move forward with their civil lawsuit against gun-maker Remington Outdoor Co, who was the parent company of the manufacturer of the AR-15 used in the Sandy Hook shootings in 2019. The suit was initially dismissed after a lower Connecticut Court ruled that gun makers have broad immunity from liability under the Protection of Lawful Commerce in Arms Act (PLCAA). The families argued that the gun maker did not market the weapon for sport, as a target practice tool, or for self-defense. Instead, the families argues that the gun maker marketed the weapon as a military weapon. Marketing by the gun maker for the weapon included images of soldiers in combat, and described the Bushmaster Rifle as “the uncompromising choice when you demand a rifle as mission-adaptable as you are.”³ The Supreme Court agreed with the families that companies marketing military-style guns to civilians as a way of killing enemies

² (2023, August 29) Phillips V. Lucky Gunner, LLC <https://casetext.com/case/phillips-v-lucky-gunner-llc-1#:~:text=Pursuant%20to%20the%20Order%20Awarding%20Fees%20and%20Costs,costs%20of%20defending%20this%20action%2C%20and%20it%20is>

³ Abcnews.com (2023, August 15) Sandy Hook families push to reinstate lawsuit against gun manufacturer <https://abcnews.com/US/sandy-hook-dad-utmost-faith-case-families-hope/story?id=51137338>

could be violating state fair-trade/consumer protection laws. The case was eventually settled for \$73 million with the additional requirement that Remington must release thousands of pages of internal company documents that included possible marketing plans for the AR-15.

b. Gender Affirming Care

Gender affirming care can have significant benefits for those who receive it. In fact, disallowing a treatment/surgery to someone with gender dysphoria may cause depression, low self-esteem, and/or difficulty forming social relationships. The trustee's concern must be balanced with ensuring the well-being of the beneficiary along with examining the long-term impact any choice may have. In a situation with gender affirming care, the trustee may be asked to assist financially with social or medical transitioning.

Socially transitioning is the process of the person adopting the name, pronouns, and gender expression (like clothing or hairstyle) that match their identity. It is important that the trustee is supportive in this process. Being understanding includes recognizing that gender specific clothing is not a sole benefit issue. This has potential to be a major organizational shift if there has been a strong policy on purchasing gender conforming clothing to prove sole benefit. A recent study published in the journal *Pediatrics* followed 317 socially transitioned children as their authentic gender for more than year and found that almost 95% continued to identify as transgender five years later. Doctors interviewed for an ABC news story regarding the study agreed with the findings, with one stating that he is “always surprised by anecdotal reports that transgender youth frequently retransition because it’s not what he’s seen on a large scale in his medical practice”.⁴

Abcnews.go.com (2023, August 15) Most Children who have socially transitioned still identify as transgender years later: Study <https://abcnews.go.com/Health/children-socially-transitioned-identify-transgender-years-study/story?id=84450021>

Medical transitioning is when there is medical involvement like hormone treatment, gender affirming surgery etc. It would be wise for the trustee to obtain a medical opinion letter advocating for the treatment to properly document their files. This includes understanding the potential of co-existing psychiatric disorders and treatment that may be needed. The National Library of Medicine documents a peer reviewed study regarding surgery and mental health concerns.⁵

If a trustee is considering a request for any type of gender affirming medical care, it is important to seek a Medicare and/or Medicaid (as applicable) denial before making the decision to approve or deny a request. Section 1557 of the Affordable Care Act prohibits discrimination based on sex. But, some states have recently moved to implement restrictions on gender affirming health care, especially for youth. As of May 2023, at least 18 states have passed laws or policies that restrict gender affirming care for people under the age of legal majority, and at least 14 other states are considering or have introduced bills. While opponents of such legislation see this type of bill as an infringement on the rights of families to make their own health decisions, supporters of the bills believe that people should wait until they are legal adult age to make these decisions. Therefore, it is clear that this is a divisive issue.

This leads us to the question of whether a trustee should consider the impact gender affirming care may have on their business. The recent “Bud Light Effect” has shown that anti-transgender beliefs can have significant impact on one’s business. A trustee will not necessarily be advertising their support of the transgender community as Bud Light did with transgender

⁵ Ncbi.nlm.nih.gov (2023, September 18) /Transsexual attractions and sexual reassignment surgery: Risks and potential risks
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4771004/#:~:text=In%20a%202015%2C%20Boston%20study,lethal%20intent%2C%20and%20both%20inpatient>

activist Dylan Mullvaney. But, the beneficiary getting the support from a trustee's trust may advertise their support of the transgender community. Accordingly, a disclosure by the beneficiary on social media that their trustee helped them with their gender affirming care could potentially have backlash from those who do are not in support of it. Therefore, the solution may be to treat this issue like one would with any negative statement regarding one's organization, by simply remaining silent or having a statement prepared. This issue of how to handle gender affirming care advertisements should be considered proactively and reviewed in real time as more incidents of it continue to develop.

c. Abortion & Birth Control

Abortion is another highly politically charged issue that is seeing significant legislation across the country due to the Supreme Court decision to overturn Roe v. Wade in 2022. It is necessary for trustees to understand the abortion laws in the states where their beneficiary lives. As of July 2023, fourteen states have banned abortion, while other states have restricted abortions by gestational periods or through circumstances including rape, incest, or the life of the mother. Additionally, only fifteen states and Washington DC cover abortions through Medicaid.

A recent NBC news story addressed how people with disabilities often feel left out of the conversation regarding abortion. This issue is a result of people with disabilities being de-sexualized and stereotyped by many that they are not sexually active. People with disabilities are often disappointed with both sides of the issue because they do not like being used as “scapegoats or props” for the arguments. Often, they find that pro-abortion advocates use the need for abortion to avoid having a child with a disability, whereas pro-life advocates often state

that abortions are used as eugenics.⁶ It is clear as to why it can be frustrating for people with disabilities to feel as though their voices are not heard within these arguments.

In 2015, the United Nations Population Fund released a report stating that access to birth control is a human right. Birth control for a person with a disability can potentially have a life-or-death impact. For example, a January 2023 Time article followed a 20-year-old woman in Oklahoma, who was born with a connective-tissue disorder that prevents her body from properly making collagen. People who are born with this disorder who become pregnant risk having an organ rupture. Considering this issue, the mother and daughter have resorted to stockpiling morning-after pills with the fear that she will lose access to having an abortion. Additionally, there are abortifacients medications (substances that induce abortion) that people with disabilities are prescribed. These medications concern people with lupus, cancer, and Crohn's disease to become concerned with losing their access to their medications if abortion laws continue to become more stringent.

The alternatives to these circumstances are not much better. Historically, when there was a concern that a person with a disability could not medically or cognitively endure a pregnancy, doctors often recommended sterilization, having the uterus removed, or genital mutilation. The Disability Rights movement worked towards ensuring protections for people with disabilities, including reducing the use of sterilization. Families feel betrayed that they must now reconsider sterilization as an alternative with an inability to get an abortion.⁷ Overall, the greatest issue is a

⁶ Nbcnews.com, (2023 August 16) Disability Rights Groups are fighting for abortion access-and against ableism <https://www.nbcnews.com/news/us-news/disability-rights-groups-are-fighting-abortion-access-ableism-rcna38703>

⁷ Time.com (2023, August 16) For People with Disabilities, Losing Abortion Access Can be a Matter of Life or Death <https://time.com/6248104/abortion-access-people-with-disabilities/>

lack of appropriate healthcare for people with disabilities, especially reproductive care. The NBC article further explores the lack of sex education regarding people with disabilities, the inability to obtain birth control, and poor transportation availability.

What will the trustee decide when an abortion or travel for abortion is requested? Will there be liability if they do or do not distribute for the procedure or transportation to the procedure? Consider the following:

- In Alabama, anyone who performs an abortion, provides abortion pills or “aids, abets or prescribes the same faces up to 12 months in county jail or hard labor and a fine up to \$1000.
- Legislation in Idaho makes helping a pregnant minor get an abortion, whether through medication or a procedure, in another state punishable by two to five years in prison
- Oklahoma and Texas allow lawsuits against people who help facilitate an abortion within the states’ borders⁸

d. Medical Aid in Dying (MAID)

Presently there are eight states and Washington DC that allow MAID via legislation and one state that allows it via court ruling. The remaining forty states have laws prohibiting MAID.⁹ When filing a request for medical aid for dying, the trustee is faced with reviewing the laws of the state, long term repercussions of disbursement, and having to consider transportation or moving to a state where MAID is legal.

⁸ Politico.cm (2023, August 29) Abortion bans and penalties would vary widely by state <https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572>

⁹ProCon.org (2023, August 16) States with Legal Medical Aid in Dying <https://euthanasia.procon.org/states-with-legal-physician-assisted-suicide/>

In 2019, a study *Disability Assisted Suicide Laws and their Danger to People with Disabilities* the National Council on Disability (NCD) alarmingly found that “the most prevalent reasons offered by someone requesting assisted suicide are directly related to unmet service and support needs.”¹⁰ Furthermore, the study found that insurers denied expensive life-sustaining medical treatment while offering to subsidize legal drugs. Having a referral for a psychological evaluation was rare prior to doctors writing lethal prescriptions, and financial and emotional pressures often distorted the patient’s choice. Further research by the NCD exposed the flaws of quality-adjusted years of life for people with disabilities. This included expressing the deep disparities that exist for people with serious medical conditions and how their lives are valued in the healthcare system.¹¹

Concerns of eugenics have certainly been raised regarding euthanasia and persons with disabilities. The Netherlands’ 2002 *Termination of Life on Request and Assisted Suicide Act* requires “unbearable suffering” to have a medical basis. This includes psychiatric conditions, dementia, various geriatric syndromes, chronic pain syndromes, or genetic conditions. A 2021 study found that the percentage of deaths occurring through assisted suicide in The Netherlands for reasons other than terminal illness is low, but was shown to be increasing. The analysis of the study revealed a large focus of people with Autism Spectrum Disorder (ASD) and revealed that people with autistic traits were significantly over-represented among those that died by suicide. It was noted that the “cognitive inflexibility associated with ASD may reduce some individual’s problem-solving ability, especially those who cannot find a way out of a stressful situation and

¹⁰ Ncd.gov (2023, August 16) Federal study finds nation’s assisted suicide law rife with dangers to people with disabilities <https://ncd.gov/newsroom/2019/federal-study-assisted-suicide-laws>

¹¹ Ncd.gov (23, August 16), Quality-Adjusted Life Years and the Devaluation of Life with Disability, https://ncd.gov/sites/default/files/NCD_Quality_Adjusted_Life_Report_508.pdf

see suicide as the only solution.¹² The study questioned whether a biomedical framework to assess people with complex social and psychological needs to define suffering was overly simplistic and even dangerous. Case studies included:

Case 1 (2018–24): Suffering arising solely from having intellectual disability/ASD:

A man of above-average intelligence (aged 18–30) was severely autistic and found this difficult to cope with. His suffering was described as ‘the realization that he could not lead a “normal” life’. He had received a range of treatments and support to help him accept and manage the limitations, including psychotherapy, cognitive–behavioral therapy, electroconvulsive therapy and medication for his low mood, breathing techniques, help in structuring his days, and support in moving into a stimuli-poor independent home. Despite this, he could barely manage independently and quickly became overstimulated. In particular, he could not, or could only with great difficulty, perform daily activities that required contact with others; these then exhausted him completely. Making choices or carrying out simple instructions was extremely difficult, if not impossible, because of his rigid way of thinking, which resulted in a need for clarity, certainty and structure; this paralyzed him in his functioning. Because of his inability to put himself in other people’s shoes and understand them, it was also impossible to form intimate relationships, although he wanted to. He suffered from the hopelessness of his situation and the lack of any prospect of improvement. His doctor, who had known him for 2 years, agreed that there were no realistic options left to relieve his suffering.

Case 6 (2020–113, female, 50s, intellectual disability):

Suffering arising from a combination of somatic and psychiatric conditions A woman in her 50s, who had mild intellectual disability, suffered from spina bifida with total paralysis of her lower body. She also had osteoarthritis, spondylosis, kyphosis, chronic sacral pressure ulcers, renal dysfunction, tinnitus, tension headache, muscle atrophy and pain in her elbows, upper arms, and shoulders. She was ‘rolstoelgebonden’ (‘wheelchair-bound’) and lived in a care facility. In her youth, the patient had been affectively and emotionally neglected by her foster family and she had often felt unwanted, unsafe, and vulnerable. In her adult life she had to move to a different care facility 15 times; the frequent changes of support workers and caregivers had demanded a lot from her adaptability. She had always felt rejected, no longer had faith in humanity, felt overstimulated and experienced her total dependence as an unbearable burden. She increasingly suffered from the physical effects of her infirmities, especially the pain in her arms and shoulders. She had no contacts or day-to-day activities that were meaningful to her. The patient did not want to live like this anymore. Her physician thought that her disturbed neurocognitive and socio-emotional development made it too difficult for her to

¹² Cambridge.org, (2023 August, 17) <https://www.cambridge.org/core/journals/bjpsych-open/article/euthanasia-and-physicianassisted-suicide-in-people-with-intellectual-disabilities-andor-autism-spectrum-disorders-investigation-of-39-dutch-case-reports-20122021/93B38EAE616E0A6C378BE308C87253A2#article>

adapt and accept her limitations, and that the combination of somatic and psychological suffering was unbearable for her.¹³

Again, the trustee should tread carefully in assisting with this kind of decision. Have all avenues been explored? Additionally, is the organization a remainder beneficiary of the funds? That may be an issue that is addressed by those who may not agree with an end-of-life decision. The trustee should be analyzing all angles of the request.


IV. Case Law that May Assist- Abuse of Discretion

Case law is inherently sparse with atypical distribution requests and rulings tend to vary widely. However, case law that does exist may prove to be invaluable for a professional trustee. For example, prior to a 2004 Minnesota Court of Appeals ruling (*In re Irrevocable Supplemental Needs Trust of Collins*, A04-1018, 2004 WL 2858079 (Minn. Ct. App. Dec. 14, 2004)), the State of Minnesota District Court had denied distributions for a snowmobile and Brittany Spears tickets from a Special Needs Trust while approving of a bike and other outings. Trust beneficiary, Jennifer Collins, was a teenager with Down Syndrome at the time with a First Party Special Needs Trust. Her father served as trustee. The Minnesota Court of Appeals reconsidered the District's opinion and wrote "whether Brittany Spears concert tickets are an appropriate expenditure for a 14 year old...requires an exercise of discretion: parents of disabled and non-disabled children are constantly faced with such discretionary decisions.... We conclude that [Mr. Collins] exercised but did not abuse his 'sole discretion' in providing a child's snowmobile and concert tickets for Jennifer." Note that the "Abuse of Discretion" standard is widely used by courts and that this case may provide a standard to support a trustee's approval of unique requests for beneficiaries.

¹³ Cambridge.org, (2023 August, 17) <https://www.cambridge.org/core/journals/bjpsych-open/article/euthanasia-and-physicianassisted-suicide-in-people-with-intellectual-disabilities-andor-autism-spectrum-disorders-investigation-of-39-dutch-case-reports-20122021/93B38EAE616E0A6C378BE308C87253A2#article>

V. Summary

Trustees may face some difficult decisions in today's political climate. We must balance the needs of the beneficiary with state and federal law. Additionally, we must balance the liability and legal consequences for both the beneficiary and the trustee themselves. The equilibrium of these differing interests and risks can create a challenge that must be approached with creativity, understanding, discretion, and thorough due diligence. Using a multidisciplinary approach that is highly individualized is as essential as allowing staff the ability to opt out of decision making if needed. Reflection must lead to the obvious, which is that healthcare is not adequate for people with disabilities, because the most politically charged topics seem to have a much more significant commonality. The bias, lack of education, and hurdles to obtain healthcare is significantly impacting the disabled community. Rather than looking at these issues from a political or moral standing, the value analysis should be more heavily focused on what can be done to provide equality to all.



*Discretionary
Distributions in
Today's Political
Climate
Assessing Politically Charged
Requests*


Megan Brand, Executive Director
Colorado Fund for People with Disabilities-CFPD

Kerry Tedford-Coles, Executive Director
Planned Lifetime Assistance Network of Connecticut-PLAN of CT

Stetson SNT Conference, 2023

1

Agenda



- Framework for Decision Making
- More Support
- Politically Charged Requests
- Case Law
- Summary

**The paper that is part of your written materials includes all citations to articles, websites, etc. used in this presentation

2

Introduction



However, just as quickly as the trustee believes that they have seen it all, they receive a request that puts them in uncharted waters, often outside of their comfort zone. Some requests may seem particularly challenging in today's political climate where partisan gaps can be witnessed broadly across the United States, but also as personal as families and the workplace.

3

*Framework
for decision
making:
Appropriateness
for the
individual*

- Appropriateness for the individual
 - Identify the need.
 - Who is requesting the distribution?
 - Beware of new "players"
 - Mandatory reporting in Colorado and most other states
 - Opinion of beneficiary advocate - outside counsel, case/care manager, investment advisor, family member?
 - When is the request made or frequency of the request.
 - Fiduciary internal policy & procedure.

4

*Framework
for decision
making:
Relation to
Disability*

- Relation to Disability
 - Impact on public benefits.
 - State vs. federal regulations ('prices and participation may vary').

5

*Framework
for decision
making:
Professional
Recommendations*

- Professional Recommendation
 - Outside resources to consider:
 - PSNT Board/Committee
 - Medical Professional
 - Social Worker
 - Mental Health Provider
 - Case/Care Manager
 - Trust Protector/Advisor
 - Family Members
 - Outside Counsel
 - Get recommendation in writing!
 - Note: Consider obtaining a HIPAA release from beneficiary

6

*Framework
for decision
making:
Financial
Plan/Budget*

- Financial Plan/Budget
 - Consider request at hand vs other necessary expenditures.
 - SNTs = wasting trusts.
 - "Optimal Outcomes". (sample Beneficiary Profile form in Appendix)
 - Longevity Projections.
 - Tax Implications.

7

*Framework
for decision
making:
Values Check*

- Values Check
 - Personal experience.
 - Religious upbringing.
 - Moral context.
 - Paternalism (as fiduciaries we are not mom & dad!).
 - Opinion of outside professional.

8

*Framework
for decision
making:
Values Check*

And.....
We need to consider ourselves and our staff
and our/their own moral/religious beliefs

Sample Policy Language:

CFPD staff members may individually choose whether to participate in the request process for End of Life Options. If a staff member decides not to participate, an alternative staff contact will be assigned for the End of Life Options request process.

9

When you need more Support in the Decision

Cross discipline advisors	External advisors	Court Intervention
→ Medical Professionals	→ Letter of Opinion from Attorney or other professional well versed in this area (Ex: Criminal Law Attorney)	→ Petition for instruction
→ Care/Case Managers		→ Request for a Guardian Ad Litem
→ Beneficiary Friends or Family or other Supports		
→ Fellow fiduciaries	→ Medical Professional who specializes (Ex: Psychiatrist or Psychologist)	
→ PSNT Board Committee Comprised of these individuals		

BEST PRACTICE: ALL DECISIONS SHOULD BE DOCUMENTED IN WRITING! 10

10

When you need more Support in the Decision

Use of disinterested Party	Use of a Trust Protector/Advisor
→ Ask for a review of the situation and objective opinion or alternative solution	→ Typically, an advocate for the beneficiary
→ Ex: Require a hunter's safety course and recommendation from the instructor that the beneficiary can safely handle a firearm.	→ Knows/understands the beneficiary better than the trustee
	→ Doesn't necessarily relieve the trustee of liability

11

11

When you need more Support in the Decision

- If the decision is "no",
- Consider approving a separate expenditure to fee up additional personal income
 - ALWAYS document your decision to the beneficiary in writing.
 - Give a thorough explanation for the 'why' of the denial. Cite the law or trust document if applicable.
 - Notify the beneficiary of your appeal process.

12

12

Gender Affirming Care

202300X
PRESENTATION TITLE
16

Considerations:

- Seek Medicare and/or Medicaid denial before making the distribution for SRS from trust.
- Consider age: As of May, 2023 at least 18 states have passed laws or policies that restrict gender affirming care for people under the age of legal majority and at least 14 others are considering or have introduced bills.
- “Bud Light Effect”. A trustee would likely not advertise their support of certain distributions, but a beneficiary may! (Ex: Instagram/Facebook Post: I want to thank [PSNT Org.] for making my reassignment surgery possible.) Be prepared with a statement for media.

*Framework for Decision Making should be considered with all requests.

16

Abortion and Birth Control

202300X
PRESENTATION TITLE
17

Considerations:

- Significant legislation across states since Roe V. Wade was overturned in 2022.
- As of July, 2023, 14 States have banned abortion while other states have restricted abortions by gestational periods or circumstances (ex: rape, incest, life of mother)
- Only 15 states and Washington D.C. cover abortions through Medicaid.

17

Abortion and Birth Control

202300X
PRESENTATION TITLE
18

Considerations:

- People with Disabilities and Abortion/Birth Control per recent NBC news story:
 - Often feel left out as a result of being de-sexualized/ people with disabilities don't have sex
 - Do not like being scapegoats or props for either side
 - Pro-abortion: avoid having children with disabilities
 - Pro-Life: Abortion as Eugenics
- Some people with disabilities are concerned they may lose access to birth control (when pregnancy for them can be life threatening)
- Historically, if there was a concern about medically or cognitively enduring pregnancy, doctors recommended sterilization, hysterectomy or genital mutilation
- Access to education and appropriate healthcare, especially reproductive care, for people with disabilities is a critical problem that needs addressed.

18

Abortion and Birth Control

Requests for Abortion and Travel for Abortion, Final considerations:

- In Alabama, anyone who performs an abortion, provides abortion pills or "aids, abets or prescribes the same faces up to 12 months in county jail or hard labor and a fine up to \$1000.
- Legislation in Idaho makes helping a pregnant minor get an abortion, whether through medication or a procedure, in another state punishable by two to five years in prison
- Oklahoma and Texas allow lawsuits against people who help facilitate an abortion within the states' borders

*Framework for Decision Making should be considered with all requests.

2020XX

PRESENTATION TITLE

19

19

Medical Aid in Dying (MAID)

Considerations:

- Presently there are 8 states and Washington DC that allow MAID via legislation and 1 state that allows it via court ruling. The remaining 40 states have laws prohibiting MAID. ProCon.org (2023, August 16) States with Legal Medical Aid in Dying
- In a 2019 study *Disability Assisted Suicide Laws and their Danger to People with Disabilities* the National Council on Disability (NCD) found that "the most prevalent reasons offered by someone requesting assisted suicide are directly related to unmet service and support needs."
- The study went on to find that insurers denied life-sustaining medical treatment but offered to subsidize lethal drugs.

2020XX

PRESENTATION TITLE

20

20

Medical Aid in Dying (MAID)

Considerations:

- Concerns of Eugenics re: euthanasia and people with disabilities:
 - A 2021 study found that the percentage of deaths through assisted suicide in The Netherlands for reasons other than terminal illness is low, but it was increasing.
 - Individuals with Autism Spectrum Disorder (ASD) were significantly over-represented among those that died by suicide.
- The remainder beneficiary of the trust (PSNT Organization or a family member in a 3rd party trust) need to be considered in these requests. We recommend that these requests can come ONLY from the beneficiary and not from any outside party.

*Framework for Decision Making should be considered with all requests.

2020XX

PRESENTATION TITLE

21

21

Case Law that May Assist-*Abuse of Discretion*

Prior to a 2004 Minnesota Court of Appeals ruling (*In re Irrevocable Supplemental Needs Trust of Collins*, A04-1018, 2004 WL 2858079 (Minn. Ct. App. Dec. 14, 2004)), the State of Minnesota District Court had denied distributions for a snowmobile and Brittany Spears tickets from a Special Needs Trust while approving a bike and other outings....

The Minnesota Court of Appeals reconsidered the District's opinion and wrote "whether Brittany Spears concert tickets are an appropriate expenditure for a 14 year old...requires an exercise of discretion: parents of disabled and non-disabled children are constantly faced with such discretionary decisions.... We conclude that [Mr. Collins] exercised, but did not abuse his 'sole discretion' in providing a child's snowmobile and concert tickets for Jennifer."

NOTE THAT THE "ABUSE OF DISCRETION" STANDARD IS WIDELY USED BY COURTS AND THAT THIS CASE MAY PROVIDE A STANDARD TO SUPPORT A TRUSTEE'S APPROVAL OF UNIQUE REQUESTS FOR BENEFICIARIES.

22

22

Summary

We must balance the **needs of the beneficiary** with **state and federal law** as well as the **liability** and legal consequences for both the beneficiary and the trustee themselves.

The equilibrium of these differing interests and risks can create a challenge that must be approached with creativity, understanding, discretion and thorough due diligence.

Using a multidisciplinary approach that is highly individualized is essential as is allowing staff the ability to opt out of decision making if needed.

Problem: Healthcare is not adequate for people with disabilities, biases, lack of education and hurdles to obtain care.

Proposed Solution: Rather than looking at these issues from a political or moral standing, the value analysis should be more heavily focused on what can be done to provide equality.

23

23

Thank you

Megan Brand, Executive Director, CFPD

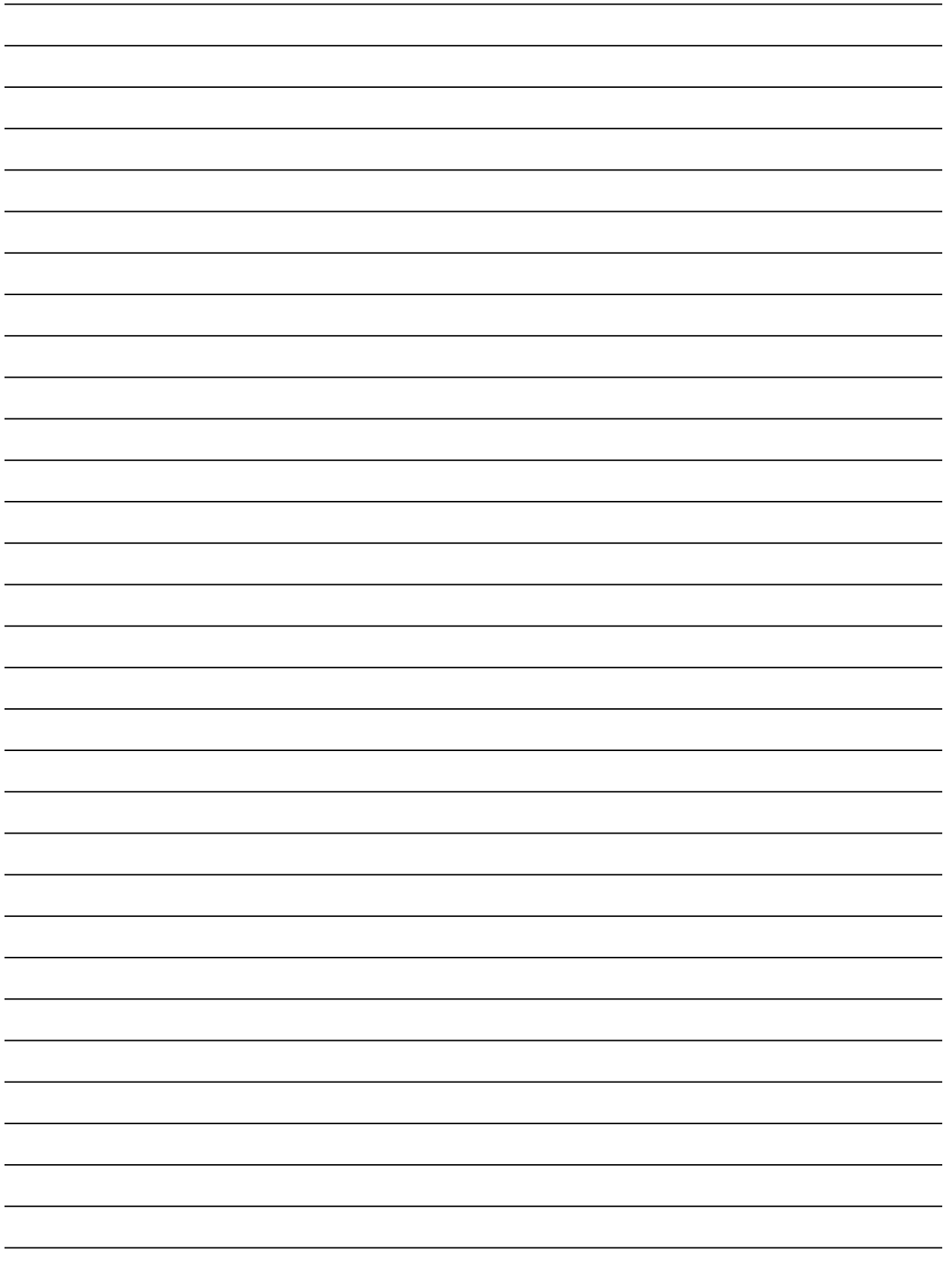
mbrand@cpdtrust.org

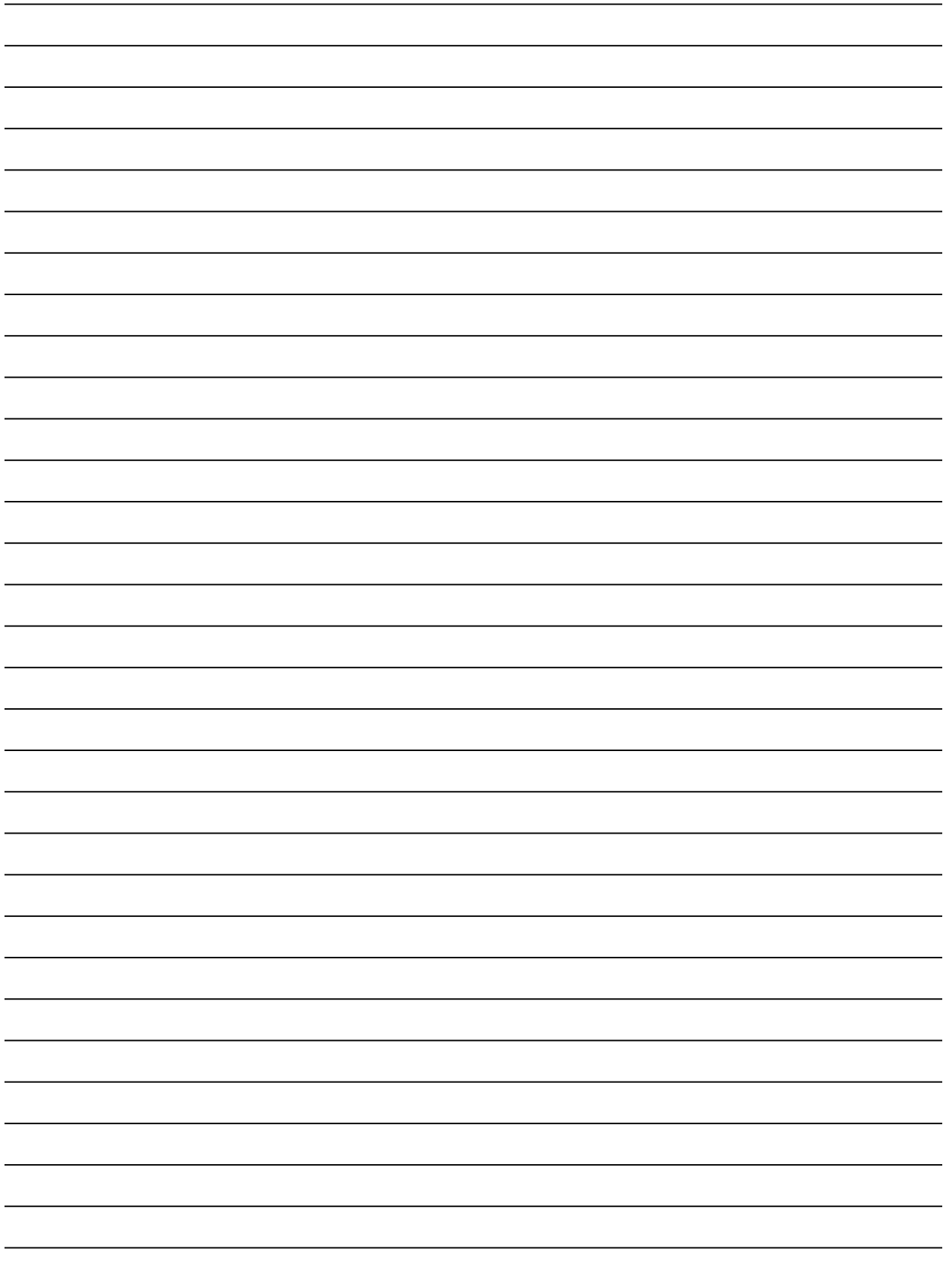
Kerry Tedford-Coles, Executive Director, PLAN of CT

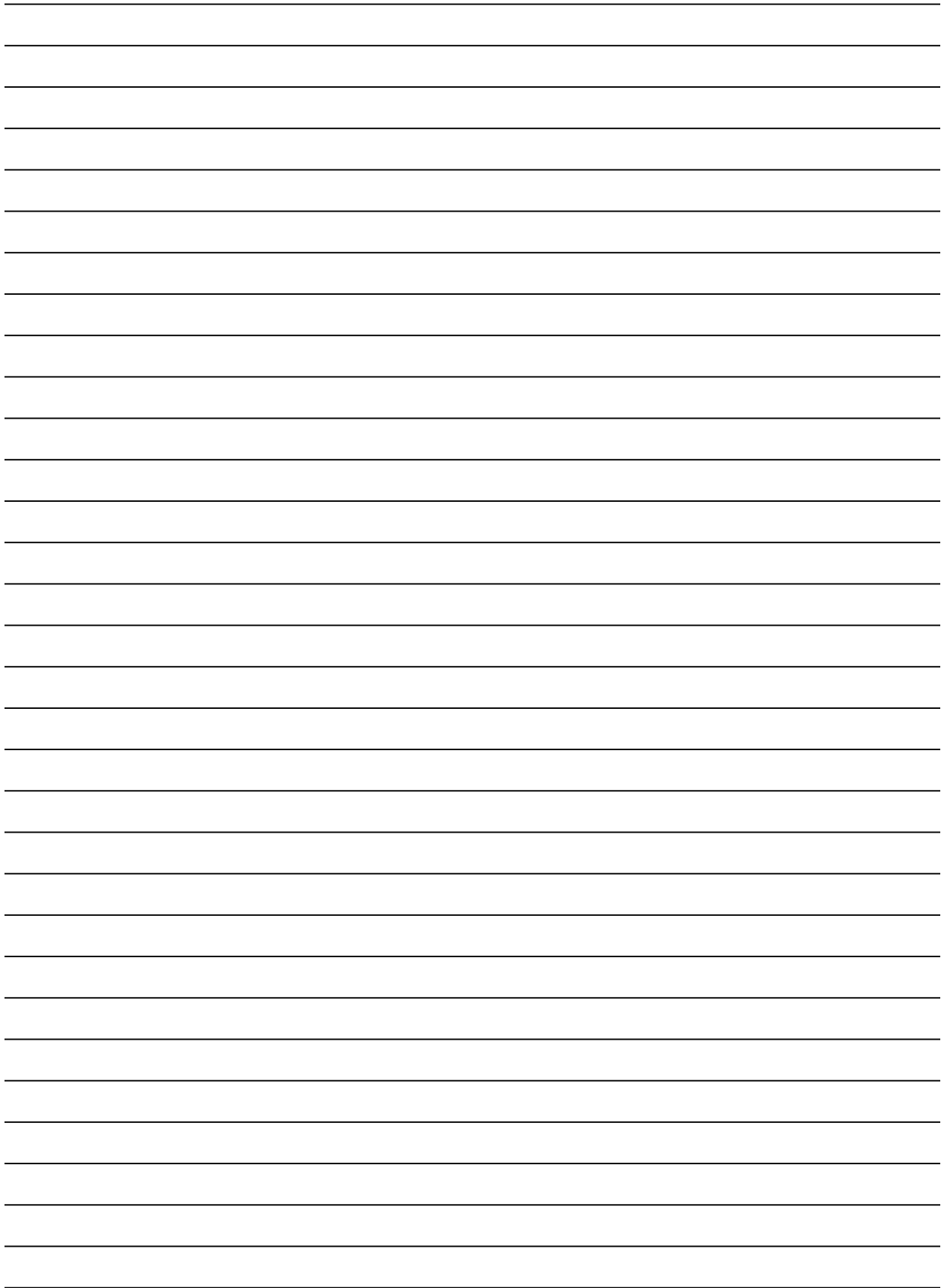
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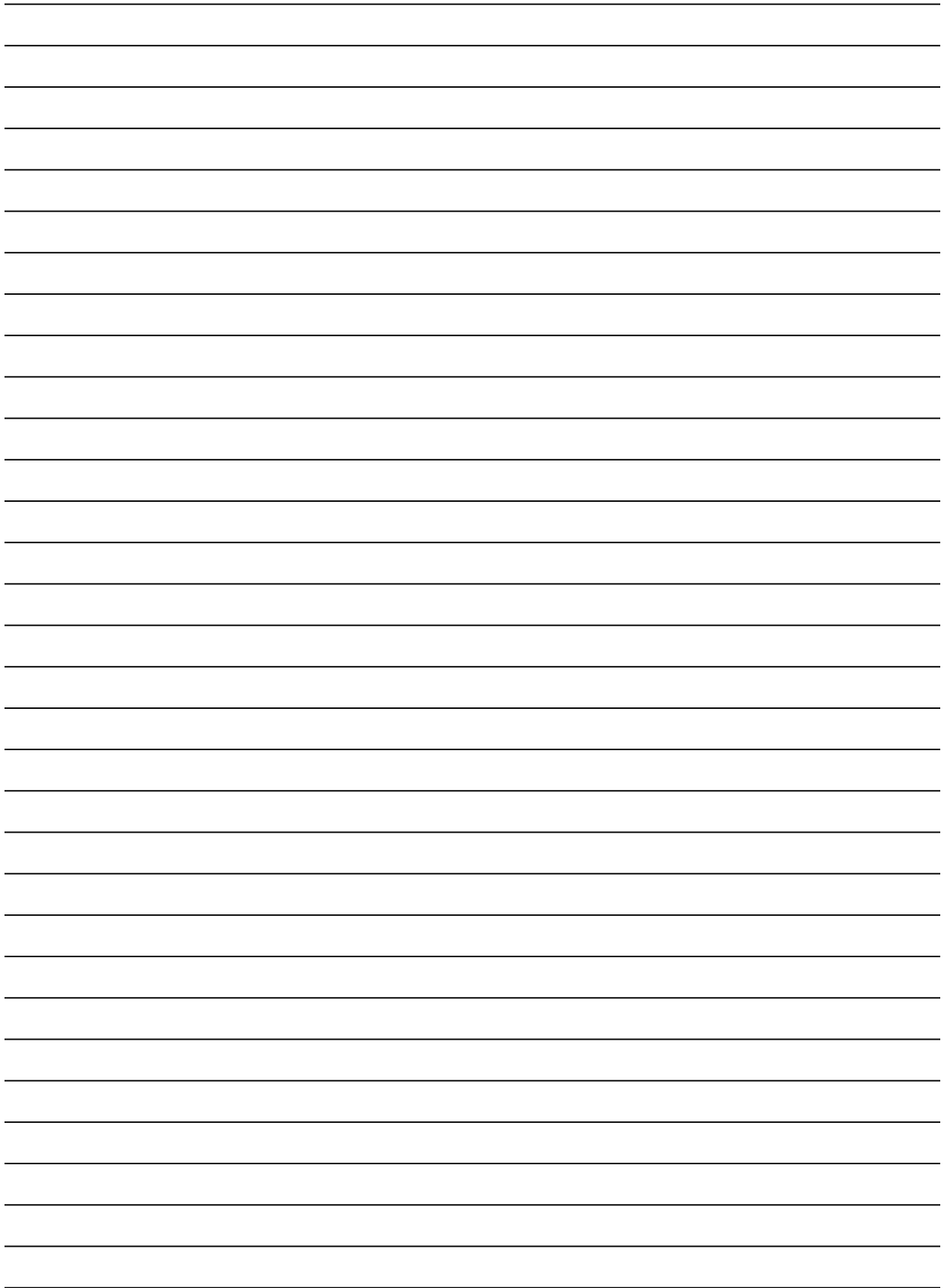
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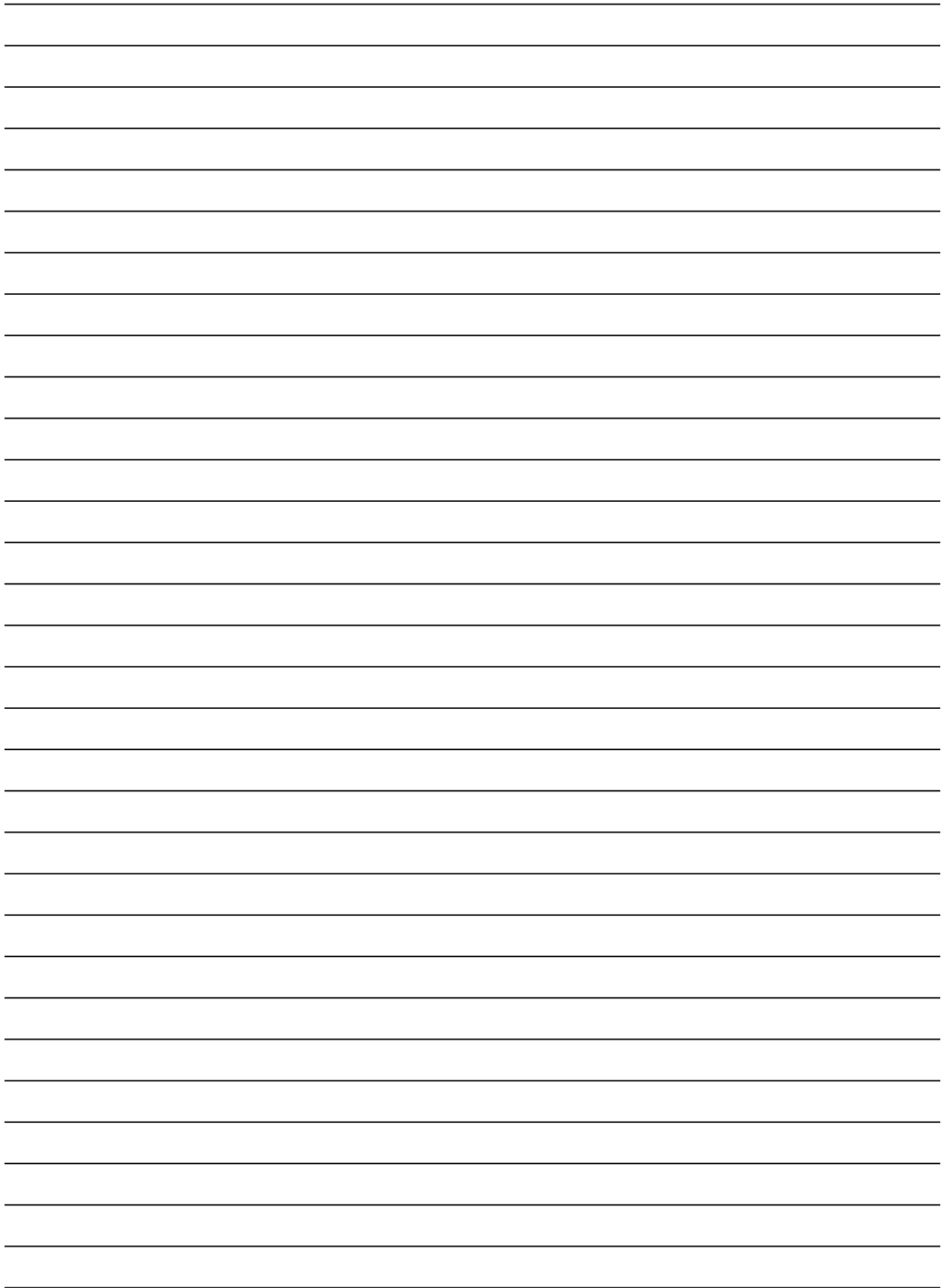
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STETSON LAW

Pooled Trusts Intensive

**Wednesday
October 18, 2023**

**Post COVID Issues – Change in Employment
Landscape, Housing Pressures, and Medicaid
Recertifications**



STETSON
LAW

*Center for
Elder Justice*

Access and Justice For All®

POST COVID ISSUES:
 Change in Employment Landscape, Housing Pressures, and Medicaid Recertifications

HOW DID COVID-19 IMPACT HOUSING?

1

Employment Challenges Post COVID

Stephen W. Dale LL.M
 Trustee - Golden State Pooled Trust

2

Ongoing Impacts of the Pandemic Community Services

Issues with DSP Workforce:

- High turnover and low retention of direct support professionals (DSPs)
- The national turnover rate for DSPs is 43%, with some individual states seeing rates as high as 65%.
- Low wages are not the only factor driving high turnover

DSP workers also concerned about

- 1) supervision;
- 2) appreciation and recognition;
- 3) and career advancement and growth

Improvements in recognition, educational opportunities and more direct feedback of the workforce will help reduce employee turnover, but low wages continue to be the biggest factor.

• Source of above: Relias 2023 DSP Survey Report:

3

The Issue

- COVID exacerbated a long term problem for pooled trusts, but also with securing community services with a workforce that is evolving.
- In many cases a beneficiary may be eligible for services, but in fact in the workforce may not be available to fulfill the need, or the reliability of the services may be in jeopardy.
- Lets review 2 surveys to learn more



4



The State of America's Direct Support Workforce Crisis 2022

ANCOR The State of America's Direct Support Workforce Crisis 2022

New Research Finds Direct Care Workforce Having Detrimental Impact on Access to Community Disability Services

New data from ANCOR shows that a significant majority of direct support professionals (DSPs), the frontline workers supporting people with intellectual and developmental disabilities (IDD), face racial and ethnic disparities in their pay, benefits, and working conditions. The research also found that DSPs are more likely to be employed in lower-paying, less-stable jobs compared to other workers in the disability services sector. As a result, workforce legislation to stabilize the DSP workforce is critical to ensuring services are available and of adequate quality and quantity for people with IDD.

There are nearly 8 million people with IDD living in the United States, many of whom rely on long-term, intensive, and expensive direct support services. The direct support workforce is the backbone of these services, and the stability of providers is critical to the success of these services. The research also found that DSPs are more likely to be employed in lower-paying, less-stable jobs compared to other workers in the disability services sector. As a result, workforce legislation to stabilize the DSP workforce is critical to ensuring services are available and of adequate quality and quantity for people with IDD.

The direct support workforce crisis is largely attributable to support development rates and the stability of providers to offer support that are competitive with those of non-disability workers, such as fast-food, retail, and construction workers. Although support providers face these challenges, support providers are often the only workers in their field who are not only paid less but also work longer hours for less pay. This research also found that DSPs are more likely to be employed in lower-paying, less-stable jobs compared to other workers in the disability services sector. As a result, workforce legislation to stabilize the DSP workforce is critical to ensuring services are available and of adequate quality and quantity for people with IDD.

For the first time in over a decade, ANCOR has measured the impact of the direct support workforce crisis on community providers and their ability to deliver high-quality, person-centered IDD services. When ANCOR surveyed providers in August 2022, ANCOR found that providers are more likely to report that they are struggling to pay workers in the public health emergency. While many providers in the private sector were able to offer increased wages, being temporary, part-time, and seasonal, community providers reported that they were unable to do so. Community providers felt almost exclusively in financial jeopardy and this has resulted in hiring delays that have had a detrimental impact on people with IDD.

The results of our 2022 survey reveal that the workforce emergency is now the point of breaking services to services and further threatening quality of services for people with IDD. Our research also found that providers are more likely to report that they are struggling to pay workers in the public health emergency. While many providers in the private sector were able to offer increased wages, being temporary, part-time, and seasonal, community providers reported that they were unable to do so. Community providers felt almost exclusively in financial jeopardy and this has resulted in hiring delays that have had a detrimental impact on people with IDD.

The pages that follow detail the specific findings of the 2022 State of America's Direct Support Workforce Crisis survey and are intended to be used as a resource for providers, advocates, and policymakers to inform and improve service delivery systems. If the public services providers advance progress toward a more sustainable service delivery system.

5

66% of Providers are Concerned Vacancy and Turnover Rates Will Increase with the End of the Public Health Emergency

- **FACT:** Sixty-six percent of respondents reported being concerned that vacancy and turnover rates will increase when COVID-19 relief funding and regulatory flexibilities related to the COVID-19 public health emergency are terminated.
- **IMPACT:** Providers remain reliant on the availability of increased fundings and emergency regulatory flexibilities pursuant to the public health emergency to maintain basic operations with reduced staffing. Almost every state included initiatives aimed at stabilizing the direct support workforce in their implementation of enhanced home and community-based services funding provided by the American Rescue Plan Act (ARPA). However, providers will face a devastating fiscal cliff when that temporary funding expires.

The State of America's Direct Support Workforce Crisis 2022. Alexandria, VA: ANCOR, 2022.

6

83% of Providers are Turning Away New Referrals

- **FACT: More than 8 in 10 respondents indicated that they had turned away or stopped accepting new referrals due to insufficient staffing. This represents a 25.8% increase since the beginning of the pandemic.**
- **IMPACT:** The limited number of available providers has left individuals with significant or complex support needs traveling long distances outside of their communities—assuming they are able to find a provider at all—thereby heightening their risk of institutionalization or unnecessary hospitalization.

The State of America's Direct Support Workforce Crisis 2022. Alexandria, VA: ANCOR, 2022.

7

63% of Providers are Discontinuing Programs and Services

- **FACT: More than 6 in 10 respondents indicated that they had discontinued programs or service offerings due to insufficient staffing. This represents a staggering 85.3% increase since the beginning of the pandemic.**
- **IMPACT:** With programs and services closing at an accelerating rate, the ability of states to maintain an adequate network of community providers and meet federal access standards is at grave risk. Reduced availability of services jeopardizes the safety and well-being of the people relying on them.

The State of America's Direct Support Workforce Crisis 2022. Alexandria, VA: ANCOR, 2022.

8

55% of Providers are Considering Additional Service Discontinuations

- **FACT: More than half of all respondents indicated that they were considering new and additional discontinuations of programs and service offerings due to the current rate of high turnover and vacancy. Another 37% indicated they were not sure if they would need to close additional services, with only 8% responding they would not.**
- **IMPACT:** With the infrastructure of services deteriorating as the dearth of adequate staffing grows, there are nearly 700,000 people languishing on states' HCBS waiting lists. Without providers available to deliver supports, families will remain unable to access services, even after they are removed from the waiting list

The State of America's Direct Support Workforce Crisis 2022. Alexandria, VA: ANCOR, 2022.

9

92% of Providers are Struggling to Achieve Quality Standards

- **FACT: A staggering 92% of respondents indicated that they had experienced difficulties in achieving quality standards due to insufficient staffing. This represents a 33.3% increase since the beginning of the pandemic and a 13.6% increase in the last year alone.**
- **IMPACT:** When too few workers apply for jobs, providers are reliant on emergency regulatory flexibilities to maintain minimum staffing requirements. When emergency orders are lifted, providers are left unable to comply with staffing requirements, in turn forcing immediate discharge

The State of America's Direct Support Workforce Crisis 2022. Alexandria, VA: ANCOR, 2022.

10

71% of Case Managers are Struggling to Find Available Providers

- **FACT: More than four in 10 respondents (42%) reported that they offer case management services in addition to long-term services and supports. Of those respondents, 71% indicated that it is difficult to connect families with services due to lack of available providers.**
- **IMPACT:** Case managers work with people with I/DD to coordinate services to meet their needs. Due to their role finding and managing availability of services, case managers are often in a unique position to assess accessibility of the provider network—suggesting there are now fewer services to be offered than before.

The State of America's Direct Support Workforce Crisis 2022. Alexandria, VA: ANCOR, 2022.

11

Ongoing Impacts of the Pandemic on Medicaid Home & Community-Based Services (HCBS) Programs: Findings from a 50-State Survey

KFF The independent source for health policy research, polling, and news.

Medicaid

Ongoing Impacts of the Pandemic on Medicaid Home & Community-Based Services (HCBS) Programs: Findings from a 50-State Survey

Widespread workforce shortages are the biggest challenges facing state Medicaid home and community-based (HCBS) programs and those shortages were greatly amplified by the COVID-19 pandemic, which reduced the number of potential workers and increased the demand for services. The American Rescue Plan Act (ARPA) and COVID-19 public health emergency (PHE) authorities gave states new—but temporary—flexibility and funding to address pandemic-related challenges, which all states used. Those states were enabled to respond to the pandemic and invest in HCBS programs, helping millions of seniors and people with disabilities who rely on Medicaid HCBS to meet daily self-care and independent living needs in community-based settings.

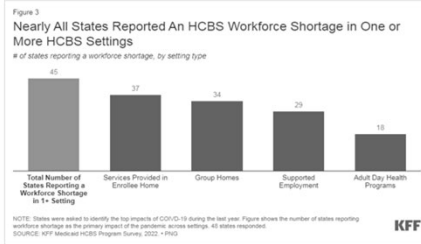
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All States Reported Workforce Shortages and Almost All Increased Their Payment Rates



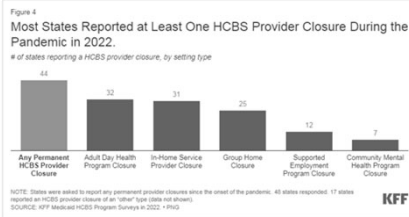
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How is the Pandemic Affecting the Workforce?



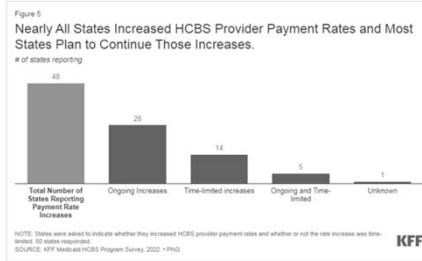
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How is the Pandemic Affecting the Workforce?



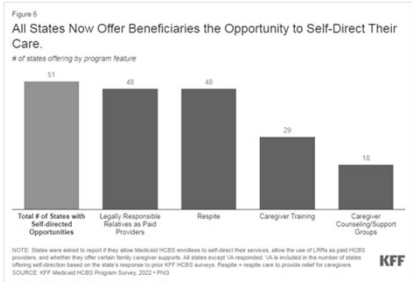
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How did States Respond to the Workforce Crisis?



16

How did States Respond to the Workforce Crisis?



17

Ongoing Impacts of the Pandemic Community Services

- Widespread workforce shortages are the biggest challenges facing state Medicaid home and community-based (HCBS) programs
- The COVID-19 pandemic exacerbated existing challenges for direct service providers and the people they serve.
- All responding states indicated they were experiencing shortages of direct care workers in 2022 (See Figure 1)
- Workforce shortages have been exacerbated by the pandemic; All states that responded to this question indicated they were experiencing shortages of direct care workers in 2022. (Figure 3)
- As the pandemic persisted, HCBS workforce shortages contributed to provider closures: 44 states reported a permanent closure of at least one Medicaid HCBS provider during the pandemic (Figure 4).
- When asked about their overall responses to workforce shortages, most states reported that they increased HCBS provider payment rates and most plan to continue those rate increases even after pandemic authorities and funding end (Figure 5)
- States increased self-directed and family caregiving opportunities for HCBS beneficiaries throughout the pandemic as one way of addressing workforce challenges (Figure 6)

18

So – How Does this Affect Your Program?

19

How Does This Affect Your Program?


- Many pooled trusts are feeling the same pressures
 - Hiring has become more competitive
 - Turnover has increased
- In many cases this leads to unanticipated expenditures
- For community programs, the national turnover rate for DSPs is 43%, with some individual states seeing rates as high as 65%.
- If a Medicaid funded attendant care program either does not have staff, or staff is unreliable then the pooled trust administrator is going to need to fill the gap.
- The welfare of our beneficiaries are at stake
 - Care management and oversight of persons with disabilities in the community may be impaired
 - Many services such as supported employment may be affected
 - The pooled trust is likely to have increased expenses depleting accounts more rapidly

20

What Can We Do?



21



What Can We Do?

- Alliance of Pooled Trusts
 - On a systemic level we need to advocate long term sustainable solutions including
 - Reasonable rates
 - Career paths
- We need to make sure that the persons and entities that have a stake in community living are aware of the problems
- We need to partner with groups like the Arc, NAELA, NPA, the SNA and like-minded organizations to make this a priority

22

Housing Challenges Post COVID

Barb Helm, Executive Director
Arcare, Inc.

23

Housing Crisis Post Covid

- Eviction Moratorium ended July 2021, Cares Act does provide some lasting protection calling for a 30 day notice on evictions.
- District of Columbia only state that still has a moratorium on evictions.
<https://www.lawdistrict.com/articles/eviction-moratoriums-by-state>
- Rent increases during the Covid rose, with inflation adjusted median rent growing from \$1,163 in 2019 to \$1,191 in 2021.
- 2023 Fair market rent data shows that compared to 2020 one bedroom unit rent increased in 58% of counties by as much as 35%
- <https://usafacts.org/articles/where-are-rents-rising-post-covid-19/>

24

The Housing Choice Voucher Program

- Created in the 1970's the Section 8 housing choice Voucher Program is nation's largest source of rental assistance
- Individuals and families with low incomes use vouchers to help pay for privately owned housing.
- The program is federally funded and administered by the Dept. of Housing and Urban Development (HUD) and a network of approx 2170 state and local public housing agencies (PHAs)
- More than 5 million people in 2.3 million low-income families use vouchers
- Once a voucher is received recipient has 60 days to find housing
- Rent is 30% of tenant's income, voucher covers the rest of the cost. Housing agencies may establish a higher payment standard as a reasonable accommodation for a person with a disability.

25

Who is being served in the program?

- 24% of vouchers are being used by person's with disabilities
- 62% are female
- 41% are under 18 – families using vouchers
- 53% are used in urban areas, 36% in Suburbs and 11% in rural areas.

Center on Budget and Policy Priorities – Policy Basics: The Housing Choice Voucher Program 4/12/2021

26

How is it Funded?

- Part of the federal budget – non defense discretionary funding called NDD. Funds allocated to state and local housing agencies.
- Local Housing agencies historically use all of their allocated funds
- Vouchers sharply reduce homelessness lifting more than a million people above the poverty line. Vouchers increase housing choices, expand access to neighborhoods and other resources.

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Priorities and Waiting List

- Because of insufficient funding local housing authorities often prioritize specific groups for available vouchers such as veterans, working families, or people fleeing domestic violence or homelessness.
- 53% of Agencies administering vouchers have close waiting lists (2019). Wait list average 8 months (Dallas) to 98 months (Miami)
 - Demographics of wait lists
 - 60% families
 - 11% older adults
 - 18% include at least one person with a disability

28

Outlook For 2024

- FY24 Budget: President Biden’s budget calls for funding HUD programs at 73.3 billion approx. 2 billion or 1.6% increase over FY23
- This would renew all existing housing vouchers and expand assistance to an additional 50k households.
- Divided Congress has introduced a proposal that would cap FY24 spending at FY22 levels which could result in an average cut of 24% to NDD programs – which includes housing assistance.

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Advocacy

- **Urge Congress to Increase – Not Cut – Investments in Affordable Housing in Fiscal Year 2024**
- State and local governments and the communities they serve rely on federal resources to meet the housing, homelessness, and community development needs of their communities. However, Congress has underfunded these resources for decades, and now House Republicans are threatening to impose austere spending cuts to non-defense programs.

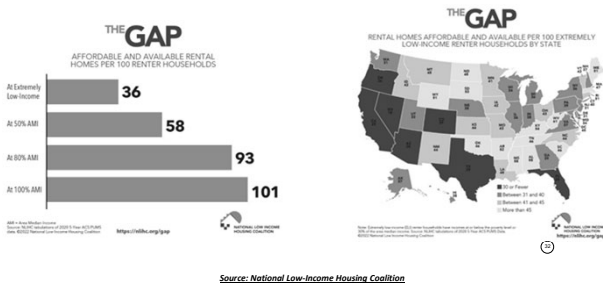
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Advocacy

- Urge your members of Congress to fund housing and homelessness programs at the highest level possible in FY24.
- Implement full funding for the Tenant-Based Rental Assistance (TBRA) program to renew all existing contracts.
- Provide full funding for public housing operations and repairs.
- Fully fund homelessness assistance grants.
- Provide \$100 million for legal assistance to prevent evictions.
- Fund a permanent Emergency Rental Assistance program.
- Maintain funding for competitive tribal housing grants for tribes with the greatest needs.

31

Affordable housing: 7 million unit shortage for ELI



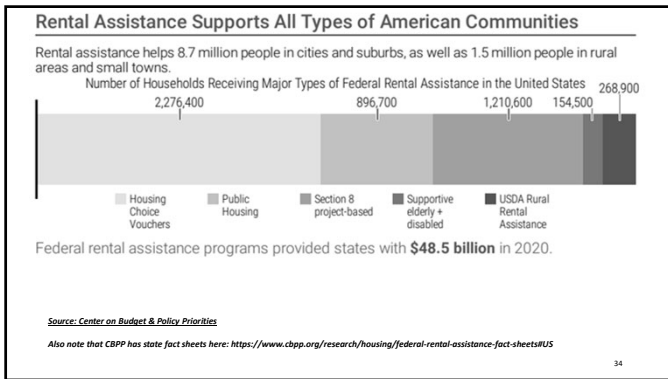
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Federally Assisted Housing at a Glance

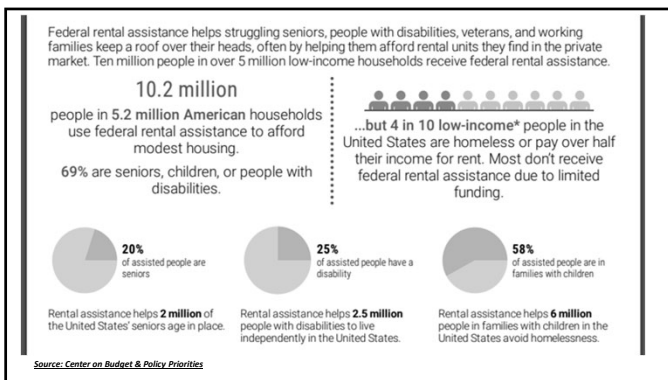
- Major HUD Housing Programs
 - Public Housing
 - Housing Choice Vouchers
 - Project-Based Section 8
 - Section 202/811 (senior and disabled)
- USDA Rural Housing
- Low Income Housing Tax Credits
- Note: State/Local Subsidies

33

33



34



35

How Does This Affect Your Program?

Many pooled trusts are feeling the same pressures:

- Properties/landlords discontinuing participation in HUD housing programs
- Beneficiaries unable to find properties willing to accept vouchers
- Beneficiaries losing or unable to access housing vouchers
- Increased number of unhoused beneficiaries
- More are requesting SNT to pay housing costs

Trustee must seek creative solutions to assist beneficiaries.

36

Medicaid Recertification

Yolanda Mazyck, CEO
Shared Horizons, Inc.

37

Unwinding and Returning to Regular Medicaid Operations after COVID-19

The Consolidated Appropriations Act, 2023, delinked the end of the Families First Coronavirus Response Act's (FFCRA) Medicaid continuous enrollment condition from the end of the COVID-19 Public Health Emergency. As a result, the Medicaid continuous enrollment condition ended on March 31, 2023.

States resumed normal operations, including restarting full Medicaid and CHIP eligibility renewals and terminations of coverage for individuals who are no longer eligible. Beginning April 1, 2023, states started terminating Medicaid enrollment for individuals no longer eligible.

38

The Challenge

Pre-pandemic, about 17 million people lost Medicaid or CHIP coverage – some because they're no longer eligible, but others because of red tape. That means that during the pandemic, more than 50 million Medicaid terminations did not happen.

Making sure enrollees receive their renewal notices as many relocated during the pandemic.

Providing resources to assist with the recertification process, and staffing with the State Medicaid eligibility programs in an attempt to mitigate backlogs.

39

The Centers for Medicare and Medicaid (CMS) Response

CMS allows States 12 months to complete the renewal process and have encouraged them to streamline the process wherever possible.

50% of state will renew eligibility based on information from other programs, like SNAP, avoiding duplication of information and paperwork.

The majority of states are using information from Medicaid Managed Care Organizations and other databases to obtain update contact information to help ensure renewal letters are received.

Many states have adopted other strategies to renew Medicaid for eligible families without requesting additional paperwork.

40

How Can PSNTs Assist?

Decide whether you will make staff available to assist your beneficiaries with the renewal process

[Renew Your Medicaid or CHIP Coverage | Medicaid](#)

Make sure your staff has the above link and shares it with your beneficiaries and their support network.

Also, add the link to your website and social media

Provide your beneficiaries with sample responses about how to report their trust account during the recertification process.

Much of the information was obtained from Medicaid.gov Unwinding and Returning to Regular Operations after COVID-19 | Medicaid

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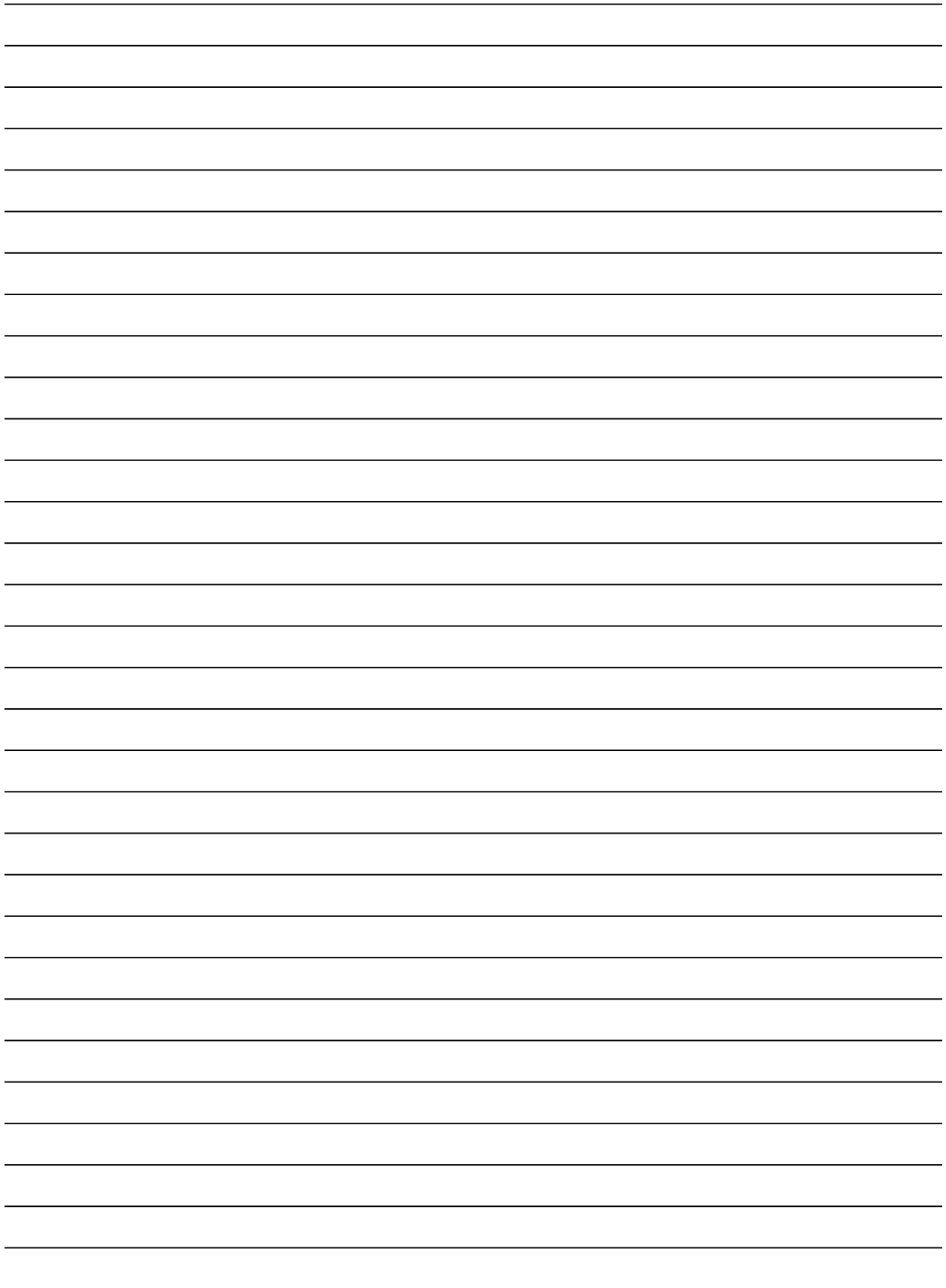
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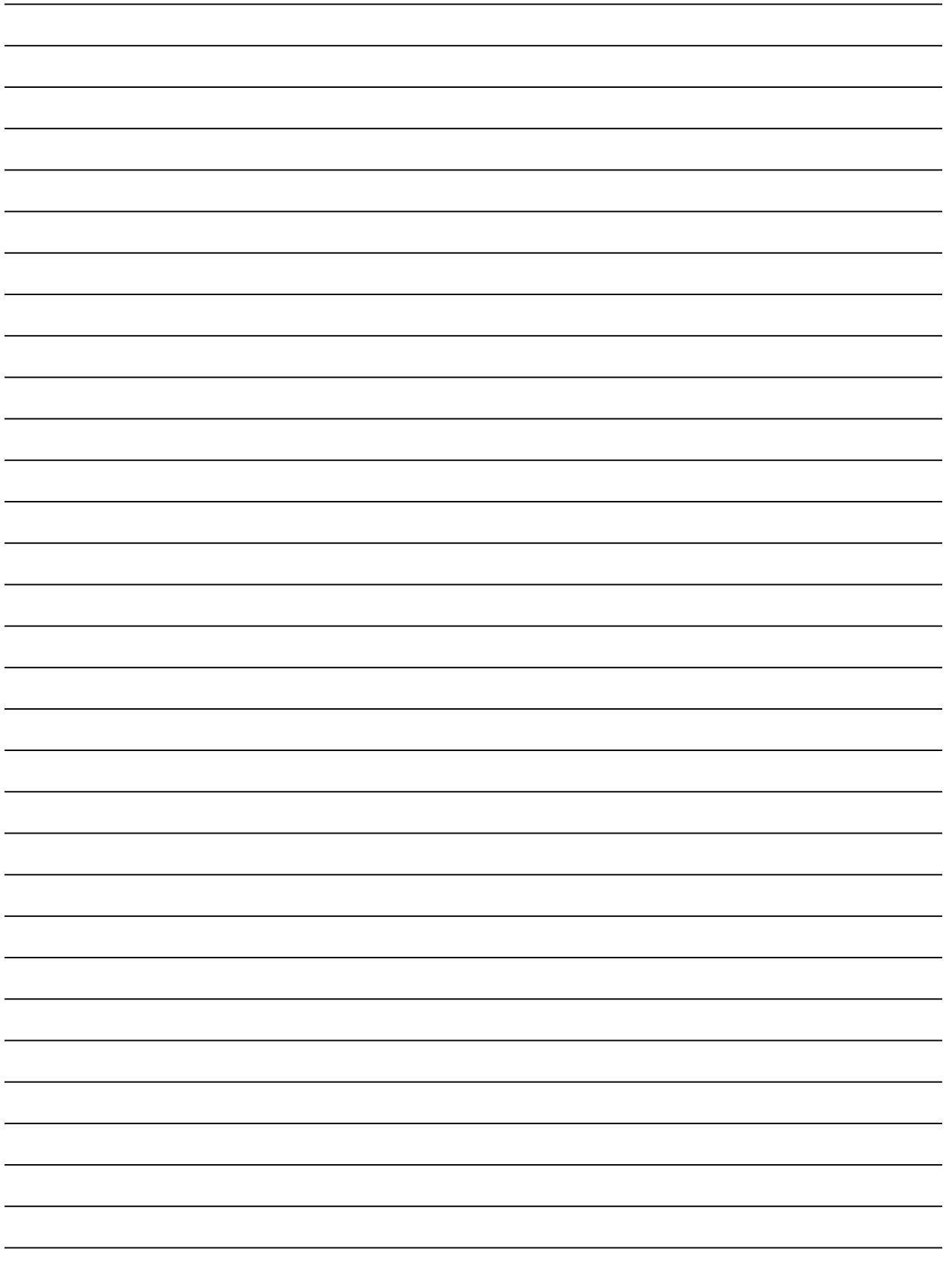
Stephen W. Dale, Esq. LL.M
[Golden State Pooled Trust](#)
steve@gspt.org

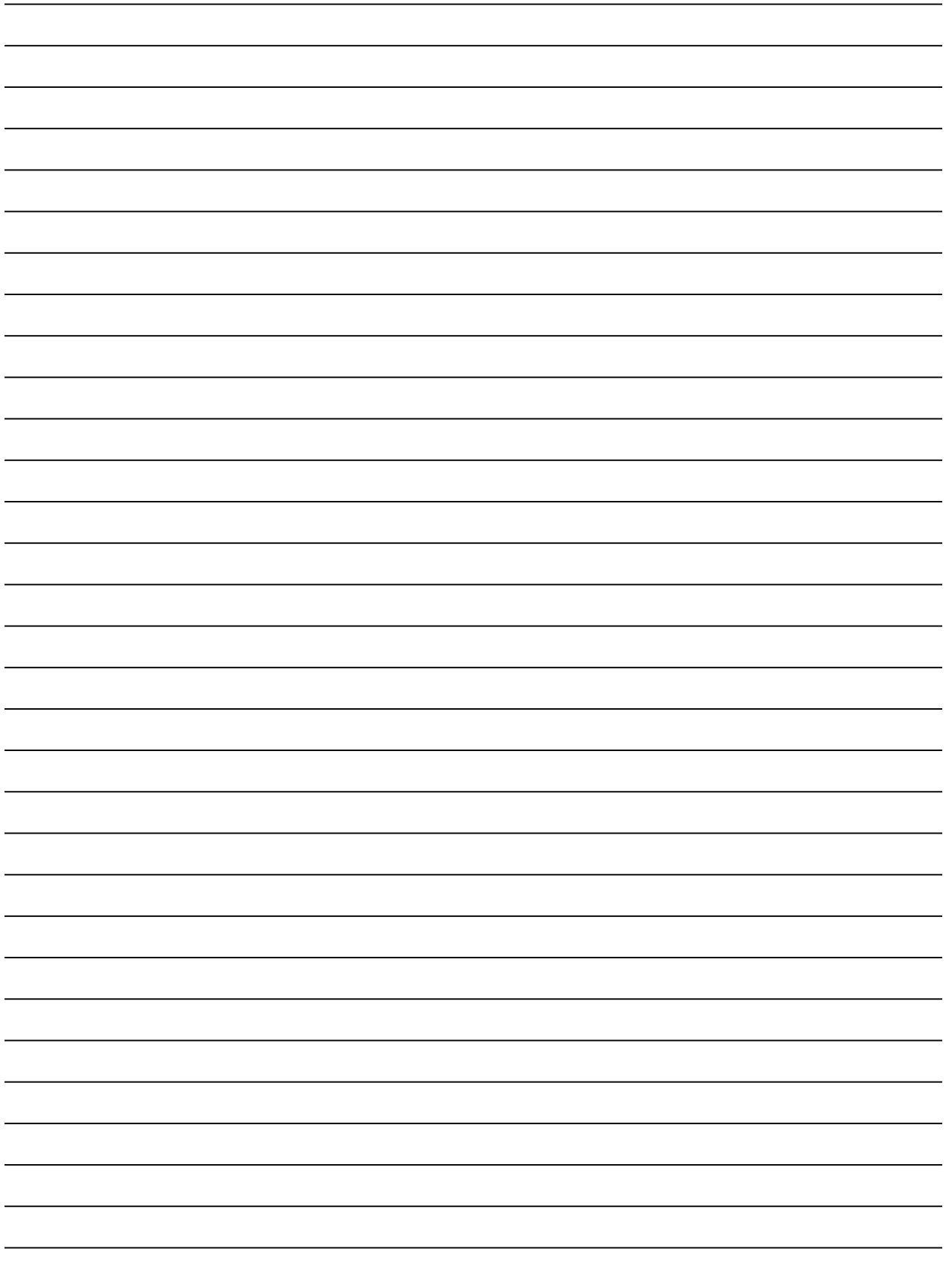
Barb Helm, Executive Director
[Arcare, Inc.](#)
barbh@arcare.org

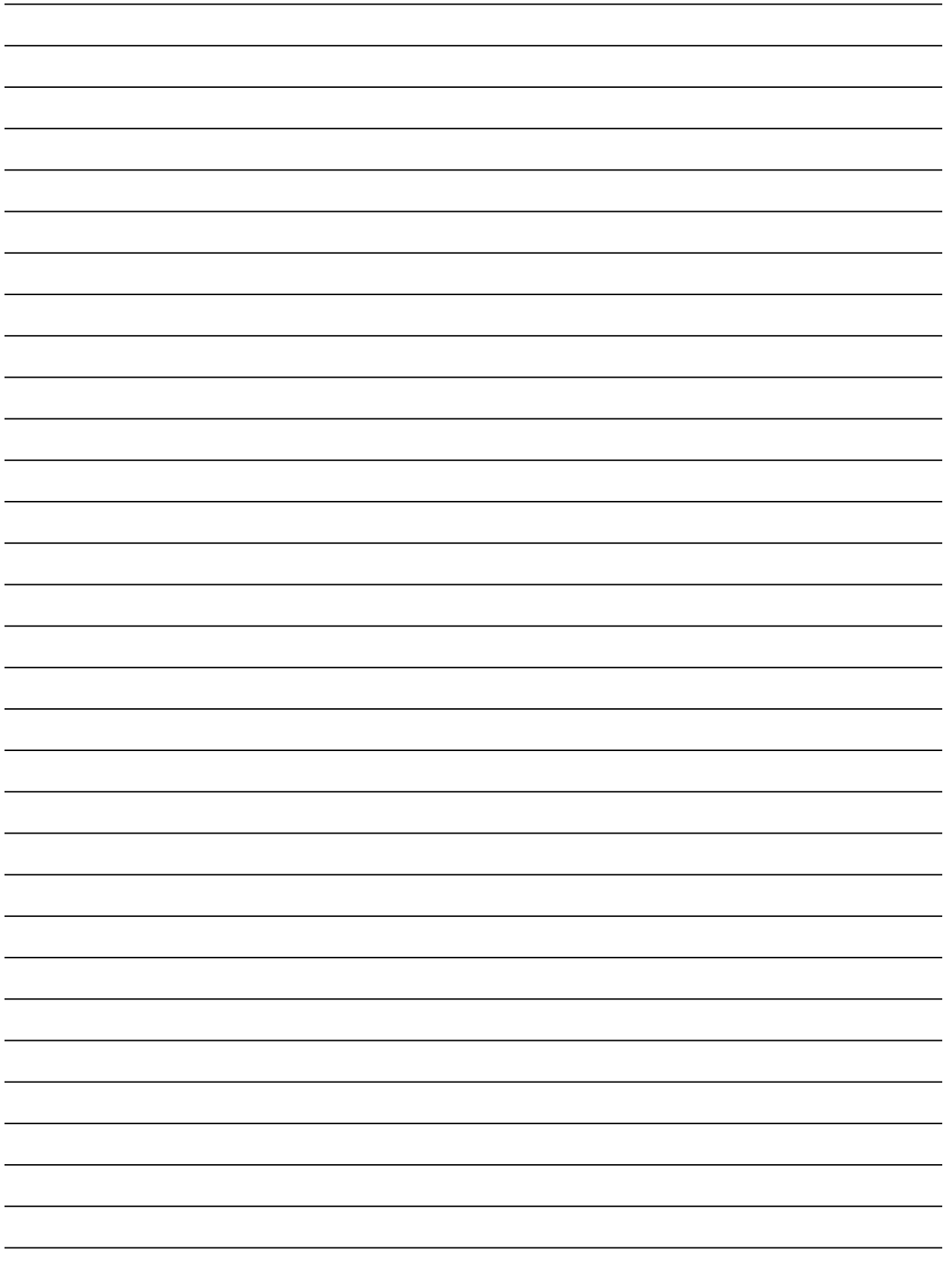
Yolanda Mazyck, CEO
[Shared Horizons, Inc.](#)
ymazyck@shared-horizons.org

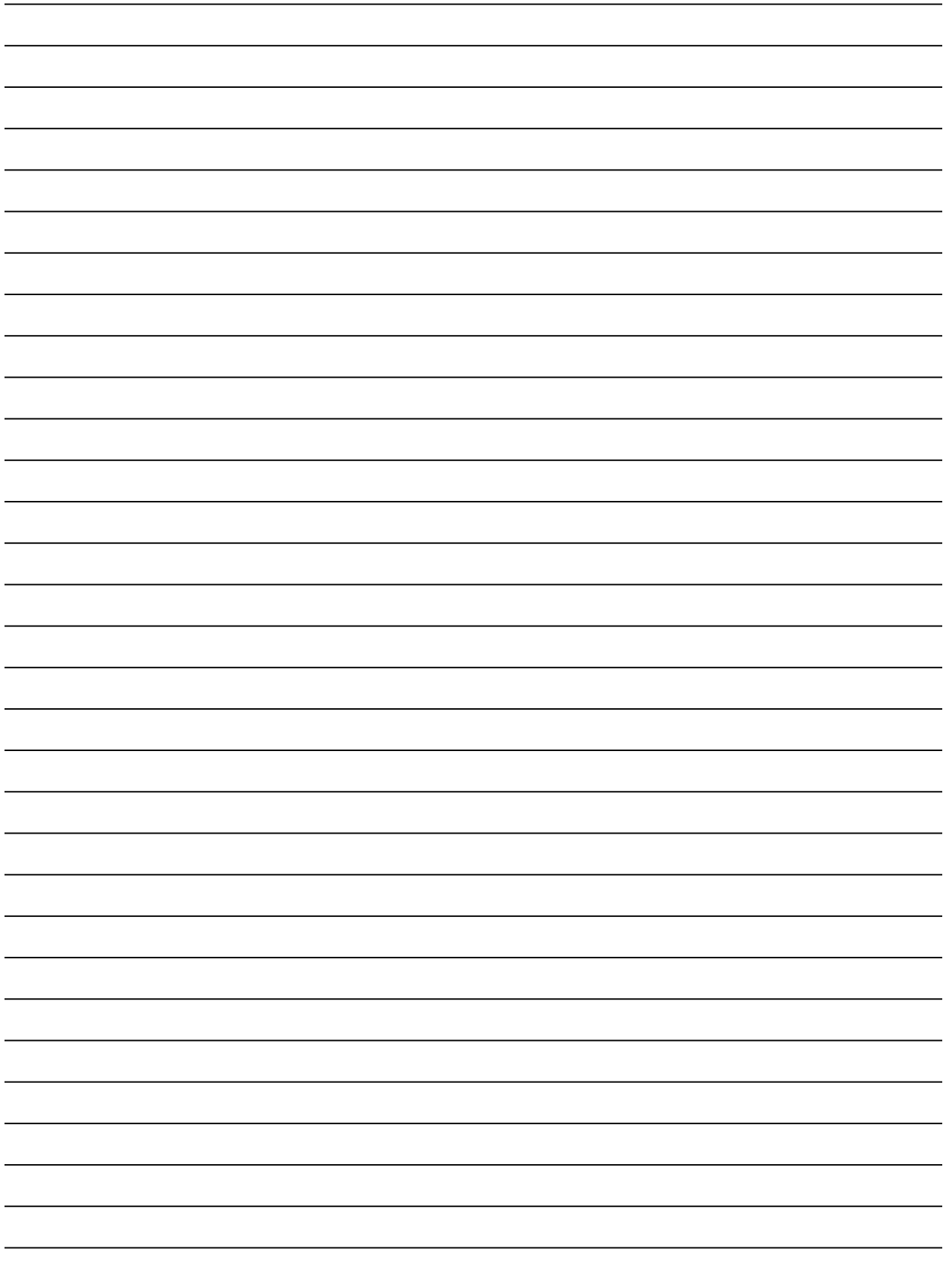
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Wednesday
October 18, 2023

Making a House a Home for People with Disabilities



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Elder Justice*

Access and Justice For All®

Making a House a Home for People with Disabilities or Aging in Place

1

- MS Aging and Neuroscience – USF College of Medicine
- State of Florida Certified Building Contractor
- National Association of the Remodeling Industry (NARI)
 - Universal Design Certified Professional (UDCP)
- Former Chairman of Habitat for Humanity of Hillsborough County (2019-2022)

Mark Zdrojewski
President - Strobel Design Build

2

1. Aging in place with Traumatic Change Needs
 - **Identified by:** Family, Friends, Physician (Emergency)
 - **Catalyst:** Traumatic fall, injury, stroke, etc.

2. Aging in place with Progressive Condition-Based Needs
 - **Identified by:** Self, Family, Friends, Physician (Specialist)
 - **Catalyst:** Medical diagnosis (acute or chronic), degenerative condition (limited mobility within 6 months)

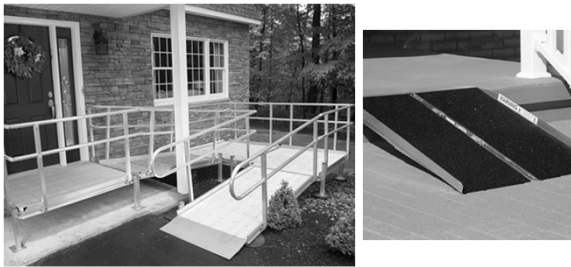
3. Aging in Place Without Urgent Needs
 - **Identified by:** Self, Spouse, Elder Law/Estate planning attorney
 - **Catalyst:** Proactive planning, Estate planning, degenerative condition (limited mobility expected in 6-12 months or more)

3

- Ramps
- Stair lifts
- Grab bars
- Anti slip surfaces
- Less opportunity for aesthetic integration at this stage
- Requirements by health care professionals
- **Time to Implement:** hours to a few days
- **Cost:** a few hundred to a few thousand dollars (\$)

Aging in place with Traumatic Change Needs

4




Ramps

5



Stair Lift & Grab Bars

6



Automation/Technology

7

- By working with a person's regular physician and other doctors, an Occupational Therapist (OT) can suggest changes to be made to a person's home in order to uniquely compensate for that particular patient's capabilities and disabilities.
- Improvements (Proactive)
 - Widening doorways, barrier removal
 - Bathroom and kitchen modifications
 - Visual cues and lighting
 - More aesthetic integration possible at this stage
- **Time to Implement:** weeks to months
- **Cost:** a few thousand to tens of thousands (\$\$)

Aging in place with Progressive Condition-Based Needs

8



Widen Doorways

9



Kitchen modifications

10



Bathroom modifications

11

- Aging in Place without urgent needs:
 - Proactive approach
 - Modifications over time (elevator, grab bars)
 - Aesthetic considerations
 - Technology integration
 - Investment in property
 - Additions
 - Extensive remodeling
 - **Time to Implement:** 6 months to a year or more
 - **Cost:** \$100,000 (extensive remodel), \$200,000 and up (addition)

Aging in Place Without Urgent Needs

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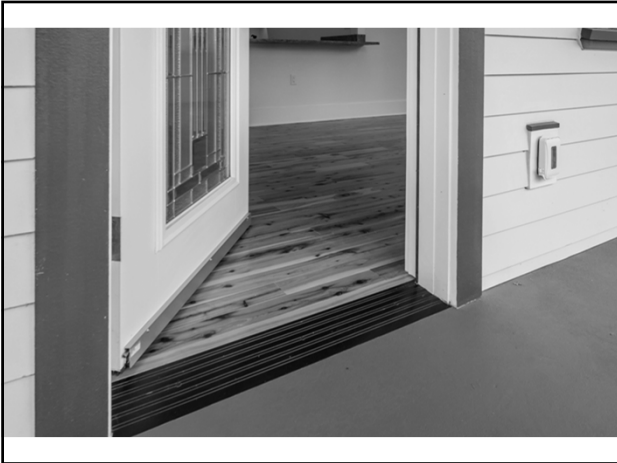
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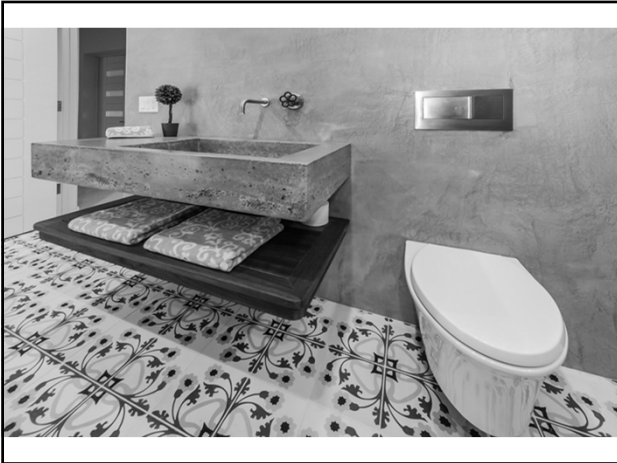
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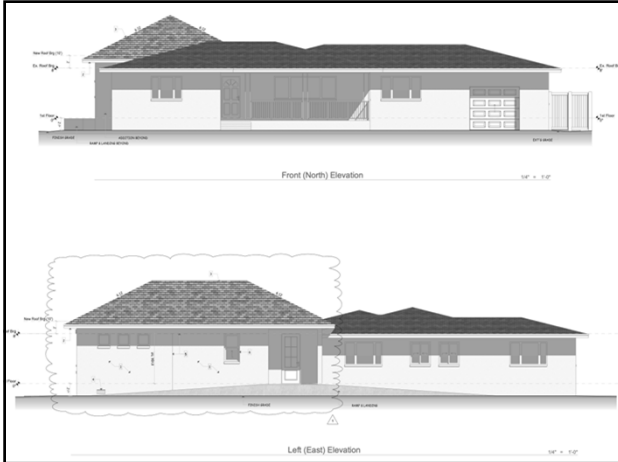
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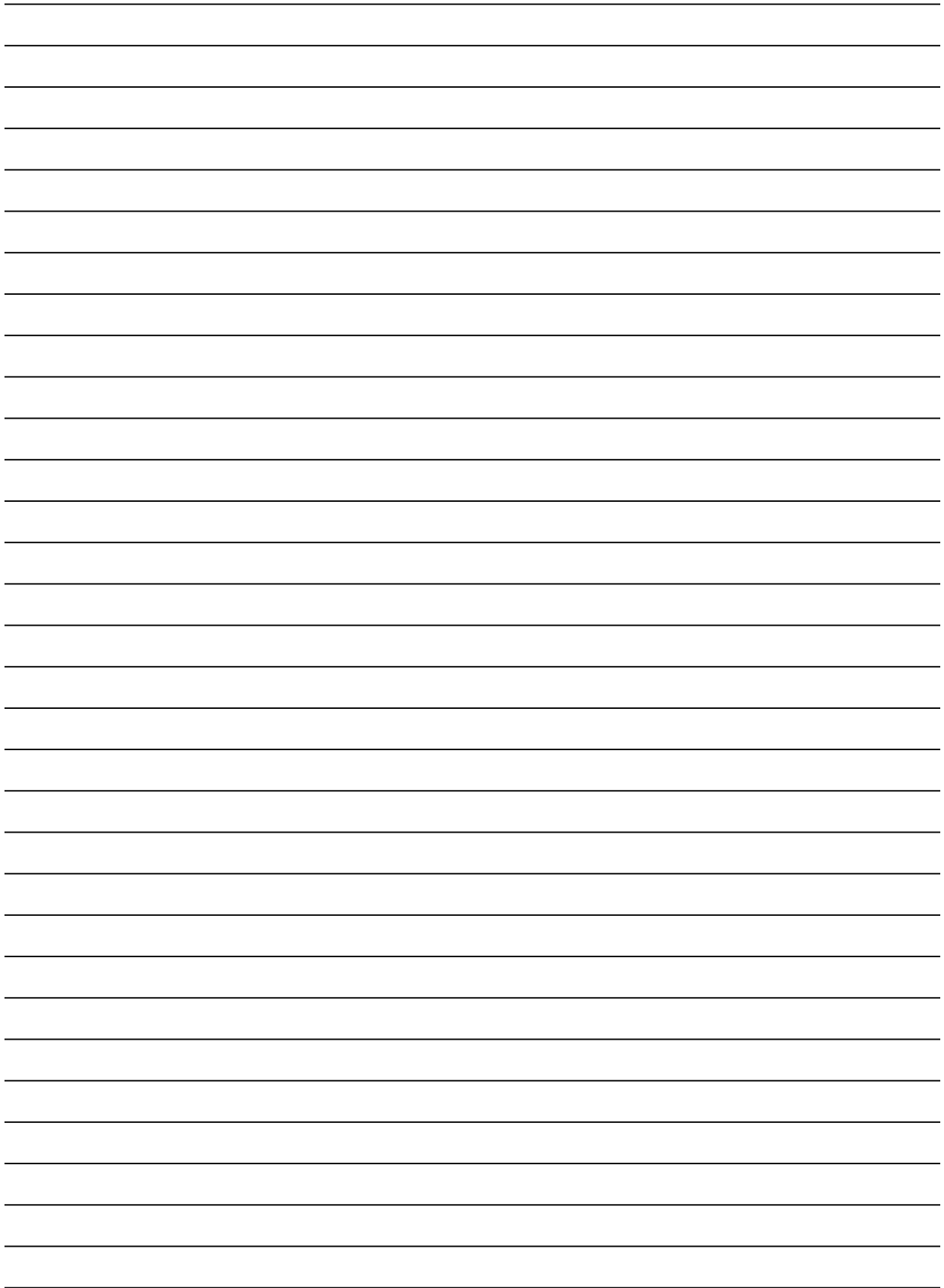
Things to consider...

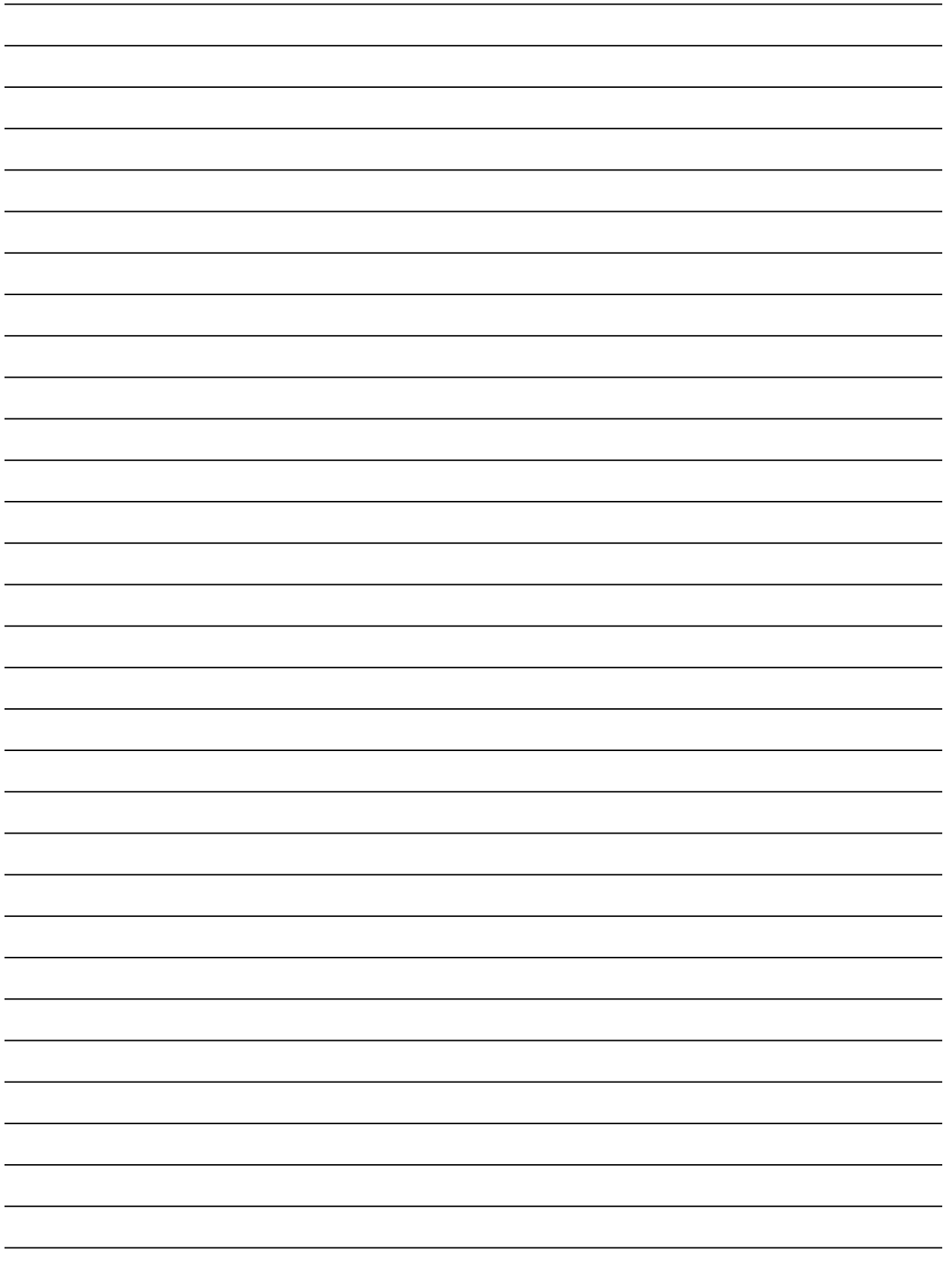
- Requires planning ahead (years preferably)
- Will require an architect or Design-Build contractor
- Restrictions of space, zoning rules, budget
 - ROI: High – compared to need based modifications
 - “Universal” design makes this attractive to any home buyer
 - Comparatively less expensive than 3-5 years of assisted living
 - Appreciating value of largest asset (especially with an increase of living square footage)

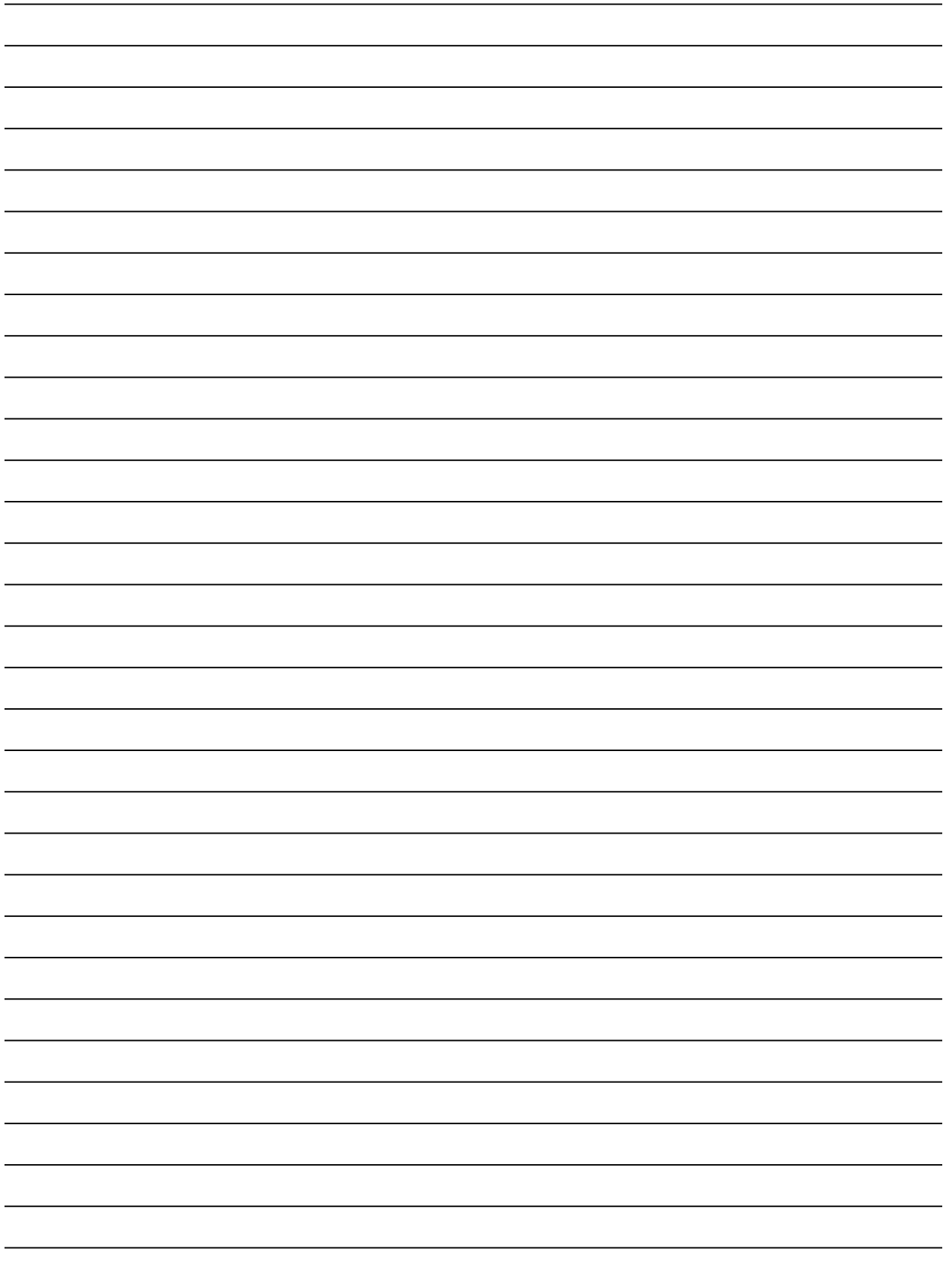
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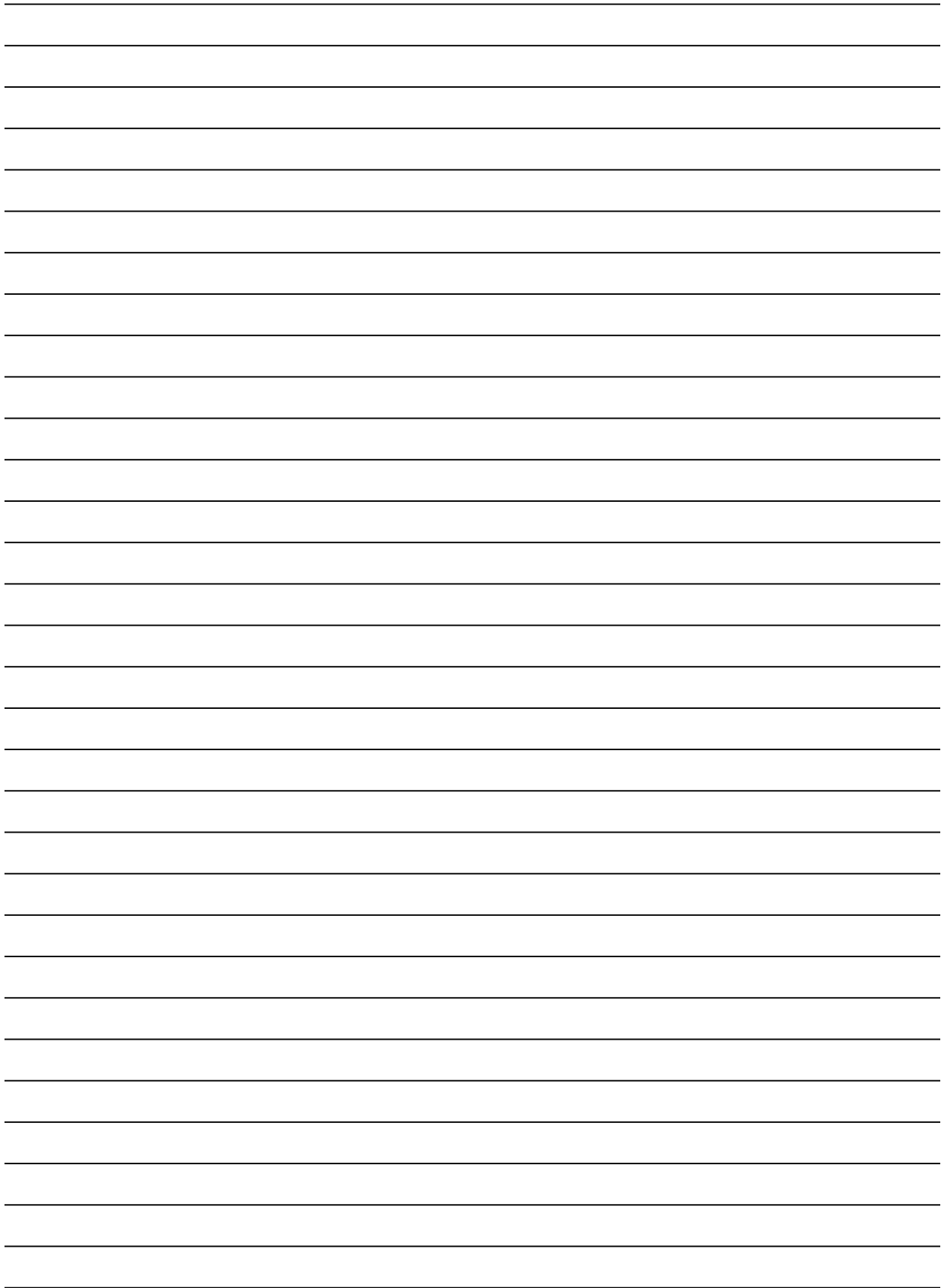
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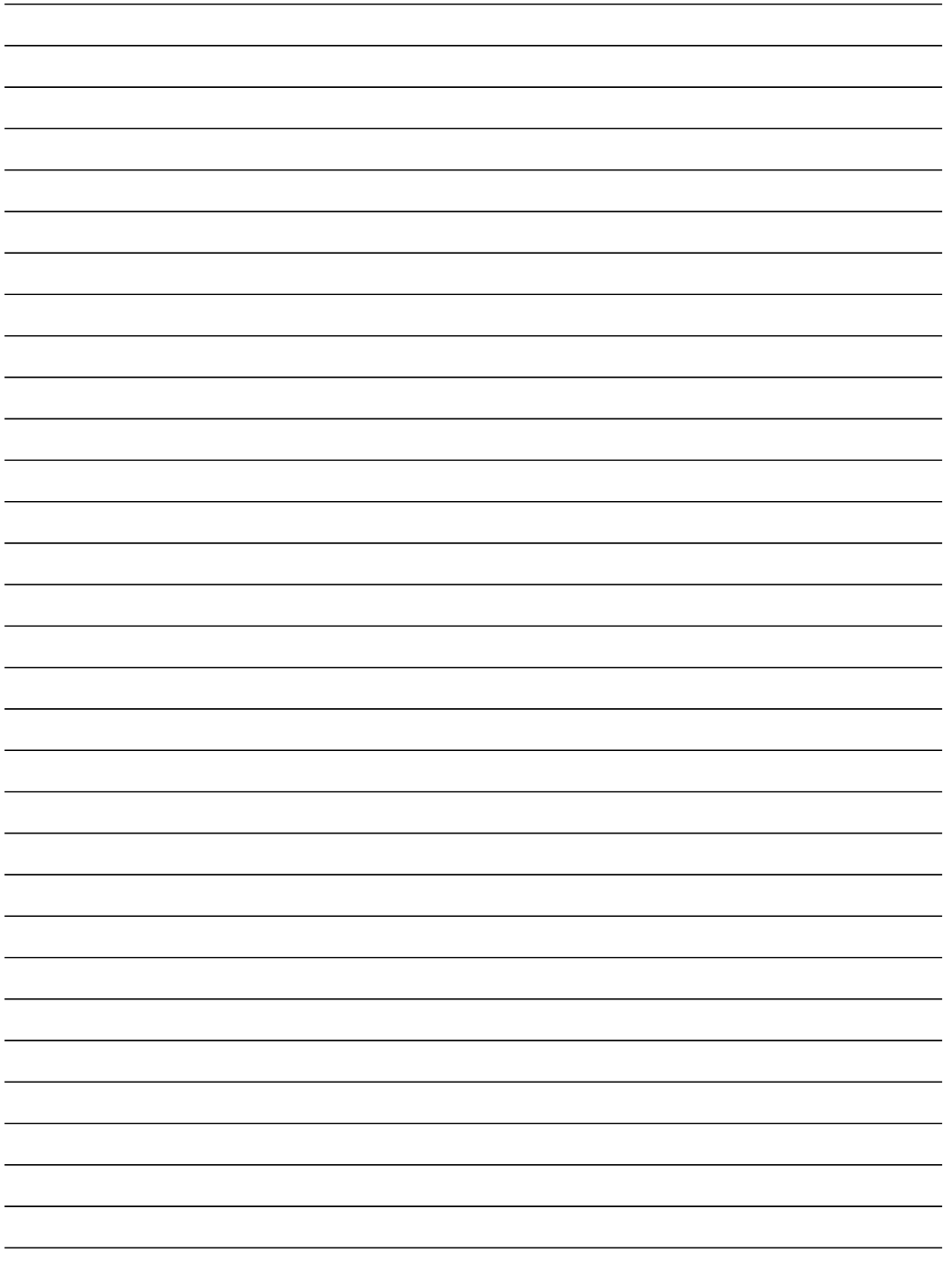
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Pooled Trusts Intensive

**Wednesday
October 18, 2023**

How to Talk with Beneficiaries in a Volatile Market



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*2023 National Conference
on Special Needs Planning and Special Needs Trusts*



How to Talk with Beneficiaries in a Volatile Market

Kevin R. Hayde
Executive Director
Wispact, Inc.
www.wispact.org
khayde@wispact.org

Bryan Kreitzberg, CFA
Director, Portfolio Management
True Link Financial Advisors, LLC
www.truelinkfinancial.com
bryan.kreitzberg@truelinkfinancial.com

Peter J. Wall
Director, Fiduciary Services
True Link Financial Advisors, LLC
peter.wall@truelinkfinancial.com

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1. Executive Summary

Note from the authors: The following paper will not attempt to address the specifics of recent market conditions, as such information would be out-of-date in future circumstances. Such topical updates and commentary will be provided during the live presentation. This written presentation, instead, is meant to inform and provide guidance for fiduciary administration of trusts and Pooled Special Needs Trusts (PSNTs) - and how adhering to and understanding fiduciary principles and the framework of the Uniform Prudent Investor Act (UPIA) can benefit administrators when exercising or delegating discretion over the investment management or when communicating with beneficiaries.

Investing in financial markets has inherent risks, such as loss of principal; and for that risk, investors generally expect to be compensated with a positive rate of return on their principal. However, the relationship between risk and return is not consistent over all time periods, or all investment asset selections, and this uncertain nature of investing can lead to investor anxiety. Historically, investor anxiety, which has been approximated through surveys like the AAI Investor Sentiment Survey, tends to increase during times of heightened market volatility.

Market volatility is usually considered synonymous to risk to the investment portfolio, but it may also serve as a source of benefit. The nuance between these two aspects of volatility can be difficult for trust administrators to communicate to beneficiaries. Trustees and administrators are responsible for adhering to a standard of prudence and a duty of loyalty to the trusts and beneficiaries under their care. The duty of care and exercise of prudence may lead to conflict during periods of negative performance or high volatility, particularly when fiduciaries are tasked with protecting the principal of the trust corpus.

The UPIA provides a framework for managing investment assets in a fiduciary manner, whether discretion is exercised or delegated by the trustee. One defining principle of the UPIA involves widening the scope of investments to include multiple categories. This shift towards diversification, however, requires increased expertise on the part of trustees or administrators to

understand which investments are appropriate and how to best approach them. This paper aims to help trustees and administrators navigate the nuances of investment management and the UPIA to better communicate the practices used to invest the assets and the dynamics of financial markets.

The paper provides an overview of the UPIA (including principles of appropriate asset allocation and investment management practices) and discusses beneficiary dynamics and planning. Case law affecting trustees is reviewed while providing best practice guidelines applicable to all fiduciaries. Additionally, the factors of the UPIA that are reviewed in the paper are supported by leading investment management research to solidify the context in which the UPIA practices remain relevant today.

2. Introduction

The primary duty of trustees is loyalty to their beneficiaries. This duty is especially relevant when addressing the investments of a Pooled Special Needs Trust (PSNT), a non-pooled Special Needs Trust (SNT), or any fiduciary arrangement. The oversight requirements for investments in any of these vehicles are further complicated by public benefits structures and regulations, diverse clientele, fiduciary liability, risk mitigation, and variable tax implications.

The beneficiaries of the trust(s) can benefit from clear communication and resources to help close the gaps in understanding the complex nature of trusts. The underlying investment assets and asset allocation utilized in administering the trusts should align with the needs of the trust and beneficiary. However, financial market volatility can cause a perceived or realized dislocation in accomplishing the stated objectives.

3. Investment Implementation and the Uniform Prudent Investor Act

The UPIA is widely considered the industry standard for investing fiduciary assets. Drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association on February 14, 1995, the UPIA replaced the Prudent Man Rule found in *Restatement (Second) of Trusts (Restatement of the Law Second, Trusts, American Law Institute © 1959)* (“*Restatement (Second)*”). It’s important to briefly review its guidance and terminology.

Portfolio Construction

UPIA § 2 is the heart of the entire Act and is loosely patterned on Restatement Third: Prudent Investor Rule § 227. UPIA § 2(c) illustrates eight governing principles that all fiduciaries should consider in constructing a portfolio:

- 1) **General economic conditions:** the state of the domestic or global economy and how it may affect current and future performance.
- 2) **The possible effect of inflation or deflation:** the increase or decrease of the prices of goods and services.
- 3) **The expected tax consequences of investment decisions or strategies:** analysis of beneficiary and trust tax impact of investments including taxable income, step-up in cost basis, pass-through taxation, capital gains tax, appreciated gains or losses, carry forward losses, etc.
- 4) **The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property:** consolidated portfolio analysis with all assets of the trust included to properly assess risk, return, and diversification.

- 5) **The expected total return from income and the appreciation of capital:** the sum of the income (e.g., interest and dividends) generated by the portfolio, capital gains, distributions, and capital appreciation.
- 6) **Other resources of the beneficiary:** the assets outside of the trust, potential Social Security receipts or wages, annuity payments, etc.
- 7) **Needs for liquidity, regularity of income, and preservation or appreciation of capital:** beneficiary budgeting, Life Care Plan considerations, etc.
- 8) **An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries:** e.g., a non-productive trust property, such as a beneficiary-occupied residence.

Modern Portfolio Theory

Modern Portfolio Theory (MPT), which was introduced by economist and Nobel Prize laureate Harry Markowitz, is a key component of the UPIA and provides a framework for evaluating the expected volatility of a diversified portfolio. The shift from the Prudent Man Rule to the UPIA came about from universal changes in the investment industry that altered the definition of prudence in the fiduciary arena. A robust and widely accepted body of hypothetical and empirical data and practices led to the creation of what is known as Modern Portfolio Theory. The theory entails that a single investment should not be viewed individually; rather, it should be evaluated as part of a total portfolio. The various elements of MPT show that an investor can construct a portfolio of multiple types of assets to maximize returns for level risk or volatility. Some of the key measurement factors in MPT include:

- **Variance:** the range of return deviation from the average investment return.
- **Correlation:** the degree to which two investments move in relation to each other.
- **Standard Deviation:** the statistical measure used to calculate historical volatility of an investment's annual return.
- **Efficient Frontier Theory:** a framework for constructing a set of optimal portfolios offering the highest expected rate of return for a defined level of risk (introduced by Henry Markowitz).

Asset Allocation

Asset allocation refers to how a portfolio's composition is structured over different asset classes to balance risk and reward and account for prudent diversification, a key principle outlined by the UPIA. The asset allocation for a trust's portfolio should reflect the trust's goals, financial plan or budget, risk tolerance, and investment horizon. A SNT beneficiary's investment horizon is most likely defined by their life expectancy, as the trust is often their only significant financial resource.

When contemplating the proper asset allocation for beneficiaries, an investment advisor typically selects from three major asset classes: equities (stocks), fixed income (bonds), and cash or cash-equivalents. Other asset classes (alternatives, long-short funds, commodities, real estate, etc.) may also factor into the mix. All asset classes have inherently different levels of risk and return and will behave differently over time. "Determinants of Portfolio Performance" is the seminal paper on asset allocation (Gary P. Brinson, L. Randolph Hood & Gilbert L. Beebower (1995) *Determinants of Portfolio Performance*, *Financial Analysts Journal*, 51:1, 133-138, DOI).

The paper presents evidence that 93.6% of the total return variation in portfolios is due to asset allocation, and not to investment manager selection, individual security selection, or market timing. In other words, the actual selection of the securities within the portfolio (or the timing of their purchase or sale) is secondary to the way that assets are allocated between equities (stocks), fixed-income securities (bonds), and cash. L. Randolph Hood revisited this issue in the article "Determinants of Portfolio Performance—20 Years Later" and addressed a number of observations and reactions to the original publication. (L. Randolph Hood (2006) "Determinants of Portfolio Performance—20 Years Later": Author's Response, *Financial Analysts Journal*, 62:1, 11-12, DOI.) Randolph, on behalf of himself and his co-authors, reiterated in his later article that "the broad types of asset classes a fund includes in a portfolio and the proportions they represent have a profound effect on the variability of returns." (Id.)

Here again, the beneficiary's financial plan or budget should be a primary consideration in the selection of a proper portfolio asset allocation. For example, a beneficiary with an upcoming

large purchase (e.g., home or vehicle) that will significantly deplete their trust's corpus may be better suited in a more conservative mix of cash and fixed income to minimize potential account volatility. Conversely, a young beneficiary with modest spending needs and a longer investment time horizon may be better suited with heavier exposure to equities in their portfolio as they have more time to ride out the inevitable market fluctuations and potentially reap greater returns over time. Certainly, age or time horizon should never be the sole determinant of a beneficiary's asset allocation. However, these factors may serve as a good starting point.

The overall industry standard for asset allocation and investment management today understandably revolves around retirement planning and wealth accumulation. While this is generally effective for most of the population, SNTs, in particular, are typically meant to be "wasting trusts." That is, they are meant to be spent on the beneficiary during the beneficiary's lifetime to improve their quality of life, increase their financial empowerment, and bolster their overall happiness and security. As such, the investment approach for SNTs should be very different from traditional institutional wealth management.

While somewhat counterintuitive, the investment approach that appears "safest" or most conservative does not always equate to fiduciary best practice for all beneficiaries. The case of *In re: Mark Anthony Fowler Special Needs Trust*, No. 39729-3 (WA Ct. App. Feb. 8, 2011) outlines these asset allocation issues. This trust was established in 2000 from a personal injury settlement at which time Mr. Fowler was expected to live another 58 years. (Note here the need again to consider a beneficiary's life expectancy and needs when developing an investment strategy by utilizing a Life Care Plan if available.) In 2008, the trustee submitted annual accounting to the court that showed a 12% loss in performance during the prior year. In fact, 2008 was a devastating year for most portfolios. The trustee in this case actually outperformed one of the trust's applicable benchmarks (the S&P 500 Index) by 2.5% over the same time period. The SNT was invested in a typical Growth with Income strategy, with approximately 65% of its assets invested in equities. The trial court refused to approve the trustee's accounting and ordered all of the trust's assets to be invested in FDIC-insured money market vehicles with diversified institutions. The trustee's investment specialist testified against this overly conservative approach, and the court-appointed guardian ad litem concurred with the trustee's

approach, finding that the trustee had invested the assets prudently. The Washington Court of Appeals reversed the lower court's decision finding that "beneficiaries can be disserved by undue conservatism."

Prudence

UPIA § 1(a) states that a "trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this [Act]" unless otherwise directed by the trust instrument. The UPIA further explains the fundamental principles of prudent investing, many of which may also be found in the *Restatement (Third) of Trusts*, American Law Institute 2003) ("*Restatement (Third)*"). Prudence may be defined as follows:

- *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830) - "Observe how [people] of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."
- *Uniform Probate Code §7-302 (1969)* - "The trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent [person] dealing with the property of another ..."
- *UPIA §2(a)* - "A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution."

The first defining principle may be found in UPIA § 2(b), which states that investments "must be evaluated not in isolation but in the context of the trust portfolio as a whole." Here, the UPIA essentially instructs the trustee not to put total emphasis on any one holding; rather, the trustee should review an asset's contribution to the entirety of the portfolio as a defining factor of its retention. For example, a trustee should certainly review the health and stability of XYZ stock on

its own merits, but XYZ stock's contribution to diversification and the overall portfolio structure is equally important.

As noted above, UPIA § 2(b) indicates that the trade-off between risk and return “reasonably suited to the trust” should be among the trustee’s chief considerations. Additionally, the UPIA lifts all specific investment category or type restrictions that were first promulgated in the Prudent Man Rule, allowing trustees or their agents more leeway in developing a prudent asset allocation that fits the needs of the beneficiary while adhering to the terms of the trust. The removal of these restrictions allows the trustee to take into consideration all investments of the trust, including annuities and beneficiary-occupied homes, for example, to properly balance the risk and return of the overall portfolio through asset allocation.

Diversification

Diversification of investments remains a key focus of the UPIA. UPIA § 3 states that “a trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.” Put simply, diversification is a risk-management strategy that combines a wide variety of different investments and asset classes within a portfolio. In other words, don’t put all your eggs in one basket. Holding securities with similar correlations (e.g., stocks of companies in a similar business industry) may not be as effective as holding a mix of investments with lower correlations (e.g., stocks of companies in different business industries like technology and energy). Mutual funds or Exchange Traded Funds (ETF) that hold a basket of securities is an effective vehicle for diversifying investment assets. Spreading risk over different types of asset classes, on average, yields higher long-term portfolio returns while mitigating the risk of any individual holding within the portfolio. By spreading risk over a wide assortment of assets, diversification smoothes out any concentrated risk events in the portfolio.

In his 1991 article titled “An Introduction to Modern Financial Theory 20” (*American College of Trust and Estate Counsel Foundation*, 1991), Jonathan R. Macey notes that “diversification reduces risk ... [as] stock price movements are not uniform. They are imperfectly correlated.” At

its core, this means that the positive performance of an asset class will most likely neutralize the negative performance of others. As such, diversification only truly benefits trust beneficiaries when securities in the portfolio are not correlated and respond differently to market influences. This may be achieved not only by investing in different asset classes such as large-capitalization (“large-cap”), mid-cap or small-cap stocks, growth versus value stocks, mutual funds (by style, manager, category, etc.), and index-based funds, but also by investing in diverse geographies (e.g., domestic versus international). Trustees may also wish to review the pros and cons of investing solely in one mutual fund manager. For example, it could be found that a trustee failed to properly diversify a portfolio by only investing in XYZ mutual funds, thus breaching their fiduciary duty should said mutual fund manager dissolve, underperform as a company, or even file for bankruptcy (see Lehman Brothers, 2008).

Failure to prudently diversify may have dire consequences for the trustee or their agent. In 2013, a Native American tribe sued the United States, seeking an accounting and asserting a claim for monetary losses and damages relating to an alleged breach of fiduciary duty by the Bureau of Indian Affairs (BIA). The Federal Court held *inter alia* that by keeping unreasonably large balances in relatively low-yield, short-term investments and failing to properly diversify the tribe’s portfolio, the BIA breached its fiduciary duty to maximize the trust income. As such, the BIA was ordered to pay the tribe the investment income lost by its imprudent management. *Jicarilla Apache Nation v United States*, 112 Fed.Cl. 274 (2013).

Additionally, a 2012 New York State Appellate Court ruling found that a co-trustee of a testamentary trust violated both the prudent-person rule of investment and the Prudent Investor Act by maintaining a concentration of certain stock in trust for more than 20 years, warranting a surcharge of \$4,322,412.40 with statutory interest. The ruling continues on to state that the co-trustee “never formulated an investment plan for the trust that included diversification of [the] concentration of stock ... and failed to take steps to determine whether retaining non-diversified holdings was in the beneficiaries’ best interests.” *In re Hunter*, 955 N.Y.S.2d 163, 165 (N.Y. App. Div. 2d Dept. 2012).

The basic tenets of diversification outlined in this section provide a framework for fiduciary practices, but recent research shows that too much emphasis in regards to diversification may potentially lead to unintended consequences. In the article “What Free Lunch? The Costs of Overdiversification” (Shawn McKay, Robert Shapiro & Ric Thomas (2018) What Free Lunch? The Costs of Overdiversification, *Financial Analysts Journal*, 74:1, 44-58, DOI: 10.2469/faj.v74.n1.2), the authors explore a number of negative impacts seen in real world practices of over-diversifying investments. The focus of the article is on the practice of diversifying through a set of active portfolios, like actively managed mutual funds (versus passively managed index Exchange Traded Funds (ETFs)), and how the expected benefits decline when participating in active risk with the addition of multiple fund managers, while additionally increasing the portfolio’s fees per unit. Ultimately, the combination of these adverse effects may lead to missing the portfolio’s return objectives.

However, taking too narrow of an approach with diversification can also lead to missed portfolio return objectives, as authors found in the *Financial Analysts Journal* article “Long-Term Shareholder Returns: Evidence from 64,000 Global Stocks” (Hendrik Bessembinder, Te-Feng Chen, Goeun Choi & K. C. John Wei (2023) Long-Term Shareholder Returns: Evidence from 64,000 Global Stocks, *Financial Analysts Journal*, 79:3, 33-63, DOI: 10.1080/0015198X.2023.2188870). The research found that over a long period (January 1990 to December 2020), of the 64,000 global stocks, 55.2% of U.S. stock and 57.4% of non-U.S. stocks failed to outperform the one-month U.S. Treasury Bill over similar time horizons. The paper also found that the stock outcomes over that time period were very concentrated. In fact, only the best performing 1,526 companies accounted for all of the net global wealth creation. The paper also found that a broad market weighted portfolio outperformed the Treasury Bill in each time horizon studied.

These two research articles capture many of the best practices of fiduciary investment management:

- 1) Concentration risks justify diversification.
- 2) Focusing on low cost market exposure has proven successful over many time periods.

3) Skilled managers that take a targeted approach to active risk offer the best potential for meeting desired long-term objectives.

Real Value of Trust Assets

Fiduciaries are tasked with protecting trust assets and making trust property productive. The intersection of these two objectives drives investment decisions around preserving the real value of the trust assets. The effects of inflation over a long period of time serve as a deterrent for avoiding investment risks altogether as the rising costs of future expenses would erode the real value of trust property. In order to best address this trade-off between protecting principal today versus appreciating principal over a longer period of time, the decisions for how to invest the assets should be aligned with the objectives and time frame for the trust. Simply put, if the distribution needs are immediate, then the effect of inflation will be minimal and protecting assets from potential market risks is of greater importance. Whereas if the distribution needs are largely expected to occur several years into the future and may be lesser in nature, then the trade-off between possible short-term market volatility and future growth of principal to maintain or exceed the rate of inflation align with the objectives of the trust.

Investment managers have historically found the objective of maintaining or exceeding the rate of inflation to be challenging due to a variety of factors. In the research article titled “Investing in Deflation, Inflation, and Stagflation Regimes” (Guido Baltussen, Laurens Swinkels, Bart van Vliet & Pim van Vliet (2023) Investing in Deflation, Inflation, and Stagflation Regimes, *Financial Analysts Journal*, 79:3, 5-32, DOI: 10.1080/0015198X.2023.2185066), the authors explore a number of factors that can challenge many widely held assumptions about investment allocations and the intersection with inflation. The paper found that the long-term perspective for managing an investment portfolio with equities, bonds, on average, has been able to provide positive real returns for investment portfolios. Over the time period studied, equities were shown to be the best performer of the three asset classes (8.4% average return vs. 3.2% average inflation rate). However, the inflation rate, much like the rate of return on investments, fluctuates over different time periods. The changing rate of inflation can lead to periods of negative real returns (e.g., Inflation Rate (minus) Portfolio Return). This is especially true in periods of high-inflation, where positive nominal multi-asset returns produced negative real returns after netting

the effects of inflation. Understanding the interaction between real returns and inflationary environments can help fiduciaries make appropriate investment allocation decisions, assess time-frame parameters, and communicate expectations with beneficiaries.

In an effort to assist an administrator with evaluating the longevity or the long-term real value of trust assets, an investment advisor will typically utilize a Monte Carlo simulation, which models the probability of different investment outcomes. These outcomes are not easy to predict due to the intervention of random variables, such as trade disputes, economic conditions, and company failures (also known as systematic or systemic risk). Monte Carlo simulations ignore outside factors, such as macroeconomic trends, company stability, media hype, and sector performance data (cyclical or otherwise) to assume an efficient market. By removing such unknowable data and inserting beneficiary-specific financial plans or budgets coupled with projected inflation data, a Monte Carlo simulation will assist both the trustee and the beneficiary in planning for the beneficiary's long-term financial stability. This exercise is helpful in generating peace of mind for the beneficiary and assisting the trustee in making appropriate plans and discretionary distribution decisions.

Duty of Loyalty and Impartiality

Finally, the UPIA stresses the duty of loyalty and impartiality: "A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries" (UPIA § 5). "Duty of loyalty" is perhaps the most pervasive principle throughout trust law. It requires the trustee to act exclusively for the benefit of the beneficiaries rather than for the trustee's own personal interest or in the interest of other third parties (see *Restatement Second* § 170, comment q, at 371). UPIA § 6 states that "if a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."

It is important to note that "beneficiary" may in some cases refer to remainder-persons of the trust as well. As such, when the trustee owes duties to all such "beneficiaries," loyalty requires the trustee to take into account the interests of all parties when prudently investing and

administering the trust. Also tied to these duties of loyalty and impartiality is UPIA § 7, which states that “in investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.” As such, a trustee must carefully consider the cost of investments (investment manager fees, internal fund costs, and the like) as unnecessary spending is at its core imprudent.

A vast majority of states have adopted the UPIA in some form or fashion. Therefore, all factors of the UPIA should be at the forefront of fiduciaries’ minds and investment decisions.

Delegation

The last update to the UPIA regarding the Prudent Man Rule is significant in that it is designed to strike an appropriate balance between the advantages and hazards of delegation. The Prudent Man Rule forbade trustees from delegating investment and management functions to third parties. In UPIA § 9, these restrictions are lifted and states that “a trustee may delegate investment and management functions as prudent under the circumstances” and continues by outlining the specific parameters and oversight requirements by which a fiduciary should adhere. As such, delegation is still subject to certain safeguards and continued trustee oversight, which comes with inherent liability.

4. Planning

A trust beneficiary will never achieve their goals or have their trust last long without appropriate planning. Both long-term and short-term beneficiary budgeting and planning are crucial to any beneficiary’s investment strategy. A trustee will have to work across multiple disciplines, such as social work, psychology, and fiduciary representation to fully complete the beneficiary’s plan. Plan considerations should include the goals and needs of the beneficiary; the beneficiary’s unique family dynamics; whether the beneficiary has diminished capacity or special needs; the public benefits the beneficiary may be receiving, is entitled to, or may be eligible for in the future; and the costs and special circumstances involved in the beneficiary’s life. The trustee

should also educate and advocate for their beneficiaries. In order to do so, the trustee may require the combined services of a multitude of other professionals, such as case managers, public benefits planners, agents under power of attorney, conservators and/or guardians, and investment managers. Any professional involved in the beneficiary's planning procedure may not be entitled to confidential beneficiary information. Although there is a good faith effort to approach these issues in a cooperative manner, it is important for the trustee to recognize potential confidentiality and evidentiary issues.

No two beneficiaries' life goals and circumstances are alike; just as a trustee cannot properly assess a beneficiary's immediate and future needs without a budget or a plan, neither can an investment manager. A thorough assessment of a beneficiary's situation should occur before an investment plan is finalized. In addition to a standard annualized budget for a beneficiary, the following factors should be addressed in the beneficiary's financial plan to assist in the development of their investment strategy:

- Age
- Life expectancy
- Disability
- Lifestyle/Hobbies
- Employment (current and future)
- Cost of living
- Tax situation (current and future)
- Beneficiary education
- Beneficiary investment knowledge or experience
- Beneficiary risk tolerance
- Potential future funding opportunities
- Family lifelong planning (testamentary) or inheritance -
 - Discount such potential testamentary funding
 - Additional settlements or awards

Often overlooked in planning for beneficiary needs is a review of the beneficiary's current resources. A fiduciary should take into account all facets of the beneficiary's financial situation. For example, should a Structured Settlement Annuity be a part of the trust's funding (both initial and ongoing), it should be factored into the beneficiary's spending plan. In such cases, when reviewing the Structured Settlement Annuity's terms and pay-out schedules, a trustee may discover that more costly expenditures outlined in the beneficiary's Life Care Plan (LCP) are actually contemplated and fully covered by scheduled lump sum annuity pay-outs. When funding a beneficiary's trust in testamentary situations, the trustee may discover substantially appreciated legacy assets from a third party. In this case, consultation with a tax professional or investment advisor may be warranted in order to capture any step-up in tax cost basis opportunities or to develop a prudent liquidation strategy that will not be overly onerous to either the beneficiary or the trust.

It can be beneficial to review new clients' assets with a tax professional or investment manager before acceptance. At the beginning of the fiduciary relationship, in addition to accounting for the beneficiary's short-term goals for the trust, the trustee should also focus on the beneficiary's long-term goals. These "Optimal Outcomes" focus on the ultimate goals and desires the beneficiaries have for their trusts, whether to provide for their lifetime, start a business, provide for college expenses, pay for annual vacations, or leave a legacy or inheritance for their desired remainder persons, if applicable. Having these conversations with the beneficiary and, more importantly, recording them are critical in managing the beneficiary's expectations.

The trustee should also budget for professional costs and fees for the beneficiary. Such costs may include trustee fees, investment advisory fees, tax preparation fees (both for the trust and the beneficiary as applicable), case management fees, and attorney fees. In the final stages of beneficiary financial planning, the trustee should do a cost/benefit analysis of all needs and desires of the beneficiary from the trust versus where such services may be provided for elsewhere (e.g., public benefits). A prudent trustee will review such expenditures with an eye towards trust longevity.

Case law suggests that it may be the Special Needs Trust (SNT) trustee's duty to research all avenues of paying for such requests before approval in order to protect the trust's longevity. In *Liranzo v. LI Jewish Education/Research*, No. 28863/1996 (N.Y. Sup. Ct. June 25, 2013), a corporate trustee privately paid for caregivers and other services that may have been available to the beneficiary through different public benefits programs. These payments were made at the request of the minor beneficiary's parent. The trust was quickly depleted, and the trustee sought relief from the court when the trust became uneconomical to retain. The court concluded that the trustee should have sought out all available alternative avenues to pay for such services and directed the trustee to reimburse the trust almost \$176,000. Although there were other factors in *Liranzo*, this case certainly speaks to the duty of the trustee to protect a trust's longevity, as well as to seek out all available public benefits for a beneficiary as appropriate. The same cost/benefit analysis should be applied in determining how to pay for beneficiary requests.

Beneficiaries' plans change, whether due to unforeseen circumstances or changes in their desires and needs. As such, any financial plan is variable and should be adaptable. A best practice is reviewing each beneficiary's financial plan and budget no less than annually or more frequently as circumstances warrant.

Managing beneficiary expectations from the onset of the fiduciary relationship pays huge dividends throughout the lifetime of the fiduciary-beneficiary relationship. Typically, if the beneficiary feels like a part of the overall process, the inevitable bumps and hurdles throughout the trust's lifetime are easily overcome together. Without such a beneficiary-specific financial plan, it is nearly impossible to properly select an investment strategy for the beneficiary. Once complete, this financial plan is key in determining the beneficiary's asset allocation and investment strategy.

Risk Tolerance

Another factor in the planning process that can also prove to be a driver in determining an appropriate asset allocation is the beneficiary's individual tolerance for market risk. Put simply, risk tolerance is the amount of variability or volatility in investment returns with which a

beneficiary is comfortable. Having an accurate understanding of the beneficiary's ability to weather the inevitable up and down movements of the market is key to successful trust administration and beneficiary expectation management. If a beneficiary is constantly pouring over market news and fretting about the security of their portfolio, it can cause a sense of investor anxiety.

Other factors affecting a beneficiary's risk tolerance include their time horizon, current or future earning capacity, other assets, and a potential inheritance. An SNT beneficiary's investment time horizon may simply be their life expectancy, as their SNT is often their only long-term resource. As mentioned previously, beneficiary short-term and long-term planning is crucial in determining the beneficiary's true investment time horizon. Beneficiaries with a longer investment time horizon may have the ability to take on greater risk because they have a longer time to recoup any potential short-term losses in their portfolio.

Many investment advisors offer Risk Tolerance Questionnaires to their clientele to properly assess each individual's tolerance for market volatility. Traditional wealth management Risk Tolerance Questionnaires focus on the client's age, time horizon to retirement, and comfort with market volatility.

5. Conclusion

Fiduciary investment decisions are driven by many factors, including: beneficiary objectives, regulatory guidelines, and industry best practices. These aspects provide a good decision foundation, as the ultimate results from investment market participation have historically proven to be volatile.

Research from Nobel laureate professors Eugene Fama and Kenneth French in their article "Volatility Lessons" (Eugene F. Fama & Kenneth R. French (2018) Volatility Lessons, Financial Analysts Journal, 74:3, 42-53, DOI: 10.2469/faj.v74.n3.6) provide a well-supported basis for the expected timeframe being a primary determinant for investment strategy

implementation. In the article, they found that negative outcomes (as measured by equity returns relative to one-month Treasury Bills, or “equity premium”) tend to decline and the likelihood of good outcomes increases for longer time horizons. In fact, the research showed a 41.28% chance of negative monthly equity premiums, but that the chance of negative equity premiums fell to 4.08% over a 30 year timeframe. While this research highlights the importance of focussing on long-term objectives, it also demonstrates that time horizon, by itself, does not completely solve for investment risk or volatility. Combined with many of the other attributes covered in this paper such as planning, asset allocation, and diversification, there are many practices to be consider when constructing a prudent investment portfolio in an effort to best meet beneficiary needs in both the short- and long-term.

Disclosures:

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STETSON LAW
2023 National Conference on Special Needs Planning and Special Needs Trusts

How to Talk with Beneficiaries in a Volatile Market

Presented by:


Kevin Hayde
Executive Director
Wispect
khayde@wispect.org

Peter J. Wall
Director of Fiduciary Services
True Link Financial Advisors, LLC
peter.wall@truelinkfinancial.com

Bryan Kreitzberg, CFA
Portfolio Manager
True Link Financial Advisors, LLC
bryan.kreitzberg@truelinkfinancial.com



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Presenter's Bio


Kevin Hayde is the Executive Director of Wispect, Inc. He joined the staff of Wispect in June of 2017. He had spent the previous 11 years as the Executive Director of The Disability Foundation, Inc., in Dayton, Ohio, where he managed a pooled special needs trust organization.

For 35 years, Kevin has advocated for the rights and appropriate support services for individuals with disabilities. He has served in a wide range of positions throughout his career ranging from quality assurance; the management of a supported living agency; the securing of appropriate and adequate housing for individuals with disabilities; and the management of a Foundation organized to provide grants to not for profit organizations which were providing supports to individuals with developmental disabilities.

He has previously served on numerous state- and county-level advisory and advocacy committees; along with serving as a Board member for numerous organizations during his professional career. Kevin is a proud member of the National PLAN Alliance, Inc. (NPA) and liaison to the Elder Law Special Needs Board (WI) and has made several presentations to national audiences including NPA; the National Special Needs Conference (Stetson), the Special Needs Financial Services Institute and directly to Pooled Trust and Community Foundations around the country. Kevin is a 1988 graduate of Miami University in Ohio.

Kevin Hayde
Executive Director
Wispect, Inc.

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Presenter's Bio

20 years of professional trust administration - Focus in Elder Law & SNT Planning


Prior to joining True Link Financial Advisors, LLC:

- Developed and helped lead an Elder Law and SNT division of an \$80 billion nationally chartered trust bank
- Past President of the Centennial Estate Planning Council
- Member of the Board of Directors for Easter Seals
- Past President of VSA Access Gallery
- Member of the Academy of Special Needs Planners

Special needs trusts, estate planning, taxation, and trust administration faculty member and presentations include:

- 2016, 2018, 2019, 2020, 2021, 2022 & 2023 Stetson National Conference on Special Needs Planning and Special Needs Trusts
- CBA 2012, 2014, 2015, 2017 & 2022 CBA Elder Law Retreat
- 2013 National Down Syndrome Congress
- 2015 48th Annual Autism Society National Conference
- 2022 Schwab IMPACT®
- 2017 & 2021 National Conference for National Guardianship Association
- 2019, 2020 Special Needs Alliance
- 2019, 2020 & 2021 National NAELA Conference
- 2020 CA NAELA
- 2020, 2021, 2022 & 2023 PFAC Annual Conference

Peter J. Wall
Director of Fiduciary Services
True Link Financial Advisors, LLC



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Presenter's Bio

20 years of financial services and investment experience

- Responsible for managing investment portfolios with True Link Financial Advisors, LLC
- Over 10 years of experience managing investment portfolios for private trusts, pooled trusts, individuals, and family foundations
- Chartered Financial Analyst® and member of CFA Society Colorado
- MBA from Indiana University Kelley School of Business; BS from Montana State University

Bryan Kreitzberg, CFA
 Director, Investment
 Management
 True Link Financial Advisors, LLC

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Financial Anxiety - Building Blocks

Universally Shared

Financial Literacy - The ability to make wise decisions with your money

- **Income** - Money received, particularly on a regular basis
- **Expenses** - Money spent on needs and wants to support lifestyle
 - **Budgeting** - A plan to balance income and expenses
- **Savings/Investments** - Money set aside for emergencies or a future need
 - Financial Products - Understanding the risks, rewards, and terms of the products and services
- **Borrowing** - Fear of over leveraging into bankruptcy
- **Protecting your assets** - Developing goals and plans for navigating the ups and downs of life and financial events

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Financial Anxiety - Building Blocks

Unique to Trusts or Special Needs Trusts

- Personal ties to trust corpus
- Inexperience managing financial resources
- Financial literacy gap between beneficiary and trustee
- Recently experienced a major life or financial event
- Lack of control driven by structure of trust protections
 - System of resource restrictions
 - Understanding public benefits

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Building a Plan and Beginning to Navigate the Anxieties

Inexperience Managing Finances

- Develop an Individual Spending Plan
 - Major Purchases
 - Outstanding Debts
 - Income Sources
 - Monthly Expenses

Lack of Control

- Active Participation/Partnership in Individual Spending Plan

It's Personal

- Provide Counsel
 - Settlor Intent?
 - Enjoyment?
 - Security?

Understanding Public Benefits Systems

- Leverage Individual Spending Plan Process
- Introduction Communication
 - Outline Expectations
 - Administration Process
 - Introduce Beneficiary Specialist/Trust Advisor

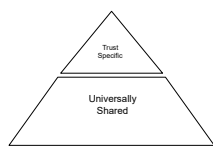
Financial Literacy

- Provide Materials/Resources
 - Address Common Questions
 - Review Communication Materials (e.g., statements)
- Education Opportunities
 - Workshops/Seminars
 - Understanding SNTs
 - Real Life Experiences

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Financial Anxiety - Building Blocks



Primary communication tool: Statements

Success is viewed through quarter over quarter or year over year change



Deviations from the expected path generate ongoing concern and can largely come from: **Investment Volatility**

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Question #1

Why does my trust need to be invested at all?



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Why invest?

Duty of Loyalty
Act in the best interest of the beneficiaries

Duty of Care/Prudence
Act reasonably as any prudent person would

- Note: When a trustee has held themselves out as a professional in certain areas, a higher standard of care applies (esp. in litigation).
- Consider delegation of certain duties

Duty to Account
Accountings/reportings to beneficiaries, remainder persons, interested parties, courts, public benefits agencies, etc.

Duty of Impartiality

- Treat all beneficiaries the same.
- Disregard race, sex, sexual orientation, age, religion, country of origin, political views, morals, etc.

Duty to Make Trust Property Productive
Act in the best financial interests of the beneficiaries

- CA Probate Code § 16007: "The trustee has a duty to make the trust property productive under the circumstances and in furtherance of of the purposes of the trust."

Trust circumstances that may warrant the trust NOT be invested:

- Small corpus
- Wasting trust
- Tax preparation fee > expected investment return
- Short time frame until trust termination (e.g., distributions at certain beneficiary ages)
- Beneficiary well-being (i.e., housing)

fiduciary (fi-dū-shē-ē-ē): n. "One, such as an agent of a principal or a company director, that stands in a special relation of trust, confidence, or responsibility in certain obligations to others."

Latin: fiduciarius, from fiducia - "trust"

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UPIA - Prudence

- UPIA §1 (a) – a "trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this [Act]" unless otherwise directed by the trust instrument.
- Found in the *Restatement (Third) of Trusts (Restatement of the Law Third, Trusts, Am. Law Inst. © 2003)* ("R3")
- UPIA §2(a) - "A trustee shall invest and manage trust assets as a prudent investor would, by considering the **purposes, terms, distribution requirements, and other circumstances of the trust**. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." [emphasis added]

UPIA § 9

- "a trustee may delegate investment and management functions"
- "trustee shall exercise reasonable care, skill and caution in selecting an agent"
- Relies on duties of loyalty and impartiality as well as audit and judicial oversight

UPIA § 9(a)(3)


- trustee has an ongoing duty to "periodically [review] the agent's actions in order to monitor the agent's performance and compliance..."

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Question #2

Since the funds are invested, can you tell me what types of investments are in the trust?



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Common Investment Vehicles

Stocks (Also known as Equities)

- Represent a partial ownership (share) of a company.
- Right to vote in shareholder meeting, receive applicable dividends, and sell the shares in some cases
- Shares are predominately purchased or sold on publicly traded exchange.

How does the investment grow or earn income?

- Ownership of company assets and participation in earnings - distributed through dividends or reinvested back into the company for future growth

How is the investment risky or how could it lose money?

- Economic cycle, business cycle, and individual business operation risk.
- Recessions can reduce earnings and earnings growth prospects for a company causing price decline.
- Fundamental valuations like PE Ratio (measure market Price divided annual Earnings), can help evaluate the market expectations for the company.



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Common Investment Vehicles

Bonds (Also known as Fixed Income)

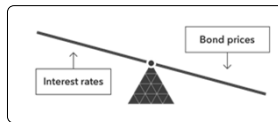
- Represents a loan made by the investor to the borrower.
- Common issuers are Government and Government Agencies and Corporations, and mortgage holders.
- Fixed interest payment (sometimes floating) and a promise to repay the principal by a set date

How does the investment grow or earn income?

- Interest and principal payments

How is the investment risky or how could it lose money?

- Default, or failure to pay the interest and principal
- Typically, bond prices have an inverse relationship to interest rates. I.E. If interest rates increase - bond prices decrease
- Interest rate may be below the rate of inflation



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Bond Example

For Illustrative Purposes Only

Bond Details

- \$100 Principal Value
- 1% Interest Rate - Annual Payment
- Maturity in 1 Year

Price \$100



One Hour Later Interest Rates ↑ 1%

New Bond Details

- \$100 Principal Value
- 2% Interest Rate - Annual Payment
- Maturity in 1 Year

Price \$100

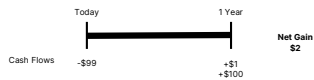


Updated Price of Original Bond

Original Bond Details

- \$100 Principal Value
- 1% Interest Rate - Annual Payment
- Maturity in 1 Year

Price \$99



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Common Investment Vehicles

Pooled Investments - Mutual Funds and Exchange Traded Funds (ETF)

- Pools investor assets to invest in securities like stocks or bonds.
- Low cost way to diversify and/or have professional management.

Two primary categories:

- Index Funds - Structured to track a financial market index, such as the S&P 500 Index
- Active Funds - Managed in an effort to outperform an index or benchmark

Differences

- Mutual Funds - Priced daily based on the Net Asset Value (NAV) of the underlying holdings
- ETFs - Traded throughout the day on a public exchange, similar to a stock, and value is tied to underlying assets

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Question #3

I've heard of diversification - but what does it really do?



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Managing Risk

Diversification

- URIA §3 - "a trustee shall diversify the investments of the trust"
- Similarly correlated securities (e.g. Apple and Google) < mutual fund/ETF holding entire technology sector

Diversifying holdings:

- On average, yields higher long-term returns while mitigating risk
- Designed to smooth out unsystematic risk (risk specific to the security or the industry)
- Goal is to reduce risk as stock prices are not uniform (imperfect correlation)

How to diversify:

- Across capitalization (large cap, mid cap, small cap)
- Growth stocks (tech, biotech, discretionary) vs. value stocks (dividend paying, financials)
- By geography (domestic vs. international)
- Active vs. Passive investments

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Managing Risk

Volatility and Risk Management Foundations

Modern Portfolio Theory

- Variance: difference between optimal investment return and volatility
- Correlation: degree to which two investments move in relation to each other
- Standard Deviation: statistical measure applied to annual rate of return to measure historical volatility
- Efficient Frontier Theory: introduced by Nobel Laureate Henry Markowitz, framework for constructing optimal portfolios offering highest expected return for a defined level of risk
- Diversification: an approach to manage risk by holding a variety of investments within a portfolio

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Diversification

The Callan Periodic Table of Investment Returns

Annual Returns for Key Indices Ranked in Order of Performance (2003-2022)

Index	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
S&P 500	12.1%	10.4%	12.6%	15.8%	5.5%	-37.1%	26.9%	15.5%	15.0%	15.0%	15.0%	12.1%	5.0%	11.9%	21.8%	18.2%	11.6%	-18.2%	28.6%	10.0%
Small-Cap	11.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
International	11.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Real Estate	10.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Commodities	10.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Art	9.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity	9.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt	8.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity (Global)	8.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt (Global)	7.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity (Asia)	7.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt (Asia)	6.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity (Europe)	6.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt (Europe)	5.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity (Latin America)	5.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt (Latin America)	4.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity (Africa)	4.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt (Africa)	3.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity (Middle East)	3.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt (Middle East)	2.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Equity (Oceania)	2.0%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%
Private Debt (Oceania)	1.5%	10.0%	12.0%	15.0%	5.0%	-35.0%	25.0%	15.0%	15.0%	15.0%	15.0%	12.0%	5.0%	11.0%	21.0%	18.0%	11.0%	-17.0%	28.0%	10.0%

Source: Callan Institute

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Individual Stocks

Media Hype/Trendy Trades

- "Single-name" stock media hype
 - "Meme stocks"
 - GME, AMC, etc.
 - COVID Darlings
 - PTON, DOCU, MRNA, etc.
- Crypto
- SPAC/IPO

Difficult to Pick Winners

- S&P 500 Index Top Companies in 2010
 - 4 of 10 outperformed
 - Apple outperformed index by +6x
 - Alphabet (Google) outperformed by +2x
 - 5 of 10 underperformed, but were positive
 - Exxon (largest at the beginning of 2010)
 - Index outperformed by -4x
 - 1 of 10 underperformed and lost money
 - General Electric



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Question #4

Besides diversification, what others strategies help manage the risk in my portfolio?

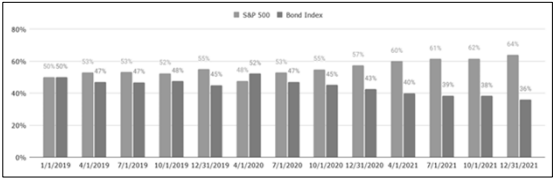


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Rebalancing

Risk Management Foundations

- An investment allocation of 50% stocks and 50% bonds 2019 through 2021 if left alone (no rebalancing)



Date	S&P 500 (%)	Bond Index (%)
1/1/2019	50	50
4/1/2019	53	47
7/1/2019	53	47
10/1/2019	52	48
12/31/2019	55	45
4/1/2020	49	51
7/1/2020	52	48
10/1/2020	55	45
12/31/2020	57	43
4/1/2021	60	40
7/1/2021	61	39
10/1/2021	62	38
12/31/2021	64	36

Source: Values are derived from closing prices on dates listed for the SPY, SPDR S&P 500 ETF Trust and AGG iShares Core U.S. Aggregate Bond ETF. Price values only, reinvests does not take into account dividends, interest, or fee impact on portfolio allocation. Illustrative purposes only, not a recommendation.

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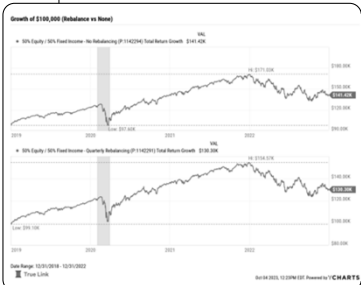
Results of Rebalance

End Result As Expected (In hindsight)

- Stocks outperformed bonds over the 3 and 4 year time periods
 - Outperformance drove the allocation drift
- Non-Rebalanced (2019-2022)
 - \$100k investment grew to \$141k
 - \$74k range in value
- Rebalanced Quarterly (2019-2022)
 - \$100k investment grew to \$130k
 - \$55k range in value

So Rebalancing Doesn't Matter? - Not So Fast

- Market volatility and timing of cash flows matter
- Pooled Trust Implications
 - Beneficiary joining at the end of 2021
 - No Rebalance - Down 17.5%
 - Rebalanced - Down 15.6%



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Question #5

Why do some events seem to affect my investments more than others?



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Risks and Impact on Portfolios

Systematic Risk

- Inherent risk to the entire market
- Undiversifiable risk
- Examples:
 - Economic factors
 - Interest rates
 - Geopolitical issues
 - Corporate viability

2020-2022 Systematic Risk Events:

- China Trade Deal
- Brexit
- Supply Chain
- Inflationary Pressures
- Stimulus Packages
- Ukraine/Russia
- COVID-19

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Risks and Impact on Portfolios

Systematic Risk

- Inherent risk to certain sectors
- Undiversifiable risk at sector level
 - Mitigant: holistic portfolio diversification
- Examples:
 - Sector pressure/default
 - Hedge funds
 - Solvency/Bankruptcy

Systemic Risk Events:

- Subprime Mortgage
- Regional Banks
- Lehman Brothers

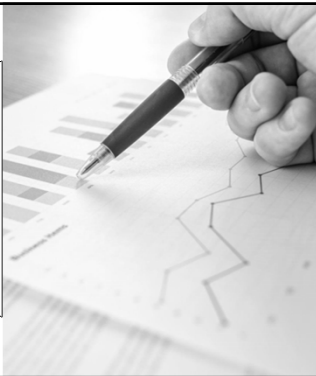


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Question #6

But really, why do my funds need to be invested? At my current rate of spending, my funds should last my entire life.



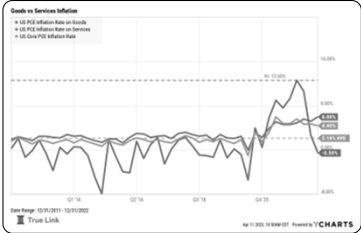
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Protecting Real Value of Assets

Inflation

- **Definition** - A general increase in prices and decrease in purchasing power
- Long term purchasing power decline is a factor for investing
- Multiple sources of inflationary pressures
- Global implications

Impacts Goods and Services Differently



Category	Rate
US PCE Inflation Rate on Goods	4.8%
US PCE Inflation Rate on Services	4.3%
US Core PCE Inflation Rate	4.0%

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Impact of Inflation


Historic Perspective (2003 to 2023)

Dollar Value

- \$1 in 2003 is worth roughly \$0.60 in 2023
- Loss of 2.50% annually

Investments Provided a Hedge

- Global Equities - +8.40% annually
- US Aggregate Bonds - +3.10% annually
- 50/50 Stock/Bond Portfolio - +6.71% annually



Asset Class	Value in 2023	Annual Return
US Consumer Price Index (Loss of Purchasing Power)	\$0.60	-2.50%
Global Equities	\$8.40	+8.40%
US Aggregate Bonds	\$3.10	+3.10%
50/50 Stock/Bond Portfolio	\$6.71	+6.71%

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Question #7

If the markets are down or have risks, why don't we just sell and wait until things are more stable?




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Reasons To Sell

- Presidential Impeachment
- Banking Failures
- US Credit Downgrades
- Government Shutdown
- Recessions

S&P 500 Index (Since 1989)

- Avg +10.09% Annually



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Time IN The Market vs. Timing The Market

Negative Effect of Missing Days

- Large changes in outcomes driven by large positive or negative moves in the markets

Timing is Difficult

- 11 of the 20 Best Days occurred within one week of the 20 Worst Days



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Stocks:
Bull Markets
 Last Longer Than
Bear Markets

Bull Markets
 Since 1950
 ● Average: 5 ½ Years Long

Bear Markets
 Since 1950
 ● Average: 1 Year Long

Bull vs. Bear Markets

▲ Bull Markets Since 1950 Total Returns

▲ Bear Markets Since 1950 Total Returns

Date Range: 01/01/1950 - 06/30/2023
 Size: US Equities
 © 2023 YCharts

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Question #8

I can't take much more of this. Can you PLEASE just put my trust in all money market holdings?

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Case Law

In re: Mark Anthony Fowler Special Needs Trust, No. 39729-3 (WA Ct. App. Feb. 8, 2011)

- Trust established in 2000 from PI settlement; beneficiary expected to live another 58 years
- 2008 accounting by trustee shows 12% loss in performance.
- Growth with income investment strategy
- Outperformed S&P 500 by 2.5% over same time period.
- Court refused to approve trustee's accounting & ordered all trust assets to be invested in FDIC-insured money market vehicles with diversified institutions
- Overly conservative approach testified against by trustee's investment professional as well as beneficiary's Guardian Ad Litem
- Washington Court of Appeals reversed lower court's decision.
- "Beneficiaries can be disserved by undue conservatism"

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Closing Thoughts and Best Practices

Investment Policy Statement

- Sets the goals and objectives for the investment portfolio
- Outlines expectations for asset allocation and benchmarks

Proactive Communication Wins the Day!

- Proactively check in with your clients
 - Market uncertainty and negative performance can be stressful for everyone
- Talk with your advisor
 - Potentially assist with client communication
- Do not wait!
 - When the client is the one who has to bring it up, you've already lost.

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2023 National Conference on Special Needs Planning and Special Needs Trusts

Thank You!

How to Talk to Beneficiaries in a Volatile Market

Kevin Hayde
Executive Director
Wispact
khayde@wispact.org

Peter J. Wall
Director, Fiduciary Services
True Link Financial Advisors, LLC
peter.wall@truelinkfinancial.com

Bryan Kreitzberg, CFA
Director, Investment Management
True Link Financial Advisors, LLC
bryan.kreitzberg@truelinkfinancial.com

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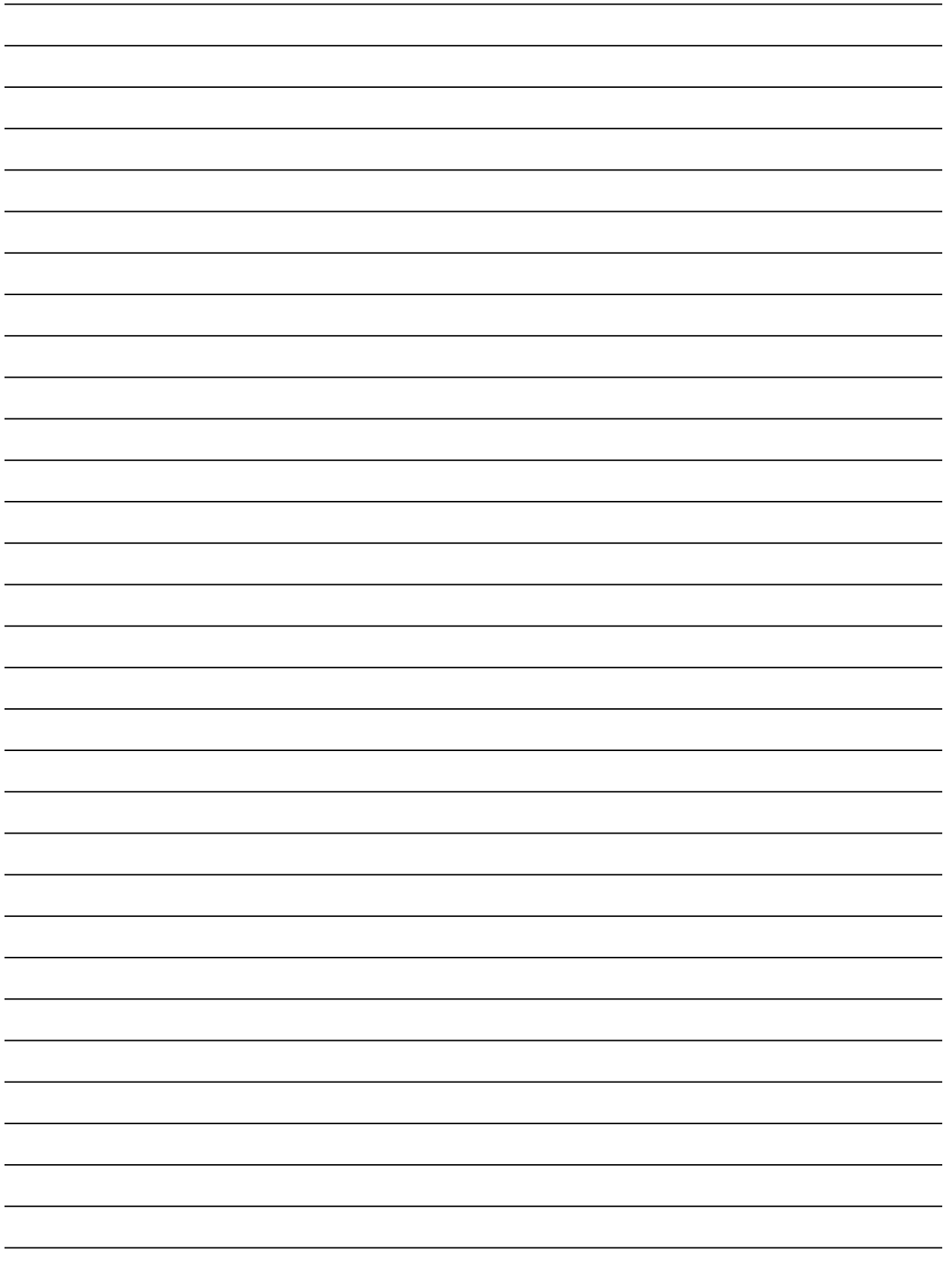
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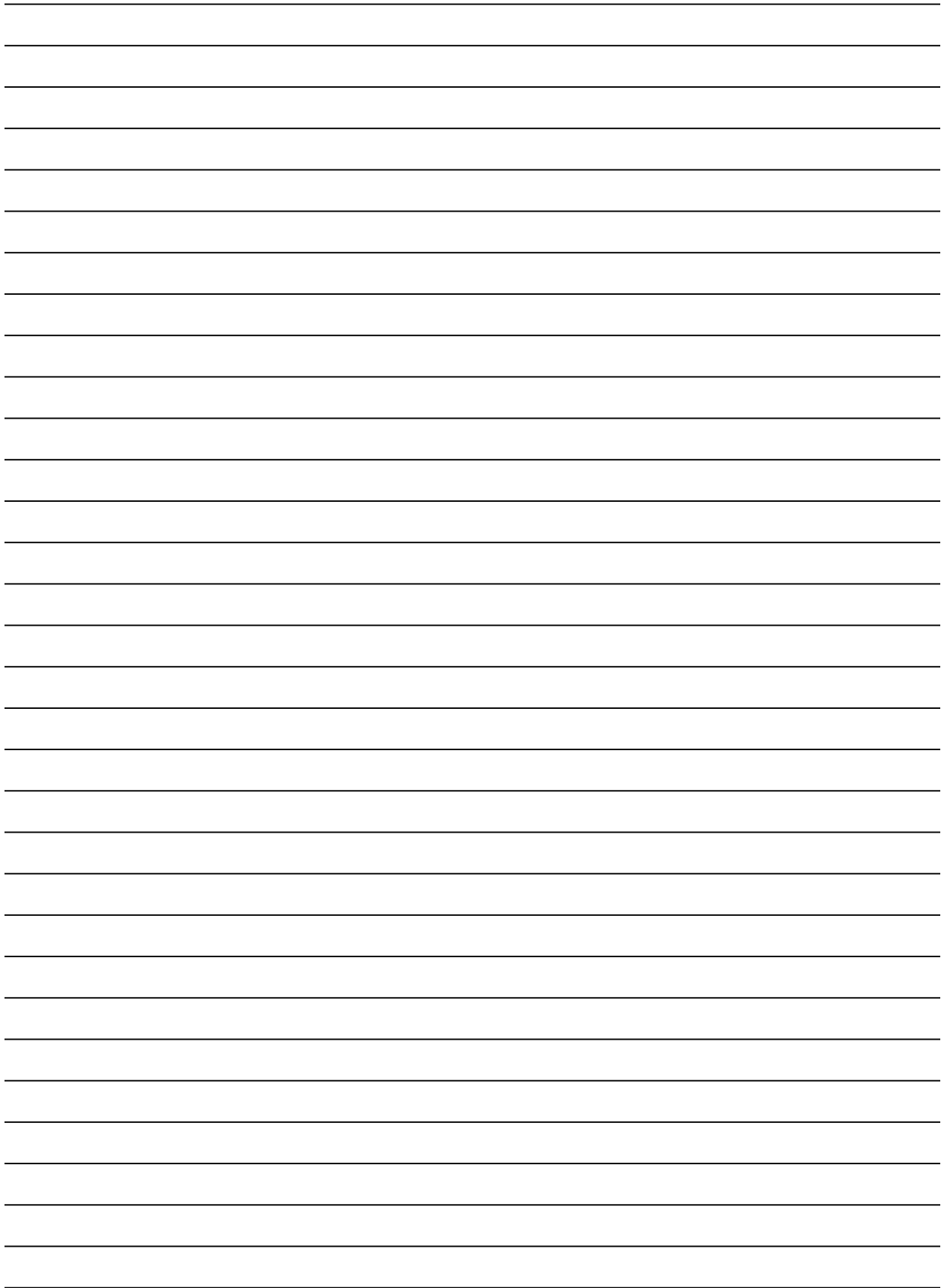
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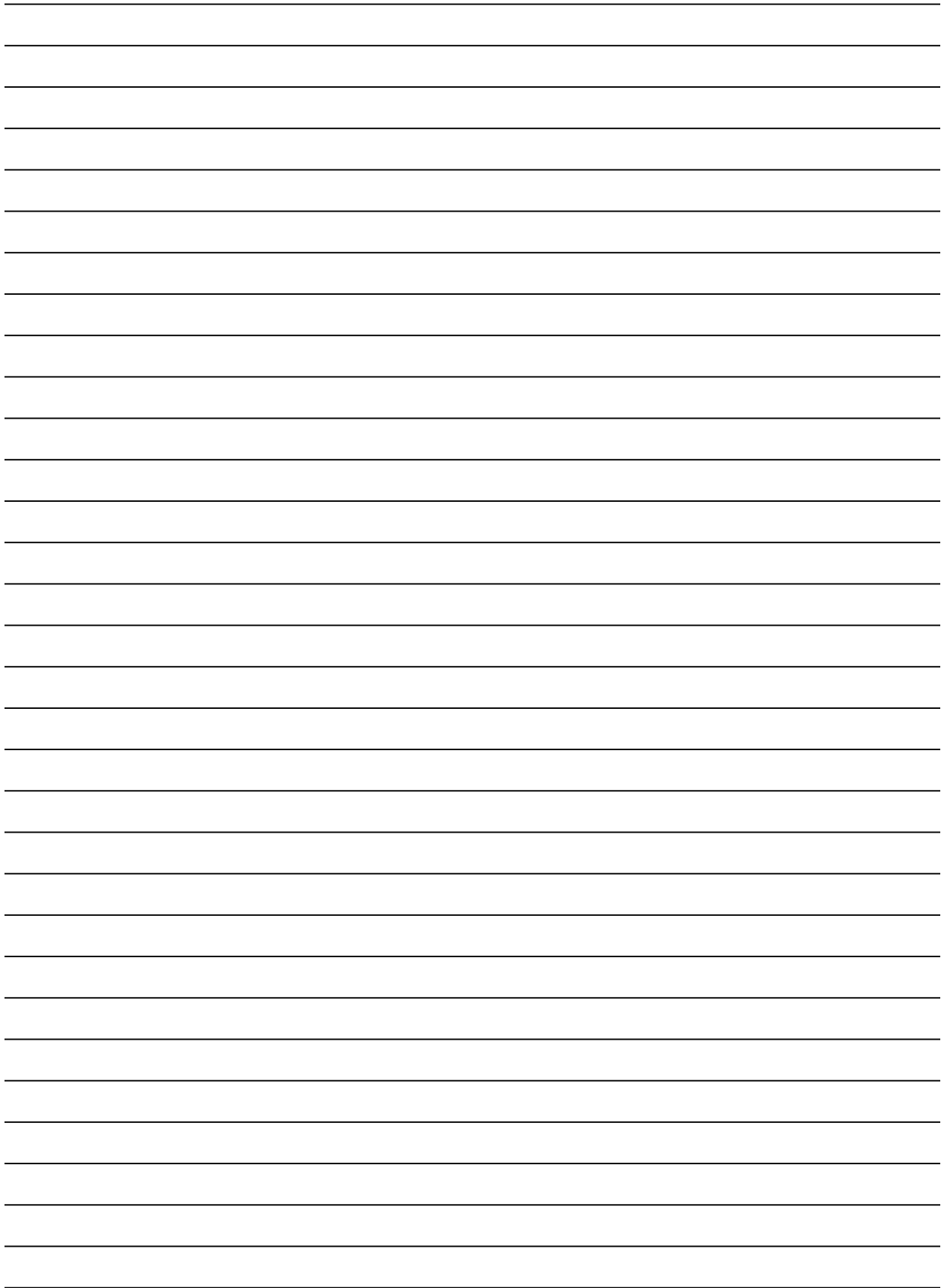
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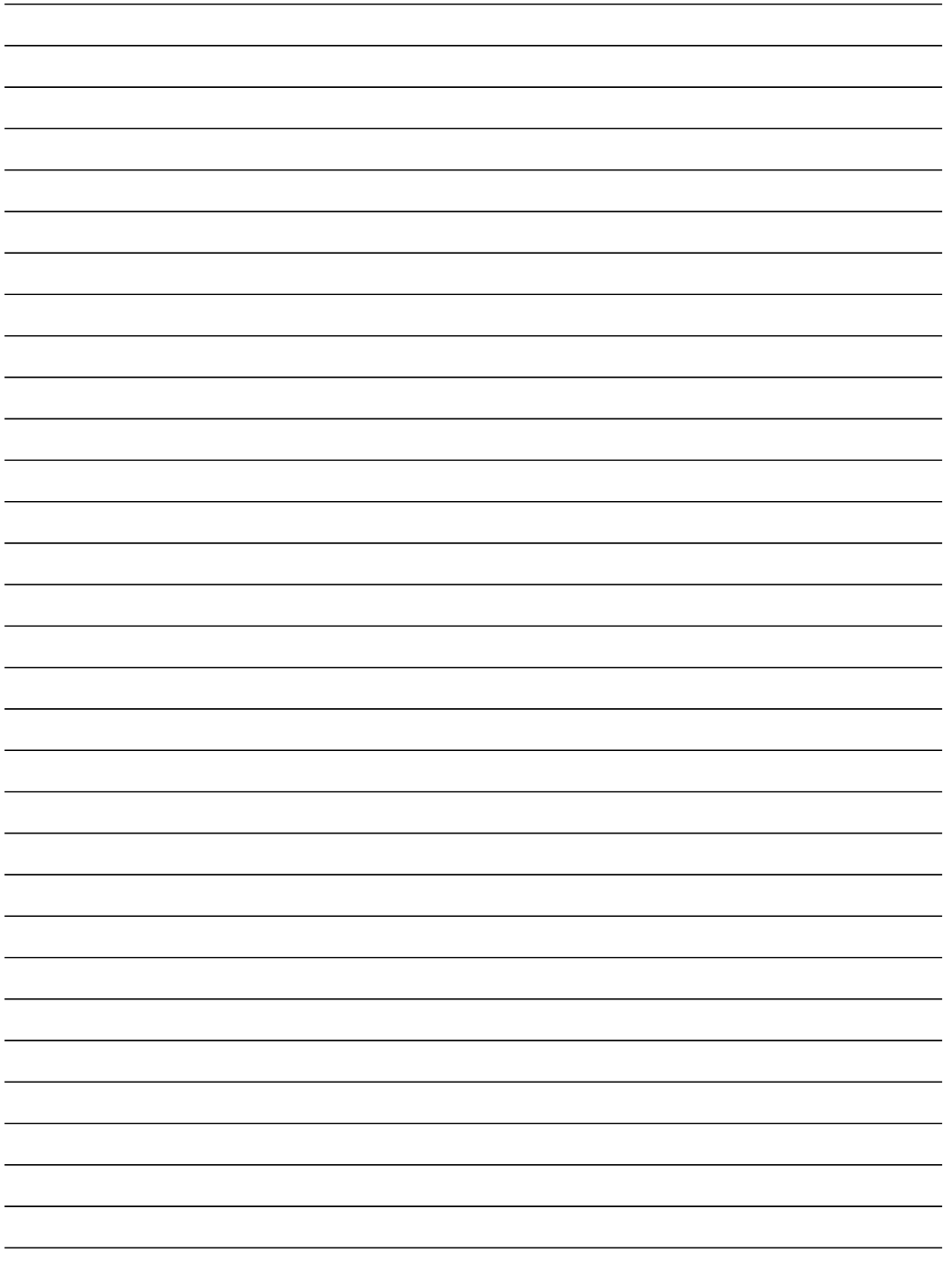
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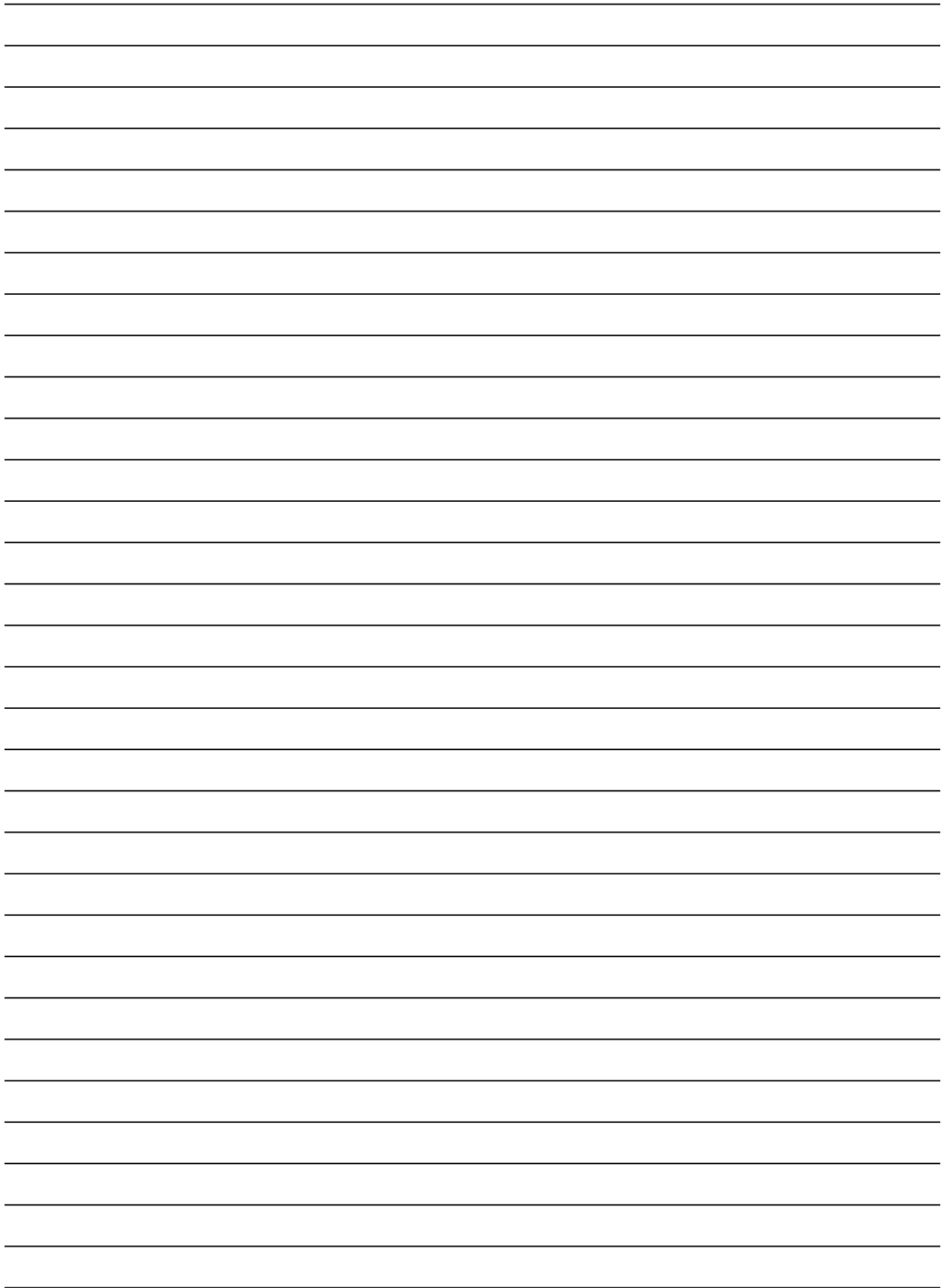
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STETSON LAW

Pooled Trusts Intensive

Wednesday
October 18, 2023

Home and Vehicle Ownership by a Trust



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Elder Justice*

Access and Justice For All®

HOME AND VEHICLE OWNERSHIP BY A TRUST

Anna O. Sappington, Esq.
Principal, Law Office of Anna O. Sappington
101 Old York Road Suite 303
Jenkintown, PA 19046

Shirley Whitenack, Esq.
Partner, Schenck, Price, Smith & King LLP
220 Park Avenue, P.O. Box 991
Florham Park, NJ 07932

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I. Introduction

Purchases of real estate and vehicles can profoundly improve the circumstances of special needs trust beneficiaries. Trust-purchased residences allow beneficiaries to avoid rent costs and conserve their income for utilities, food, and other needs. They provide security from displacement and can be customized to meet a beneficiary's specific physical needs. Purchase of a home can be a springboard to access school districts, medical care, and amenities not available in other communities.

Vehicle purchases provide similar benefits. Outside of home ownership, access to private transportation is one of the best ways to increase a beneficiary's quality of life. Vehicles make everyday tasks such as grocery shopping and laundry far more convenient and less time-consuming, allow access to areas and providers not well served by public transportation, and avoid the high costs of private transportation services.

Notwithstanding these advantages, SNT trustees often regard home and vehicle purchases with some trepidation. Trustees often are asked to make these large distributions at the outset of the trustee/beneficiary relationship, when they don't have a good sense of the beneficiary's needs, abilities, and supports. Both types of purchases require a significant immediate investment and an ongoing responsibility by the trust for costs such as insurance, repair, and maintenance. Trustees can face significant pressure from beneficiaries feeling excitement and urgency, but who come to these transactions without the experience necessary to be informed consumers.

Our goals today are to explain the legal bases for trust-purchased real estate and vehicle transactions and to discuss some of the issues trustees commonly face when administering trusts that have purchased these assets. We hope that our materials and discussion can help you approach these transactions feeling more confident, both as you consider distribution requests

and post-purchase, as you work with the beneficiary to ensure that the purchased property is maintained and used to benefit the trust beneficiary.

II. Home Ownership

A. Authority; How Accomplished

A trust-purchased property may be titled either to the trust beneficiary or to the trust. Social Security's POMS provide that a home titled to an SSI claimant is an excluded resource, regardless of value.¹ To qualify for the exclusion, the home must be the recipient's principal place of residence,² defined as "the dwelling the individual considers his or her established or principal home and to which, if absent, he or she intends to return."³ "Home" includes the physical shelter and "can" also include the land on which the shelter is located and related buildings on the land.⁴ However, a home need not be a traditional house: "It can be real or personal property, fixed or mobile, and located on land or water."⁵ Thus, a mobile home or houseboat might qualify as a home if it serves as the recipient's principal place of residence as defined by SSA. If the property is titled to the trust rather than to the SSI claimant, the trust beneficiary is considered to have an equitable interest in the property.⁶

Whether titled to the beneficiary or the trust, purchasing the home is considered "in-kind support and maintenance (ISM)" (in-kind shelter) by the trust to the beneficiary, resulting in an ISM reduction in the beneficiary's SSI benefit the month of purchase.⁷ This reduction is

¹ POMS SI 01130.100.B.1.

² Id. at A.1.

³ Id. at A.2.

⁴ Id. at A.1.

⁵ Id. at A.2.

⁶ POMS SI 01130.100A.4, 01110.515C.2.

⁷ POMS SI 00835.310B.

calculated under the PMV rule⁸ and in 2023 is capped at \$324.66.⁹ Thereafter, the beneficiary's ownership interest in the home (a legal interest if the home is owned by the beneficiary, or an equitable interest if the home is owned by the trust) causes SSA not to treat the beneficiary's residency as ISM.¹⁰ Utilities (i.e, gas, electricity, heating fuel, water, sewer, and garbage collection service) and property taxes all are considered "shelter costs" which, if paid by the trust, result in ISM to the beneficiary, reducing the SSI benefit amount.¹¹ If you're lucky, your beneficiary's SSA field office will treat single payments of annual property taxes as ISM only in the month received. Some field offices pro rate the trust's single property tax payment over the tax year and reduce the beneficiary's SSI payment each month, though the authority for this treatment is unclear.

As discussed further below, if the trust holds title to the property, it has duties to safeguard the property against loss (by purchasing insurance), secure and maintain the property, and pay taxes resulting from the property ownership.¹² Can these duties be avoided simply by titling the trust-purchased property to the beneficiary, as permitted under SSI rules?¹³ In most cases, no. A state Medicaid agency may require the trust to hold the property, or hold a security interest in the property, as a way of ensuring that the property will be available to pay Medicaid's claim upon the trust beneficiary's death. Additionally, while titling the property to the trust

⁸ POMS SI 00835.110A.2 (PMV rule applies when claimant has ownership interest in home), 00835.300 (PMV rule).

⁹ See POMS SI 00835.300C.2.b.

¹⁰ POMS SI 00810.010 ("An item an individual receives in the current month is income for the current month only. If held by the individual until the following month, that item is subject to resource-counting rules.")

¹¹ POMS SI 00835.020B.36 ("shelter costs" defined), 00835.310 (when ISM occurs).

¹² Uniform Trust Code Article 8.9 sets forth the duties of a trustee with respect to property. See also BEGLEY & CANNELLOS, SPECIAL NEEDS TRUSTS HANDBOOK, Section 9.02[A].

¹³ POMS SI 00120.201F.3 (real property purchased by SNT must be titled to beneficiary as opposed to other parties to comply with the sole benefit rule).

beneficiary may avoid duties attendant to trust ownership, it could open the trustee to claims by the beneficiary or third parties if the beneficiary's ownership is unsuccessful. There are myriad ways in which the beneficiary's ownership of the property could go wrong. The beneficiary could be subject to claims by creditors or an ex-spouse; could fail to insure the property, resulting in a loss or a personal tort claim; or the beneficiary's income could be insufficient to sustain property ownership. To the extent a poor outcome could be considered likely or foreseeable, a trustee might arguably have neglected its duties to the beneficiary in titling the property to the beneficiary rather than the trust.

When a beneficiary resides in a trust-purchased property, they (and all other cohabitants) should sign an agreement setting out the terms of their occupancy. This agreement can make several points clear:

- Respective responsibilities for payment of costs related to the property;
- Rent for cohabitants;
- The duty of the occupants to report maintenance issues promptly and allow reasonable access for inspection and repair;
- Provisions requiring cohabitants to move out of the property if the beneficiary dies, in order that the property can be sold and used to repay Medicaid's claim for services provided to the beneficiary during their life.

State landlord's and realtor's associations typically have forms that can be used as a starting point for drafting.

B. Problems That Can Arise

i. Financial Sustainability

When deciding whether to purchase a property, the trustee should carefully consider whether the trust has adequate resources to pay the property's carrying costs. Property taxes, in particular, can require significant expenditures over time. Homeowner's insurance is another expensive necessity. Tax and insurance costs can be estimated prior to purchase, so that the trustee can keep a reserve to meet these costs; however, in practice it can be difficult for trustees to maintain the reserve in the face of other pressing needs.

Modifications, renovations, and repair are also important considerations. As discussed further below in the "Suitability" section, accessibility modifications may be necessary in the short term for the beneficiary to fully utilize the home. Additionally, like other new homeowners, beneficiaries living in trust-purchased properties often seek to customize the property through renovations and improvements. Prior to the property's purchase, the trustee and beneficiary should discuss any thoughts or plans the beneficiary may have regarding improvements. An estimated budget for improvements should be developed prior to the property's purchase. Setting a cap will help the beneficiary prioritize improvements (as must all homeowners) and will help preserve funds for non-property distributions during the term of the trust's administration.

Repairs to major systems such as roof, HVAC, and plumbing also arise over time. Keep in mind that many beneficiaries have lived solely in rental properties for terms of a year or two and may be unfamiliar with spotting conditions that require remediation to avoid significant repair costs later. A trustee can use a property manager or consultant to conduct inspections periodically to spot and address these issues. The beneficiary should be advised of the purpose of

these inspections and before move-in should agree in writing to grant reasonable access to the property. It is not uncommon for a beneficiary to refuse access to the trust-purchased property later, and a written agreement makes clear the agreed-upon terms and may facilitate assistance by authorities.

ii. Violation of Sole Benefit Rule

Because SSI's benefit rate is extremely modest,¹⁴ recipients often cohabitate with others to share costs. Even when a trust purchases housing for the beneficiary and pays property taxes and insurance, it can be extremely difficult to pay the household utilities in full solely from one's SSI benefit. However, when a nonbeneficiary resides in a trust-purchased property, the tenancy can run afoul of the sole benefit rule, which applies to first-party special needs trusts (i.e., trusts funded with the beneficiary's money). Third party trusts also sometimes are drafted to require that trust distributions are for the beneficiary's sole benefit.

The sole benefit rule applicable to first-party trusts is present in the federal statute that permitted first-party SNTs and is incorporated into the POMS requirements for SNTs.¹⁵ The POMS provide the following direction regarding evaluating whether a trust distribution meets the criteria:

The key to evaluating [the sole benefit rule] is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral benefit to anyone else. For example, if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there, or if the trust purchases a television, that no one else can watch it. On the

¹⁴ If a full-time employee's net monthly pay was equal to SSI's benefit rate, the person would be earning \$5.78 per hour, significantly less than the \$7.25 federal minimum hourly wage (\$916 benefit rate / 160 hours per month = \$5.78 hourly).

¹⁵ 42 U.S.C. § 1396p(d)(4)(A), (C); POMS SI 01120.203B.6, C.4 (individual SNTs); POMS SI 01120.203D.5. (pooled SNTs).

other hand, it would violate the sole benefit rule if the trust purchased a car for the beneficiary's grandson to take her to her doctor's appointments twice a month, but he was also driving it to work every day.¹⁶

The sole benefit rule is met when cohabitants pay their share of household costs and pay rent to the trust for the value of the housing they receive. Reduced (or free) rent may be possible if the cohabitant agrees to pay the value of the rent by other means; for example, by paying more than their share of household costs, or by providing the trust beneficiary personal care or companion care in addition to that provided by Medicaid. The value of these contributions should be roughly equal to (or greater than) the value of the housing received by the cohabitant. Trustees always should document how they determine the property's rental value (usually by contemporaneous comparisons with similar properties), and those who make agreements for free or reduced rent should document how they determined the value provided by the cohabitant.

Often, parents of minor trust beneficiaries ask the trustee of their child's trust to purchase a home "for the family" – including parents, siblings, and perhaps extended family members. Purchasing a permanent home for a minor beneficiary can provide stability and consistency and have a profoundly positive impact on the beneficiary's life and future. However, the parents of a minor beneficiary have a legal duty of support that can be relieved when the trust furnishes housing; not having to meet this responsibility itself is a benefit received by the minor's parents. This point argues for the minor's parents paying all costs for the family's occupancy, and not just their own and other children's proportionate shares. In situations where the child is profoundly disabled and requires extraordinary care due to their disability, care provided by parents which is unpaid by Medicaid can offset the amount due in part or whole. Theoretically, when the beneficiary is a parent of minor children, the trust should be able to

¹⁶ POMS SI 01120.201F.3.

provide housing for the children as a way of relieving the beneficiary's duty of support; however, some Medicaid agencies insist upon costs being split proportionally, with only the beneficiary's costs being paid by the trust.

iii. Suitability of Property

Like anyone else, beneficiaries (and their families) can fall in love with a particular house and ignore reasons why it may not be the best available choice. In particular, parents of minor beneficiaries may not anticipate how the child's growth or the disability's progression could affect their ability to use the property. For example, a beneficiary who likely will become wheelchair-bound should have all their accommodations on the first floor or have a house that can include an elevator if needed; carrying a child upstairs to bed when they are four is much different than when they're twelve. Another issue that often comes up is whether existing hallways can accommodate a beneficiary's wheelchair or a gurney. If they can't and are not modified, the house will sustain significant damage.

One important component to suitability is location. Many beneficiaries dream of owning rural property. However, home-based services may be difficult to find and hard to replace in more rural areas. More than one house has had to be sold because the beneficiary lost a caregiver and couldn't replace them.

Beneficiaries (and reviewing courts) expect that trustees with experience and skill administering SNTs will bring these attributes to bear in real estate decisions. A trustee may be expected to spot issues the beneficiary might not. Trustees also may be held to account if they uncritically accept a beneficiary's assurance that apparent obstacles or issues can easily be overcome, particularly when the plans include heretofore undemonstrated abilities (including the

ability of a cohabitant to maintain employment), cumbersome workarounds, or relying upon nonprofessionals to modify the property or to provide ongoing support.

iv. Death of Beneficiary and MA Reimbursement

Under federal law, first-party SNTs must provide for Medicaid reimbursement at the death of the trust beneficiary.¹⁷ Funds remaining in a payback trust after reimbursement to Medicaid may be distributed to remainder beneficiaries, as specified in the trust agreement (and for pooled trust accounts, the contract establishing that beneficiary's sub-account). "Retaining" pooled trusts are an exception to the Medicaid payback requirement: in these trusts, at the death of the beneficiary the nonprofit retains remaining funds.¹⁸ The pooled trust agreement for a retaining trust usually provides that the nonprofit use these funds for the benefit of other persons with disabilities.

Payback most often requires that the trust-purchased property be sold so that the proceeds can be paid to Medicaid. Additionally, if the trust has a lien on real property held outside of the trust, Medicaid may require that the trust execute on the lien and sell the property so that Medicaid can receive its value. The property must be sold for fair market value (FMV), but may be sold to the beneficiary's family members or other cohabitants if they can pay off the lien or buy the property for FMV. In these cases, it's just a matter of selling the property to the cohabitants as one would to any other buyer.

Sometimes, the trust has sufficient liquid resources to repay Medicaid claims without selling property held in trust, or executing on the lien it holds for property titled to the

¹⁷ 42 U.S.C. §1396p(d)(4)(A) (individual trusts), (C)(iv) (pooled trusts).

¹⁸ *Id.* at (C)(iv). A nonprofit establishing a first-party pooled SNT decides whether its trust will be retaining when drafting its master trust agreement.

trust beneficiary. In these cases, the property can be distributed to the remainder beneficiaries (who hopefully are the people living in the house).

The situation becomes more complicated when the property must be sold, but the cohabitants are unable to buy it. Trustees may not use trust funds to relocate survivors. First, these distributions would not be for the benefit of the trust beneficiary, and thus would violate the sole benefit rule. Second, a trustee may make distributions prior to Medicaid payback only for certain administrative expenses defined in POMS SI 01120.203E.1, which are:

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

Given the examples of trust administration expenses provided in the POMS, this category does not include costs for relocating cohabitants.¹⁹

In the period immediately after the beneficiary's death, cohabitants often are wondering what will happen for them. The trustee can send a letter expressing its condolences, explaining Medicaid payback and limits on the trustee's ability to make distributions, and informing the cohabitants that it will request Medicaid's statement of claim for services provided to the beneficiary. Once the statement of claim is received, the trustee should communicate to the cohabitants whether the property will need to be sold, explain that the cohabitants may be able to

¹⁹ One of the "canons" (rules) for interpreting legal language is "ejusdem generis" ("of the same kind, class, or nature"). If a nonexclusive list is provided, items not specifically listed are presumed to be of the same general type as the examples given. Here, the examples given are accounting tasks required to reconcile the trust's books prior to termination. Therefore, the "other required actions" likely refers to other accounting tasks, and not relocating cohabitants of trust property.

purchase the property if they can secure financing, and provide a time frame for the cohabitants to discuss their plans with the trustee.

Cohabitants often become uncommunicative or uncooperative once they determine they can't obtain financing to purchase the property. In these cases, after ample efforts to make contact and reach agreement about vacating the property, the trustee may have no option other than eviction. Typically, outside counsel is required in these cases. Be aware that the eviction process can take months, depending on state law. As long as the trust has an interest in the property, the trustee has a legal duty to protect it, for example, by paying insurance and for lienable costs which could result in foreclosure if not paid (such as property taxes). This duty exists even when the trust's other resources are exhausted. If the trustee expends its own funds to meet legal fees or other expenses, it may be reimbursed from the proceeds of sale prior to Medicaid reimbursement.

Everyone hates evicting survivors. Nonprofits entered the SNT market to help people with disabilities and their families, not to enforce Medicaid claims after the death of a person with special needs. In these situations the kindnesses you can offer are sympathy, transparency, and consistency. Even when survivors dislike the situation, your organization's commitment to these principles is a way of showing its respect and care.

III. Vehicle Ownership

A. Authority; How Accomplished

The POMS provides a resource exception for "one automobile per household regardless of value if the recipient or [eligible] couple or a member of the recipient's or couple's household

uses it for transportation.”²⁰ The exception applies not only to cars, but to “**any** registered or unregistered vehicle used for transportation[,]” including “motorcycles, boats, snowmobiles, animal-drawn vehicles, and even animals.”²¹ Vehicles that are not used for transportation (i.e., recreational vehicles or junked vehicles) are countable.²²

For benefits agencies (including SSA), a “household” is a group of cohabitants who pool resources to function as one economic unit. People who share the same living quarters may not be in the same household under this definition. For example, let’s say a couple lives in a condo and rents out their spare bedroom to a friend. The friend pays his share of rent and utilities and buys his own food. The couple pays their bills without regard to which partner’s money pays which expense or whether the partners’ respective contributions are equal. In this case, the couple is one household, and the friend another. Each household serves as its own economic unit that pays its share of the bills.²³

When a household owns more than one vehicle, the exclusion is applied in the way most advantageous to the claimant, by excluding the vehicle with the highest equity value (its FMV minus the value of any encumbrance, such as an outstanding lien).²⁴ In cases where the trust purchases the vehicle but a lien in favor of the trust is recorded on the vehicle title, SSA considers the equity value to be \$0. This means that a trust-purchased vehicle secured by a lien should never affect SSI eligibility, even when it’s the second vehicle in the claimant’s household.

²⁰ POMS SI 01130.200A.

²¹ *Id.* at B.1. (emphasis in original).

²² *Id.* at C.3.

²³ The POMS automobile exclusion uses the term “household” without defining it; however, “household” is defined at POMS SI 00835.020B.10 (for purposes of ISM) and 01310.140A (for purposes of deeming).

²⁴ POMS SI 01130.200C.2.

The rules for vehicle titling are at POMS SI 01120.201F.3.a:

Purchased goods that require registration or titling, for example a car or real property, must be titled or registered in the name of the beneficiary or the trust(ee) unless State law does not permit it. For example, State law may not allow a car to be registered to the beneficiary, or may require a co-owner, if the beneficiary is a minor or an individual without a valid driver's license. Some State Medicaid agencies may permit a car to be titled in a third party's name if the trustee holds a lien on the car. A lien guarantees that the trust receives the value of the car if it is sold and prevents the purchase from being considered a transfer of resources.

NOTE: Even if a person or entity other than the beneficiary or the trust(ee) is listed on the title of the purchased good, it must still be used for the sole benefit of the trust beneficiary.

Trustees typically avoid titling a trust-purchased vehicle to the trust; doing so can make it difficult to obtain insurance and could lead to the trust's having liability in the event of an accident. Instead, title it to the person who will be using the vehicle. Trustees should develop criteria for title owners other than the trust beneficiary; for example, members of the beneficiary's family or household. The more attenuated the connection between the driver and beneficiary, the more risk there is of violating the sole benefit rule and conversion. For example, if the driver doesn't live with the trust beneficiary, will the vehicle truly be available for the beneficiary's primary use and benefit? If the driver is a friend rather than a family member, can the trustee rely on that friendship continuing such that it is reasonable to title the car to the friend?

In considering a vehicle purchase request, trustees must project the likely costs of vehicle ownership and plan to keep a reserve so that the trust can pay maintenance and insurance costs during the term of ownership. If the trust will exhaust prior to the vehicle's expected lifespan, the beneficiary should be able to demonstrate that they have the ability financially to pay these costs without recourse to the trust.

A trust creates a security interest in a trust-purchased vehicle by entering into a security agreement with the vehicle title owner. The security agreement should state that the trust provided all consideration (money) for the vehicle's purchase, set forth the terms for the driver's use and possession of the vehicle, and establish that the driver has a duty to relinquish the vehicle upon the beneficiary's death or as requested by the trustee. The trust's security interest then is perfected (made legally enforceable and given priority over other creditor claims) by its recording a lien on the vehicle title. Security interests are governed by state law, specifically the subject state's adopted version of the Uniform Commercial Code articles two (sales) and nine (secured transactions).

B. Problems That Can Arise

i. Repair Costs

The costs of repairing a trust-purchased vehicle typically are borne by the trust, as part of ensuring that the vehicle is in good condition and available for the beneficiary's use. Many trustees allow only new vehicle purchases as a way of limiting repair costs. While a car purchased from a family member may be in good condition and a reasonable choice, the cost savings of purchasing an older secondhand car from a used car lot or private party unknown to the beneficiary can quickly be outweighed by significant mechanical issues requiring repair that were undisclosed at the time of purchase. In these cases, it can become a matter of determining at which point the trustee is spending good money after bad. It may be better to buy a replacement rather than continue to invest money in a car which has had major problems and which likely will have more.

In some cases, the driver's operation or use of the vehicle may cause above-average maintenance and repair costs. Bad driving habits such as ignoring potholes and speed

bumps, not using the parking brake, not stopping the vehicle before shifting, and hard stops and starts can affect transmission, suspension, and tire wear. If the trust-purchased vehicle has more than one unexpected repair, it may be helpful for the trustee to pay a mechanic to educate the driver about driving habits that may limit future repair costs. The driver's track record also may be relevant in considering whether to replace a vehicle which had an unusually short lifespan. However, replacement often is justifiable provided the trust has adequate resources, considering the value the beneficiary receives from having consistent access to transportation, the inconvenience or unavailability of public transportation, and the high cost of private transportation services.

ii. Poor Driving

A prospective driver will need to show proof of insurance as part of completing a vehicle purchase. The insurance quote provides your first data-informed look at the prospective driver's track record. In some cases, the cost of insurance will make it impossible to purchase the vehicle: the cost of insurance requires too much of the trust corpus given the beneficiary's other needs.

There is a reason why insurance quotes are affected by a driver's driving history. Most drivers rarely if ever get into accidents, but some drivers are in accidents often. In cases in which the vehicle is totaled, some trustees limit the budget for successive vehicle(s) to the amount paid by insurance; this limits the trust's total vehicle investment. An accident in which the driver is found to be at fault is an opportunity for the trustee to require the driver to receive additional training, which may help everyone concerned. If your driver has caused more than one serious accident, consider if it is reasonable to continue to allow the driver to use the vehicle.

Does your organization want to be in the position of providing a driver a replacement vehicle, knowing that person has demonstrated a history of poor driving?

iii. Suitability

As with real estate, beneficiaries and their families may overlook important considerations in selecting a vehicle. Some that come to mind are:

- Foreseeable changes in the beneficiary's size or driver's abilities. A parent may be able to transfer a beneficiary from a wheelchair to a seat in the vehicle while the beneficiary is small, but this strategy may become unworkable if the beneficiary grows (in stature or girth) or as the parent ages. A larger beneficiary also may require larger equipment; could the vehicle accommodate it if needed?
- The driver's ability to comfortably use the vehicle. A test drive provides a very limited experience of being in the vehicle, and during a test drive the driver is likely to be focusing on driving and how the car operates. However, post-purchase, a driver's satisfaction with a vehicle often stems in part from how physically comfortable the driver is when using the car. Is the car hard to enter or exit? Does the seatbelt fit well and is it easy to buckle? Is there enough room for the driver's legs, seat, abdomen, and head? Comfort can be a dealbreaker.
- Terrain. Some areas of the country have weather that requires four-wheel drive for safe driving. Particular properties also may require this feature (for example, properties with steep or gravel driveways). For vehicles that will be used in ice and snow, windshield wiper de-icers and headlight washers and wipers may also be important safety features.

Today's vehicles are manufactured to last 200,000 miles (300,000 for electric vehicles).²⁵ Use this number as a guide to estimate how long a proposed vehicle will serve a trust beneficiary, and to evaluate what the beneficiary's needs will be during the term of ownership. Since the lifespan of a vehicle is measured by its mileage, beneficiaries living in rural areas or who travel long distances to access medical care may require vehicle replacements more often than those who travel less.

iv. Conversion

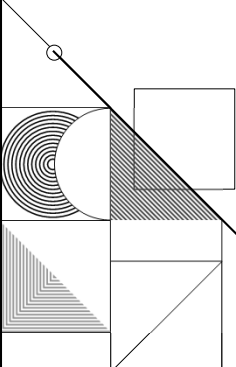
Sometimes it happens that a title owner no longer uses the trust-purchased vehicle for the benefit of the trust beneficiary. For example, at the time of purchase, the title owner and beneficiary lived in the same household, but that changed. If a vehicle must be relinquished, as trustee you should offer to deliver that message rather than the beneficiary, to allow the driver and beneficiary to preserve their relationship. If the title owner leaves without relinquishing the car, as trustee, you have a duty to locate and recover it. In these cases, you are in the same situation as any other lender seeking to execute on its security interest by repossessing collateral. Be aware that repossessions are subject to state laws, which may require notice to the driver of the trustee's intent to repossess, limits on where and how the repossession occurs, providing an opportunity for the driver to collect their property in the vehicle at the time of the repossession, and notice to the driver of the vehicle's sale.

²⁵ *How Many Miles Does a Car Last?*, CAR AND DRIVER MAG., <https://www.caranddriver.com/research/a32758625/how-many-miles-does-a-car-last/> (last visited September 10, 2023).

IV. Conclusion

Real estate and vehicle purchases and ownership are some of the trickiest parts of SNT administration. Trustees must manage beneficiary expectations, maintain assets over which they have no control – and then potentially recoup and liquidate the assets to repay Medicaid’s claim. Given the various difficulties attendant to managing these assets, some trustees decline to make these purchases as a matter of policy, despite the significant benefits they can bring to trust beneficiaries.

Trusts allowing these purchases should start with statements of policy that can guide trust administrators facing purchase decisions and ensure that purchased assets are property titled. It may be helpful to have these high-value decisions vetted by committee rather than by individual administrators acting alone. For properties, trustees should have mechanisms to ensure major costs are paid timely and that the property is inspected at least annually. For vehicles, trustees should verify the attachment of the trust’s security interest and ensure that vehicle insurance is secured and maintained. In all cases, the trustee should review the account’s usage rate periodically; if the rate is higher than anticipated, it may be necessary to course-correct to maintain an adequate reserve for anticipated future costs. Finally, trust fee structures should reflect the additional time and costs involved in administering these assets.

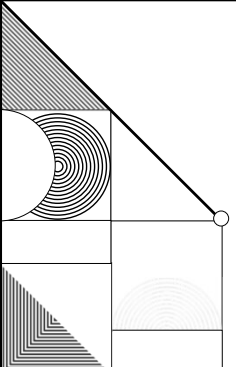


HOME AND VEHICLE OWNERSHIP BY A TRUST

Anna O. Sappington, Esq.
Law Office of Anna Sappington, Jenkintown, PA

Shirley Whitenack, Esq.
Partner, Schenck, Price, Smith & King LLP
Florham Park, NJ

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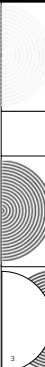


ABOUT US

Anna Sappington, Esq. operates a small practice in Pennsylvania. She authors [The Pennsylvania Special Needs Planning Guide](#), a special needs planning treatise for attorneys in Pennsylvania. Anna advises multiple pooled special needs trusts regarding trust drafting and administration.

Shirley Whitenack, Esq. is a partner at Schenck Price Smith & King, LLP and co-chairs its Special Needs Law Practice Group and its Estates and Trusts Litigation Practice Group. Shirley is a past president of NAELA and has served as an adjunct professor in the J.D. and LL.M. Elder Law Programs at Stetson University College of Law. She has served as counsel for PLAN of NJ since 2006.

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AGENDA

INTRODUCTION

- The promise and perils of home/vehicle ownership

HOME OWNERSHIP

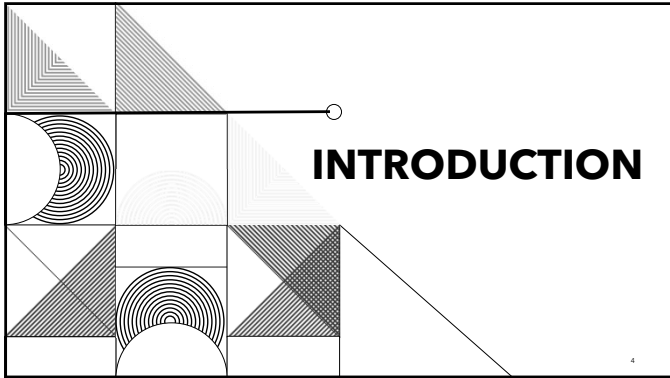
- Mechanics of a trust purchasing a property
- Common issues

VEHICLE PURCHASES

- Mechanics of trust vehicle purchases
- Common issues

CONCLUSION / Q&A

3



4

HOME OWNERSHIP

BENEFITS

- Trust's willingness to consider it may be deciding factor in choosing your trust
- Provides beneficiary housing stability
- Provides access to "good" neighborhoods, school districts, medical providers, amenities
- Conserves beneficiary's income for other needs
- Can be customized to beneficiary's unique needs

DRAWBACKS

- Funds invested in property are illiquid and unavailable for other needs
- Purchase requires the trustee to maintain an additional reserve for insurance, taxes, and maintenance
- Cohabitants must pay their share
- Hard to unwind if purchase isn't working well
- Trustee has responsibility, but limited control
- Property likely will need to be sold upon beneficiary's death

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VEHICLE OWNERSHIP

BENEFITS

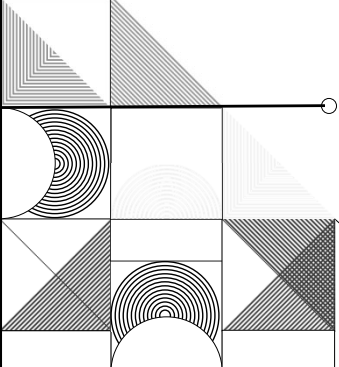
- Can eliminate need for fee-for-service private transport
- Simplifies planning and time required for errands, leaving that time/energy for other needs
- Provides access to wider range of service providers, amenities
- Vehicle type and model and adaptations can meet beneficiary's unique needs

DRAWBACKS

- Purchase requires the trustee to maintain an additional reserve for insurance, repair, and maintenance
- Trustee has responsibility, but limited control
- Problems with user's maintenance and operation of the vehicle

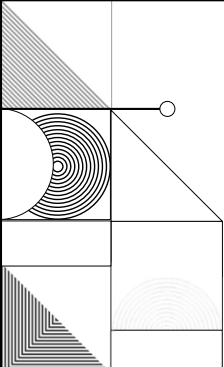
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HOME OWNERSHIP

7



HOME OWNERSHIP

POMS SI 01130.100

SSI considers a home owned by an SSI recipient as an excluded asset, regardless of value.

- Principal place of residence to which recipient intends to return if absent
- "It can be real or personal property, fixed or mobile, and located on land or water."

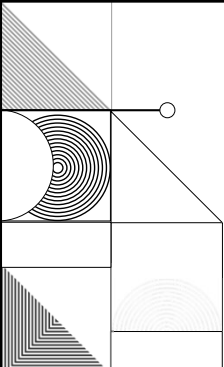
Medicaid may have limits on the value that can be excluded under its home exclusion.

- However, if the home is titled to the trust, these limits should not apply. Because the trust is not countable, assets held within the trust are not countable.

If titled to beneficiary, beneficiary has legal interest in home. If titled to trust, beneficiary has an equitable interest in the home.

The POMS allow a SNT to purchase a home and title it in the name of the trust beneficiary.

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HOME OWNERSHIP

EFFECT ON BENEFITS

In the month of purchase, the house is considered "in-kind maintenance" (ISM) housing to trust beneficiary

- This will cause an SSI recipient's benefit to be reduced by \$324.66 that month (in 2023).

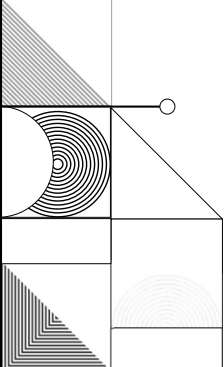
After the month of purchase, the beneficiary's interest in the home (legal or equitable) means that the home will not be considered ISM.

ISM can also occur if trust pays other "shelter costs":

- Utilities: gas, electric, heating fuel, water, sewer, trash
- Property taxes (SSA may prorate lump-sum payments)
- Home insurance, if required by mortgage lender

Purchase of house, paying vendors for expenses should not affect Medicaid

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HOME OWNERSHIP

HOW TO TITLE

Many Medicaid agencies require that trust-purchased properties be titled to the trust rather than the beneficiary.

- If titled to beneficiary, Medicaid may require trust to hold lien

Trustees usually choose to hold property in trust to protect beneficiary from bad outcomes

- Financial exploitation or waste
- Creditor or support claims
- Loss
- Inability to manage property ownership or its financial obligations

A trustee arguably could be faulted for titling property to a beneficiary if a poor outcome was likely or foreseeable

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HOME OWNERSHIP

BEST PRACTICES

DON'T RELY ON BENEFICIARY'S ASSESSMENT

- Suitability of residence
- Financial viability
- Community supports

KEEP AN ADEQUATE RESERVE

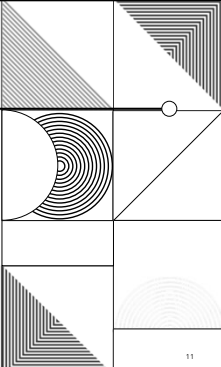
- For taxes, insurance, maintenance, repair, and fees
- To evict habitants and relocate beneficiary if trust is exhausted

COMMUNICATE

- Any assumptions as to how long the beneficiary will be able to stay
- Effect purchase will have on beneficiary's ability to use other trust funds
- Sole benefit requirement - cohabitants must contribute
- Terms of occupancy (including trustee access)
- Trust will have to sell property if trust is exhausted
- Trust may (or likely will) have to sell property when beneficiary dies

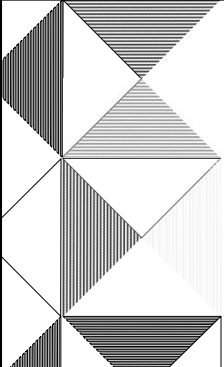
PUT IT IN WRITING

- Policies in event of trust exhaustion or beneficiary's death
- Terms of occupancy
- Burn rate



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WHAT COULD GO WRONG?

UNANTICIPATED COSTS

- Pressing demands can eat into reserves earmarked for property expenses
- Additional repair and maintenance costs
- Overruns in modification costs

VIOLATION OF SOLE BENEFIT RULE

- Cohabitants must pay their share through monetary or in-kind contributions
- Parents have duty to provide their minor children shelter

MISUSE OF PROPERTY

- Authorized occupants cause damage, don't report repair needs,
- Trust-purchased property becomes public nuisance - parties etc.
- Unauthorized occupants inhabit house

SUITABILITY

- Will property accommodate beneficiary's needs in future? (i.e., care, physical growth, progression of medical conditions)
- Will home-based services be available at the property?

MEDICAID REIMBURSEMENT

- Especially an issue with medically fragile minor beneficiaries

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QUESTIONS/COMMENTS

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VEHICLE PURCHASES

14

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VEHICLES

POMS SI 01130.200

SSI excludes one vehicle per household, used for transportation

- Any vehicle used for transportation (not only cars)
- But not recreational or junked vehicles
- Must be titled to trust, beneficiary, or third party (secured by a lien) if permitted by State Medicaid rules.

Additional vehicles are valued according to the title owner's equity in the vehicle.

Most trusts hold a lien on the vehicle, even if owned by beneficiary

- Prevents sale of vehicle or use of title loans
- Allows trustee to repossess vehicle

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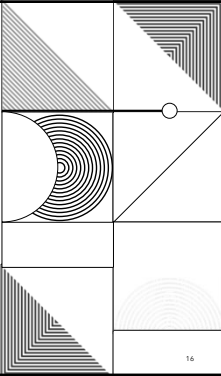
VEHICLES
SECURITY INTERESTS

Trusts typically put the lien on at the time the vehicle is purchased, according to the trust's instructions to the seller.

However, legally enforcing the lien may require the trustee to have a security agreement

Terms for security agreements:

- Trust provided all vehicle funding
- Terms of driver's use and possession of vehicle
- Duty to surrender upon beneficiary's death or at trustee's request



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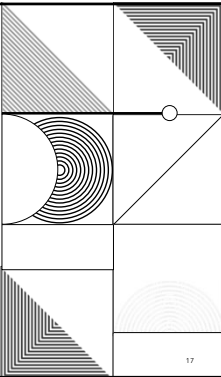
VEHICLES
POLICY DEVELOPMENT

Trustees should develop a policy for third-party vehicle ownership

- Risk of conversion, violation of sole benefit rule
- Consider requiring the title owner to be a member of the beneficiary's family or household

Under what circumstances would the trust demand the driver surrender the vehicle?

- At-fault accidents
- Violations
- Tickets



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VEHICLE OWNERSHIP
BEST PRACTICES

DON'T RELY ON BENEFICIARY'S OR FAMILY'S ASSESSMENT

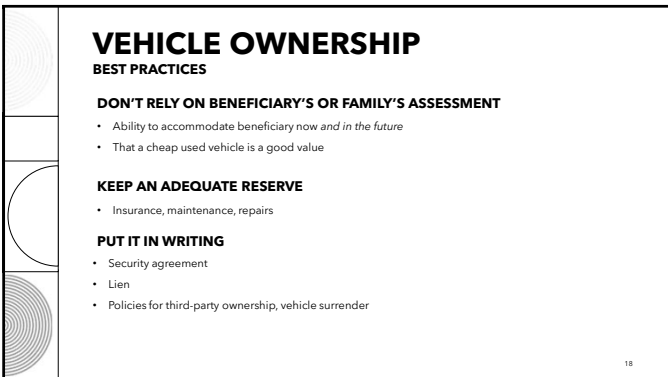
- Ability to accommodate beneficiary *now and in the future*
- That a cheap used vehicle is a good value

KEEP AN ADEQUATE RESERVE

- Insurance, maintenance, repairs

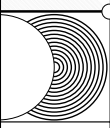
PUT IT IN WRITING

- Security agreement
- Lien
- Policies for third-party ownership, vehicle surrender



18

18



WHAT COULD GO WRONG?

REPAIR COSTS

- Used vehicles
- Above-average wear and tear

POOR DRIVING

- In\$\$\$urance
- Requests for replacement vehicles
- Policies for when poor driving results in vehicle repossession

SUITABILITY

- Will vehicle accommodate changes in size of beneficiary or equipment, or foreseeable changes in medical conditions?
- Driver's ability to comfortably use the vehicle day in and day out
- Are certain features necessary given weather or terrain?

CONVERSION

- Duty to locate and recover vehicle
- Pay attention to state laws regarding vehicle repossession

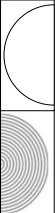
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QUESTIONS/COMMENTS



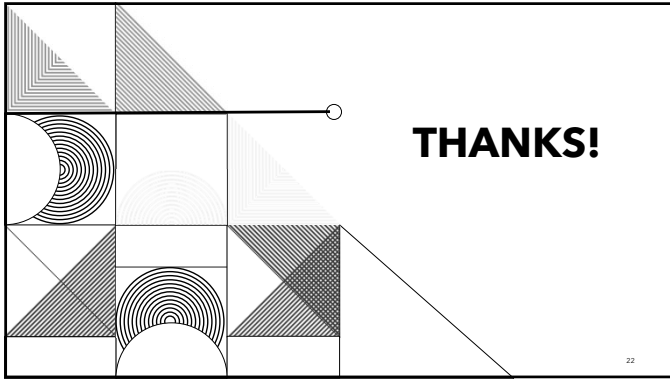
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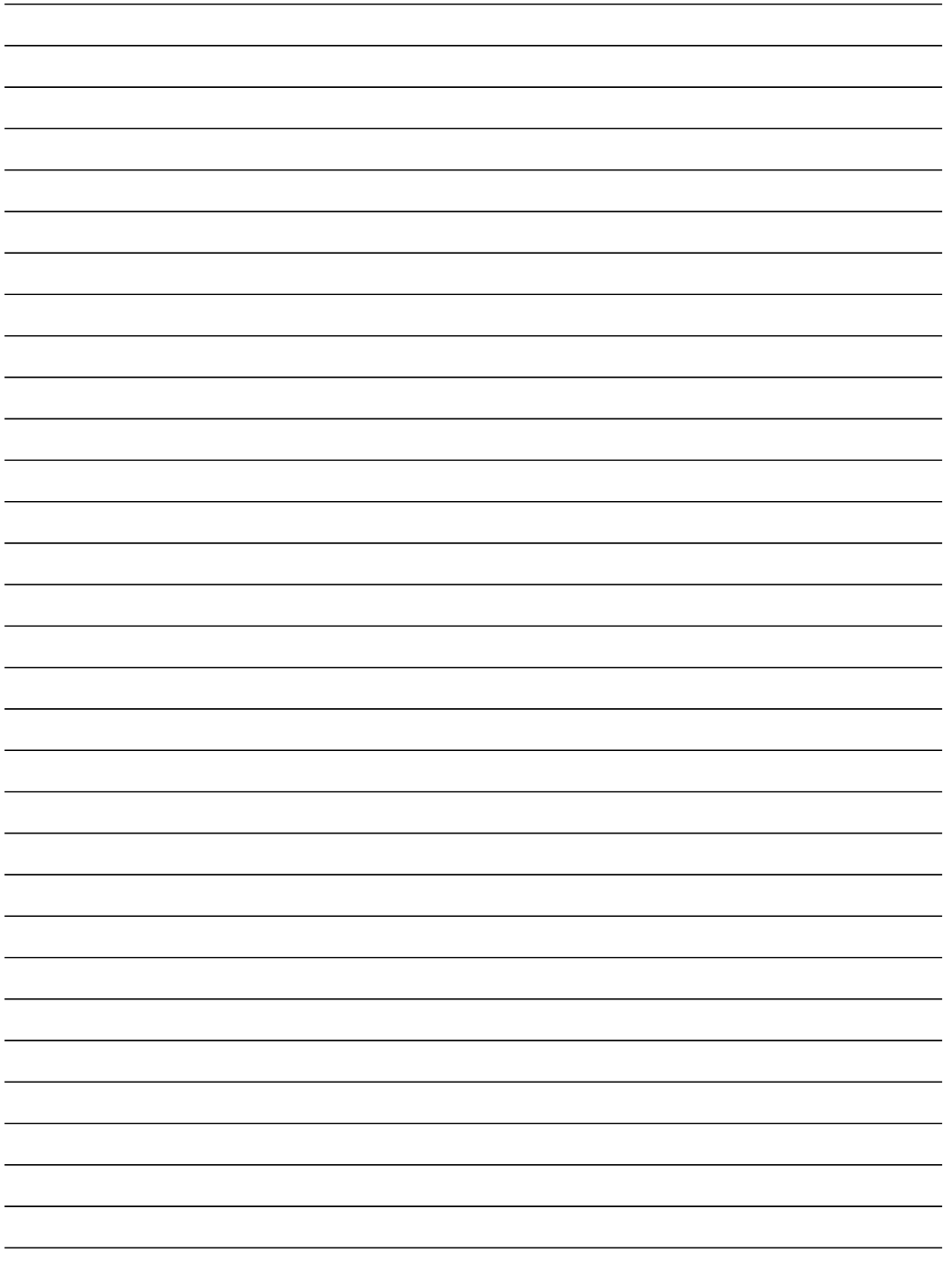
CONCLUSION

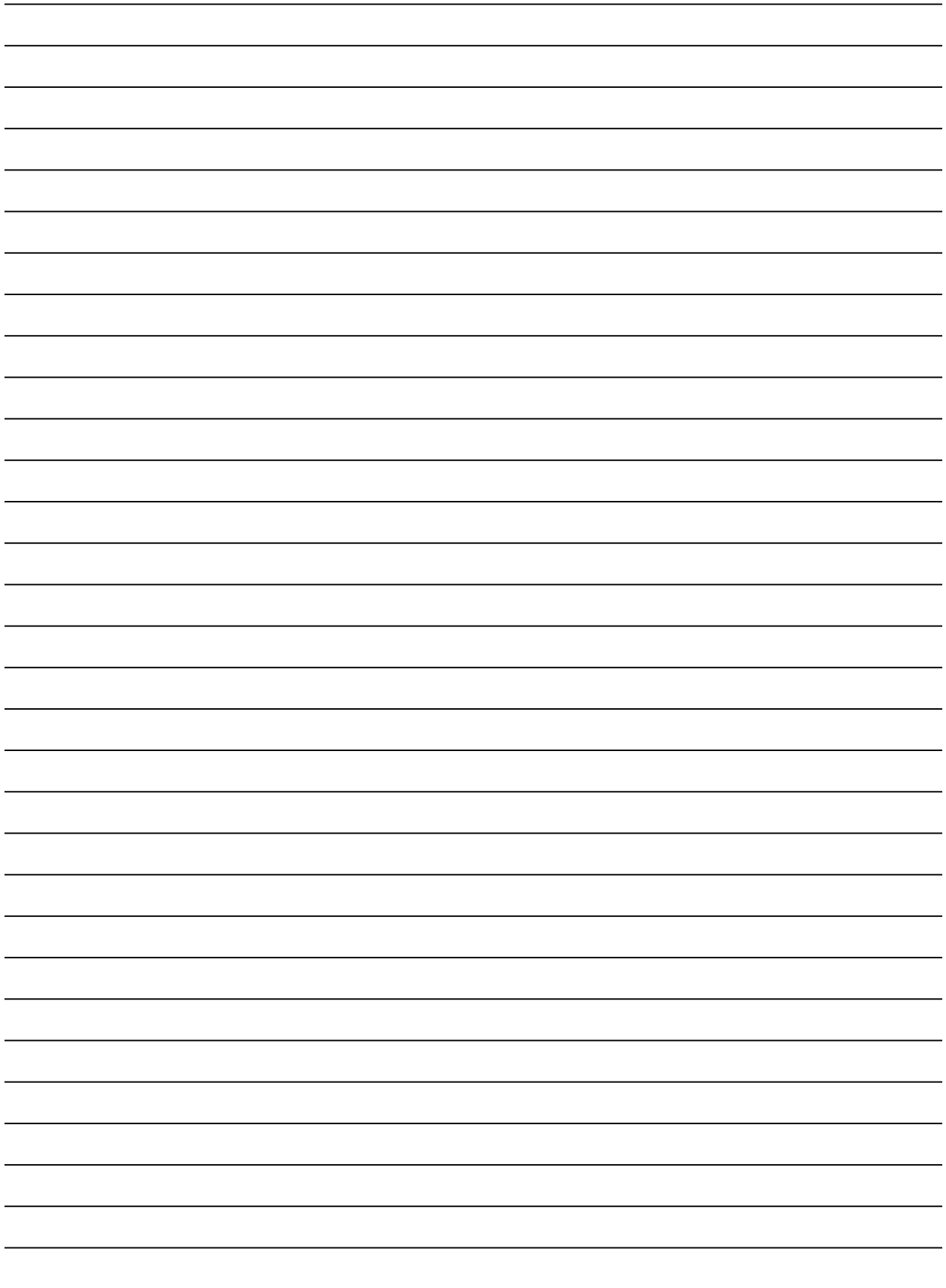
 <p style="font-size: small;">A trustee's willingness to consider home and vehicle purchases is a significant selling point</p>	 <p style="font-size: small;">A trustee cannot simply rely on beneficiary's judgment or plans but itself must evaluate if purchase will work</p>	 <p style="font-size: small;">Weigh purchase decisions carefully</p>
<p style="font-size: small;">These purchases convey significant benefits to beneficiaries</p>	<p style="font-size: small;">Constructive working relationships with beneficiaries are a must</p>	<p style="font-size: small;">Address issues proactively and communicate clearly and consistently</p>

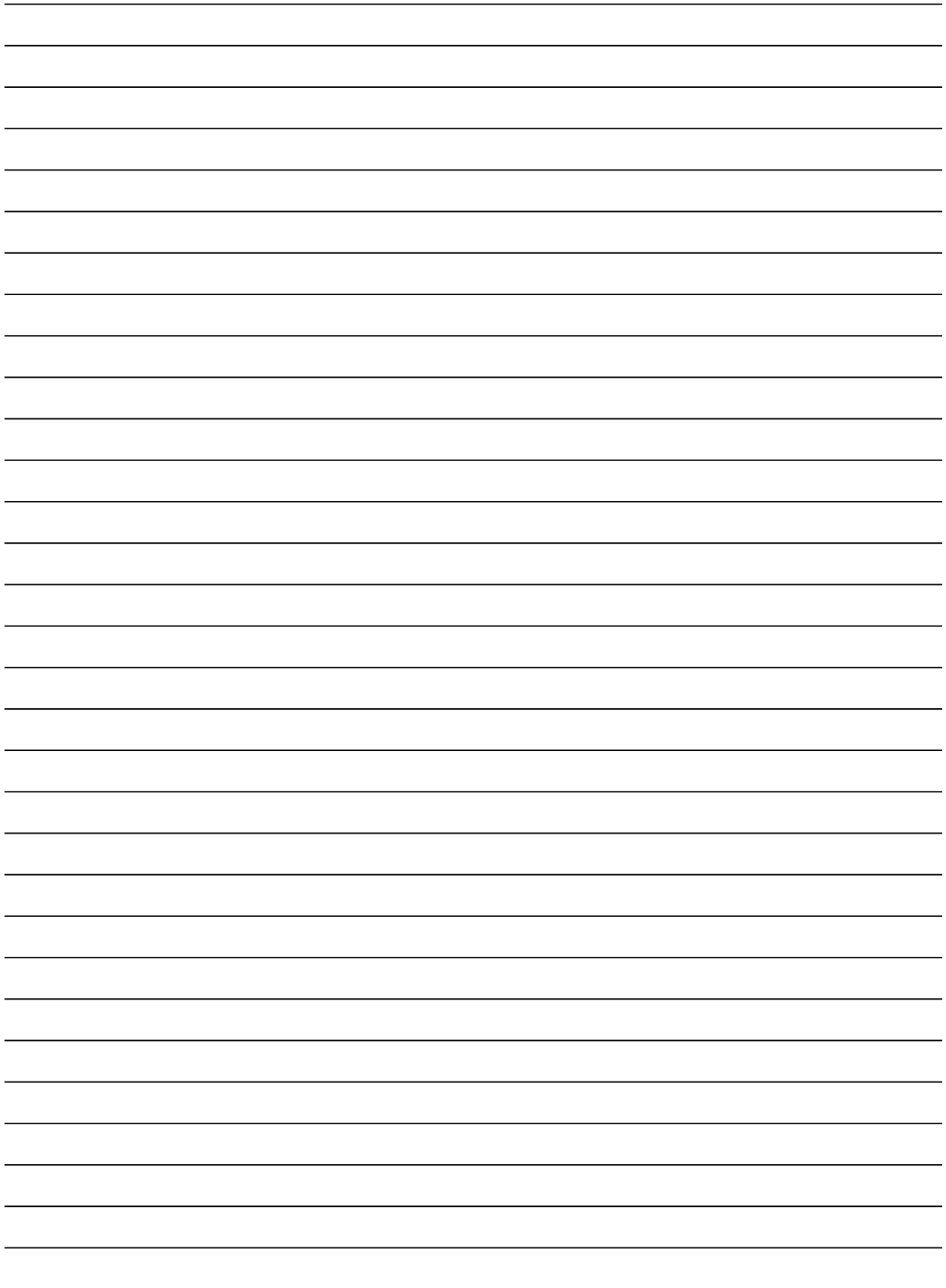
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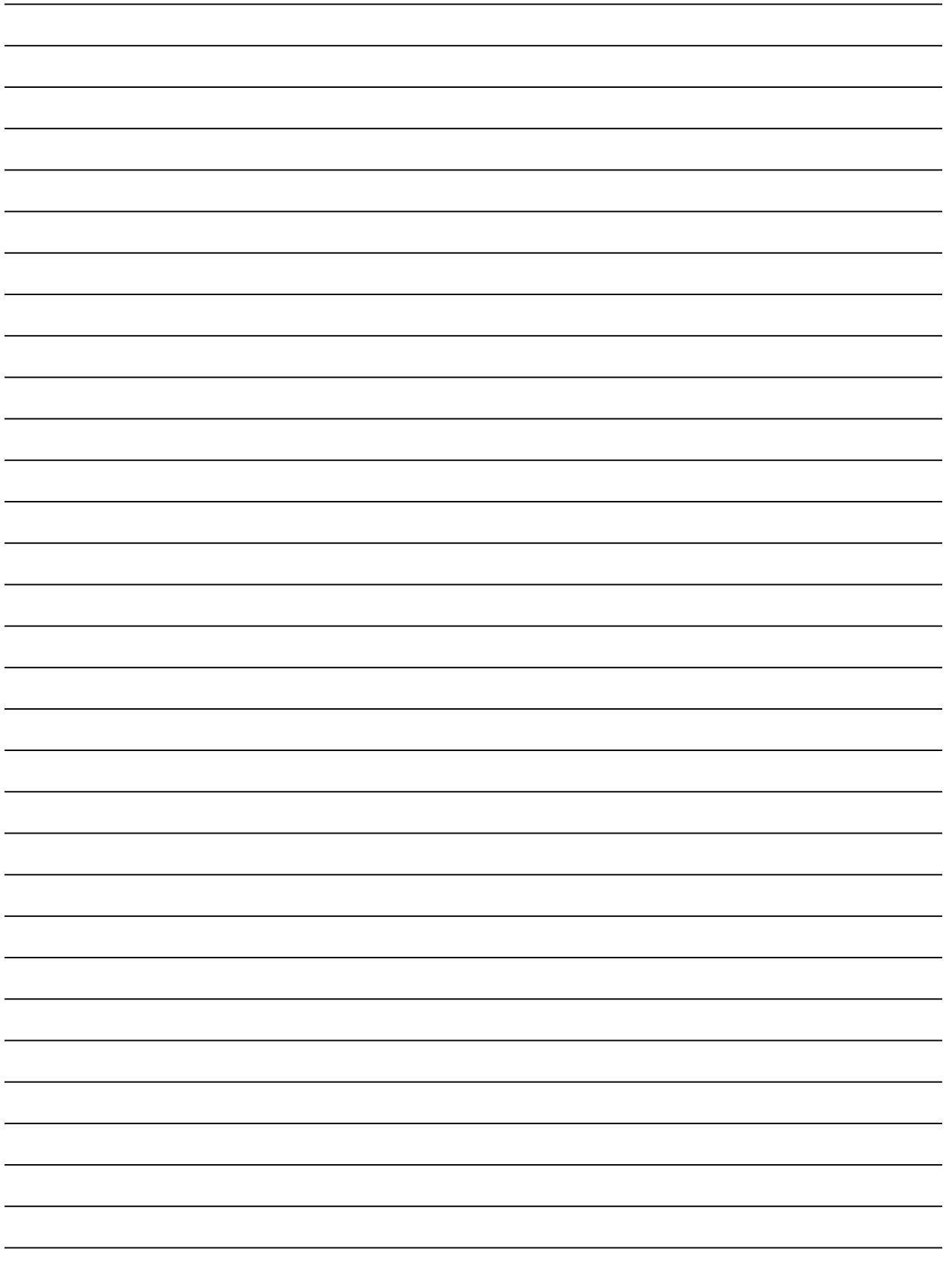


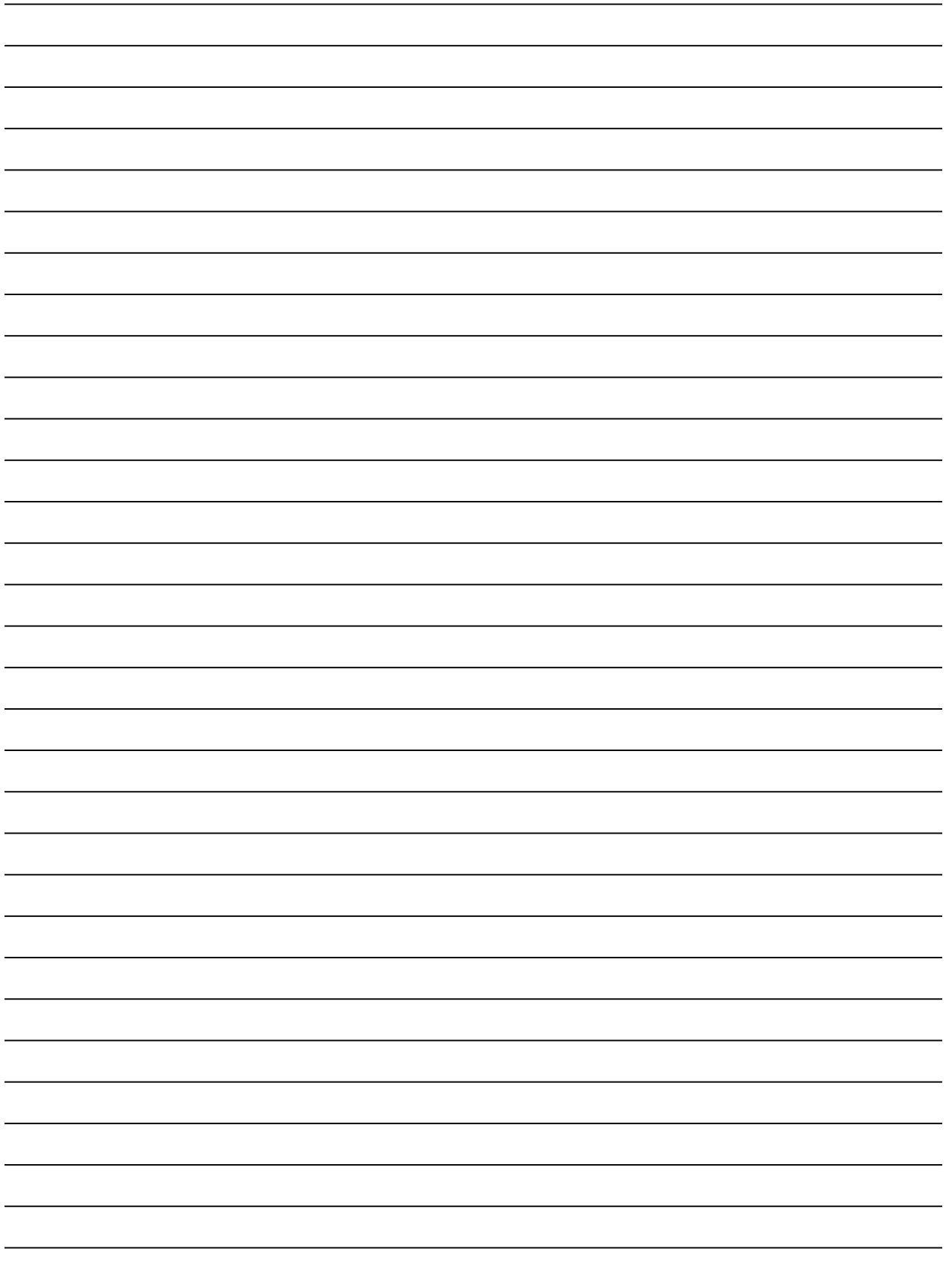
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**Wednesday
October 18, 2023**


Working with Beneficiaries with Mental Illness



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Working with Beneficiaries with Mental Illness

Heather Fisher, CLPF *Stephen W. Dale, LL.M*
California Licensed Professional Fiduciary Trustee - Golden State Pooled Trust

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Working with Beneficiaries with Mental Illness

- This session will review methods and challenges when working with beneficiaries with a mental illness. We will look closely at the different types of cases that present themselves for both the attorney and the fiduciary such as special needs trusts, conservatorship of the person, and case management.
- We will review the intake process, common diagnoses, and treatment planning. Working with this population often poses a unique challenge for the attorney, trustee, clinician and family so we will address ways to handle some of the difficult issues.

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Imagine

- You have a daughter named Kathy who has schizophrenia.
- Kathy is likely to need some level of assistance for the rest of her life.
- You set up a 3rd party account with your local pooled trust to provide for her needs in the event of your incapacity or death.
- Kathy is otherwise healthy and is likely to live 70 years or longer.



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The Challenge


- ▶ Benefit laws may will change
- ▶ Social service systems will change
- ▶ Her condition may change
- ▶ Her advocacy system may change
- ▶ Attitudes may change
- ▶ The amount of resources she needs may change



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Deinstitutionalization

- **For many persons with mental illness, deinstitutionalization, or community-based care, has been shown to improve quality of life for people with long-term mental health problems.**
 - Instead of living in a psychiatric hospital, people with mental illness can live on their own or in supportive housing.
 - Deinstitutionalization can also improve social functioning, stability, and psychiatric symptoms.
- **However, deinstitutionalization has been a failure for some people. Evidence of system failure includes:**
 - Increased homelessness
 - Increased suicide
 - Increased acts of violence
- **Deinstitutionalization was driven by three factors:**
 - The belief that mental hospitals were cruel and inhumane
 - The hope that new antipsychotic medications offered a cure
 - The desire to save money
- The 1963 Community Mental Health Centers Act (CMHCA) restructured how mental health services were provided.

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The Community Mental Health Centers (CMHC) Act of 1963

- The Community Mental Health Centers (CMHC) Act of 1963 restructured how mental health services were provided and who performed those services.
 - The act provided federal subsidies for the construction of community mental health centers.
 - These centers provided community-based care as an alternative to institutionalization.
 - Patients could be treated while working and living at home.
 - The act was intended to decrease the number of institutionalized individuals.



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The Community Mental Health Centers (CMHC) Act of 1963

- The act was intended to be the cornerstone of a radically new policy.
- The 1960s saw major changes in mental health care, including
 - a reduction in hospital beds,
 - the growth of community services, and
 - improved pharmacological and psychological interventions.



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1965 The U.S. Congress establishes Medicaid and Medicare.

- Mentally disabled people living in the community are eligible for benefits but those in psychiatric hospitals are excluded.
- By encouraging patients to be discharged, state legislators could shift the cost of care for mentally ill patients to the federal government.

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1981 President Reagan passes the Omnibus Budget Reconciliation Act.

- This pushes the responsibility of mentally ill patients back to the states.
- The legislation creates block grants for the states, but federal spending on mental illness declines.

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ISSUES REGARDING PUBLIC BENEFITS

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Social Security Definition of Disability

A benefits recipient must be a person under the age of 65 who is not be able to engage in substantial gainful activity (SGA) because of a medically-determinable physical or mental impairment(s) that is expected to last a year or longer or end in death.


- 2023 monthly SGA amount for non-blind individuals is \$1,470.



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Childhood Disability Benefits

- Upon the disability or retirement of the parent, an eligible disabled child will receive an amount equal to 1/2 of the parent's benefit
- Upon the death of the parent, an eligible disabled child will receive an amount equal to 3/4 what the parent's SSA benefit.


CDB
Childhood Disability Benefits



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CMS on Behavioral Health Services


- Medicaid is the single largest payer for mental health services in the United States and is increasingly playing a larger role in the reimbursement of substance use disorder services.
- Individuals with a behavioral health disorder also utilize significant health care services—nearly 12 million visits made to U.S. hospital emergency departments in 2007 involved individuals with a mental disorder, substance abuse problem, or both.

<https://www.medicaid.gov/medicaid/benefits/behavioral-health-services/index.html>

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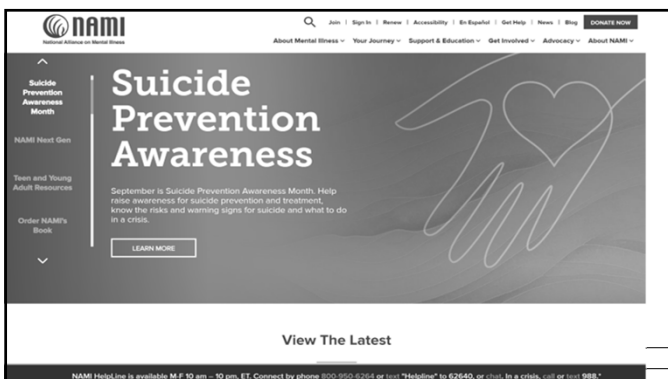


NAMI
NATIONAL ALLIANCE ON MENTAL ILLNESS

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NAMI
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About Mental Illness | Your Journey | Support & Education | Get Involved | Advocacy | About NAMI

Suicide Prevention Awareness Month

NAMI Head Gen
Teen and Young Adult Resources
Order NAMI's Book

Suicide Prevention Awareness


September is Suicide Prevention Awareness Month. Help raise awareness for suicide prevention and treatment. Know the risks and warning signs for suicide and what to do in a crisis.

[LEARN MORE](#)


View The Latest

NAMI HelpLine is available M-F 10 am - 10 pm, ET. Contact by phone 800.950.6264 or text "HelpLine" to 62640, or chat. In a crisis, call or text 988.

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 **How does a person get a gravely disabled status?**


- Gravely disabled by California definition means a person can not provide for their food clothing or shelter. BUT if someone else provides for their food, clothing or shelter they are not considered gravely disabled. Not meeting any one of these three criteria can establish gravely disabled.



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 **How does a person get a gravely disabled status?**

Gravely disabled can be established if the person has


- 1. no place to live safely; they may not come home unless they are under the LPS Conservatorship and have gone through treatment, and/or
- 2. if the person has lost significant weight or is paranoid by food, and/or
- 3. a person creates a health risk by dressing inappropriate for the weather resulting in a health risk or they take their clothes off at inappropriate times or places, can be considered gravely disabled. This is very important in requesting an LPS Conservatorship. In addition, if the person is not compliant with treatment and medication this helps to build a case for the LPS Conservatorship.




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 **How does a person get a gravely disabled status?**


- To prove that a person cannot provide food or clothing is extremely difficult because if they can go to the Salvation Army or a dumpster to acquire clothes, pan handle for money, or find the food kitchens; then they are not considered gravely disabled.



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 **Doe v. Gallinot (C.D. Cal. 1979) 486 F. Supp. 983, aff'd (9th Cir. 1981) 657 F.2d 1017**

- In Doe v. Gallinot the court held that "standards for commitment to mental institutions are constitutional only if they require a finding of dangerousness to others or to self."
- The court added that "[t]he threat of harm to oneself may be through neglect or inability to care for oneself."
- So harm to self is not jumping off the top of a building. It may be that the individual simply lacks the provisional sense to care for themselves due to their mental illness.


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 **Care Court**

- CARE Court connects a person struggling with untreated mental illness - and often also substance use challenges - with a court-ordered Care Plan for up to 24 months.
- Each plan is managed by a care team in the community and can include clinically prescribed, individualized interventions with several supportive services, medication, and a housing plan.
- The client-centered approach also includes a public defender and supporter to help make self-directed care decisions in addition to their full clinical team



CALIFORNIA'S CARE COURT
Community Assessment, Recovery and Empowerment CARE Court is Governor Newsom's new plan to get California in control of the state's and its housing treatment and care.


ACTING EARLY TO GET PEOPLE THE SUPPORT THEY NEED
California's Care Court is a new, voluntary, court-ordered program that provides a coordinated, individualized care plan for people with mental health and substance use challenges. The program is designed to help people get the support they need to live safely and successfully in the community.

SETTING THEM UP WITH AN INDIVIDUALIZED CARE PLAN
The Care Court program is designed to help people get the support they need to live safely and successfully in the community. The program is designed to help people get the support they need to live safely and successfully in the community.

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 **Kendra's Law
New York**


Kendra's Law is a New York State law that allows judges to order people with mental illness to undergo psychiatric treatment. The law, which has been in effect since 1999, is also known as assisted outpatient treatment (AOT).

- Kendra's Law allows courts to order people to stay in treatment for up to a year while living in the community.
- The law applies to people who are unlikely to survive safely in the community without supervision.
- The criteria for AOT are easier to meet than the "imminent dangerousness" standard often required for inpatient commitment.
- Kendra's Law was passed in response to the death of Kendra Webdale.
 - In 1999, a man with schizophrenia who was not taking his medication pushed Webdale in front of a subway train.
 - Webdale was killed. Andrew Goldstein, the man who pushed Webdale, was arrested.

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CARE MANAGEMENT FOR BENEFICIARIES WITH MENTAL ILLNESS

*Heather Fisher, CLPF
California Licensed Professional Fiduciary*

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Introduction – When You’re New to the Case

- It is important to learn as much as you can about the beneficiary as soon as is practical. Talk to family, friends, and of course, the beneficiary. Things to find out:
- **Is he/she stable? Where do they live? Who supports them?**
 - You want to get a sense of how independent the individual is and what kind of support they have immediately available to them.
- **What is the diagnosis? What are the symptoms?**
 - While each mental health diagnosis comes with hallmark symptoms, not every individual suffering from a mental illness experiences each of the symptoms or in the same way as the next person.
- **Is he/she medicated? Do they self medicate? If so, what is the drug of choice?** Self medication is a barrier to rationale, cooperation, and stabilization.
- **Is he/she violent? Are they a danger to themselves or others?**
 - You may need to think about taking certain precautions when visiting this individual and you have to do so in a way that promotes safety but still enable you to build trust.

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Case Management – Working with the Beneficiary

- To help someone with a mental health diagnosis, you must always be mindful of the diagnosis and unique struggles that individual faces.
 - **Be Patient. Be Kind.** It is easy to forget when you have an intelligent, charismatic manic bipolar that he has poor impulse control and reasoning skills. It can be frustrating and often unrewarding, but you must learn to put on the superhuman hat and push down the frustrations and keep trying.
 - **Be Firm. Set Boundaries.** Beneficiaries often have a significant amount of time to come up with ways to manipulate to get what they want. The best thing to do is set boundaries and stick to them.
 - **Be ready to get Lucky. Don't Give up.** You're going to try things that don't work. Then something is going to happen that you didn't plan for that does work. Or the thing that didn't work before suddenly is working now. My favorite saying has always been "Don't get attached to outcome, just do the job." If you don't try because you are afraid it won't work, you may never find the thing that's going to stick.
 - **Gaining Cooperation.** Often, a mentally ill individual will not want to cooperate with your efforts to help them. You must use what have learned to try and figure out what motivates this individual. I'm not saying go out and by them an 8 ball. But figure out what you can do. Don't be afraid to bribe and leverage your way into a positive outcome.

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Working with Friends and Family

- Working with the Family of a mentally ill beneficiary is like a box of chocolates, you never know what you are going to get.
- **Supportive and Cooperative-USE THEM!** Use them as much as you can but nurture them and appreciate them. These individuals become a part of the team that is necessary to help the beneficiary find stability.
- **Disengaged and Disinterested.** Leave them alone. Don't try to force the relationship.
- **Enabling and Inconsistent.** Run for the hills! Get yourself and the beneficiary as far away from this relationship as you can.

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Working with Agencies

- It is vitally important that you familiarize yourself with the various agencies and organizations within your community and on the State and Federal levels. You don't have to be an expert, but you should definitely have one on speed dial.
- **Social Security:**
 - An invaluable resource to those with mental health diagnoses. Famously hard to work with!
 - Do not let your beneficiary navigate the complexities on their own. Most people, Social Security included, do not fully understand Trusts and the Social Security Administration is quick to kick a recipient off benefits and slow to get them reinstated.
 - ISM Short Cuts – When you have a beneficiary waiting for approval who cannot take an ISM reduction, you can "Loan" money from the trust to the beneficiary so as not to leave him destitute while SS makes their decision. These funds DO have to be paid back from any retroactive benefits received but you DO NOT have to charge interest.

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Criminal Justice System:

- This is a double-edged sword.
 - It is often traumatic for a beneficiary to get caught up in the system and can result in a permanent record.
 - However, it is one of the best gateways if not the best into the public mental health system.
- 5150.
 - When an individual is a danger to themselves or others.
 - This process can be used to get an individual into the system without a criminal record.
 - If the individual is, in fact, a danger to themselves or others, do not shy away from the opportunity to tell law enforcement that.
 - This is where teaming with family and friends can be helpful.
 - Coach them on how to talk to law enforcement.

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County Behavioral Health Offices:

- Make friends with the people that work there. It is hard to get on their radar without first going through the Criminal Justice System. Once you do, they are a good resource to have in your rolodex for the next client.
- Resources available for adults and minors. There are very few resources available for persons with a mental health diagnosis, there are even fewer for minors with mental health issues.

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Resources

- **NAMI – National Alliance on Mental Illness**
 - Excellent support for friends and family of loved ones suffering from a mental health diagnosis. Able to join as a practitioner to gain resources and knowledge.
- **CalHOPE**
 - Housing Assistance
 - Services for Veterans and Youth
- **You!**
 - To be a resource you need to collect resources. Keep tabs on every resource representative you talk to, every program you hear someone talk about. You never know when you might need it.

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Working with Beneficiaries with Mental Illness

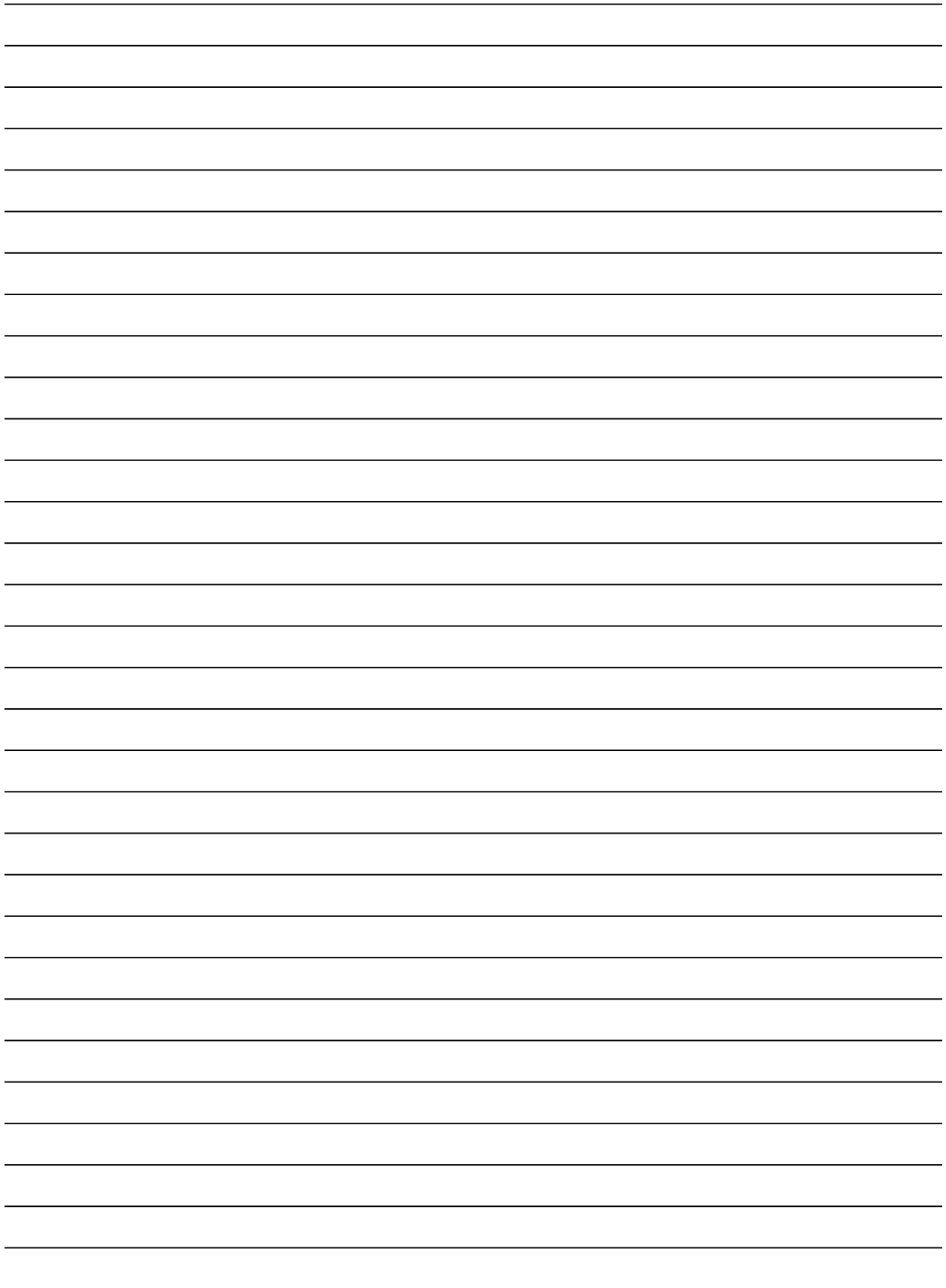
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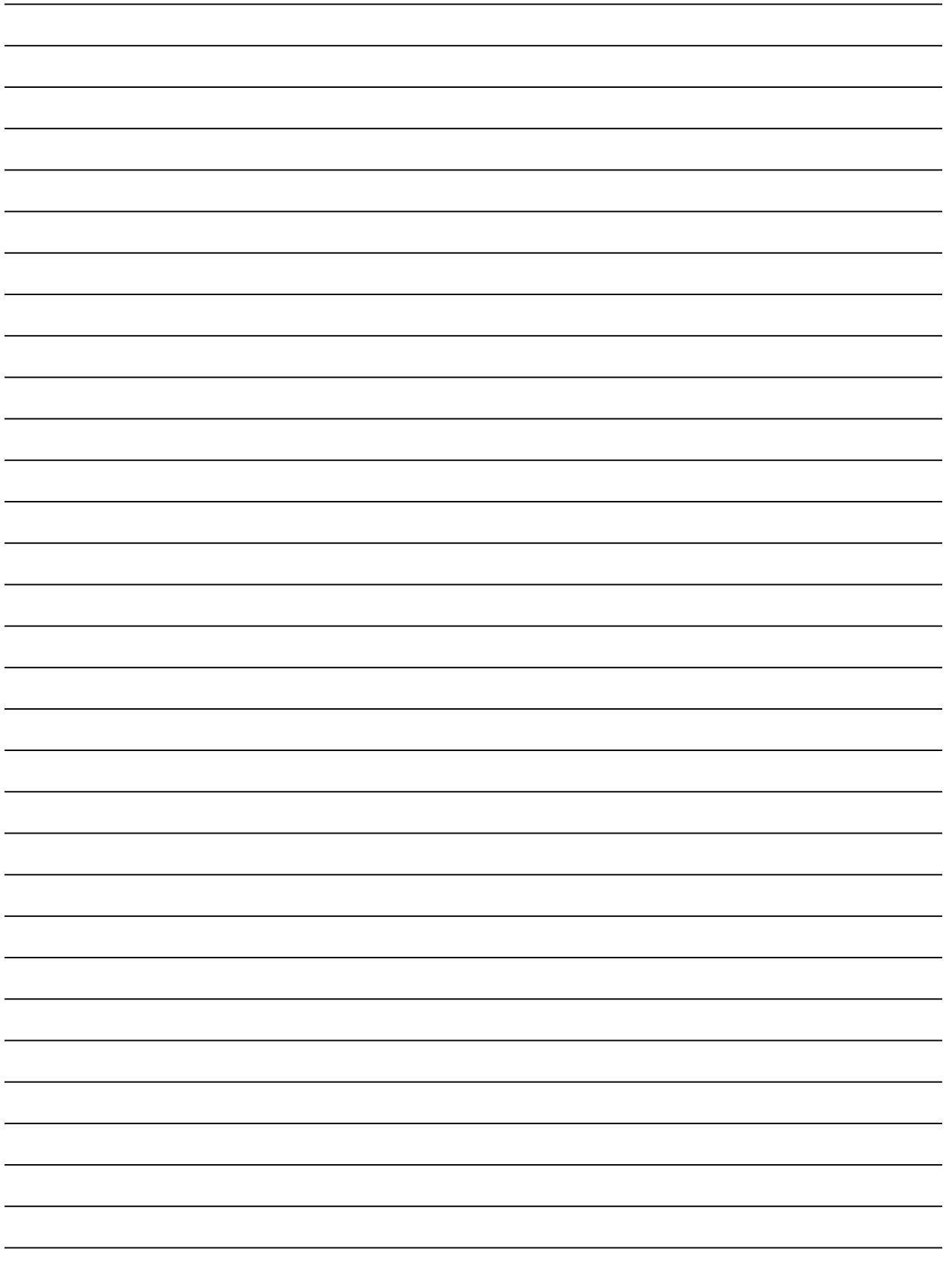
Stephen W. Dale, LL.M
Trustee - Golden State Pooled Trust

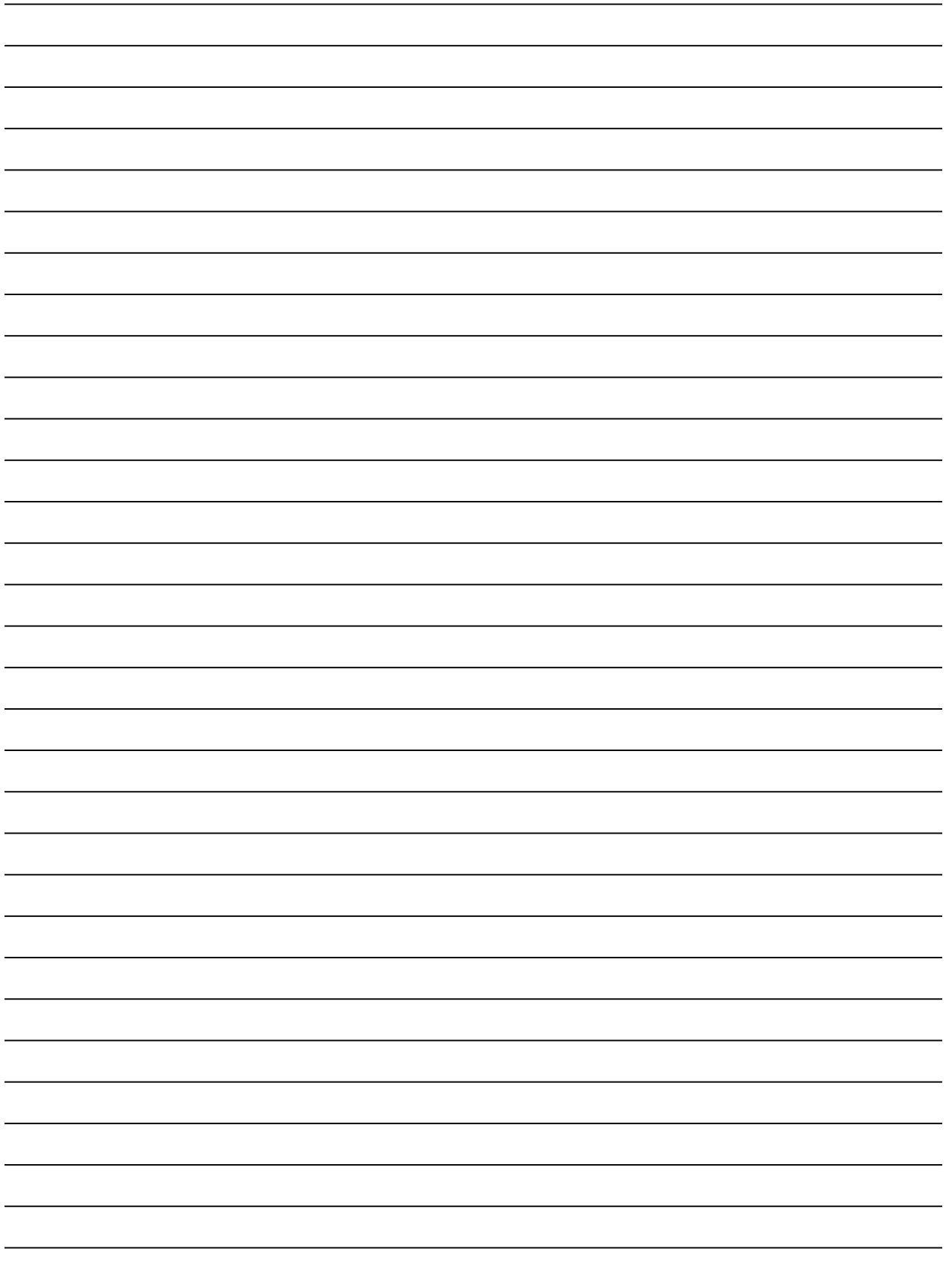
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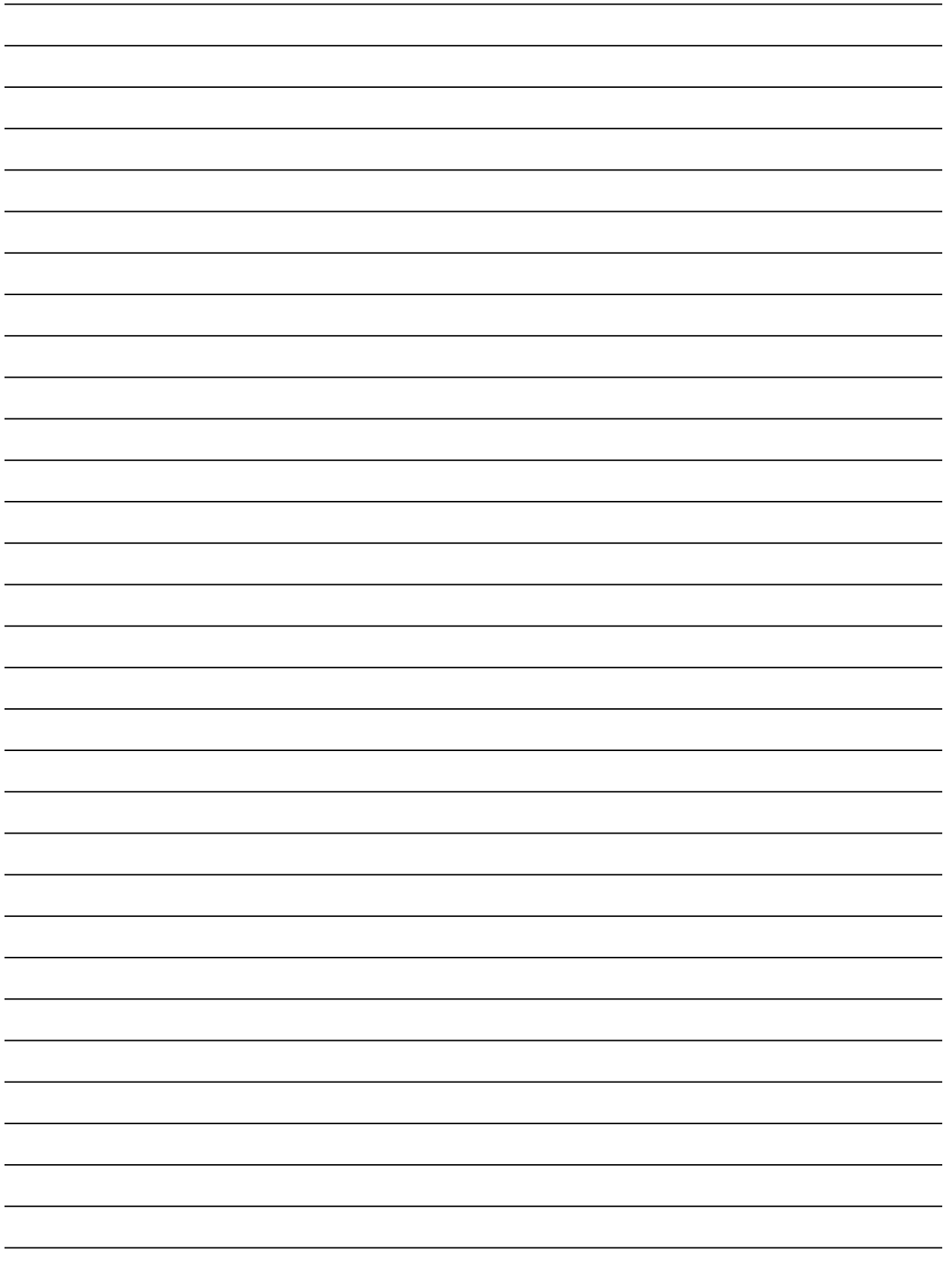
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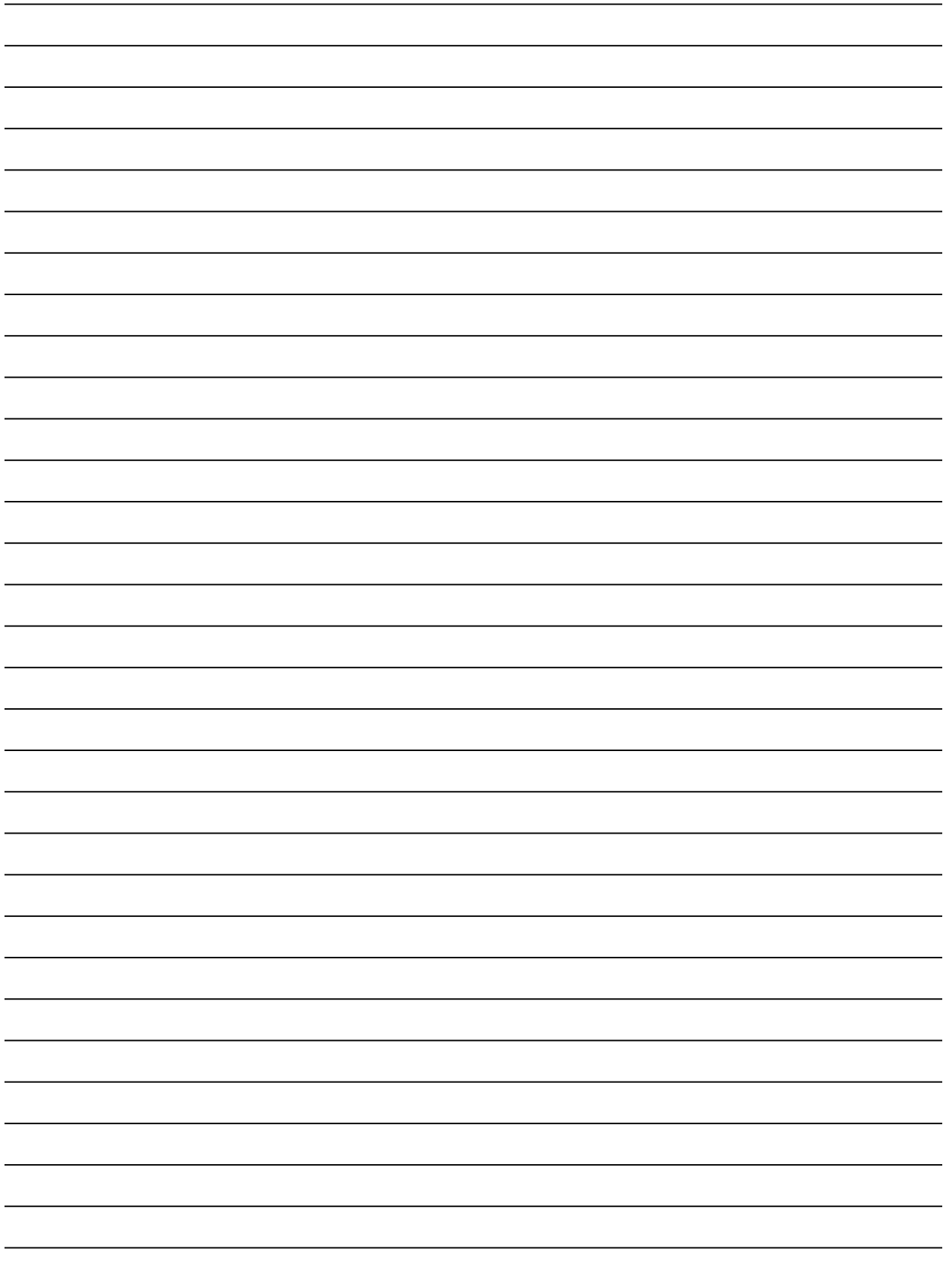
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STETSON LAW

Pooled Trusts Intensive

**Wednesday
October 18, 2023**

Course-Correcting the Complex Beneficiary



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Access and Justice For All®

COURSE-CORRECTING THE COMPLEX BENEFICIARY

PRESENTED BY
YOLANDA MAZYCK, CEO



1

PRESENTATION DESCRIPTION

We all agree that serving as fiduciaries can be challenging; however, serving as a fiduciary for a beneficiary with co-occurring disorders may sometimes feel insurmountable, often leaving our teams frustrated and defeated.

This presentation will discuss basic course-correcting options specific to the manifested behaviors we consistently engage in our practices that may reduce staff burn-out and enhance beneficiary/trustee relations.

2

LET'S START WITH THE BASICS

**What is a
Fiduciary?**

• A fiduciary is someone who manages money or property for someone else.

Meaning?

• Fiduciary decisions must ALWAYS be in the best interest of the beneficiary.

Why?

• The fiduciary shall never self-serve

3

WHAT ABOUT THE SPECIAL NEEDS FIDUCIARY?

- Same definition plus
 - We must have knowledge of the disability
 - How it impacts the beneficiaries'
 - Decision-making
 - Mobility
 - Personal Engagement
 - Knowledge of their benefits
 - What the benefits are intended to cover
 - learning about the gaps in needed and desired services
 - Knowledge of their support network
 - Discovering how the trust can enhance their lives

4

UNDERSTANDING THE PERSON'S DISABILITY

1	2	3
SECURE THE DIAGNOSIS AND DO YOUR RESEARCH	LEARN MORE FROM THE BENEFICIARY AND THEIR SUPPORT NETWORK	BE OKAY ASKING THE DIFFICULT QUESTIONS

5

SO, YOU UNDERSTAND THE DIAGNOSIS. NOW WHAT?

- Develop a plan with the beneficiary and involve their support network.
Secure information about:
 - Their benefits and what they cover
 - Any gaps in services and goods
 - Any life enhancing needs and wants
- Provide clear guidelines for engagement
 - Follow your procedures, but consider the diagnosis and possible associated behaviors if they serve as their own representative
 - To what degree will your team engage
 - How often
 - Telephone, email, text, virtual, in person

6

BE SURE TO SHARE WHAT THE TRUST EXPECTS FROM THE BENEFICIARY AND/OR THEIR SUPPORT PERSON

- CIVIL and RESPECTFUL COMMUNICATIONS
 - FOLLOW THE 'SOLE BENEFIT' RULE
 - FOLLOW PROTOCOLS WHEN MAKING REQUESTS
 - PROVIDE ACCURATE INFORMATION
- NOTIFICATION WHEN THERE IS POLICE OR EMERGENCY SERVICE INVOLVEMENT
- NOTIFY TRUST WHEN THERE ARE CHANGES TO:
 - BENEFITS
 - AND BEFORE SUBMITTING RECERTIFICATION
 - RESIDENCE/ADDRESS
 - TELEPHONE NUMBER

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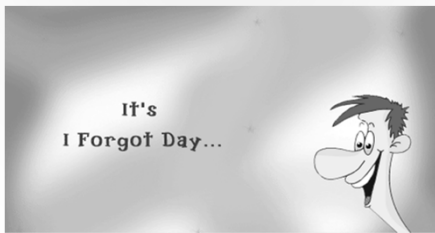
SO...

- You are clear on your role as fiduciary
- You understand the beneficiary's diagnosis
- You have asked the hard questions
- You worked with the beneficiary and/or their support network to develop the plan
- You have made clear your beneficiary expectations as they engage the trust.
- You have provided them with the written plan and expectations.

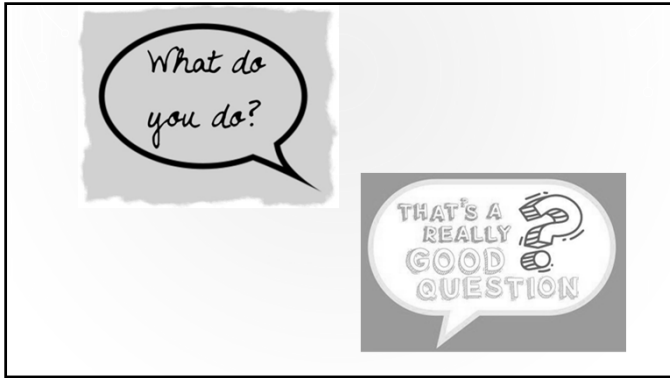
TIME TO IMPLEMENT AND ENGAGE

8

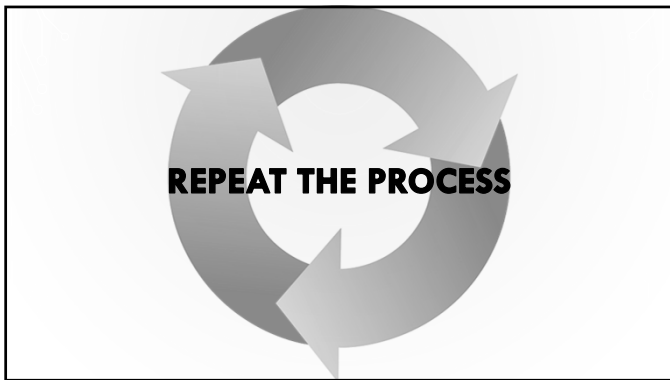
**AND...
The beneficiary or their representative forgot EVERYTHING.**



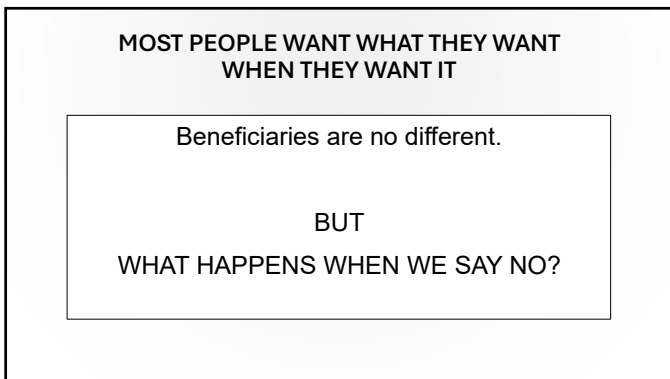
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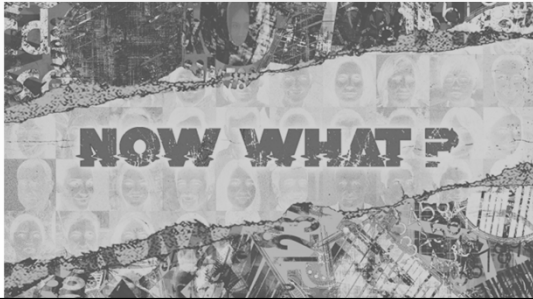
HOW IS THE 'NO' COMMUNICATED?

- IS IT VERBAL, WRITTEN OR BOTH?
- DO YOU PROVIDE A CLEAR EXPLANATION?
- DO YOU GIVE ALTERNATIVES?
 - WE CAN'T DO _____, BUT WE CAN DO _____
 - WE CAN'T DO IT THIS MONTH/QUARTER/YEAR; BUT WE CAN ADD IT TO YOUR PLAN FOR FUTURE CONSIDERATION.

THEY ARE STILL NOT SATISFIED

13

NEGATIVE BEHAVIORS MANIFEST



14

1st consider the diagnosis if applicable...

THIS SHIP MAY HAVE SAILED!

The beneficiary is beyond this stage. Their diagnosis has little to no relevance once they begin to manifest the negative behaviors.

AT THIS POINT

**PROTECT YOUR STAFF
AND
THE BENEFICIARIES' ACCOUNT**

15

HOW DO YOU PROTECT/SUPPORT STAFF?

- Have two or more staff meet with the beneficiary to address their behavior
- Request that the beneficiary's support network to attend if applicable
- Train and empower staff to manage the situation, following-up with them to make sure they are ok

16

**MORE ON
HOW DO YOU PROTECT/SUPPORT STAFF?**

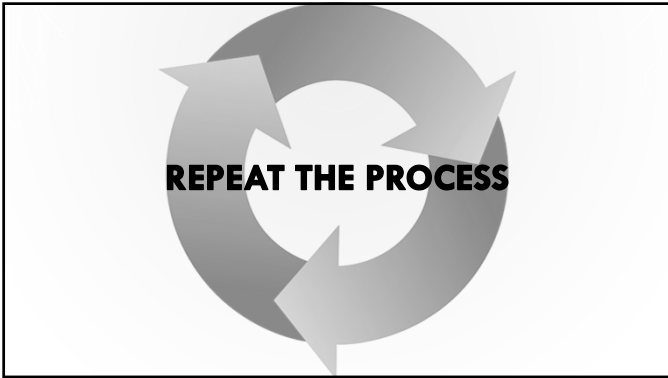
- At the meeting
 - Make sure the beneficiary understands their behavior it is unacceptable and share why
 - If they are responsive, then explain why their request was denied or delayed
 - Be clear, limit word usage, have documentation back-up
 - Discuss next steps
 - If they are not responsive and the negative behavior continues
 - Follow your protocols
 - Let them know the meeting will end if the behavior continues
 - End the meeting if necessary
 - Call security if in-person and needed
 - Call police if threats of violence are made
 - Complete an incident report – a Bar Notice may be considered

17

HOW TO PROTECT THE ACCOUNT

- Provide written notice summarizing the meeting and conclusions
- Limit their account access—consider making disbursements for needs-related expenses only
 - Rent & utilities—if applicable, phone, internet, medication, etc.
 - Provide a timeline and re-evaluate
 - Reiterate the expected beneficiary behavior when engaging the trust
- Mail and email (if available), copy support person and attendees

18



19

SO, YOU UNDERSTAND THE DIAGNOSIS. NOW WHAT?

- Develop a plan with the beneficiary and involve their support network. Secure information about:
 - Their benefits and what they cover
 - Any gaps in services and goods
 - Any life enhancing needs and wants
- Provide clear guidelines for engagement
 - Follow your procedures, but consider the diagnosis and possible associated behaviors if they serve as their own representative
 - To what degree will your team engage
 - How often
 - Telephone, email, text, virtual, in person

20

BE SURE TO SHARE WHAT THE TRUST EXPECTS FROM THE BENEFICIARY AND/OR THEIR SUPPORT PERSON

- CIVIL and RESPECTFUL COMMUNICATIONS
- FOLLOW THE 'SOLE BENEFIT' RULE
- FOLLOW PROTOCOLS WHEN MAKING REQUESTS
- PROVIDE ACCURATE INFORMATION
- NOTIFY TRUST WHEN THERE ARE CHANGES TO:
 - BENEFITS
 - AND BEFORE SUBMITTING RECERTIFICATION
 - RESIDENCE/ADDRESS
 - TELEPHONE NUMBER

NOTIFICATION WHEN THERE IS POLICE OR EMERGENCY SERVICE INVOLVEMENT

21

WHEN ALL FAILS, YOU MAY HAVE TO CONSIDER



OR



22

IN SUMMARY

- Serving as fiduciary and special needs trust management is challenging.
- Behaviors can often escalate quickly with the population served.
- An understanding of our role and providing clear expectations for engagement and establishing a relationship with the beneficiary can reduce confusion.
- Ask the difficult questions.
- Create and adhere to protocols when behaviors escalate.

23

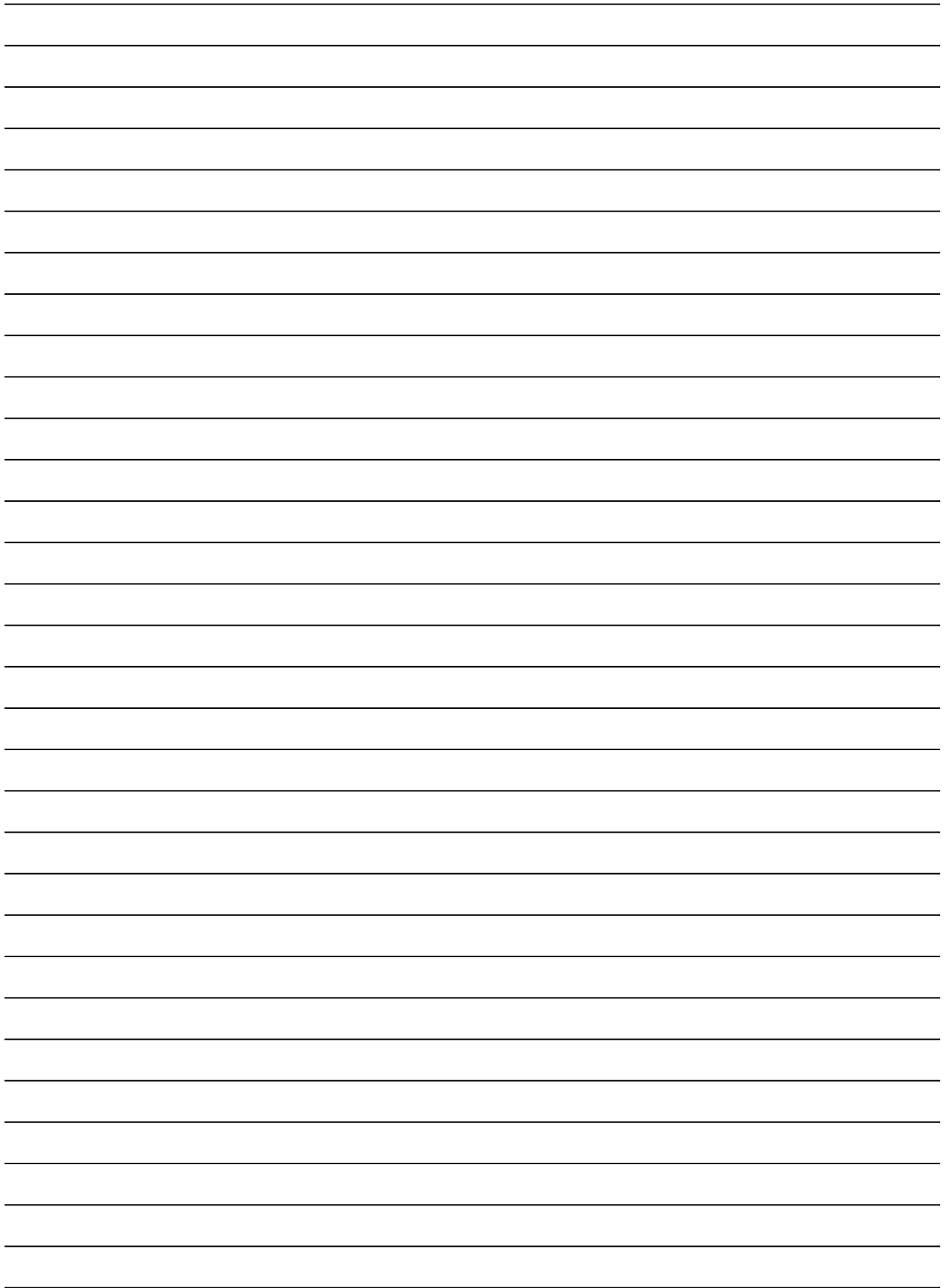


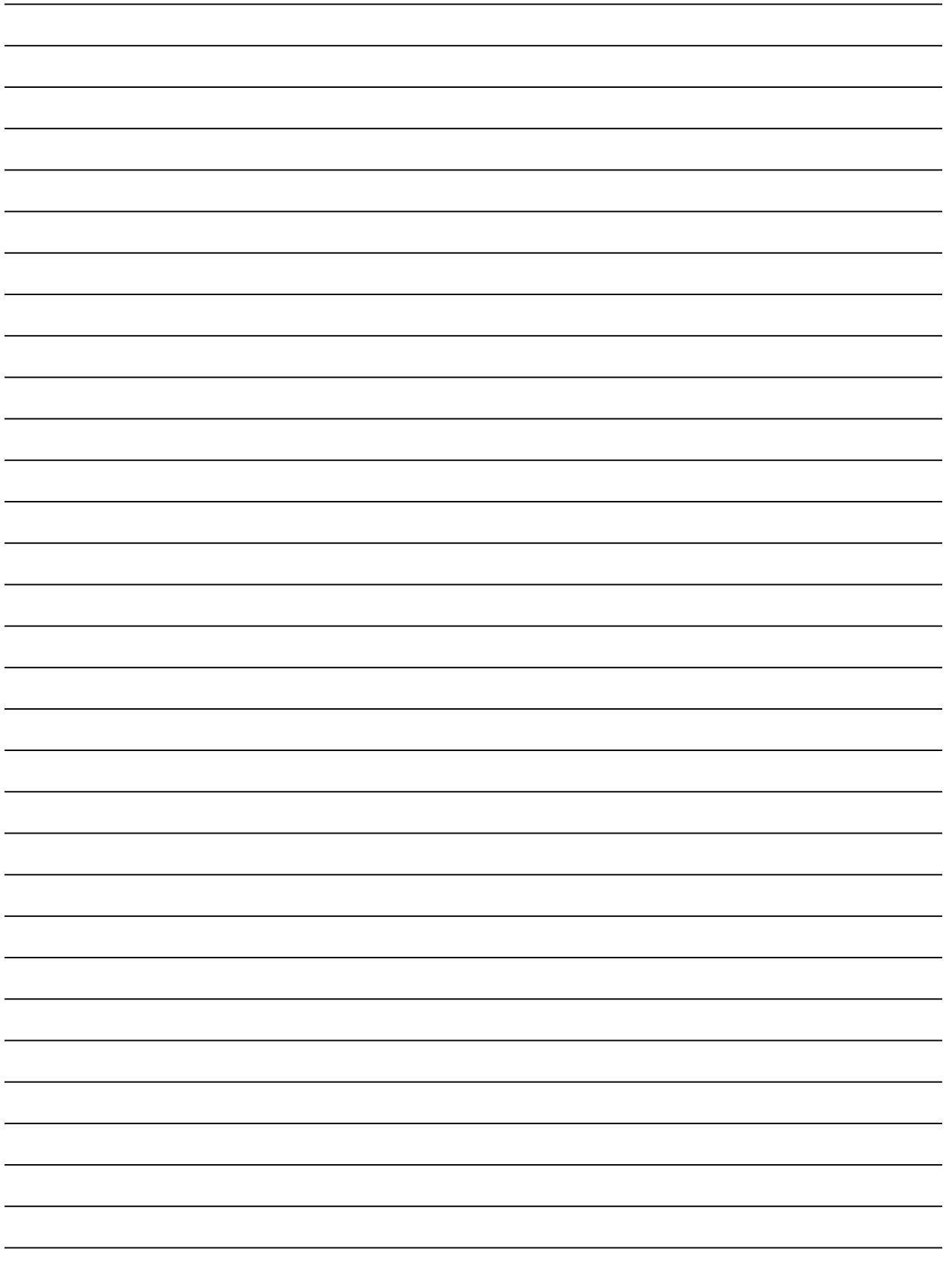
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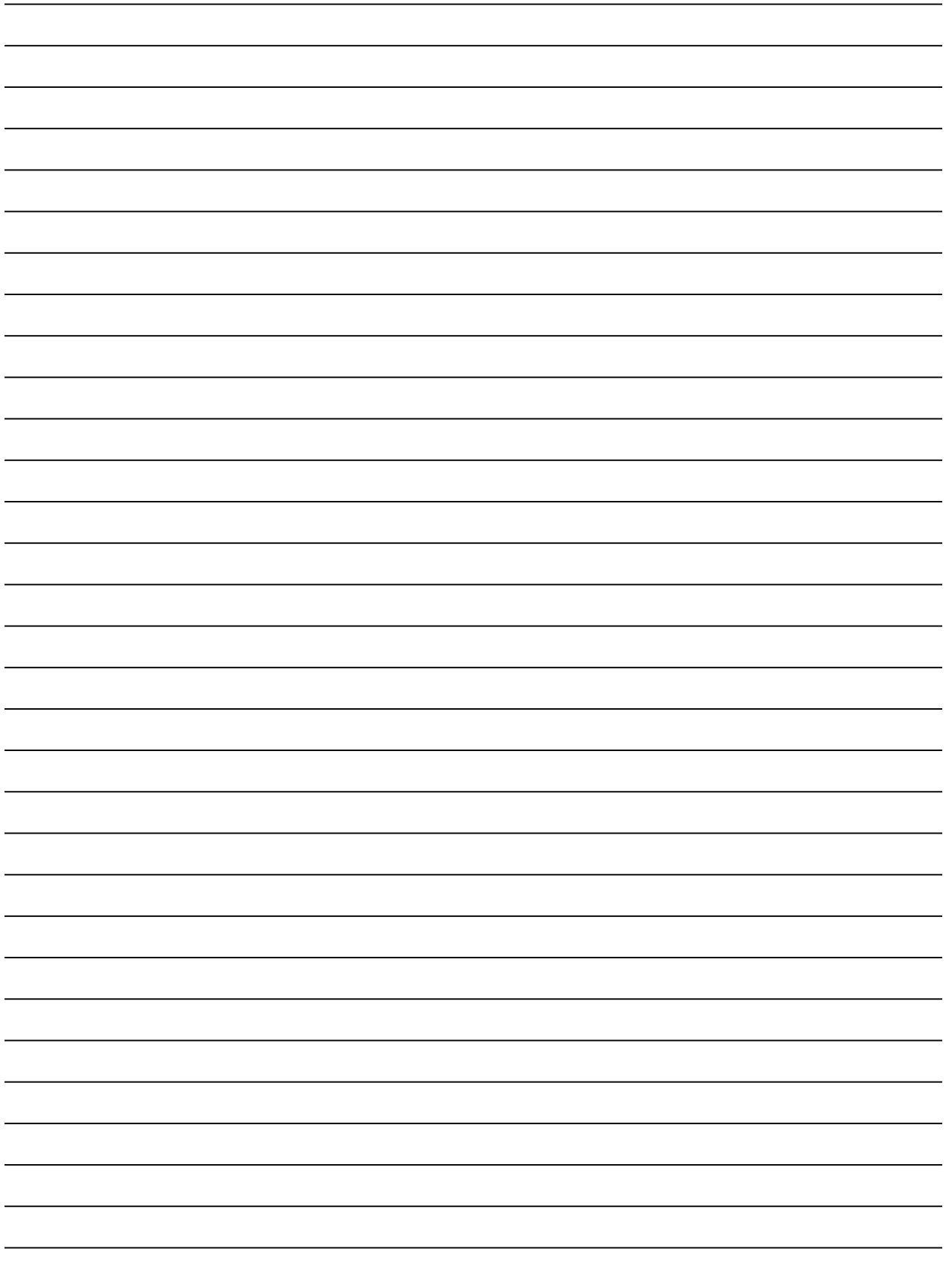
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You*

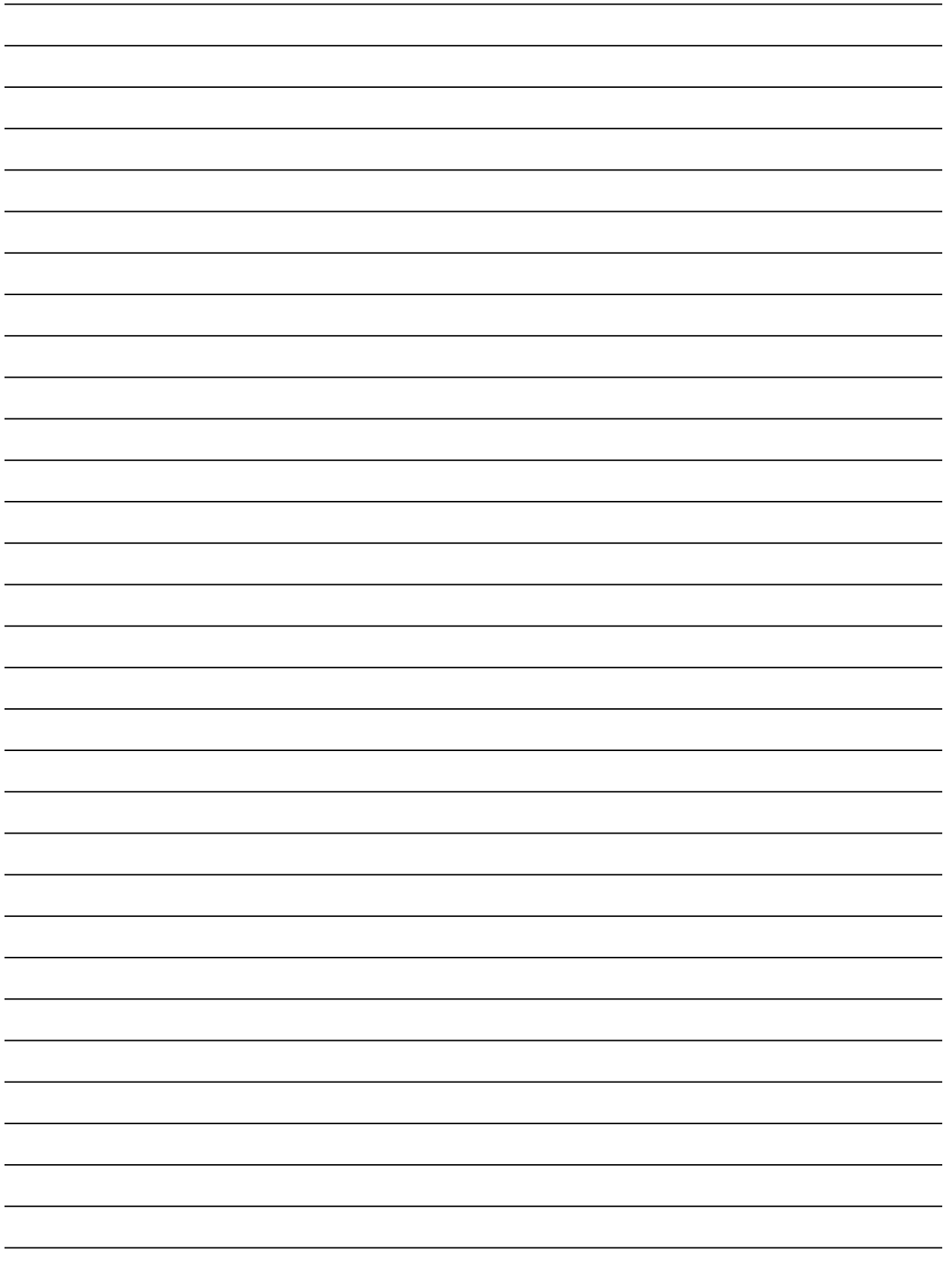
Yolanda Mazyck, CEO
4301 Connecticut Avenue NW
Suite 140
Washington, DC 20008
202-448-1460
ymazyck@shared-horizons.org
<http://www.shared-horizons.org>

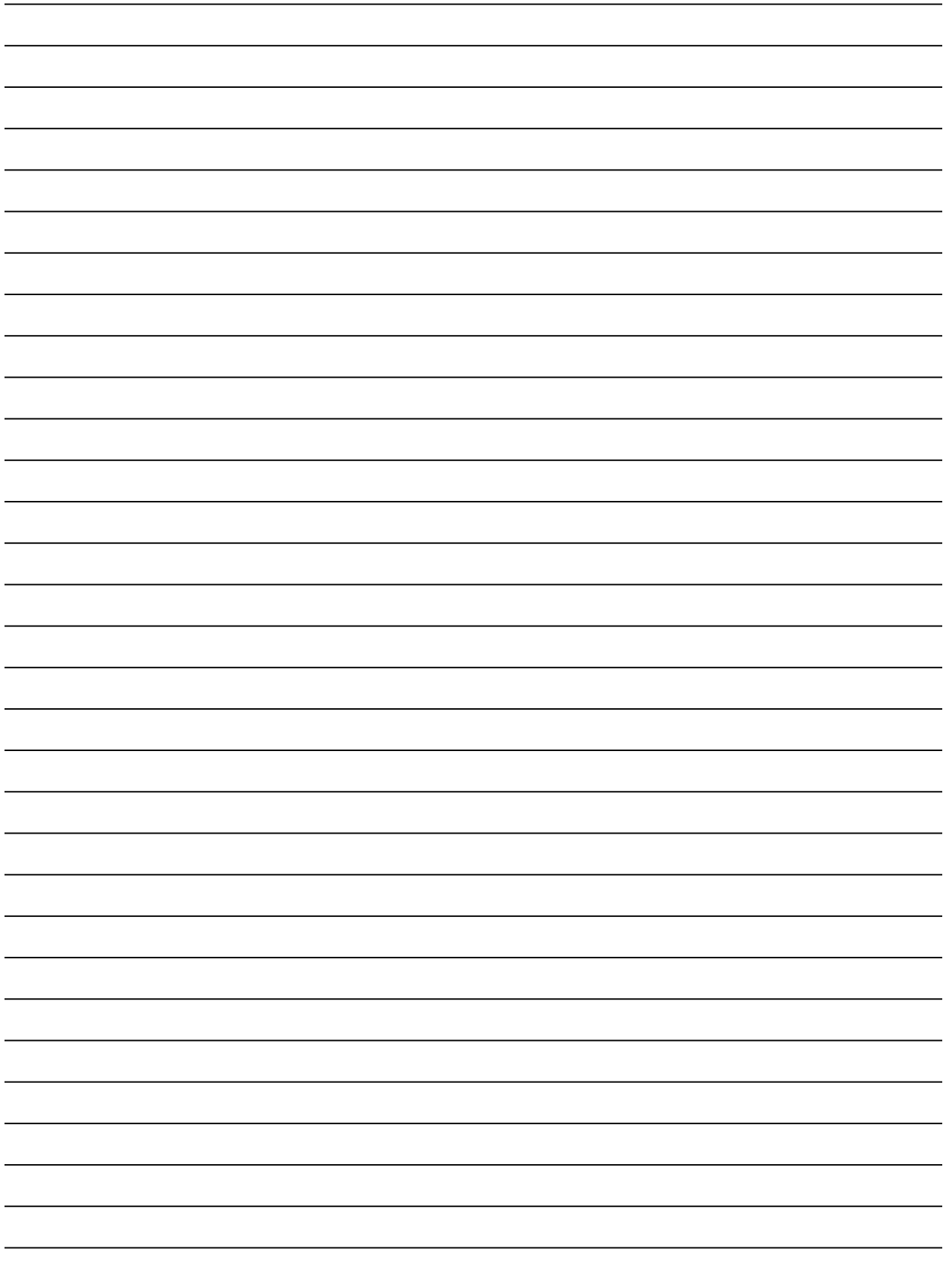














STETSON LAW

Pooled Trusts Intensive

Wednesday
October 18, 2023

Understanding Other “Languages”: Cross-Position Communication



STETSON
LAW

*Center for
Elder Justice*

Access and Justice For All®

Understanding Other “Languages”: Cross Position Communication

Tools, Resources and Examples

Below are some resources and examples that can enhance communication across departments and externally with partners, clients, and stakeholders. Effective communication lies at the heart of every successful enterprise and these tools may be useful in that endeavor.

The goal of this presentation is to equip you with the skills and insights necessary to break down silos within your organization, ensuring that departments collaborate effectively and efficiently.

We hope this presentation and these resources empower you with the knowledge and tools needed to make your communication across your company a success.

The resources and tools include:

Glossary Example – Full toolkit can be found at www.thearcoftexas.org/trust-toolkit

Acronym List

One Page Profile

Glossary

Below are some words that you will come across in this Toolkit:

AUTOMATIC PAYMENT Disbursements made to the same payee, for the same amount and on the same day each month that may be disbursed from a sub-account. *See the DISBURSEMENTS SECTION for more information.*

BENEFICIARY The person for whom the sub-account has been established.

BENEFITS Any assistance provided to the Beneficiary or their family through government agencies or other organizations. Some examples include: SSI, SSDI, SSA, SNAP, all forms of Medicaid, etc.

***MEANS TESTED BENEFITS** Benefits available only to individuals whose income and/or assets are below a certain level. Means testing is used to determine eligibility for Medicaid, SSI and other benefits.

BUDGET An invaluable tool to help prioritize spending and manage money, no matter how much or how little is available. A budget provides a concrete, organized and easily understood breakdown of how much money is contributed and how much is being disbursed. *See the BUDGETING SECTION for more information.*

CONTRIBUTOR A person or entity that wishes to put funds into a Beneficiary's sub-account.

DISBURSEMENT REQUEST FORM This form must be completed, signed and submitted by the Primary Representative each time funds are requested from the sub-account. For instructions on how to complete a Disbursement Request Form, *see the DISBURSEMENTS SECTION*. For a blank copy of the Disbursement Request Form, *see (FORM B)*.

EARNINGS A positive or negative amount reported on the quarterly statement and mailed to the Primary Representative. This amount represents the sub-account's shared portion of the pooled investment's gains and/or losses for the quarter. *See the sample quarterly statement in the SAMPLES SECTION.*

FEES Amounts deducted from a sub-account for any of the following fees: annual maintenance, tax preparation, frequent disbursement request, annual accounting, closing or other fees. *See the FEES SECTION for more information.*

FIDUCIARY DUTY A legal duty to act solely on behalf of another party's interests. These duties include prudent record keeping, safekeeping of assets and loyalty to the best interest of the Beneficiary. The Master Pooled Trust is required to comply with federal and state regulations regarding proper administration of the Trust.

FINANCIAL INSTITUTION A bank or other establishment that conducts financial transactions such as deposits, disbursements and investments.

GRANTOR The person who enrolled the Beneficiary into the Master Pooled Trust. This person is typically the parent, grandparent, guardian, court or Beneficiary themselves.

GRANTOR LETTER An annual statement of a self-funded sub-account's activity including income, deductions and credits mailed to the Primary Representative to be filed with the Beneficiary's tax return.

IRREVOCABLE TRUST Any Trust that CANNOT be modified or terminated. The Grantor, by transferring assets into that Trust, gives up all of his or her rights of ownership to the assets in that Trust. The Master Pooled Trust is an *IRREVOCABLE TRUST*.

JOINER AGREEMENT A legally binding document that a Grantor uses to establish a sub-account within the Master Pooled Trust. This agreement requests information about the Grantor, Beneficiary, Primary Representative(s), benefits, health insurance, pre-paid funeral arrangements and disability.

MASTER TRUST The Arc of Texas has four Master Trusts, legal documents, that govern how each sub-account may be used. Each Beneficiary's sub-account has a corresponding Master Trust (Trust I, II, III or IV). Trusts I & III are established with a third party's money. Trusts II & IV are established with the Beneficiary's OWN money. A Beneficiary's own money may not be mixed with a third party's money!

MEDICAID PAYBACK PROVISION A provision in the Trust document required by federal and state law that entitles Medicaid to be reimbursed for any expenses paid by Medicaid for the Beneficiary during their lifetime. *See the CLOSING SUB-ACCOUNTS SECTION for more information.*

MPT An acronym for Master Pooled Trust.

PARENTAL RESPONSIBILITY Texas law requires that parents care for and support their minor children. This includes payment for clothing, food, shelter and education. See *PARENTAL RESPONSIBILITIES* on page 18 for more information.

PAYEE A person or entity that may be paid for items or services from the sub-account for the benefit of the Beneficiary. This includes the person to whom a check is made payable or to whom a direct deposit is made.

POOLED For the purposes of investment, the money in all of the Master Pooled Trust's sub-accounts is pooled (combined). Each Beneficiary only has access to his or her own sub-account funds. See the *FEES, INVESTMENTS & TAXES SECTION* for more information.

PRIMARY REPRESENTATIVE The person or entity which serves as the main point of contact for the Master Pooled Trust. This is the only person who will be able to request disbursements, update sub-account information, correspond with the Master Pooled Trust and receive quarterly statements.

QUARTERLY STATEMENTS The Primary Representative will receive a statement in the mail on a quarterly basis which outlines all sub-account activity. These are typically sent out at the end of the month following the close of the quarter (April, July, October, January). See page 14 of the *PRIMARY REPRESENTATIVE ROLES & RESPONSIBILITIES SECTION* for more information.

SCHEDULE K-1 (FORM 1041) A tax form mailed to the Primary Representative of a third party Trust (Trust I or III) if the sub-account had a balance during the previous tax year. The Schedule K-1 indicates the sub-account tax identification number, the Beneficiary's Social Security number and the annual amount of income, deduction and credits. The Schedule K-1 should be filed with the Beneficiary's tax return.

SERVICE PROVIDER An unpaid or paid person who helps the Beneficiary with his or her activities of daily living. To establish payment for a service provider, contact the Master Pooled Trust.

SOLE BENEFIT RULE The Social Security Administration requires that any payment from the sub-account must be made for the SOLE BENEFIT of the Beneficiary. This means that the Master Pooled Trust cannot pay for items or services that benefit anyone other than the Beneficiary; however, the Master Pooled Trust can pay the Beneficiary's pro-rata share (e.g. the Beneficiary's portion of furniture for the whole family or Beneficiary's portion of a shared cell phone plan).

SOLE DISCRETION The power or right to decide or act according to one's own judgment, freedom of judgment or choice.

SUB-ACCOUNT The Beneficiary's account within the Master Pooled Trust. Each Beneficiary only has access to his or her own sub-account funds. Each sub-account is identified with a four (4) digit number.

SUB-ACCOUNT NUMBER A four (4) digit number assigned to the sub-account.

TAX PROFESSIONAL A financial expert specially trained in tax law, including Certified Public Accountants (CPAs).

THE ARC OF TEXAS A non-profit entity dually recognized as a 501(c) (3) organization by the Internal Revenue Service. The Arc of Texas' mission is to promote, protect and advocate for the human rights and self-determination of Texans with intellectual and developmental disabilities. The organization serves as the Manager of the Master Pooled Trust. The Master Pooled Trust is a program of The Arc of Texas. *For more information, visit www.thearcoftexas.org/trust.*

TRUSTEE A person or firm that carries the fiduciary responsibility and liability to use Trust assets for a third party according to the provisions of the Trust document.

TRUE LINK CARD A specialized Visa card that is an efficient, secure way for Beneficiaries to pay for items or services with funds from their sub-account while still remaining eligible for benefits. *See TRUE LINK CARDS on page 64 for more information. For the True Link Card Request Form (FORM K) see the FORMS SECTION.*

SAMPLE
ACRONYM
LISTS

Acronym	Full Form
ABLE	Achieving a Better Life Experience
AGI	Adjusted Gross Income
ALJ	Administrative Law Judge
AOB	Assignment of Benefits
BWE	Blind Work Expenses
CMS	Centers for Medicare & Medicaid Services
COLA	Cost-of-Living Adjustment
COLA	Cost-of-Living Adjustment
D4A	Individual Special Needs Trust for Disabled Individuals (d)(4)(A)
D4C	Pooled Special Needs Trust for Disabled Individuals (d)(4)(C)
DDS	Disability Determination Services
DI	Disability Insurance
DSSR	Deeming of Spousal Support
Earnings Statement	Statement showing earnings history and benefits estimates
EIN	Employer Identification Number
FBR	Federal Benefit Rate
FICA	Federal Insurance Contributions Act
FPLS	Federal Parent Locator Service
GPO	Government Pension Offset
HHS	U.S. Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
Income Exclusion	Certain income not counted for SSI purposes
IRS	Internal Revenue Service
IRWE	Impairment-Related Work Expenses
ISM	In-Kind Support and Maintenance
OASDI	Old-Age, Survivors, and Disability Insurance
PASS	Plan to Achieve Self-Support
PIA	Primary Insurance Amount
POMS	Program Operations Manual System
QDE	Qualified Disability Expenses
SNT	Special Needs Trust
SSA	Social Security Administration
SSDI	Social Security Disability Insurance
SSI	Supplemental Security Income
VTR	Vendor to Recipient Ratio
WEP	Windfall Elimination Provision



PARTNERS IN DISABILITY LEADERSHIP

A Program of The Arc of Texas

Common Acronoymys

#	504	Section 504 of the Rehabilitation Act of 1973
A	AAA	Area Agency on Aging
	AAC	Augmentative Alternative Communication
	AAE	Adaptive and Assistive Equipment
	ABA	Applied Behavioral Analysis
	ABLE Act	Achieving a Better Life Experience
	ACA	Affordable Care Act
	ACF	Administration for Children and Families
	ACL	Administration for Community Living
	ADA	Americans with Disabilities Act
	ADD	Administration on Developmental Disabilities
	ADD	Attention Deficit Disorder
	ADHD	Attention Deficit Hyperactivity Disorder
	ADL	Activities of Daily Living
	AEP	Alternative Education Program
	AFN	Access and Functional Needs
	AIDD	Administration on Intellectual and Developmental Disabilities
	ALS	Amyotrophic lateral sclerosis (Lou Gehrig's Disease)
	APS	Adult Protective Services
	ARD	Admission, Review, and Dismissal
	ASD	Autism Spectrum Disorder
ASL	American Sign Language	
AT	Assistive Technology	
AUCD	Association of University Centers on Disabilities	
AYP	Adequate Yearly Progress	
B	BH	Behavioral Health
	BI	Brain Injury
C	CAP	Client Assistance Program
	CART	Communication Access Real Time Translation
	CBA	Community Based Alternatives
	CDC	Centers for Disease Control
	CDD	Center on Disability and Development
	CDS	Consumer Directed Services
	CEU	Continuing Education Unit
	CF	Child Find
	CFC	Community First Choice
	CFIDS	Chronic Fatigue and Immune Dysfunction Syndrome
	CFR	Code of Federal Regulations
	CFS	Chronic Fatigue Syndrome

	CHIP	Children's Health Insurance Programs	
	CIL	Center for Independent Living	
	CLASS	Community Living Assistance and Support Services	
	CMHC	Community Mental Health Centers	
	CMS	Centers for Medicare and Medicaid Services	
	CMS	Consumable Medical Supplies	
	CP	Cerebral Palsy	
	CSHCN	Children with Special Health Care Needs	
	CTE	Career and Technical Education	
	CTS	Captioned Telephone Service	
D	DAEP	Disciplinary Alternative Education Program	
	DBMD	Deaf Blind with Multiple Disabilities	
	DD	Developmental Disabilities	
	DFPS	Department of Family and Protective Services	
	DME	Durable Medical Equipment	
	DOE	Department of Education	
	DOI	District of Innovation	
	DOJ	Department of Justice	
	DOL	Department of Labor	
	DP	Due Process	
	DPOA	Durable Power of Attorney	
	DRA	Disability Related Assistance	
	DRB	Dangerousness Review Board	
	DRTx	Disability Rights Texas	
	DSHS	Department of State Health Services	
	DSRIP	Delivery System Reform Incentive Payment	
	E	EC	Early Childhood
		ECC	Enhanced Community Coordination
ECI		Early Childhood Intervention	
ECSE		Early Childhood Special Education	
ED		Emotional Disturbance	
EHS		Early Head Start	
EL		English Learner	
EOB		Explanation of Benefits	
EPAP		Emergency Prescription Assistance Program	
EPSDT		Early Periodic Screening Diagnosis and Treatment Program	
ERC		Employment Recruitment Coordinator	
ESA		Emotional Support Animal	
ESC		Education Service Center	
ESEA		Elementary and Secondary Education Act	
ESL		English as a Second Language	
ESSA		Every Student Succeeds Act	
F		FAPE	Free Appropriate Public Education
		FAS	Fetal Alcohol Syndrome
	FC	Facilitated Communication	
	FCC	Family Centered Care	
	FCS	Family Cost Share	

	FERPA	Family Educational Rights and Privacy Act
	FFS	Fee for Service
	FHA	Federal Housing Act
	FM	Fibromyalgia
	FMLA	Family Medical Leave Act
	FNSS	Functional Needs Support Services
	FPL	Federal Poverty Level
	FY	Fiscal Year
G	GAL	Guardian Ad Litem
	GCPD	Texas Governor's Committee on People with Disabilities
	GR	General Revenue
H	HCBS	Home and Community Based Services (federal)
	HCS	Home and Community-based Services (state)
	HH	Hard of hearing
	HHS	Health and Human Services (federal)
	HHSC	Texas Health and Human Services Commission
	HI	Hearing Impaired
	HIPPA	Health Insurance Portability and Accountability Act
	HME	Home Medical Equipment
	HMO	Health Maintenance Organization
	HOH	Hard of Hearing
	HS	Head Start
	HUD	Housing and Urban Development (federal)
I	I&R	Information and Referral
	ICF	Intermediate Care Facility
	ICF/ID	Intermediate Care Facility – Individuals with Intellectual Disability
	ICU	Intensive Care Unit
	ID	Intellectual Disability
	IDD	Intellectual and Developmental Disabilities
	IDEA	Individuals with Disabilities Education Act (formerly known as P.L. 94-142 or Education for the Handicapped Act (EHA))
	IDP	Inter-Disciplinary Plan
	IEE	Independent Educational Evaluation
	IEP	Individualized Education Plan
	IFA	Individualized Functional Assessment
	IFSP	Individualized Family Service Plan
	IHFS	In-Home and Family Support
	IHO	Impartial Hearing Officer
	IHP	Individualized Habilitation Plan
	IID	Individuals with Intellectual Disabilities
	IL	Independent Living
	ILC	Independent Living Center
	ILOC	Intermediate Level of Care
	IPP	Individualized Program Plan
	IQ	Intelligence Quotient
	IRWE	Impairment Related Work Expense
	ISP	Individualized Service Plan
	ITP	Individualized Transition Plan

J	JAN	Job Accommodation Network
L	LAR	Legislative Appropriations Request
	LD	Learning Disabilities
	LEA	Local Education Agency
	LEP	Limited English Proficient
	LIDDA	Local Intellectual and Developmental Disability Authority
	LMHA	Local Mental Health Authority
	LOC	Level of Care
	LRE	Least Restrictive Environment
	LTC	Long-Term Care
	LTSS	Long-Term Services and Supports
M	MBI	Medicaid Buy-In
	MC	Managed Care
	MCO	Managed Care Organization
	MCS	Multiple Chemical Sensitivity
	MD	Muscular Dystrophy
	MDCP	Medically Dependent Children Program
	MFE	Multi-Factored Evaluation
	MH	Mental Health
	MHA	Mental Health Authority
	MI	Mentally Ill
	MIDD	Co-occurring Mental Illness and Developmental Disabilities
	MS	Multiple Sclerosis
	MSA	Medical Savings Account
	MUI	Major Unusual Incident
N	NCD	National Council on Disability
	NCLB	No Child Left Behind Act 2001
	NDRN	National Disability Rights Network
	NF	Nursing Facility
	NIDRR	National Institute on Disability and Rehabilitation Research
	NIH	National Institutes of Health
	NOD	National Organization on Disability
	NOFA	Notice of Funds Available
	NP	Nurse Practitioner
O	OCD	Obsessive Compulsive Disorder
	OCR	Office of Civil Rights
	ODPC	Office of Disability Prevention for Children
	OHI	Other Health Impairment
	OSEP	Office of Special Education Programs
	OSERS	Office of Special Education and Rehabilitative Services
	OT	Occupational Therapy
P	P&A	Protection and Advocacy
	PA	Prior Authorization
	PABSS	Protection and Advocacy for Beneficiaries of Social Security
	PAS	Personal Assistance Services
	PASRR	Pre-Admission Screen/Annual Resident Review
	PASS	Plan for Achieving Self-Support

	PBIS	Positive Behavioral Interventions and Supports
	PBMAS	Performance-Based Monitoring Analysis System
	PCA	Personal Care Attendant
	PCN	Primary Care Nurse
	PCP	Person Centered Plan
	PCP	Primary Care Provider
	PCT	Person Centered Thinking
	PDD	Pervasive Developmental Disorder
	PDN	Private Duty Nursing
	PDP	Person-Directed Plan
	PECS	Picture Exchange Communication
	PEIMS	Public Education Information Management System
	POA	Power of Attorney
	PPCD	Preschool Program for Children with Disabilities
	PPO	Preferred Provider Organization
	PT	Physical Therapy
	PTSD	Post Traumatic Stress Disorder
	PWS	Prader Willi Syndrome
Q	QA	Quality Assurance
	QIDP	Qualified Intellectual Disability Professional
R	RFP	Request for Proposal
	RN	Registered Nurse
	ROM	Range of Motion
	RSA	Rehabilitation Services Administration (federal)
	RTC	Residential Treatment Center
	RTI	Response to Intervention
	Rx	Prescription
S	SAMHSA	Substance Abuse and Mental Health Services Administration
	SBOE	State Board of Education
	SCI	Spinal Cord Injury
	SEA	State Education Agency
	SDM	Supported Decision Making
	SED	Seriously Emotionally Disturbed
	SFL	Substantial Functional Limitation
	SFY	State Fiscal Year
	SGA	Substantial Gainful Activity
	SHARS	School Health and Related Services
	SHIP	State Health Insurance Program
	SHL	Supported Home Living
	SIB	Self-Injurious Behavior
	SIB	Sibling
	SIL	Services for Independent Living
	SILC	State Independent Living Council
	SIS	Supports Intensity Scale
	SNF	Skilled Nursing Facility
	SOS	Secretary of State
	SPA	State Plan Amendment

	SSA	Social Security Administration
	SSDI	Social Security Disability Insurance
	SSI	Supplemental Security Income
	SSLC	State Supported Living Center
	ST	Speech Therapy
	SUD	Substance Use Disorder
T	TAC	Texas Administrative Code
	TANF	Temporary Assistance for Needy Families
	TAS	Texas Accessibility Standards
	TBI	Traumatic Brain Injury
	TCDD	Texas Council for Developmental Disabilities
	TCDS	Texas Center on Disability Studies
	TCM	Targeted Case Management
	TDCJ	Texas Department of Criminal Justice
	TDCJ -	Texas Correctional Office on Offenders with medical or mental Impairments
	TDHCA	Texas Department of Housing and Community Affairs
	TEA	Texas Education Agency
	TIC	Trauma Informed Care
	TJJJ	Texas Juvenile Justice Department
	TRS	Telecommunication Relay Services
	TS	Tourette's Syndrome
	TSBVI	Texas School for the Blind and Visually Impaired
	TSD	Texas School for the Deaf
	TST	Transition Support Teams
	TTY	Teletypewriters for Persons with Hearing Impairments
	TWC	Texas Workforce Commission
TWS	Texas Workforce Solutions	
	TWWIA	Ticket to Work and Work Incentives Improvement Act
	TxHML	Texas Home Living
U	UCEDD	University Centers for Excellence in Developmental Disabilities
V	VA	Veterans Affairs
	VAC	Vocational Adjustment Coordinator
	VI	Visually Impaired
	VR	Vocational Rehabilitation
	VRI	Video Remote Interpreter Services
W	WAIS	Wechsler Adult Intelligence Scale
	WE	Work Evaluation
	WIC	Women, Infants, and Children program
	WIOA	Workforce Innovation and Opportunity Act
	WIPA	Work Incentive Planning and Assistance
	WISC	Wechsler Intelligence Scale for Children

ONE PAGE
PROFILE
TEMPLATE

It's ALL About _____

Put your picture here

A few things that are Important TO Me

A few things that are important FOR Me

How YOU can SUPPORT Me

What everyone ADMIRES about Me

Understanding Other "Languages"

Cross-Position Communication

1

	Heidi Flatt, CGMA Family Network on Disabilities
Haley Greer, JD The Arc of Texas Master Pooled Trust	The Arc of Texas MASTER POOLED <i>trust</i>

2

COMMUNICATION CHALLENGES

Discuss with us the daily challenge of communication across departments, positions, and with external parties. Positions across your organization may or may not understand what folks in other positions do, their language or their needs. Based on your position and background your language may not translate easily. Come discover tips, tricks and tools to understand other languages across your organization and communicate effectively.

3



Let's Define Communication

- The process of sharing information, ideas and thoughts between individuals or groups.
- It involves the exchange of messages through various channels such as verbal, written and non-verbal means
- The goal is to ensure that the intended message is accurately understood by the recipient.
- Communication has changed!

4


People we communicate with

External	Partners	Internal
• Attorneys	• Care Managers	• Board
• Agencies	• Outside Partners	• CEO
• Courts	• Families	• Coworkers
	• Interested Parties	• Accounting vs. Programs

5

External

Attorneys
Courts
Agencies
SSA, Medicaid,
Attorney General



This group likely understands higher level technical information.

6

Consider this:	<ul style="list-style-type: none"> • What language are they using? • Who should talk to these folks? <ul style="list-style-type: none"> • <i>Some people shouldn't communicate without having the knowledge and language.</i> • Know what you can share with them. <ul style="list-style-type: none"> • <i>What information can/should/is appropriate for you to share?</i>
-----------------------	--

7

<ul style="list-style-type: none"> • Whose name goes on the communications? <ul style="list-style-type: none"> • who is copied vs. who sends vs. who knows what • Who is handling the follow up communication? • Who is signing the letter?
Other considerations

8

	<h2 style="margin: 0;">Partners</h2> <p style="margin: 0;">This group likely understands the needs and services for individuals with disabilities</p> <ul style="list-style-type: none"> • Families • Interested Parties • Care Managers • Outside Partners <ul style="list-style-type: none"> • Trustee • Retained attorneys
---	---

9

Questions to ask



What is being communicated?



What is their role in relation to your organization?



Who has the knowledge and expertise to answer their questions?



Who should and should not be talking to these folks?

10/6/2023 10

10

This is likely a diverse group of people from diverse backgrounds and experiences.

Internal

**Board
CEO/ED
Coworkers
Accounting vs.
Programs**

11

Considerations

Personalities

- Learn how others communicate and communicate in ways that work for them.
- Personality Tests (DISC, Colors, Myers Brigs, Enneagram)

Understanding Roles

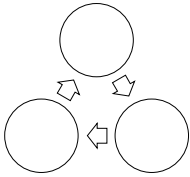
- Job descriptions
- Outlined roles and expectations

Biases

- Assumptions about particular positions and/or personalities

12

- A day in the life
- Overview of individual roles
- Policies and Procedures



Crosstrain, Crosstrain, & Crosstrain Again

13

Tools, Tips & Tricks

14

TOOL: Create a Glossary

- Internal Words
- External Words
- Acronyms

Glossary

Below are some words that you will come across in this Toolkit:

AUTOMATIC PAYMENT Disbursements made to the same payee, for the same amount and on the same day each month that may be disbursed from a sub-account. See the **DISBURSEMENTS SECTION** for more information.

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www.thearcoftexas.org/trust-toolkit

15

<p>What type & when to use them</p> <ul style="list-style-type: none">• Inquiry• Establishment• Closing• Approval• Denial• Condolences• Regular Reports	<p>TOOL: Form or 'Standard' Responses</p>
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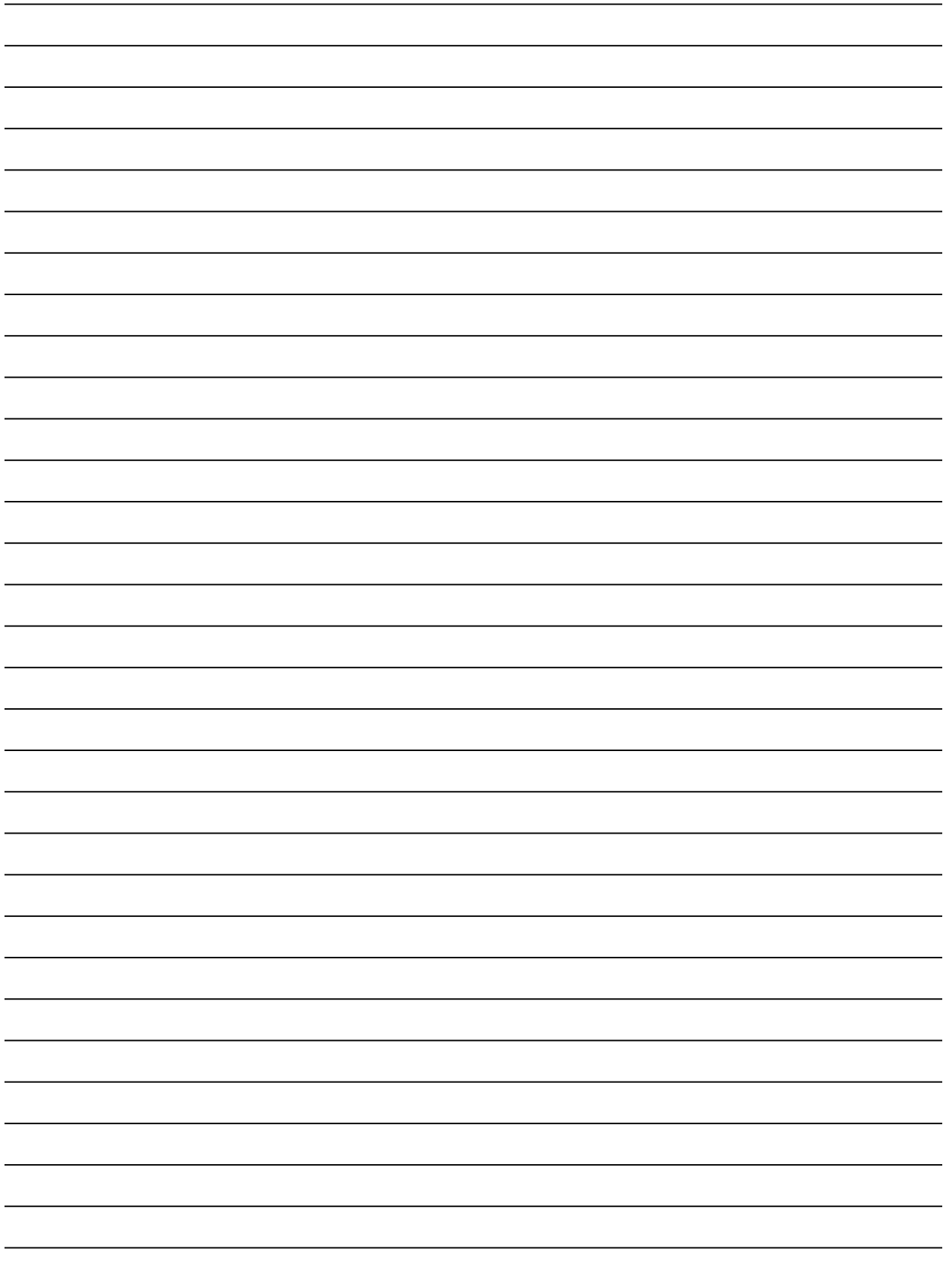
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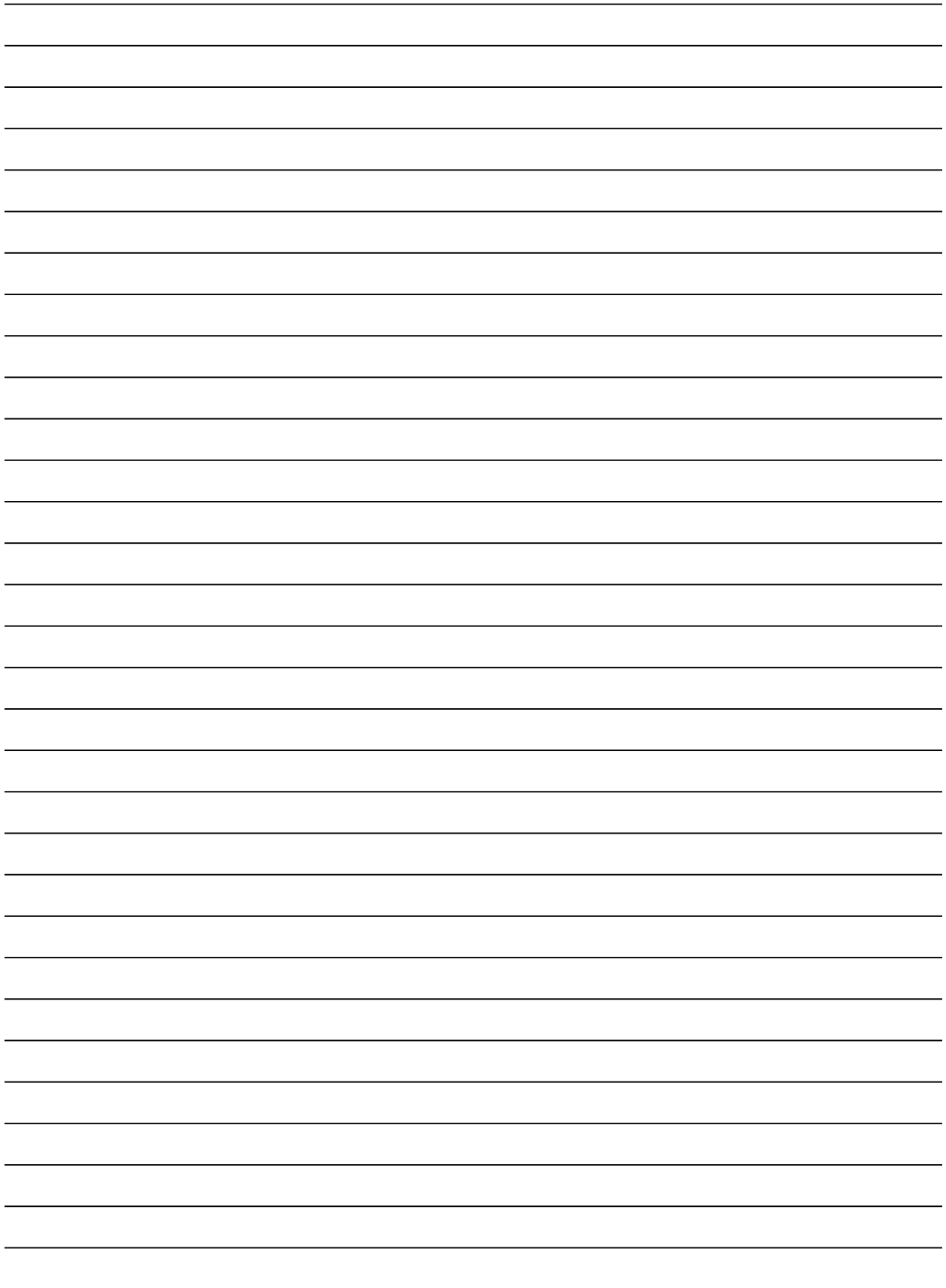
	<p>Tips and Tricks</p> <ul style="list-style-type: none">• Call attorneys back at night/after hours• Take time before responding to emails• Respond or connect in person• Understand the role of the individual(s) you are communicating with• Occasionally ask if they understand and tell them questions are okay• Surveys and Feedback
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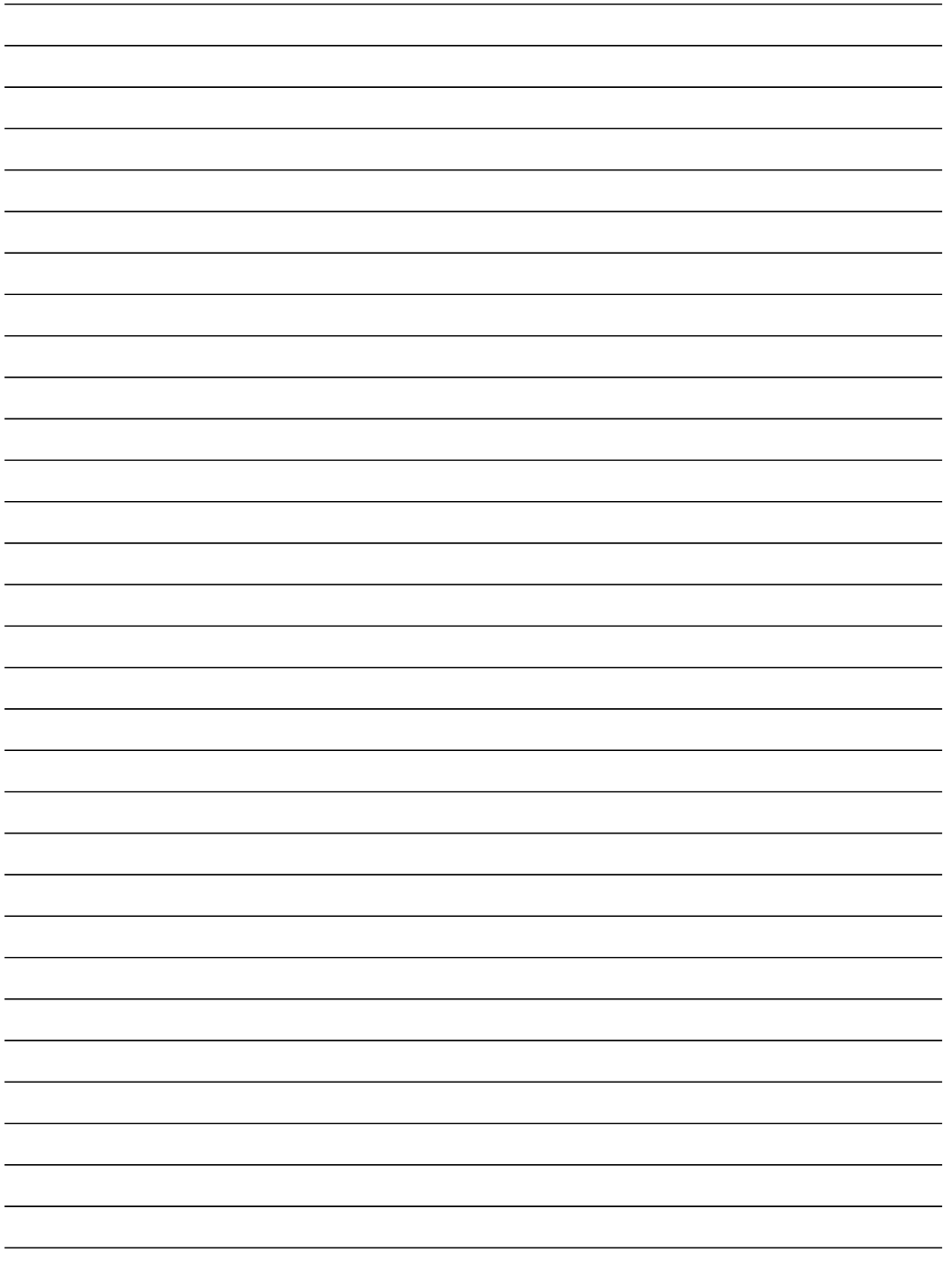
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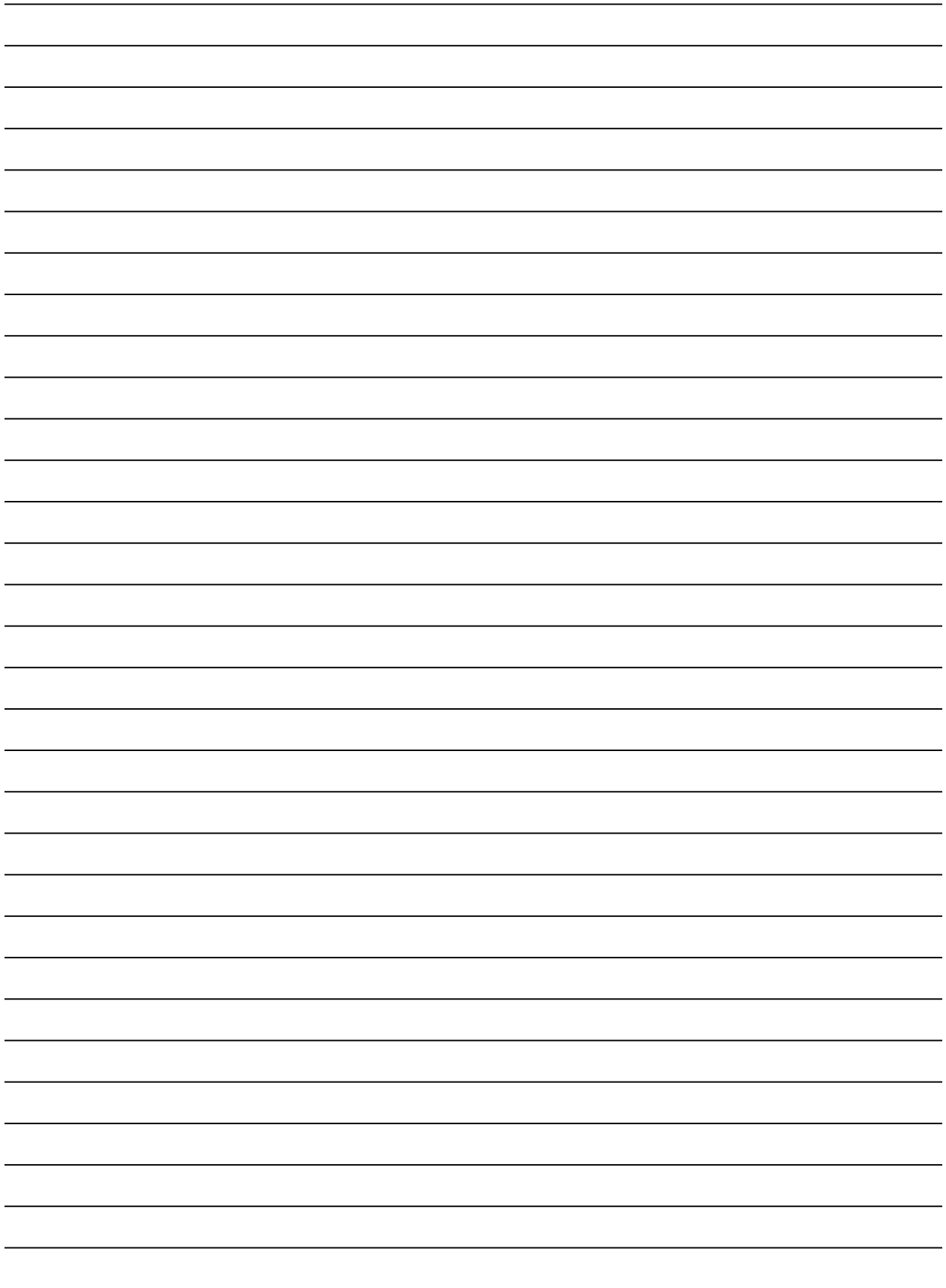


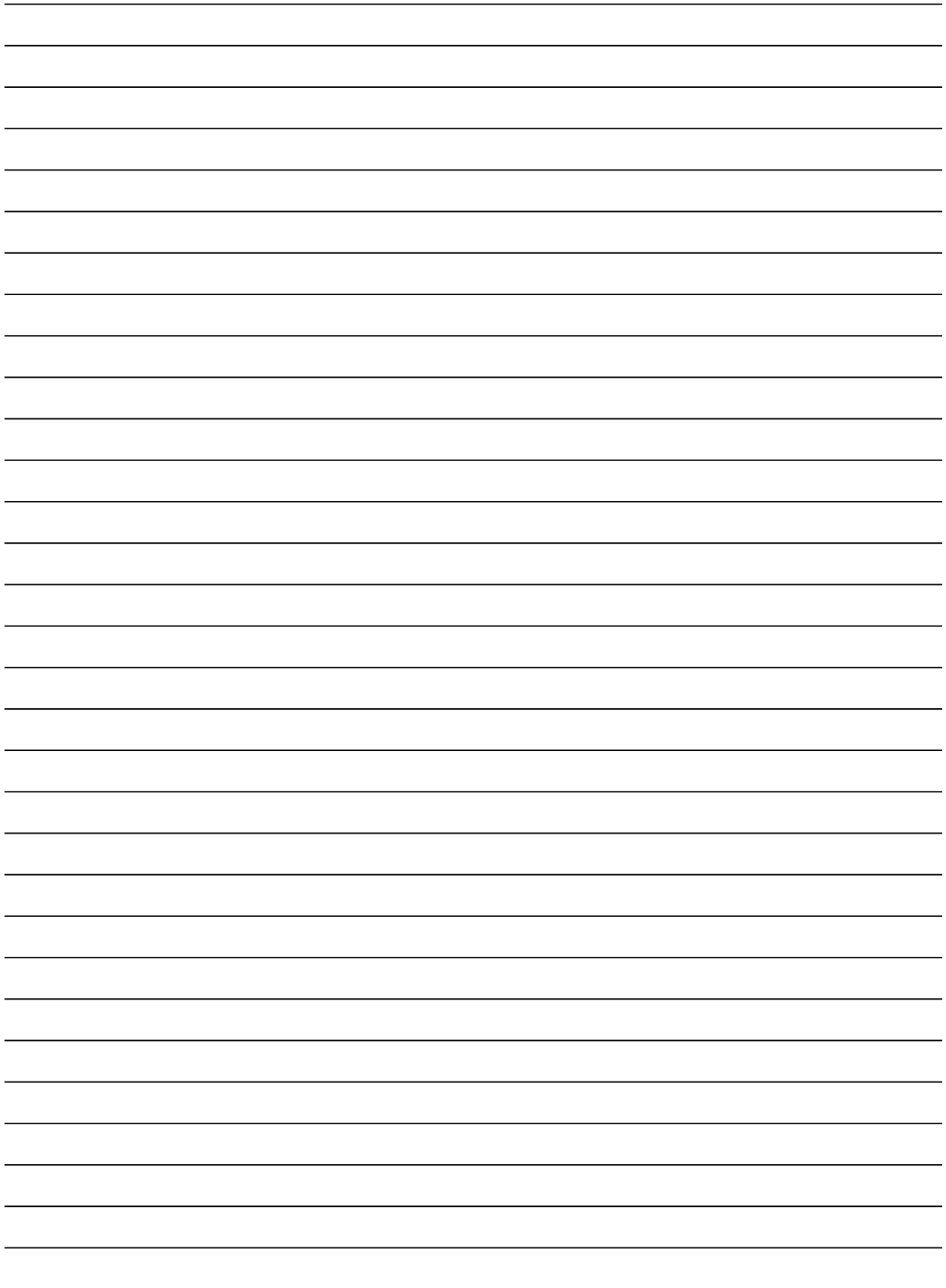
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STETSON LAW

Pooled Trusts Intensive

Wednesday
October 18, 2023

Call to Action/Legislative Update



STETSON
LAW

*Center for
Elder Justice*

Access and Justice For All®

Session: Call to Action/Legislative Update
National Conference on Special Needs Planning and Special Needs Trusts
Pooled Trust Intensive
Wednesday, October 18, 2023

Presented by: Kerry Tedford-Coles (moderator), David Goldfarb, Marielle Hazen, Roxanne Chang, and Barb Helm.

Overview: Staying current with legislative, regulatory and policy updates is challenging; not doing so can be costly. This session will review important legislative, regulatory, and policy updates trustees need to know, and provide an overview of proposed changes and areas where advocacy is needed.

I. Key Changes Since Last Conference

• **Legislation**

- Special Needs Trust Improvement Act, which permits charitable organizations to be named as a beneficiary of a special needs trust.
 - H.R.2617 - Consolidated Appropriations Act, 2023, Division T-SECURE 2.0 of 2022, Title 2, Sec. 337, available at <https://www.congress.gov/117/plaws/publ328/PLAW-117publ328.pdf> (at PDF page 915).
 - SNA press release: <https://www.specialneedsalliance.org/wp-content/uploads/2023/02/SNT-Improvement-Act-2023-FINAL-.pdf>
- ABLE Age Adjustment Act, raises the maximum age of disability onset for ABLE accounts to before age 46, starting after December 31, 2025.
 - H.R.2617 - Consolidated Appropriations Act, 2023, Division T-SECURE 2.0 of 2022, Title I, Sec. 124: <https://www.congress.gov/117/plaws/publ328/PLAW-117publ328.pdf> (at PDF page 856).
- Medicaid Money Follows the Person extend through September 2027. The program allows states to pay for transitions out of nursing homes/intermediate care facilities to community settings.
 - H.R.2617 - Consolidated Appropriations Act, 2023, DIVISION FF—HEALTH AND HUMAN SERVICES, Title V, Sec. 5114 available at <https://www.congress.gov/117/plaws/publ328/PLAW-117publ328.pdf> (PDF page 1483).

- **Regulation**

- Housing Opportunity Through Modernization Act of 2016 (HOTMA): Implementation of Sections 102, 103, and 104

- Available at: <https://www.regulations.gov/document/HUD-2023-0012-0001>.
- Additional materials: https://www.hudexchange.info/news/hotma-income-and-assets-training-series/?utm_medium=email&utm_source=govdelivery

- New POMS/Forms for Temporary Institutionalization

- POMS: <https://secure.ssa.gov/apps10/reference.nsf/links/08242023081107PM>
- Form: <https://www.ssa.gov/forms/ssa-186.pdf>

- **Other Recent Actions**

- Unwinding and Returning to Regular Operations after COVID-19

- CMS guidance and materials: <https://www.medicaid.gov/resources-for-states/coronavirus-disease-2019-covid-19/unwinding-and-returning-regular-operations-after-covid-19/index.html>
- Florida Lawsuit: <https://healthlaw.org/news/suit-challenges-florida-over-illegal-medicaid-terminations-marking-first-lawsuit-amid-chaotic-nationwide-medicaid-unwinding/>

- Transitions from Emergency Waivers

- Kaiser Family Foundation issue brief: <https://www.kff.org/policy-watch/ending-the-public-health-emergency-for-medicaid-home-and-community-based-services/>
- Advancing States, NAMD, and NASDDDS Release Joint Project on the End of Pandemic Flexibilities: <http://www.advancingstates.org/sites/nasudad/files/u34188/Medicaid%20Disaster%20Relief%20Flexibilities%20and%20HCBS%20Unwinding%20with%20CMS%20edits.pdf>

- Debt Ceiling Medicaid Fight

- The Arc action alert: <https://thearc.org/blog/medicaid-work-requirement-in-debt-ceiling-bill-puts-people-with-disabilities-at-grave-risk/>

II. Proposed Legislation

- Better Care Better Jobs Act (S. 100/H.R. 547)
 - One-pager: https://www.aging.senate.gov/imo/media/doc/better_care_better_jobs_one_pager.pdf
 - Text: <https://www.congress.gov/bill/118th-congress/senate-bill/100/text?s=1&r=2&q=%7B%22search%22%3A%5B%22Better+Care+Better+Jobs+Act%22%5D%7D>

- HCBS Access Act (S. 762/H.R. 1493)
 - Text: <https://www.congress.gov/bill/118th-congress/house-bill/1493/text?s=2&r=1&q=%7B%22search%22%3A%5B%22HCBS+Access+Act%22%5D%7D>
 - Press release: <https://debbiedingell.house.gov/news/documentsingle.aspx?DocumentID=3959#:~:text=The%20HCBS%20Access%20Act%20is,home%20care%20and%20institutional%20care.>

- SSI Savings Penalty Elimination Act
 - Press release: <https://www.brown.senate.gov/newsroom/press/release/brown-cassidy-announce-first-bipartisan-bicameral-bill-in-decades-to-update-supplemental-security-income-program>

- Recognizing the Role of Direct Support Professionals Act
 - Press release: <https://www.hassan.senate.gov/imo/media/doc/RecognizingtheRoleofDirectSupportProfessionalsAct-Onepager.210427.pdf>

- Work Without Worry Act
 - Text: <https://www.congress.gov/bill/118th-congress/senate-bill/2196?q=%7B%22search%22%3A%5B%22Work+Without+Worry%22%5D%7D&s=3&r=1>
 - Press release: <https://www.finance.senate.gov/chairmans-news/wyden-and-cassidy-introduce-legislation-to-allow-americans-with-disabilities-to-work-without-worry#:~:text=The%20Work%20Without%20Worry%20Act%20promotes%20financial%20security%20by%20ensuring,that%20began%20before%20age%2022.>

III. Proposed/Upcoming Regulations

- Social Security Administration
 - Exclusion of Food as In-Kind Support and Maintenance
 - <https://www.federalregister.gov/documents/2023/02/15/2023-02731/omitting-food-from-in-kind-support-and-maintenance-calculations>
 - Nationwide Expansion of the Rental Subsidy Policy for SSI Recipients
 - <https://www.federalregister.gov/documents/2023/08/24/2023-18213/expansion-of-the-rental-subsidy-policy-for-supplemental-security-income-ssi-applicants-and>
 - Expand the Definition of a Public Assistance (PA) Household
 - <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=0960-AI81>
- Department of Health and Human Services
 - Ensuring Access to Medicaid Services proposed rule (CMS-2442-P)
 - <https://www.regulations.gov/docket/CMS-2023-0070>
 - The Arc comments: <https://www.regulations.gov/comment/CMS-2023-0070-1080>
 - <https://acl.gov/news-and-events/acl-blog/input-needed-cms-proposes-rule-improve-access-and-quality-medicaid>
 - Discrimination on the Basis of Disability in Health and Human Service Programs or Activities (Section 504) proposed rule
 - <https://www.regulations.gov/document/HHS-OCR-2023-0013-0001>
 - Nursing home staffing standards proposed rule
 - <https://www.cms.gov/newsroom/fact-sheets/medicare-and-medicaid-programs-minimum-staffing-standards-long-term-care-facilities-and-medicaid>
 - Adult Protective Services proposed rule
 - <https://www.federalregister.gov/documents/2023/09/12/2023-19516/adult-protective-services-functions-and-grant-programs>
 - Final Rule: Streamlining Medicaid and CHIP
 - <https://www.cms.gov/newsroom/fact-sheets/streamlining-medicaid-and-chip-final-rule-fact-sheet>
- Department of Labor Overtime Proposed Rule
 - <https://www.dol.gov/newsroom/releases/whd/whd20230830>

IV. Looking Ahead

- Social Security Marriage Penalty
 - The Arc blog: <https://thearc.org/blog/for-tyson-marriage-changed-everything-including-his-ssi/>
 - Social Security Advisory Board presentation: <https://www.ssab.gov/announcements/ssab-to-host-briefing-on-social-security-marriage-penalties/>
- DAC/SSI "Childhood Disability Benefit Fairness Act"
 - SNA overview: <https://www.specialneedsalliance.org/wp-content/uploads/2022/03/Childhood-Disability-Fairness-Act.pdf>
 - POMS on Special Groups of Former SSI Recipients: <https://secure.ssa.gov/poms.nsf/lnx/0501715015>
- When is it appropriate to pay family caregivers?
 - Related CMS HCBS waiver instructions: https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf (PDF pgs 140 - 146)
 - Kaiser Family Foundation report, *Pandemic-Era Changes to Medicaid Home- and Community-Based Services (HCBS): A Closer Look at Family Caregiver Policies*: [Pandemic-Era Changes to Medicaid Home- and Community-Based Services \(HCBS\): A Closer Look at Family Caregiver Policies | KFF](#)

